

APPENDIX

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10969

D.C. Docket No. 2:13-cr-00096-SPC-CM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

BRIAN ROBERT HARLING,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 28, 2017)

Before TJOFAT and ROSENBAUM, Circuit Judges, and REEVES,* District
Judge.

PER CURIAM:

* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of
Kentucky, sitting by designation.

Defendant-Appellant Brian Robert Harling appeals his conviction and sentence for knowingly possessing materials depicting minors engaged in sexually explicit activity, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). He makes four arguments on appeal. First, he argues that the district court erred in denying his motion to suppress five USB drives after the drives were seized and searched without a warrant. Second, he asserts that the district court should have granted his motion for judgment of acquittal because the government failed to prove that he knowingly possessed the USB drives, that he knew that the visual depictions were of minors engaged in sexually explicit conduct, or that he actually appeared in any of the videos. Third, he contends that the district court abused its discretion by refusing to give a “mere presence” jury instruction. And finally, Harling argues that his sentence of 240 months’ imprisonment followed by a lifetime of supervised release is substantively unreasonable. After careful consideration, and with the benefit of oral argument, we affirm Harling’s conviction and sentence.

I.

A. Facts¹

In 2013, Nicole Dunwody² saw a listing on Craigslist advertising a condominium unit for rent in Fort Myers, Florida. Harling occupied the unit at the time but was looking to rent it out because he had just purchased a new home.

¹ These facts are taken primarily from the hearing on Harling’s motion to suppress.

Nicole decided to rent the unit from Harling and coordinated with him to move in her belongings. Soon after she moved in, Nicole bumped the door frame of a closet in the residence and heard something fall to the floor. She looked down and saw that three USB drives had fallen from the top of the door frame inside the closet.

Nicole took the three USB drives to her mother Ada Dunwody's house. There, Ada plugged the first of three drives into her computer, and large thumbnail images loaded onto the screen. She and Nicole scrolled through the contents of the first drive and saw images of what they described as small children in unnatural, sexually suggestive poses engaging in sexually explicit conduct with adults.

After viewing at least thirty thumbnail images, Nicole decided she had seen enough and called the police. Meanwhile, Ada continued to view the contents of the two remaining USB drives. After scrolling through the contents of the second drive, which Ada also described as containing images and videos of young children in unnatural, sexually explicit poses, Ada estimated that she had seen well over 100 images and videos. The third drive contained more videos, but it also had a file type that Ada did not recognize. Afraid of inadvertently downloading something unknown onto her computer, Ada removed the third USB drive from her computer

² The fact in this case involve more than one person with the last name "Dunwody." For clarity, we refer to each by her first name.

and placed all three USB drives in a plastic bag for delivery to the police. She did not really probe into the contents of the third USB drive.

Nicole and Ada agreed to meet Fort Myers Police Officer Domonic Zammit at Nicole's condominium. When Officer Zammit arrived, Nicole informed him that Harling owned the condominium unit and had resided in it before she did, a fact that Officer Zammit confirmed when he called and spoke with Harling over the phone. Nicole also gave Officer Zammit the plastic bag containing the three USB thumb drives and explained that she and her mother had seen, between the two of them, explicit images and videos of children engaged in sexual acts. Nicole then showed Officer Zammit the closet from which the three USB drives had fallen. When he looked up into the closet, Officer Zammit discovered two more USB thumb drives in the same location at the top of the door frame inside the closet.

Officer Zammit returned to the Fort Myers Police Department with the five USB drives and along with his supervisor, Sergeant Doro, reviewed them. They opened one image file and one video file on each of the five drives to confirm that all five contained child pornography. Officer Zammit then submitted the five drives into evidence, ending his involvement in the investigation.

Soon after that, Detective Meeks, a member of the computer-crimes unit, retrieved the five USB drives from the evidence custodian and, after reviewing

Officer Zammit's report, conducted a limited forensic preview to confirm the presence of child pornography on the drives and to determine the owner of them. He confirmed the presence of images and videos of child pornography on all five drives, including a series of images of a particular minor child being sexually abused by a particular adult male on the first USB drive. He also noted a file on the fourth drive that contained Harling's business card.

Detective Meeks observed that many of the images had file names in a sequential numerical order, which indicated to him that the images were homemade—rather than downloaded from the internet—and taken with a single camera. Because he knew from Officer Zammit's report that Harling was the previous resident of the condominium unit, Detective Meeks obtained Harling's driver's license photograph and confirmed that Harling was the adult in the series of pornographic images involving the particular minor child.

He then contacted the Department of Homeland Security ("DHS") for assistance in locating Harling. DHS agents accessed Harling's public Facebook page and found profile pictures of Harling that matched the adult male observed in the photographs contained on the USB drives, providing further confirmation that Harling was the adult male featured in the pornographic images on the USB drives. Detective Meeks then met with Nicole and Ada, who shared with him the specific details of what they had observed on the USB drives.

Law-enforcement officers eventually learned Harling's address and visited him at his home on July 11, 2013. After being advised of his rights, Harling agreed to speak with the agents. They showed him multiple images that they had downloaded from Facebook, of a young boy whom Harling identified as his step-grandson. That same boy was the minor child who appeared in the series of homemade pornographic images discovered on the USB drives.³

Later that same day, Detective Meeks prepared an affidavit for a search warrant to conduct a complete forensic examination of all five USB drives. His affidavit included the detailed descriptions conveyed to him by both Nicole and Ada regarding exactly what they had seen on the USB drives. After obtaining the warrant, Detective Meeks conducted a more thorough forensic examination of all five USB drives and found that they contained hundreds of images of child pornography and over forty videos, including hundreds of images of Harling sexually abusing his step-grandson.

On the basis of these findings, authorities applied for and were granted a second warrant to search Harling's residence for additional computer equipment and data, which they executed on July 12, 2013. Inside his home, authorities observed furniture, bedding, and other household décor that matched the furniture,

³ Harling's adult son confirmed that the young boy from the pictures on the USB drives was Harling's step-grandson. He also confirmed that another minor child observed in the images on the USB drives, a young girl, was Harling's step-granddaughter.

bedding, and household décor that appeared in several photographs recovered from the USB drives. Those observations led authorities to obtain a third search warrant that same day to search Harling's residence for specific items matching items previously seen in the images and videos stored on the USB drives.

B. Procedural History

A federal grand jury returned an indictment charging Harling with one count of knowingly possessing child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). Harling moved to suppress the contents of the five USB thumb drives, as well as any evidence gathered from his residence. The district court denied Harling's motion to suppress.

Harling proceeded to trial. At the close of the Government's case, he moved for a judgment of acquittal, arguing that the evidence presented failed to establish that he possessed the USB drives. Harling also renewed his objections to the district court's denial of his motion to suppress. The district court denied his motions and his request for a "mere presence" jury instruction."

The jury found Harling guilty after a two-day trial. The Presentence Investigation Report ("PSI") prepared before Harling's sentencing hearing calculated an adjusted offense level of 44, which was treated as an offense level 43 pursuant to U.S.S.G. Ch. 5, Pt. A, comment n. 2. Harling did not have any prior criminal convictions and was assigned a criminal-history category of I. The

resulting guideline sentence was originally life in prison. But because the maximum term of imprisonment for a conviction under 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2) is 20 years, Harling's guideline term of imprisonment was 240 months, with a supervised-release term of between five years and life.

Prior to his sentencing hearing, Harling filed a sentencing memorandum wherein he requested a sentence of no more than twenty years. At the sentencing hearing, neither the government nor Harling made any objections to the PSI. After considering the Sentencing Guidelines and the factors identified in 18 U.S.C. § 3553(a), the district court sentenced Harling to 240 months' imprisonment, followed by a lifetime term of supervised release. Harling raised no objections to his sentence. He now appeals his conviction and sentence.

II.

A. Motion to Suppress

On appeal, Harling argues that his rights under the Fourth Amendment were violated when law-enforcement officers seized and then searched his personal property without first obtaining a warrant. He makes the following arguments in support of his position: (1) he did not abandon the five USB drives, so he retained a reasonable expectation of privacy in them; (2) no exigent circumstances existed necessitating a search of the USB drives without first obtaining a search warrant; (3) the searches performed by law-enforcement officers before obtaining a search

warrant exceeded the scope of the private-party searches conducted by Nicole and Ada; and (4) the affidavits used to obtain the search warrants included false and misleading statements, rendering them void.

A district court's ruling on a motion to suppress presents a mixed question of fact and law. *United States v. Garcia-Bercovich*, 582 F.3d 1234, 1238 (11th Cir. 2009). We review a district court's factual findings for clear error and its application of the law to those factual findings de novo. *Id.* In applying the law to the facts, we construe the facts in the light most favorable to the party that prevailed in the district court—in this case, the Government. *See United States v. Mathis*, 767 F.3d 1264, 1274–75 (11th Cir. 2014); *United States v. Laist*, 702 F.3d 608, 612 (11th Cir. 2012).

Courts generally prohibit the government from introducing at trial evidence gathered as a result of a search or seizure that violated the Fourth Amendment. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998). But the Fourth Amendment applies to only governmental action; “it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as the agent of the Government or with the participation or knowledge of any governmental official.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quotation omitted). Once a private individual, acting of her own accord, conducts a search—even one that frustrates a defendant's reasonable expectation of

privacy—the Fourth Amendment does not forbid the government from replicating the search, as long as government officials constrain their search to the parameters of the search conducted by the private individual. *United States v. Young*, 350 F.3d 1302, 1306–07 (11th Cir. 2003); *Jacobsen*, 466 U.S. at 115. As a result, “a warrantless law-enforcement search conducted after a private search violates the Fourth Amendment only to the extent to which it is broader than the scope of the previously occurring private search.” *United States v. Sparks*, 806 F.3d 1323, 1334 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 2009 (2016), *cert. denied sub nom. Johnson v. United States*, 137 S. Ct. 34 (2016).

Here, Harling contests the search of all five USB drives—the three discovered and viewed by Nicole and Ada and the two later discovered in the same location by Officer Zammit and viewed by law-enforcement officers in the first instance. As an initial matter, we agree that Harling did not abandon the USB drives.

But Nicole and Ada are private citizens who acted of their own accord when they viewed the contents of the first two USB drives. Therefore, law enforcement’s subsequent search of the first and second USB drives, after listening to Nicole and Ada describe in detail what they had observed, was not violative of the Fourth Amendment since it did not meaningfully exceed the scope of Ada’s search. *See Jacobsen*, 466 U.S. at 119. The officers replicated a search already

conducted by private citizens who acted independently, observed what they thought to be child pornography, and shared their concerns with the officers, who then confirmed that the drives contained what Nicole and Ada reported.

With regard to USB drives three, four, and five, the issue is more complicated because it is unclear whether Ada actually observed any content on the third drive and uncontested that Nicole and Ada did not view any content on the fourth and fifth drives. While law enforcement's search of these drives without a warrant was a *per se* violation of the Fourth Amendment, the evidence obtained is nonetheless admissible under the independent-source doctrine. In the event that the government violates the Fourth Amendment in conducting an illegal search, "[t]he independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *United States v. Barron-Soto*, 820 F.3d 409, 415 (11th Cir. 2016) (quoting *Nix v. Williams*, 467 U.S. 431, 443 (1984)).

We apply a two-part test to determine whether the independent source doctrine operates to render evidence admissible regardless of whether the initial search violated the Fourth Amendment. *United States v. Noriega*, 676 F.3d 1252, 1260 (11th Cir. 2012).

The first thing we do is excise from the search warrant affidavit any information gained during the arguably illegal initial entry and determine whether the remaining information is enough to support a probable cause

finding. If the remaining or nonexcised information is enough to support a probable cause finding, the second thing we do is determine whether the officer's decision to seek the warrant was "prompted by" what he had seen during the arguably illegal entry. To determine whether an officer's decision to seek a warrant is prompted by what he saw during the initial entry, courts ask whether the officer would have sought the warrant even if he had not entered. If the officer would have done so, his decision to seek the search warrant is supported by an "independent source," and the evidence seized under the warrant is admissible regardless of whether the initial entry violated the Fourth Amendment.

Id. at 1260-61 (internal citations omitted).

The first question we ask then is whether, excluding any information gained from Officer Zammit's report and Detective Meeks's own preliminary forensic examination of the USB drives, probable cause still existed to support a search warrant for all five USB drives. Detective Meeks testified, and his affidavit in support of the first search warrant reflects, that Nicole's and Ada's observations regarding the contents of the first two USB drives formed "much of the basis" of his affidavit. These observations included information regarding specific file names, the approximate ages of the children involved, the unnatural and sexually explicit nature of the photographs and videos, and the presence of a specific adult male sexually assaulting a young child in at least one video. This information alone, which we have already found to be properly gleaned as a result of the

private-party search doctrine, certainly suffices to support a finding of probable cause.

So we move on to the second step and ask whether Detective Meeks would have sought the search warrant even if he had not first read Officer Zammit's report and previewed all five USB drives himself. *Noriega*, 676 F.3d at 1261. The district court concluded in its order denying Harling's motion to suppress that Detective Meeks would have. Based on just the descriptions provided by Nicole and Ada, the district court concluded that a fair probability existed that contraband or evidence of a crime would be found on all five USB drives. Officers probed the contents of the drives before obtaining the search warrant but only to confirm the veracity of what Nicole and Ada had reported seeing, not to independently obtain sufficient probable cause for a search warrant. Because the private-party search conducted by Nicole and Ada provided an independent source for the probable cause necessary to issue a search warrant for all five USB drives, the Government has successfully demonstrated that the evidence would have been ultimately obtained independent of any initial violation of the Fourth Amendment. Thus, Harling's motion to suppress was properly denied.⁴

⁴ Because we find that the affidavits used to obtain the search warrants included information lawfully obtained by Nicole and Ada, as private citizens, Harling's arguments regarding the validity of the search warrants are meritless. Additionally, we need not address Harling's argument concerning exigent circumstances because the issues raised are fully resolved through the application of the private-party search doctrine and the independent-source doctrine.

B. Judgment of Acquittal

Next, Harling asserts that the district court erred in denying his motion for judgment of acquittal as to Count One—possession of materials containing child pornography—because the government failed to prove that he knowingly possessed child pornography, that he knew that at least one of the performers in such visual depictions was a minor, or that he knew that the visual depictions were of minors engaged in sexually explicit conduct. In Harling's view, the government failed to meet its burden to show that he owned the USB drives or that he was the male in the images and videos.

We review de novo the district court's denial of a motion for judgment of acquittal, viewing the facts and drawing all inferences in the light most favorable to the government. *United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002). To uphold the denial of a motion for judgment of acquittal, "we need only determine that a reasonable fact-finder could conclude that the evidence established the defendant's guilt beyond a reasonable doubt." *United States v. Hansen*, 262 F.3d 1217, 1236 (11th Cir. 2001) (quotation marks omitted).

Section 2252(a)(4)(B) makes it a crime to "knowingly possess[] ... 1 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" that has traveled through interstate commerce if "the producing of such visual depiction involves the use of a minor engaging in

sexually explicit conduct; and such visual depiction is of such conduct.” 18 U.S.C. § 2252(a)(4)(B). An act is done “knowingly” when it is performed voluntarily and intentionally, not because of mistake or accident. *United States v. Woodruff*, 296 F.3d 1041, 1047 (11th Cir. 2002). In the context of § 2252, the term “knowingly” refers to the defendant’s knowledge of the fact that the material contains child pornography. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

Upon review of the record, we conclude that the evidence was more than sufficient to support Harling’s conviction. The evidence showed that Harling, the owner and previous occupant of the condominium unit, possessed the USB drives found in the closet. Harling also owned the same type of camera used to take the photographs discovered on the USB drives, was himself pictured in both the photographs and films engaging in sexually explicit conduct with minors, and even identified one of the young boys from the films on the USB drives as a boy he knew—a boy investigators later learned to be Harling’s step-grandson. Additionally, furniture and architectural details from Harling’s home matched the furniture and architectural details depicted in the photographs and videos found on the USB drives, and Harling’s business card was found on the fourth USB drive.

From this evidence alone, a reasonable factfinder easily could have found Harling guilty of violating the statutes charged in Count One of the indictment. In

short, the district court did not err in denying Harling's motion for judgment of acquittal.

C. "Mere Presence" Jury Instruction

Harling also contends that the district court erred when it failed to give the jury a "mere presence" jury instruction in line with his defense that his mere presence in the condominium unit at some previous point in time did not necessarily mean that he was the individual who knowingly possessed the USB drives found in the closet. We review for an abuse of discretion a properly preserved claim that the district court omitted a jury instruction. *United States v. Morris*, 20 F.3d 1111, 1114 (11th Cir. 1994).

A district court abuses its discretion in failing to give a requested instruction if "(1) the requested instruction was a correct statement of the law, (2) its subject matter was not substantially covered by the charge actually given, and (3) its subject matter dealt with an issue in the trial court that was so important that the failure to give it seriously impaired the defendant's ability to defend himself." *United States v. Paradies*, 98 F.3d 1266, 1286 (11th Cir. 1996). A theory-of-defense charge is not warranted if "the charge given adequately covers the substance of the requested instruction." *United States v. Ndiaye*, 434 F.3d 1270, 1293 (11th Cir. 2006).

We find no abuse of discretion in the district court's refusal to give Harling's requested mere-presence instruction. We first note that Harling never actually provided the district court with a proposed "mere presence" instruction; he merely requested that the district court provide one.

In any case, the instructions given by the district court substantially covered Harling's request. The court instructed the jury that to convict Harling, it had to find that he "knowingly possessed one or more matters containing visual depictions" of a minor engaging in sexually explicit conduct. The court defined "knowingly" as meaning the act "was done voluntarily and intentionally and not because of a mistake or by accident."

Having received these instructions, "the jury could not have attributed possession to [Harling] through his mere presence alone, because mere presence would not establish voluntary [and] intentional possession." *United States v. Woodard*, 531 F.3d 1352, 1365 (11th Cir. 2008). Under the given instructions, the jury could return a guilty verdict only if it found that Harling voluntarily and intentionally possessed the USB drives; the instructions did not allow a finding of guilt based on Harling's mere presence in the condominium where the USB drives were found.

D. Sentencing

Finally, Harling argues that his sentence of 240 months' imprisonment, followed by a term of lifetime supervised release is substantively unreasonable because the sentence is greater than necessary to protect the public and further the goals of sentencing. We disagree.

The reasonableness of a sentence depends upon the district court's application of the factors outlined in 18 U.S.C. § 3553(a).⁵ *United States v. Talley*, 431 F.3d 784, 788 (11th Cir. 2005). We review the substantive reasonableness of a sentence for an abuse of discretion, vacating the sentence only if we "are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc). The party who challenges the sentence bears the burden of demonstrating that the sentence is

⁵ The relevant § 3553(a) factors include the following:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed . . . treatment;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range . . . ;
- (5) any pertinent policy statement . . . ;
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a).

unreasonable in light of the record and the § 3553(a) factors. *United States v. Tome*, 611 F.3d 1371, 1378 (11th Cir. 2010).

Here, the government asserts first that Harling's arguments with regard to his term of supervised release should be reviewed for plain error only since Harling failed to challenge the district court's imposition of a term of lifetime supervised release at sentencing, and second, that this Court should decline to consider his sentencing arguments under the doctrine of invited error because Harling invited the district court to impose a sentence up to and including the statutory maximum. But we need not determine whether a heightened standard of review applies here because Harling's arguments fail under even an abuse-of-discretion standard of review.

At sentencing, the district court specifically recited the § 3553(a) factors and then concluded that the guideline range was reflective of the "abhorre[nt]" conduct at issue. Noting the seriousness of the offense, the fact that Harling took advantage of children in his care, and Harling's failure to accept responsibility, the district court found a sentence at the statutory maximum to be appropriate. It is clear from the record that the district court considered and applied the § 3553(a) factors and weighed them appropriately. *See United States v. Amedeo*, 487 F.3d 823, 832 (11th Cir. 2007) (finding that the weight given to any § 3553(a) factor is within the sound discretion of the district court). Harling's sentence was certainly

substantively reasonable. And even if we did not agree with the district court's determination of the weight given to each factor, we could not substitute our judgment for that of the district court when the district court acted within the bounds of its discretion. *Id.*; *see also Gall v. United States*, 552 U.S. 38, 51 (2007) ("The fact that [we] might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.").

III.

For these reasons, we affirm Harling's conviction and his sentence of 240 months' imprisonment, followed by a lifetime term of supervised release.

AFFIRMED.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 28, 2017

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-10969-FF
Case Style: USA v. Brian Harling
District Court Docket No: 2:13-cr-00096-SPC-CM-1

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir. R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1.

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call Janet K. Mohler, FF at (404) 335-6178.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Djuanna Clark
Phone #: 404-335-6161

OPIN-1 Ntc of Issuance of Opinion

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

November 27, 2017

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 15-10969-FF
Case Style: USA v. Brian Harling
District Court Docket No: 2:13-cr-00096-SPC-CM-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Janet K. Mohler/cb, FF
Phone #: (404) 335-6178

REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10969-FF

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

BRIAN ROBERT HARLING,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT AND ROSENBAUM, Circuit Judges, and REEVES,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

* The Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

ORD-42

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

vs

BRIAN ROBERT HARLING

Case Number: 2:13-cr-96-FtM-38CM

USM Number: 58942-018

Mark J. O'Brien, CJA
Suite 330
511 W Bay St
Tampa, FL 33606-3533

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty to Count One of the Indictment. Accordingly, the Court has adjudicated that the defendant is guilty of the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2)	Possession of Child Pornography	July 4, 2013	One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by United States v. Booker, 543 US 220 (2005).

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 shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:

March 2, 2015


SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

March 3, 2015

Brian Robert Harting
2:13-cr-88-FM-38CM

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 240 months, consecutive to Docket Number 14-cr-16 in the United States District Court for the Western District of Wisconsin.

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 U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Life.

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

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

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The mandatory drug testing requirements of the Violent Crime Control Act are waived.

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

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

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

The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

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 in a manner and frequency directed by the court or probation officer;
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 (10) 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 controlled substance or any paraphernalia related to any controlled 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 by the probation officer;

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11. The defendant shall notify the probation officer within seventy-two (72) 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 or 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.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. The defendant shall participate in a mental health program specializing in sex offender treatment and submit to polygraph testing for treatment and monitoring purposes. The defendant shall follow the probation officer's instructions regarding the implementation of this court directive. Further, the defendant shall contribute to the costs of such treatment and/or polygraphs not to exceed an amount determined reasonable by the Probation Officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.
2. The defendant shall register with the state sexual offender registration agency(s) in any state where you reside, visit, are employed, carry on a vocation, or are a student, as directed by your probation officer. The probation officer will provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S.943.0435) and/or the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248), and may direct you to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.
3. The defendant shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate, including: schools, daycare centers, theme parks, playgrounds, etc.
4. The defendant is prohibited from possessing, subscribing to, or viewing, any video, magazine, or literature depicting children in the nude and/or in sexually explicit positions.
5. The defendant shall not possess or use a computer with access to any online service at any location (including employment) without written approval from the probation officer. This includes access through any Internet service provider, bulletin board system, or any public or private computer network system. The defendant shall permit routine inspection of your computer system, hard drives, and other medial storage materials, to confirm adherence to this condition. This inspection shall be no more intrusive than is necessary to ensure compliance with this condition. The defendant shall inform your employer, or other third party who may be impacted by this condition, of this computer-related restriction and the computer inspection provision of the condition.
6. The defendant shall submit to a search of his person, residence, place of business, any storage units under the defendant's control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.
7. The defendant shall cooperate in the collection of DNA, as directed by the Probation Officer.
8. The mandatory drug testing requirements of the Violent Crime Control Act are waived.

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CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

<u>Total Assessment</u>	<u>Total Fine</u>	<u>Total Restitution</u>
\$100.00	Waived	Reserved for 90 days

The Court reserved on the issue of Restitution for a period of 90 days.

SCHEDULE OF PAYMENTS

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

Special Assessment in the amount of \$100.00 is due in full and immediately.

The defendant is hereby ordered to begin payment immediately and continue to make payments to the best of his ability until this obligation is satisfied. While in custody, you are directed to participate in the Bureau of Prisons Financial Responsibility Program, if eligible, and upon release from custody, the defendant shall adhere to a payment schedule comprised of the balance of the unpaid restitution as determined by the Probation Office.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of 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, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Indictment and the Preliminary Order of Forfeiture (Doc. #150), that are subject to forfeiture and listed as follows.

One black and white eight gigabyte SanDisk Cruzer thumb drive, with the numbers SDCZ36-008G and B10904NVPN;

One eight gigabyte black and blue PNY Attache thumb drive;

One gray Memorex one gigabyte Travel Drive thumb drive;

One black and red four (4) gigabyte Lexar thumb drive; and

One black eight (8) gigabyte PNY thumb drive.

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1998.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

VS.

CASE NO: 2:13-cr-96-FtM-38CM

BRIAN ROBERT HARLING

OPINION AND ORDER¹

This matter comes before the Court on the Defendant Brian Robert Harling's Motion to Suppress (Doc. #29) filed on November 8, 2013. United States Magistrate Judge Carol Mirando held an evidentiary hearing on the Motion on February 19 and 20, 2014. Harling filed a supplement brief on April 4, 2014, (Doc. #66) and the Government filed a supplemental brief (Doc. #72) on April 21, 2014. The Magistrate Judge issued a Report and Recommendation (Doc. #74) on April 29, 2014. Defendant Brian Robert Harling filed Objections to the Report and Recommendation (Doc. #82) on June 6, 2014. The Government filed its Response (Doc. #88) on June 20, 2014. Finally, Harling filed a Second Supplemental Brief (Doc. #90) on July 18, 2014. The issues are now fully briefed and ripe for this Court's review.

¹ Disclaimer: Documents filed in CM/ECF may contain hyperlinks to other documents or Web sites. These hyperlinks are provided only for users' convenience. Users are cautioned that hyperlinked documents in CM/ECF are subject to PACER fees. By allowing hyperlinks to other Web sites, this court does not endorse, recommend, approve, or guarantee any third parties or the services or products they provide on their Web sites. Likewise, the court has no agreements with any of these third parties or their Web sites. The court accepts no responsibility for the availability or functionality of any hyperlink. Thus, the fact that a hyperlink ceases to work or directs the user to some other site does not affect the opinion of the court.

STANDARD OF REVIEW

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify the magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); *United States v. Powell*, 628 F.3d 1254, 1256 (11th Cir. 2010). A district judge "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C); see also *United States v. Farias-Gonzalez*, 556 F.3d 1181, 1184 n.1 (11th Cir. 2009). This requires the district judge "give fresh consideration to those issues to which specific objection has been made by a party." *United States v. Derisma*, No. 2:09-cr-64-FtM-29SPC, 2012 WL 749405, at *1 (M.D. Fla. Mar. 8, 2012) (quoting *Jeffrey S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990) (citing *H.R. 1609*, 94th Cong., § 2 (1976))). The district judge reviews legal conclusions *de novo*, even in the absence of an objection. See *Derisma*, 2012 WL 749405, at *1 (citing *Cooper-Houston v. S. Ry. Co.*, 37 F.3d 603, 604 (11th Cir.1994)). A district court may not reject the credibility determinations of a magistrate judge without personally rehearing disputed testimony from the witness. *Powell*, 628 F.3d at 1256-58.

DISCUSSION

Defendant Harling objects to the Magistrate Judge's Report and Recommendation arguing the Magistrate Judge erred in determining the credibility of witnesses, in particular the testimony of Ada Dunwody (AD), Nicole Dunwody (ND), and Officer Zammit (Ofc. Zammit). Harling argues the Magistrate Judge improperly applied the law to the scope of the private citizen search of the thumb drives. That is, Harling argues all three search warrants were illegal based upon the initial USB search warrant affidavit because the

search was based upon inaccurate information. Moreover, Harling argues his statements should be suppressed.

(1) Credibility of Witnesses

Defendant Harling argues the Magistrate Judge erred in her credibility determinations and applied erroneous facts to the law in making her recommendations to the District Court. Harling suggests the standard to assess the credibility of witnesses should be the same as used in the Eleventh Circuit Court of Appeals pattern jury instructions. The Eleventh Circuit's pattern jury instruction for determining the credibility of a witness has seven factors to consider. These factors are:

Did the witness impress you as one who was telling the truth?
Did the witness have any reason not to tell the truth?
Did the witness have a personal interest in the outcome of the case?
Did the witness seem to have a good memory?
Did the witness have the opportunity and ability to accurately observe things he or she testified about?
Did the witness appear to understand the questions clearly and answer them directly?
Did the witness's testimony differ from other testimony or other evidence?

Contrary to the Harling's suggestion, the Eleventh Circuit has a credibility standard to use when assessing the credibility of a witness. The Eleventh Circuit's credibility standard states:

when weighing the credibility of witnesses the Court does not look at the status of the witness, but rather the Court must weigh the testimonies of all the witnesses, the consistencies or inconsistencies in their testimonies, their demeanor on the stand and the witnesses' interest in the outcome of the hearing.

United States v. Ramirez-Chilel, 289 F.3d 744, 749-50 (11th Cir. 2002).

In this instance, the Magistrate Judge looked at the demeanor of each witness on the stand and weighed their testimonies, reviewing both consistent and inconsistent

statements. The Magistrate Judge found the testimonies of AD, ND and Ofc. Zammit, in particular, to be credible. This Court will not overrule the recommendation of the Magistrate Judge who observed the witnesses during the hearing and made a proper credibility analysis. See Powell, 628 F.3d at 1256-58. Therefore, after a careful review of the transcript and record before the Court, the Court fully agrees with the Magistrate Judge's credibility determinations and findings of fact. The Court adopts and incorporates the facts in this Opinion and Order.

(2) Whether Officers Exceeded the Scope of the Private USB Search

There are five USB thumb drives at issue in this action. The first two were reviewed by AD and ND. The third thumb drive contained the coded eraser program and was reviewed or opened by AD. The last two thumb drives were located by Ofc. Zammit in the condo rented by ND.

(a) The First Two USB Thumb Drives

On July 4, 2013, ND bumped the interior door frame of the hall closet with a large drawing pad, causing three USB thumb drives (Gov't. Ex. 9, 10, and 11) to fall from above the interior door frame. (Doc. #61, pp. 49-50). ND brought the thumb drives to the home of her mother, AD, and the two reviewed their contents. (Doc. #61, pp. 53-57). ND testified at the hearing that she initially saw approximately 30 thumbnails, but when AD scrolled down there were "a ton more." (Doc. #61, p. 56). ND stated the thumbnails were large enough for her to see the photos were of a naked child in different poses on a bed. (Doc. #61, p. 55). ND walked away from the computer while AD continued to review the thumb drives. (Doc. #61, pp. 56-57).

AD inserted the second thumb drive into her computer and viewed additional thumbnails of what she described as sexually explicit images of children. (Doc. #61, p. 129). AD testified the children she viewed in the images were "young children," noting "[i]t wasn't preteens" and they did not appear to have reached puberty, and that the pictures appeared to be sexually explicit in nature, not natural images of children. (Doc. #61, p.130). AD also opened one movie file to see if she recognized the adult—trying to determine if Harling was in the video—but upon discovering the man was only visible from the waist down, she immediately closed the file. (Doc. #61, p. 130).

Although the Fourth Amendment prohibits unreasonable searches and seizures by law enforcement officials, the Supreme Court has "consistently construed this protection as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." United States v. Jacobsen, 466 U.S. 109, 114, 104 S. Ct. 1652, 80 L. Ed.2d 85 (1984) (citation and internal quotation marks omitted). "A search by a private person does not implicate the Fourth Amendment unless he acts as an instrument or agent of the government." United States v. Steiger, 318 F.3d 1039, 1045 (11th Cir. 2003). It is undisputed that AD and ND are private persons who were not government agents or instruments in this case. What they did with the USB thumb drives in this case did not violate the Fourth Amendment, even if their searches constituted an invasion of Harling's privacy. See Jacobsen, 466 U.S. at 113; United States v. Hyatt, 383 F. App'x 900, 906 (11th Cir. 2010). Thus, in regards to the first two thumb drives, Harling's privacy interest in the images viewed by AD and ND was eliminated by their private party search. See United States v.

Durley, 436 Fed. Appx. 966, 968 (11th Cir. 2011) (holding the defendant lost his privacy interest in the thumb drives he left in a publicly shared computer).

Nevertheless, the Supreme Court has held that an individual can retain a legitimate expectation of privacy after a private individual conducts a search. The Court clarified in Jacobsen that "additional invasions of [an individual's] privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." 466 U.S. at 115. After AD and ND viewed the thumb drives, ND called the police and then, AD and ND drove to the condominium ND rented from Harling and met with Ofc. Zammit. ND gave Ofc. Zammit the three thumb drives and reported what AD and ND saw. Ofc. Zammit took the thumb drives to the Fort Myers Police Station and viewed images and video on the thumb drives with Sgt. Doro. Additionally, Det. Meeks, and Det. Wagner also viewed the three thumb drives given to Ofc. Zammit by ND.

Harling argues Ofc. Zammit, Sgt. Doro, Det. Meeks, and Det. Wagner exceeded the scope of the private party search by examining more thumbnail images and videos on the thumb drives than AD and ND did during their private examination. Therefore, the additional viewing by Ofc. Zammit and other officers must be tested by the degree to which they exceeded the scope of the private search. Id.

Contrary to Harling's argument, an officer's viewing of what a private party has freely made available for inspection does not violate the Fourth Amendment. Jacobsen, 466 U.S. at 119. Therefore, officers may take a deeper and more thorough look into the thumb drives than the private parties without violating the Fourth Amendment. United States v. Runyan, 275 F. 3d 449, 464-65 (5th Cir. 2001) (holding that the police do not exceed the scope of the private search when they examine more items within a closed

container than did the private searchers). Thus, merely because Ofc. Zammit and others viewed more images on the thumb drives than AD and ND does not mean they violated the Fourth Amendment because, under Jacobson, officers may take a deeper look into the thumb drives than the private party search without violating the Fourth Amendment.

Based on the testimony presented at the hearing, it is clear the private party exception applies to the first two thumb drives and no Fourth Amendment violation exists.

(b) The Third Thumb Drive

Harling argues the private party exception does not apply to the third thumb drive because neither AD nor ND saw any child pornography on the third thumb drive. Harling argues, therefore, any pre-warrant viewing of images on the third thumb drive violates his Fourth Amendment rights.

ND acknowledges she did not look at any materials on the third thumb drive. Although AD opened the third thumb drive, she did not view any images on the third thumb drive either. Instead, AD testified she found a coded program that she believed was trying to put something on her computer. AD testified she did not proceed any further on that thumb drive or hit any "buttons" because she did not want anything to be placed on her computer. (Doc. #61, pp. 135, 140).

All three thumb drives were presented to Ofc. Zammit in a single baggy when he met AD and ND at the condo ND rented from Harling. At that time, ND informed Ofc. Zammit that she had viewed child pornography on all three thumb drives. By the time Ofc. Zammit received the three thumb drives, Harling's privacy interest in the thumb drives had been compromised by the private citizens, AD and ND.

As noted in Runyan, police do not exceed the private search when they examine more items within a closed container than did the private searchers. 275 F. 3d at 464-65. Although the Supreme Court has long recognized that individuals have an expectation of privacy in closed containers, see, e.g., Smith v. Ohio, 494 U.S. 541, 542, 110 S.Ct. 1288, 108 L.Ed.2d 464 (1990) (per curiam); United States v. Ross, 456 U.S. 798, 822, 102 S. Ct. 2157, 72 L. Ed. 2d 572, (1982), an individual's expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers, see, e.g., Jacobsen, 466 U.S. at 119, 104 S. Ct. 1652. Thus, the police do not engage in a new "search" for Fourth Amendment purposes each time they examine a particular item found within the container. Runyan, 275 F. 3d at 464-65.

In regards to the third thumb drive, Ofc. Zammit went no further than AD or ND in examining the contents. He did so with the good faith understanding that ND and/or AD had viewed illicit child pornography on all three thumb drives. The Runyan Court stated "the police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise." 275 F. 3d at 463. Given the first three thumb drives were found in the same place, at the same time, and ND informed Ofc. Zammit that she saw illicit pictures on all three thumb drives, Ofc. Zammit could reasonably conclude that Harling's expectation of privacy in the third thumb drive was already frustrated by the private citizen search.

In any event, it is not a violation of the Fourth Amendment if an officer looks further into a package than the private party. Id. at 464 (holding the police do not exceed the

scope of the private party search when they examine more items within a closed container than did the private searchers). The Runyan Court held that just because the police viewed more on the disk at issue, in that case, than the private searchers viewed, they did not violate the Fourth Amendment. See Rann v Atchison, 689 F. 3d 832, 837 (7th Cir. 2012) (adopting the holding in Runyan 275 F.3d at 462-64)); United States v. Simpson, 904 F.2d 607, 610 (11th Cir. 1990) (government agents' "search of the box and videotapes did not exceed the scope of the prior private searches for Fourth Amendment purposes simply because they took more time and were more thorough" than the private parties). Therefore, Ofc. Zammit and Sgt. Doro's viewing of the child pornography on the third thumb drive did not violate the Fourth Amendment.

Moreover, there is a single package exception to the Fourth Amendment. In United States v. Garcia-Bercovich, the Eleventh Circuit held that officers did not violate the Fourth Amendment when they opened multiple boxes containing marijuana after just one box on the shipping pallet had been opened by a private party. 582 F. 3d 1234, 1238 (11th Cir. 2009). In Garcia-Bercovich, employees from the shipping company CTI opened a single box taken off a pallet containing multiple boxes. The employees found marijuana in the box and called the police. The police opened the other boxes on the pallet and discovered that they also contained marijuana. Id. The defendant in Garcia-Bercovich, argued that the officers needed a search warrant for each of the additional boxes not opened by the CTI employees. Id. In upholding the decision of the district court, the Eleventh Circuit held that once the initial box was opened, the other boxes on the pallet could also be searched because they were part of the same package. Id.

Here, Ofc. Zammit received all three USB thumb drives in a single baggie from ND. All three thumb drives were found in the same location at the same time by ND, and all three were opened and examined to some extent by ND and/or AD. (Doc. #61, pp. 69, 88). Thus, the officers did not violate Harling's Fourth Amendment rights by examining the third USB thumb drive for illicit child photos as all three thumb drives had already been opened to some extent by private parties.

(c) The Fourth and Fifth USB Thumb Drives

Harling argues the fourth and fifth USB thumb drives should be suppressed because Ofc. Zammit, Sgt. Doro, Det. Meeks, and Det. Wagner viewed the contents of the thumb drives without a search warrant or prior view by a private party and therefore violated his Fourth Amendment rights.

The Court has determined the reviews of the first, second and third thumb drives did not violate Defendant's rights under the Fourth Amendment. The remaining question is whether the warrantless search by the officers of the fourth and fifth USB drives triggered the protections of the Fourth Amendment. It is a "most basic constitutional rule ... that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well delineated exceptions.'" Coolidge v. New Hampshire, 403 U.S. 443, 454–55, 91 S. Ct. 2022, 29 L.Ed.2d 564 (1971) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L.Ed.2d 576 (1967)). Warrantless searches are thus presumptively unreasonable. Kyllo v. United States, 533 U.S. 27, 31, 121 S. Ct. 2038, 150 L. Ed.2d 94 (2001).

The fourth and fifth thumb drives (Gov't. Ex. 12 and 13) were found in the closet in Harling's condominium in the same location ND found the other three thumb drives. ND testified she showed Ofc. Zammit where in the closet she had located the first three thumb drives. Upon looking inside the closet, Ofc. Zammit observed two additional USB thumb drives "located up on the overhang for baseboards" and visible to the naked eye. (Doc. #61, p.156); (Gov't Ex. 5H).

After recovering the fourth and fifth thumb drives and speaking with AD and ND about their observations, Ofc. Zammit took all five thumb drives back to the police station and viewed the contents along with Fort Myers Police Officer Sgt. Doro. (Doc. #61, pp. 169-170). Ofc. Zammit testified he saw child pornography on all five thumb drives. (Doc. #61, p. 170). Ofc. Zammit acknowledged he did not have a warrant nor did he have Harling's permission to open the thumb drives and view the contents.

The warrantless views of the fourth and fifth thumb drives were *per se* a violation of the Fourth Amendment. Pursuant to the independent source doctrine, however, evidence initially obtained by an illegal search or seizure may later be used by the government if the government can show that the evidence would have been ultimately obtained independently of the initial illegality and in compliance of the Fourth Amendment. Doe v. United States, 896 F. Supp. 2d 1184, 1188-89 (S.D. Fla. 2012) (citing Murray v. United States, 487 U.S. 533, 541-42, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988)). In other words, "[s]o long as a later, lawful seizure is genuinely independent of an earlier tainted one (which may be difficult to establish where the seized goods are kept in the police's possession) there is no reason why" the government should not be able to use the evidence previously obtained. Id. at 542. To prohibit the government from using evidence

"the police ultimately obtained by independent legal means would not put the police in the same position they would have been in if they had not committed any illegal conduct; instead, it would put them in a worse position." Doe, 896 F. Supp. 2d at 1189 (citing United States v. Markling, 7 F.3d 1309, 1315 (7th Cir. 1993)).

One circumstance where courts have held the government may use evidence initially discovered during an illegal search or seizure is where agents subsequently obtain the evidence pursuant to a valid search warrant based on information independent of the initial tainted search or seizure. Murray, 487 U.S. at 541-43. In such a situation, the "ultimate question . . . is whether the search pursuant to the warrant was in fact a genuinely independent source of the information and tangible evidence at issue." Id. at 542.

After reviewing the fourth and fifth thumb drives, Ofc. Zammit and Sgt. Doro turned the drives over to Det. Meeks. Det. Meeks obtained a warrant for all five USB thumb drives. (Doc. #62, p. 242) (Gov't. Ex. 8A). Harling argues the warrants are invalid because they contain information gathered from Ofc. Zammit and Det. Doro's illegal search as well as false information from Det. Meeks, AD and ND.

Det. Meeks testified the affidavit he used to obtain the search warrant included the information provided by AD and ND, i.e., they had seen graphic images of child pornography on two of the USB thumb drives. The affidavit also included observations and information Det. Meeks learned from Ofc. Zammit's report regarding Ofc. Zammit's view of the thumb drives and Det. Meeks' forensic preview. (Doc. #62, pp. 244-245); (Gov't Ex. 8A).

The description of the images viewed by AD and ND alone provided a fair probability that contraband or evidence of a crime would be found on all five USB thumb drives as they were found hidden in the same location, on the same day, July 4, 2013. The private search conducted by AD and ND provided the issuing court an independent source for the necessary probable cause to issue a search warrant for all five USB thumb drives.

For that reason, the Government can show the evidence would have been ultimately obtained independent of any alleged initial taint and in compliance with the Fourth Amendment without Ofc. Zammit, Sgt. Doro or Det. Meeks allegedly tainted views of the thumb drives. As such, the independent source doctrine applies to this case and the fourth and fifth USB thumb drives will not be suppressed.

(3) Validity of the Search Warrant Affidavits

Harling attacks not only the validity of the search warrants for the five USB thumb drives, but also the subsequent search warrants for his Cape Coral residence. Two search warrants were issued for Harling's Cape Coral residence. The initial search warrant was for computer-based evidence. The second, broader in scope, was for evidence relating to furniture, bedding and household décor property that appeared to match items visible in the background of the photos contained on the USB thumb drives.

Harling argues the affidavits of Det. Meeks were invalid because Det. Meeks used false or misleading information in the affidavits presented to the state court judge. Specifically, Harling argues Det. Meeks added false information in the affidavit for all three search warrants by stating AD and ND found child pornography on the first three USB

thumb drives, and included information from his warrantless forensic examinations of all five thumb drives.

What the Fourth Amendment requires of a search warrant application is that it enables the issuing judge

simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and the '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.'

United States v. Jiminez, 224 F.3d 1243, 1248 (11th Cir. 2000) (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). In this regard, "probable cause is a fluid concept-turning on the assessment of probabilities in particular factual contexts[.]" United States v. Brundidge, 170 F.3d 1350, 1352 (11th Cir. 1999) (quoting Gates, 462 U.S. at 232). For this reason,

[c]ourts reviewing the legitimacy of search warrants should not interpret supporting affidavits in a hypertechnical manner; rather, a realistic and commonsense approach should be employed so as to encourage recourse to the warrant process and to promote the high level of deference traditionally given to magistrates in their probable cause determination.

United States v. Miller, 24 F.3d 1357, 1361 (11th Cir. 1994) (citing Gates, 462 U.S. at 236-37, 103 S. Ct. at 2331-32; United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 746, 13 L. Ed.2d 684 (1965)). In reviewing the issuance of the search warrant, the undersigned must determine whether there was a "substantial basis" for concluding that probable cause existed to uphold the warrant. See Gates, 462 U.S. at 238, 103 S. Ct. at 2331; see also Massachusetts v. Upton, 466 U.S. 727, 728, 104 S. Ct. 2085, 2085, 80 L.Ed.2d 721 (1984) (per curiam).

For the following reasons, the Court finds the inclusion of the alleged erroneous information in the USB thumb drive affidavit by Det. Meeks does not support the exclusion of the evidence found pursuant to the thumb drive warrant. As noted above, Det. Meeks testified the affidavit he used to obtain the search warrant from the state court judge included the information provided by AD and ND, that they had seen graphic images of child pornography on two of the USB thumb drives. The affidavit also included observations and information Det. Meeks learned from Ofc. Zammit's report and warrantless viewing of the drives and Det. Meeks' forensic preview. (Doc. #62, pp. 244-45); (Gov't Ex. 8A).

The Court has determined the information provided by AD and ND was sufficient to give the issuing judge a fair probability that contraband or evidence of a crime would be found on all five USB thumb drives. Thus, any other information included in the affidavit for the search warrant that may have been incorrect or tainted by a warrantless view would be harmless error. See United States v. Durdley, No. 1:09-cr-00031-MP-AK, 2010 WL 916107, at *8 (N.D. Fla. Mar. 11, 2010).

Harling also contests the search warrants for his Cape Coral residence. The initial search warrant for his Cape Coral residence was issued on July 12, 2013. The initial residential search warrant also contained information from Det. Meeks' affidavit used to obtain the search warrant for the USB thumb drives. Harling objects that the warrant is the "fruit of the poisonous tree" because it was based on the allegedly illegal affidavit originally written by Det. Meeks. As noted above, the affidavit for the USB thumb drives was supported by an independent source—AD and ND's private search of the first two

thumb drives—and as such, any taint contained in the affidavit would not be cause to suppress the initial search warrant for Harling's residence.

In addition to the thumb drive information, the initial residential search warrant also contained a section on the characteristics of child pornography collectors and computer evidence. Spec. Agt. Wagner stated in his affidavit the following:

Based upon your affiant's knowledge, experience, and training in child exploitation and child pornography investigations, there are certain characteristics common to many individuals involved in the receipt of and collection of child pornography. In the past, collectors of child pornography often possessed and maintained "hard copies" of child pornographic material such as pictures, films, video, tapes, magazines, negatives, photographs, correspondence, mailing lists, books, tape recordings, etc., in the privacy and security of their own home or some other secure location. Child pornography collectors typically retained pictures, films, video tapes, magazines, negatives, photographs, correspondence, mailing lists, books, tape recordings, mailing lists, child erotica, and video tapes for many years. With the advent of technology, that is safe, secure and private, such as a computer and/or back-up storage discs or other forms of data storage devices. Child pornography collectors also may correspond with and/or meet others to share information and materials, rarely destroy correspondence from other child pornography distributors/collectors, conceal such correspondence as they do their sexually explicit material, and often maintain lists of names, addresses, and telephone numbers of individuals with whom they have been in contact and who share the same interests in child pornography. Collectors of child pornography prefer not to be without their child pornography for any prolonged time period. This behavior had been documented by law enforcement officers in the investigation of child pornography throughout the world.

(Gov't. Ex. 15a). This information contributes to the issuing judge's probable cause determination regarding Harling's Cape Coral residence. As the affidavit was supported by an independent source, any taint contained in the affidavit would not be cause to suppress the initial search warrant for Harling's residence.

Defendant Harling also challenges the second residential search warrant as the fruit of the poisonous tree. Spec. Agt. Wagner asked for a second search warrant for Harling's Cape Coral residence as a result of viewing items during the execution of the

initial search warrant that matched items in the background of the photos and videos on the USB thumb drives. As initial search warrant for the Cape Coral residence was restricted to computer and paper evidence related to child pornography, the officers did not go beyond the scope of that warrant to retrieve the items that appeared to be consistent with those viewed in the photographs on the thumb drives. Rather, Spec. Agt. Wagner sought and was granted the second broader search warrant for the Cape Coral residence relying on the evidence provided by the private search of AD and ND contained within the affidavit of Det. Meeks. Harling's objection is overruled to the second residential search warrant.

Finally, Harling argues any statements made by himself, his son, and any identifications made by his son during the search of his Cape Coral residence should be suppressed as the fruit of the poisonous tree. As to the Defendant's statements, and as noted by the Magistrate Judge, Harling was not under arrest at the time the statements were made, he was free to leave or end the interview, which he ultimately did, and he chose to make identifications or statements after he was read his Miranda warnings. The Court finds the Defendant's statements were freely and voluntarily made. The objection is overruled. As to the identifications and statements made by the Defendant's son, the Court finds Defendant has established no basis for requesting his statements be suppressed nor does the Court find any reason to do so.

CONCLUSION

The decision of the Magistrate Judge is affirmed and Defendant Brian Harling's Objections are overruled.

Accordingly, it is now

ORDERED:

(1) The Magistrate Judge's Report and Recommendation (Doc. #74) is **ADOPTED**
to the extent set forth and modified herein.

(2) Defendant Harling's Objections are **OVERRULED**.

(3) Defendant Harling's Motion to Suppress (Doc. #29) is **DENIED**.

DONE AND ORDERED at Fort Myers, Florida, this 4th day of August 2014.


SHERI POLSTER CHAPPELL
UNITED STATES DISTRICT JUDGE

Copies: Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

Case No: 2:13-cr-96-FtM-38CM

BRIAN ROBERT HARLING

REPORT AND RECOMMENDATION¹

This matter is before the Court on Defendant's Motion to Suppress ("Motion") (Doc. 29), which was referred to the undersigned by the Honorable Sheri Polster Chappell for a Report and Recommendation. The United States filed its response in opposition (Doc. 34) on November 22, 2013. The undersigned held an evidentiary hearing on February 19-20, 2014.² Docs. 61, 62. Following the hearing, the Court directed the parties to file supplemental briefing. Defendant's supplemental brief was filed on April 4, 2014 (Doc. 66), and the United States' supplemental brief was filed on April 21, 2014 (Doc. 72). This case is set for the trial term beginning June 2, 2014, with a status conference on May 12, 2014.

¹ Written objections may be filed within fourteen (14) days from the date of filing this Report and Recommendation. A failure to file timely objections waives a party's right to *de novo* review. 28 U.S.C. § 636(b)(1); Fed. R. Crim. P. 59; M.D. Fla. R. 6.02(a).

² During the hearing, the Court admitted 36 exhibits into evidence. *See* Docs. 51, 52. A two-volume transcript of the hearing was filed on March 26, 2014. Docs. 61, 62. Volume I (Doc. 61) consists of pages 1-189. Volume II (Doc. 62) consists of pages 190-403. Citations to the transcript are identified by docket entry number and corresponding page.

I. Background and Summary of Arguments

Defendant Brian Robert Harling is charged in a one-count indictment with possession and production of child pornography, in violation of 18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2). Doc. 14 at 1. Defendant seeks to suppress “all evidence obtained from five certain USB drives,³ his residences, and all evidence and statements which resulted from the search of those devices.” Doc. 29 at 1. Three of the drives were found by Defendant’s tenant, Nicole Dunwody, in the condominium in which Defendant previously resided when they fell from the inside molding of a closet as Dunwody was removing some items. The other two were located by a Fort Myers police officer upon further search of the closet at the tenant’s request. Defendant also challenges the legality of three state-court issued search warrants. Doc. 66 at 6, 19-24. The first was to search all five USB drives (Gov’t Ex. 8B), and the second and third were to search Defendant’s current residence (Gov’t Exs. 14B, 15B).

Defendant argues that he had a reasonable expectation of privacy in the drives, which are protected property under the Fourth Amendment, and that he never abandoned the drives. Doc. 66 at 7-10; Doc. 29 at 2. Defendant also argues that, because his consent to search the USB drives was never sought or obtained, law enforcement’s warrantless viewing of all five USB drives violated the Fourth Amendment, because it exceeded the scope of the views conducted by private parties.

³ The terminology “USB drives,” “thumb drives,” and “drives” are used interchangeably and refer to Government Exhibits 9-13. *See* Doc. 51. Photographs of the drives were admitted into evidence as Government Exhibits 7A-E. *See id.*

Doc. 66 at 12-19; Doc. 29 at 2. Defendant further seeks to suppress evidence recovered during a search of his residence pursuant to two state search warrants (Gov't Exs. 14B, 15B) and statements made by Defendant and his son during the execution of the warrants as "fruits" of law enforcement's prior illegal conduct. Doc. 66 at 19-20; Doc. 29 at 2-3. Specifically, Defendant argues that inclusion in the warrant affidavits of information learned during the warrantless views by law enforcement rendered the subsequent warrants invalid. Doc. 66 at 19-24. Finally, Defendant contends that no other exceptions to the Fourth Amendment's warrant requirement apply to the facts of this case. Doc. 66 at 8-12, 24-26.

The Government responds that Defendant had no reasonable expectation of privacy in the USB drives or, at least, a diminished one, and thus the Fourth Amendment does not apply. Doc. 72 at 1-5. The Government also argues that three of the USB drives were first viewed by Nicole Dunwody and/or her mother, Ada Dunwody, who informed police of their contents. Doc. 72 at 5. Moreover, the Government argues, because the Dunwodys were not acting as agents of the government at the time they viewed the three USB drives, and the Fourth Amendment does not apply to private searches, law enforcement's subsequent viewing of the USB drives was not a "search" within the meaning of the Fourth Amendment because Defendant's privacy interest in the USB drives had already been compromised, and the searches by law enforcement did not exceed the scope of the initial private search. Doc. 66 at 7; Doc. 34 at 2-3, 6-7. Alternatively, the Government argues, even if the Fourth Amendment were implicated, the

observations by the Dunwodys provided an independent source of probable cause sufficient to have sought and obtained the state search warrants. Doc. 72 at 6-8; Doc. 34 at 8-9.

The undersigned concludes that law enforcement's viewing of the first three USB drives (Government Exhibits 9, 10 and 11) did not exceed the scope of the prior private search, and therefore a warrant was not required for officers to view the contents of those drives. As to the two USB drives discovered later (Government Exhibits 12 and 13), Defendant may have retained an expectation of privacy in those drives, because they were not viewed by either of the Dunwodys. Law enforcement's warrantless search of those two drives rendered them subject to suppression. The observations of tenant Nicole Dunwody and her mother, Ada Dunwody, however, provided an independent source for sufficient probable cause to support the issuance of the search warrant for all five USB drives, including Government Exhibits 12 and 13, which in turn provided probable cause for the subsequent search warrants. The undersigned therefore respectfully recommends that the Motion to Suppress be denied.

II. Summary of Evidence

The Government called five witnesses to testify at the suppression hearing: Nicole M. Dunwody, Ada Dunwody, Officer Domonic Zammit, Detective Richard Meeks, and Agent Grant Wagner. The Government also introduced 32 exhibits, which were admitted into evidence.⁴ Defendant called one witness to testify at the

⁴ The Exhibits introduced by the United States during the hearing are identified on

hearing, Corrado Lazzizzera, and introduced four exhibits into evidence.⁵ The testimony is summarized below.

a. Nicole M. Dunwody

Nicole Dunwody ("ND") testified that she first became acquainted with Defendant in April 2013 when she answered a Craigslist ad for a condominium unit for rent located in Pinewood South Condominiums at 4790 South Cleveland Avenue, Unit 204 ("condo"), in Fort Myers, Florida. Doc. 61 at 19, 35-36. She and Defendant had multiple phone conversations and exchanged emails and text messages prior to renting Defendant's condominium and after she decided to rent the condo concerning whether they were on-track for the agreed-upon move-in date of July 1, 2013. Doc. 61 at 14-22, 34-41; Gov't Exs. 3, 4.

ND and Defendant also met in person on several occasions so ND could view the condo before deciding whether to rent it, to complete rental paperwork, exchange money for a rental deposit and for Defendant to provide ND a key. Doc. 61 at 15, 25, 27, 33, 39. Based on the series of communications and interactions leading up to her moving into the condo, ND understood Defendant to have been the immediate previous resident as well as the owner. To her knowledge, no one else had lived in the condo with Defendant. Doc. 61 at 21, 39, 82.

On July 1, 2013, ND received a text message from Defendant stating that he had finished moving out of the condo and that she could move in that evening and

the Government's Exhibit List (Doc. 51).

⁵ The Exhibits introduced by Defendant at the hearing are identified on the Defendant's Exhibit List (Doc. 52).

asking her to "let him know" if he forgot anything. Doc. 61 at 22-26; Doc. 62 at 133; Gov't Ex. 3. Upon ND's arrival at the condo the evening of July 1, 2013, the only items that she noticed were left behind were a wreath on the exterior of the front door, paint cans matching the color of the interior walls left in the master bedroom, light bulbs, tiles matching those found throughout the unit and a case of water left in a closet. Doc. 61 at 42-48; *see* Gov't Ex. 2C. There were no furniture or visible personal belongings left in the unit. Doc. 61 at 47-48.

While unpacking at the condo on July 4, 2013, however, ND bumped the interior door frame of the hall closet with a large drawing pad, causing three USB drives to fall from above the interior door frame. Doc. 61 at 49-50. ND testified that she thought it was "weird" that USB drives had fallen from the top of the closet door, because it did not seem like a place USB drives would ordinarily be located. Doc. 61 at 50, 52. ND brought the USB drives to the home of her mother, Ada Dunwody ("AD"), and upon arriving both she and AD began to view the contents of the USB drives. Doc. 61 at 53-57.

ND and AD were in the living room when AD inserted the first USB drive into the computer. Doc. 61 at 53. Once the drive was inserted, a documents box opened featuring thumbnail-size images of small children in different positions in the middle of a bed "completely naked." Doc. 61 at 54. ND testified that AD operated the computer but they were looking at the screen together. Although AD did not click on any of the images to enlarge them, ND relayed "[t]he thumbnails were big enough

where [ND] could see that it was . . . one child in each image in the center of the bed in different poses naked. Completely naked.” Doc. 61 at 55. ND further testified:

They did not appear to be natural poses at all. Like you could tell by the pictures that it was child pornography. And, um, to me that was obviously what I was looking at.

Doc. 61 at 55. Although ND estimated that initially she saw approximately thirty thumbnails, when AD “scrolled down” there were “a ton more.” Doc. 61 at 56. AD continued to view the remaining two USB drives, but ND testified that when AD “had scrolled down a bit, that’s more or less at the point where I ended up, like, okay, like I’ve seen enough, and just wanted to get on the phone with the police.” Doc. 61 at 56. ND called the police, while AD continued to view the USB drives. Doc. 61 at 57.

ND returned to the condo where she met Officer Domonic Zammit of the Fort Myers Police Department (“FMPD”), to whom she described what she and her mother had seen on the first USB drive and what her mother viewed on the others, and turned over all three USB drives in a Ziploc bag. Doc. 61 at 58, 61, 64, 99-100. She stated that she described the contents of the USB drive she and her mother viewed as “pictures of children naked” and told Officer Zammit that her mother looked further at the three drives, but that “it was definitely child pornography on the USB drives.” Doc. 61 at 64.

ND then showed Officer Zammit from where in the condo the three USB drives fell. Upon looking at the molding above the interior of the closet door, she and Officer Zammit discovered two additional USB drives. Doc. 61 at 59-61; Gov’t Ex.

5H. Officer Zammit inquired whether she knew the identity of the prior resident, and she “proceeded to tell him that it was Brian Harling, the landlord, who was also the previous tenant.” Doc. 61 at 62.

ND called Defendant and, after briefly speaking to him, handed the phone to Officer Zammit, who attempted to confirm that Defendant was the previous tenant. Doc. 61 at 62-63.⁶ Officer Zammit told Defendant that he was following up in response to a noise complaint but that “everything was fine.” Doc. 61 at 62-63. The following week ND also placed other calls on behalf of law enforcement that were monitored and during which there were agents present, but Defendant never answered those calls. Doc. 61 at 116-18. Although she could not recall exactly how many, ND estimated that she attempted to place three or four calls. Doc. 61 at 116. The only time ND actually spoke with Defendant after finding the USB drives was the call placed from the condo on July 4, 2013, when Officer Zammit was present. Doc. 61 at 117-19.

ND explained that after she met with Officer Zammit on July 4, 2013, she placed a lottery ticket in the door prior to leaving the condo to “make sure nobody came into the house” and upon returning saw the ticket had moved. Doc. 61 at 64-65. She called the police again to come back to re-check the condo. Doc. 61 at 64-65. Other than meeting Officer Zammit at the condo to turn over the USB drives, and later meeting with the officer who responded to further search the unit when she

⁶ ND testified that placing a phone call to Defendant “just came up in the conversation of trying to confirm with [Officer Zammit] who the prior tenant was.” Doc. 61 at 112.

noticed the lottery ticket had moved, ND had no further contact with law enforcement on the day she discovered the USB drives. Doc. 61 at 64-66.

ND acknowledged on cross-examination that she has no background or training in identifying child pornography. Doc. 61 at 73. She further admitted that, although she told Officer Zammit all three USB drives had been viewed, she viewed only the first USB drive, because when she

saw the naked children solo in the middle of the bed naked, yes. To me that registered in my brain as not a good, um, picture of a child. Whether you classify it as whatever. It didn't look good to me. Didn't look like it was the right picture. It didn't look like a family photo. It didn't look good. So I did not want to see it anymore, because it was upsetting me, what I saw.

Doc. 61 at 75. ND testified that she told Officer Zammit that she knew AD viewed the two remaining USB drives and that AD had described to her their contents, including what she believed were "some kind of instructions on how to like clean your computer system from looking at the websites, like illegal websites." Doc. 61 at 80-81. ND clarified that, between she and AD, they viewed all three USB drives that had been discovered to that point, and testified that she told Officer Zammit that all three had been viewed. Doc. 61 at 69, 82.

ND met with Detective Meeks and Special Agent Cramsey of Homeland Security Investigations on July 11, 2013. Doc. 61 at 65-66, 104. It was during this meeting that she provided the emails and text messages she had exchanged with Defendant, records of her correspondence with Defendant, pictures, receipts from her deposits to Defendant and a copy of her lease. Doc. 61 at 104-05; Gov't Exs. 1, 2A-D, 3, 4. She also identified three of the four USB drives she was shown during the July

11 meeting as those found in the condo on July 4, though she “couldn’t say 100 percent at the time” as to one of them, and she testified at the hearing that she could not remember whether she was shown the physical drives themselves, or pictures of them by Special Agent Cramsey. Doc. 61 at 107-09.

Although ND could not recall every detail at the hearing, she noted the length of time that passed between her original statements to police and her testimony at the suppression hearing and suggested that, to the extent she remembered something differently at the hearing or did not remember something, her memory at the time of her original statements reflected her observations and beliefs accurately at that time. Doc. 61 at 71, 73-74, 82. She also acknowledged that the information she provided Officer Zammit on July 4, 2013—that all of the USB drives had been viewed by both she and her mother—was inconsistent with her hearing testimony. She clarified, however, that between she and her mother, at least a portion of all three USB drives had been viewed. Doc. 61 at 68-70. She testified confidently and largely consistent with her prior statements and the testimony of other witnesses. She appeared to be upset when describing the nature of the images she viewed, which is consistent with Officer Zammit’s observations as to her demeanor on July 4, 2013, the day she discovered the USB drives, as discussed more fully at section II(c), *infra*.

b. Ada Dunwody

AD testified that she was aware that her daughter was moving into a condo formerly owned by Defendant and that she met Defendant on two occasions. Doc. 61 at 124-25. AD testified that ND brought three USB drives to her house on July 4,

2013, which AD inserted into her computer, revealing large thumbnail images she described as “sexually explicit material of children.” Doc. 61 at 126. AD further described the images as

pictures with small children, um, not clothed. Um, adults, you know, with small children, you know. For example, there was a little film that said, man with 12-year-old boy or something like that. It was literally – the thumbnail was like a penetration type picture.

Doc. 61 at 127. She described other pictures as

a little girl dressed like in an Indian outfit. I mean, there was another picture with two little boys naked on a couch. Um, there was pictures with, like, a whole group of young little boys, like, in showers, and things like that

Doc. 61 at 128. She was not aware of how many pages of thumbnails she viewed because she “just scrolled down,” but described it as an “extensive scroll.” Doc. 61 at 129.

After observing the contents of the first USB drive, AD removed it and inserted a second USB drive into her laptop. Doc. 61 at 129. Upon accessing the second drive, she observed “[m]ore of the same, you know, just pictures of sexually explicit, you know, things going on with children” who appeared to be “under [age] eight.” Doc. 61 at 129. AD described the children in the images as “young children,” noting “[i]t wasn’t preteens” and they did not appear to have reached puberty, and that the pictures appeared to be sexually explicit in nature, not natural images of children. Doc. 61 at 130. AD also opened one movie file to see if she recognized the adult, but upon discovering the man was only visible from the waist down, she immediately closed the file. Doc. 61 at 130. She described the thumbnail of the movie file as “the

bottom half of a man with a boy sitting on him physically penetrating.” Doc. 61 at 131. She estimated there were over 100 images, both movies and film, on the second USB drive. Doc. 61 at 130-31.

AD also inserted the third USB drive into the computer, but did not see any images. Doc. 61 at 132. She described the third USB drive as “a strange one” and “very weird” because, upon inserting it into her computer, “[i]t seemed to want to take you somewhere, but I didn’t want to hit any buttons because I didn’t want nothing on my computer.” Doc. 61 at 132. She removed the third USB drive, then all three were placed into a single plastic bag, without marking individual drives, and then she and ND drove to the condo to meet Officer Zammit.⁷ Doc. 61 at 135, 140. AD met with law enforcement sometime after July 4, 2013, and testified that she described the contents of the USB drives during the meeting in a level of detail similar to that which she provided during the suppression hearing. Doc. 61 at 137-38. AD did not recall whether she was shown the actual physical drives or photographs of the drives at a later date by Detective Meeks and Special Agent Cramsey, and was unable to identify at that time which three (of the five) she viewed. Doc. 61 at 150-51.

The Court finds the testimony of AD to be credible based upon her demeanor and manner of testifying. She was very forthcoming, visibly upset during her testimony when describing the images she viewed on the USB drives, and her

⁷ AD remained in the car with ND’s children while ND met with Officer Zammit. Doc. 61 at 136.

testimony as to the events of July 4, 2013 and the content of the USB drives was substantially consistent with her prior statements, ND's testimony⁸ and that of the law enforcement witnesses.

c. Officer Domonic Zammit

Officer Domonic Zammit has been an officer with the FMPD for twelve years and currently serves as a road patrol unit. Doc. 61 at 153. On July 4, 2013, Officer Zammit was dispatched to the condo where he met ND in response to her call that, while moving into a newly rented condo, she discovered computer storage devices containing explicit material. Doc. 61 at 154. Upon meeting ND at the condo, who Officer Zammit described as "very, very distraught" and "crying at the time," ND gave him three USB drives in a plastic bag. Doc. 61 at 155. Officer Zammit testified that ND described the contents of the USB drives as "explicit videos and pictures of children on the videos committing sexual acts." Doc. 61 at 169.

ND then showed Officer Zammit the closet where the three USB drives fell from and, upon looking inside the closet, "located up on the overhang for baseboards" and visible to the naked eye he observed two additional USB drives. Doc. 61 at 156; *see* Gov't Ex. 5H. Prior to removing the two drives, Officer Zammit took photographs of the interior and exterior of the condo unit, including the address of the residence, and the location of the two additional drives, as well as video footage of himself proceeding through the front door and to the closet where the USB drives were

⁸ The parties invoked the witness sequestration rule, so AD was not present during ND's testimony. *See* Doc. 61 at 7-9.

located. Doc. 61 at 157, 163-65; Gov't Exs. 5A-H, 6. Officer Zammit testified that the USB drives he found were distinguishable from those he had been given by ND, based on their exterior appearance. Doc. 61 at 161-62, 165. Officer Zammit then removed a plastic bag from his vest and placed the two newly-discovered drives in a plastic bag, separate from that given to him by ND, which he then put back inside his vest. Doc. 61 at 169; Doc. 62 at 194-95. He also testified that ND "wanted [him] also to go inside the residence and look in all the places that possibly could be found for more of them to be located," so he searched the rest of the condo, but did not find any other items. Doc. 61 at 156, 166.

ND told Officer Zammit that Defendant was the landlord and gave him Defendant's name and phone number. Doc. 61 at 167-68. Officer Zammit spoke to Defendant by phone for "probably two minutes" and confirmed that Defendant was the sole prior tenant of the residence. Doc. 61 at 167. Officer Zammit never mentioned to Defendant the discovery of the USB drives and instead advised Defendant that he was calling to follow up on a noise complaint. Doc. 61 at 168-69.

Officer Zammit then met FMPD Sergeant Doro at the Sergeant's office, and both Officer Zammit and Sergeant Doro reviewed the two additional thumb drives to "see if [they] could locate who [they] belonged to" and "to get it verified of what [ND] had advised" they contained. Doc. 61 at 166; Doc. 62 at 28-29. They also reviewed all five USB drives "to make sure that what Ms. Nicole Dunwody said she observed on them actually [was] accurate and on the thumb drives." Doc. 61 at 170. Officer Zammit testified that he and Sergeant Doro "pulled the video and a picture of each

thumb drive, which was consistent with all five of them, that there [were] videos of explicit material of children on all five of them.” Doc. 61 at 170. The officers accessed only one picture and one video on each of the five USB drives. Doc. 61 at 170.

Officer Zammit and Sergeant Doro contacted the FMPD Detective Sergeant, and Officer Zammit repackaged each USB drive individually and submitted all five USB drives into evidence. Doc. 61 at 171; Doc. 62 at 196; *see* Def.’s Ex. B.⁹ Officer Zammit also downloaded the pictures he took at the condo into FMPD’s “VeriPic” system, which is a “computerized system where [photographic evidence is] stored for later retrieval” that can only be accessed by “evidence people.” Doc. 62 at 30-32.

Officer Zammit memorialized the events in a report in which he described each of the five USB drives, including the make and model of each, and identified which three initially were discovered by ND and which two he and ND discovered later on the evening of July 4, 2013. Doc. 61 at 175-76; Doc. 62 at 201-02. Officer Zammit also identified at the hearing which USB drives were discovered by ND and which two were found later. Doc. 61 at 172-89. Specifically, Officer Zammit identified a black and blue PNY Attache eight gigabyte USB drive (Gov’t Ex. 13) and a Lexar four gigabyte dark gray and red USB drive (Gov’t Ex. 12) as the two USB drives that he

⁹ On cross-examination, Officer Zammit testified that the descriptions of the contents of each bag did not match the actual contents as to two of the evidence bags containing USB drives, evidence identified as Government Exhibits 11 and 13. Doc. 62 at 15-18. Officer Zammit testified that “when I submitted these into evidence, the packages that were listed on what’s on – items that’s listed on this tag, is the items that I listed in this bag. What goes on after that, what transpires between any additional exits or entries, that’s not a part of me, sir. So I cannot affirm or testify why these are in different bags.” Doc. 62 at 18.

discovered while at the condo and that are pictured in the photograph he took on July 4, 2013 (Gov't Ex. 5H).¹⁰ Doc. 61 at 174-77, 183-85, 187-88.

Officer Zammit identified Government Exhibit 9, a two gigabyte Memorex USB drive, red in color; Government Exhibit 10, an eight gigabyte SanDisk Cruzer USB drive; and Government Exhibit 11, an eight gigabyte Attache PNY, black in color, as the three USB drives first discovered and given to him by ND.¹¹ Doc. 61 at 179-83, 187-88. Officer Zammit also explained that, although two of the five USB drives are the same make and model, they are distinguishable based on their exterior color. Doc. 61 at 188.

Officer Zammit further testified that ND advised him on July 4, 2013 that she was the person who inserted the USB drives into the computer, and that she viewed all three USB drives. Doc. 62 at 18. Officer Zammit did not recall being told that ND and AD were not able to access the third USB drive, or that ND did not look at any images beyond the first USB drive. Doc. 62 at 19-20.

The Court also finds Officer Zammit's testimony to be credible and forthcoming. He acknowledged that the report he authored on July 4, 2013, particularly as to which drives were viewed and who viewed them, would have accurately reflected what he was told by ND at that time, even though it may have been inconsistent with other testimony or evidence elicited at the hearing. *See* Doc.

¹⁰ Government Exhibits 12 and 13 are reflected in the photographs identified as Government Exhibits 7E and 7D, respectively. Doc. 61 at 183-86.

¹¹ Government Exhibits 9, 10 and 11 are pictured in Government Exhibits 7A, 7B and 7C, respectively. Doc. 61 at 179-83.

62 at 9-11. Officer Zammit also admitted initially he did not recognize Government Exhibit 6, a CD of the video he took at the condo on July 4, 2013, when it was first presented to him for identification at the hearing, but was able to identify it after he reviewed it during a brief recess. Doc. 61 at 162-64; Gov't Ex. 6. He also acknowledged that the contents of two evidence bags containing USB drives did not match the descriptions written on the bags' exteriors, and readily admitted he could not explain why they were mismatched because they were in the correct bags when he submitted them into evidence. *See* note 9, *supra*. As noted, however, he was able to identify the drives and their origin. Doc. 62 at 16-19.

d. Detective Richard Meeks

FMPD Detective Richard Meeks¹² testified that his involvement in the case began on July 9, 2013, when he was first contacted by FMPD Sergeant Gates about the five USB drives found at the condo. Doc. 62 at 35. Detective Meeks retrieved all five USB drives from the FMPD evidence custodian, as well as Officer Zammit's report, and reviewed them at the special investigation forensic laboratory to verify that the drives contained child pornography and to determine who owned the drives. Doc. 62 at 38. Using a "write blocker" to prevent the contents of the USB drives from being altered in order to preserve the metadata associated with each individual file, Detective Meeks conducted a "forensic preview" of each drive by inserting the drives

¹² Detective Meeks has been employed by FMPD for twelve years and currently serves primarily with FMPD's special investigation group. He is also a certified forensic examiner with digital media, and is assigned to the South Florida Internet Crimes Against Children Task Force, and the Ft. Myers Regional Operations Center High Tech Cyber Crime Task Force, which deals with internet crimes against children. Doc. 62 at 34.

into his computer and selecting "open" from the window prompt.¹³ Doc. 62 at 41-42, 89-91. The USB drives were not password protected and did not require special software to open or read. Doc. 62 at 42.

Upon inserting the Memorex USB drive (Gov't Ex. 9), one of the drives viewed by AD and ND,¹⁴ Detective Meeks was able to see approximately 75-100 thumbnail images of pictures, nearly all of which contained sexually explicit images of minors. Doc. 62 at 43-44. Detective Meeks described some of the images as ones that "emphasized on the vaginal area of young girls," as well as others that appeared to be homemade, such as the kind taken with a digital camera, which featured a "young boy under the age of five being sexually abused both anally and orally." Doc. 62 at 43. Detective Meeks was able to determine the nature of the drive's contents and that the pictures depicted minors by viewing the thumbnail images without having to click on or otherwise enlarge individual images. Doc. 62 at 43.

Detective Meeks identified approximately 40-42 pictures contained on the Memorex USB drive as originating from a digital camera, based upon the sequential "DSC" numbers associated with those images. Doc. 62 at 44-45, 108-09. These images all appeared to depict the same minor being sexually abused, and Detective Meeks "felt it was exigent" and that he needed to view additional folders on the drive

¹³ Detective Meeks testified that a forensic "preview" is different than a forensic "examination." Doc. 62 at 94. Detective Meeks conducted his forensic preview on July 10, 2013 and began his forensic examination on July 11, 2013. See Doc. 62 at 92-94.

¹⁴ One of the USB drives affirmatively identified by Officer Zammit as one of the three given to him by ND on July 4, 2013. Doc. 61 at 176, 179, 187.

to determine if it was a live victim, and if there were other child victims. Doc. 62 at 45-46. Detective Meeks testified that he saw

another complete series of the same minor being sexually abused . . . [and] another minor that was in one of the pictures, that was naked, with the minor that had previously been sexually abused. So I had two possible victims that I needed to locate.

Doc. 62 at 46.

Detective Meeks further testified that the images that appeared to originate from a digital camera also featured an adult who “had glasses that were black with like kind of a square frame” and, based upon the images’ resolution, looked to have been made with newer technology. Doc. 62 at 47. After viewing the additional folders, Detective Meeks contacted the State Attorney’s Office, Special Agent Cramsey and the Florida Department of Law Enforcement (“FDLE”). Doc. 62 at 46, 48.

Using Officer Zammit’s report identifying Defendant as the prior tenant of the condo, Detective Meeks compared a picture of Defendant from the Florida Driver and Vehicle Information Database with the adult featured in some of the images on the USB drives, and concluded it was the same person—the Defendant. Doc. 62 at 48-49; Gov’t Ex. 8A at 10, 21. Detective Meeks testified that “it appeared when I pulled the pictures that that was the same subject that was in the pictures with the boy being sexually abused.” Doc. 62 at 48-49.

Detective Meeks and Special Agent Cramsey viewed the other USB drives to attempt to identify the minors, while other agents from Homeland Security accessed Defendant’s publicly-available Facebook page. Doc. 62 at 49. Detective Meeks also

contacted ND to get more information and to “see if she might even be able to contact Mr. Harling to verify if [the USB drives] were his or not.” Doc. 62 at 50. Detective Meeks did not seek to or obtain Defendant’s permission to view the USB drives. Doc. 62 at 89.

On July 10, 2013, Detective Meeks and Special Agent Cramsey met with ND and AD at the condo. Doc. 62 at 50-53. Detective Meeks brought four of the five USB drives¹⁵ to the condo, and he testified that ND and AD were able to identify two of the four USB drives as the ones they viewed on July 4, 2013. Doc. 62 at 60. ND also showed Detective Meeks and Special Agent Cramsey where and how she discovered the initial three USB drives, and both ND and AD described to officers what they saw when they accessed the USB drives. Doc. 62 at 52-53. Detective Meeks testified that ND “advised that she saw young kids . . . that appeared under the age of ten, and that were touching each other in a sexual manner or were posing provocatively,” and AD advised them that she had viewed all three of the USB drives. Doc. 62 at 53. Meeks further testified that AD also told him that she viewed more of the thumb drives in greater detail than her daughter and described that she saw videos with very explicit titles, which Meeks relayed during the hearing. *See* Doc. 62 at 53. ND also told Detective Meeks that Defendant had moved to Cape Coral, but she did not know his current address. Doc. 62 at 54.

Detective Meeks asked ND to place a controlled call to Defendant to see whether he would claim ownership of the USB drives. Doc. 62 at 96. Following the

¹⁵ One USB drive was “still at the lab.” Doc. 62 at 60.

meeting and interview with ND and AD, Detective Meeks submitted an affidavit and application for state search warrant for the five thumb drives. Doc. 62 at 54-55; Gov't Ex. 8A. In support of his application, Detective Meeks included the descriptions of the contents of the USB drives provided by ND and AD, as well as information that he, Officer Zammit and Sergeant Doro viewed the drives. Doc. 62 at 57-58; Gov't Ex. 8A. A search warrant for the five USB drives was issued on July 11, 2013. Doc. 62 at 55; Gov't Ex. 8B.

After obtaining the search warrant, Detective Meeks conducted a more thorough forensic examination of all five USB drives, and found that a "majority" of the drives contained child pornography. Doc. 62 at 58-59. Specifically, the Memorex drive (Gov't Ex. 9), which was identified by both ND and AD as one of the drives they viewed on July 4, 2013, as well as the drive on which Detective Meeks conducted his initial limited forensic preview, contained "269 images of either [Defendant] Brian [Harling] and the child, or Brian in one picture and the child in another being sexually abused." Doc. 62 at 59-60.

Prior to the issuance of the search warrant, Detective Meeks, along with five officers from the Cape Coral Police Department and Homeland Security agents, went to Defendant's residence in Cape Coral, Florida, "to ensure that no kids were in danger."¹⁶ Doc. 62 at 59, 62-63. Defendant and his son were present when officers arrived, and Defendant consented to the officers to search the residence to verify that

¹⁶ Officers obtained Defendant's address through a court order obtained by the FDLE. Doc. 62 at 100, 104.

no children were in danger. Doc. 62 at 59, 63-64. Detective Meeks testified that, after he and Special Agent Cramsey “verified there was [sic] no children in danger in that house, we asked if we could talk to him about the investigation,” and Defendant agreed.¹⁷ Doc. 62 at 64.

Defendant identified the minors featured in the images, including one as his grandson.¹⁸ Doc. 62 at 66-67, 100-02. At some point during the interview, Defendant stated that he no longer wished to speak with Detective Meeks and Agent Cramsey, and the interview ended. Doc. 62 at 67-68. Detective Meeks and Agent Cramsey then asked Defendant’s adult son whether he could provide the identity of any of the minors in the photos, and he identified two of them as his niece and nephew. Doc. 62 at 68, 103.

Detective Meeks prepared two reports outlining his examination of the USB drives, one authored on July 11 or 12, 2013, following his initial viewing of the drives on July 10, 2013, and a second report dated August 25, 2013, detailing the forensic examination of the drives pursuant to the search warrant. Doc. 62 at 91-92.

¹⁷ Defendant was read his *Miranda* rights, although he was not placed under arrest, in custody or detained at the time, and agreed to waive his rights and discuss the investigation. Doc. 62 at 64-65.

¹⁸ The photos were “exported” from the Memorex USB Drive (Gov’t Ex. 9), as well as printed from Defendant’s publicly available Facebook page. Doc. 62 at 66-67, 100-02. Detective Meeks estimated they exported and then printed 10-15 photos, and described the process by which pictures are exported as follows: “It means we right click to export it, to save it out to a different folder off that drive, so we don’t have to continually access that drive.” Doc. 62 at 101, 102.

e. Agent Grant Wagner

FDLE Special Agent Grant Wagner ¹⁹ first became involved in the investigation of Defendant when he was contacted by Detective Meeks to obtain a search warrant for Defendant's Cape Coral home, because the residence was not within FMPD's jurisdiction. Doc. 62 at 148-50. Agent Wagner prepared a search warrant affidavit using information provided by Detective Meeks as well as the activities and observations of ND and AD. Doc. 62 at 152-53, 171; Gov't Ex. 14A.

Agent Wagner was also present on July 12, 2013, when the search warrant seeking computer-related items and storage media was executed on Defendant's Cape Coral residence. Doc. 62 at 155-58; Gov't Ex. 14B. Upon entry, Agent Wagner saw items that matched descriptions of furnishings featured in the digital camera images on the USB drives. Doc. 62 at 157-58. Agent Wagner then sought and obtained a second search warrant, which was broader in scope and covered items such as bedding, pillows and home décor featured in the digital camera images. Doc. 62 at 158-60; Gov't Ex. 15A-B. The second search warrant was executed later the same night, on July 12, 2013. Doc. 62 at 161. Law enforcement seized throw pillows, a comforter, family photos, "several items of electronic storage," cell phones, DVDs, VHS tapes and a camera. Doc. 62 at 161.

¹⁹ Special Agent Wagner has been employed by the FDLE since 2000, and is currently a special agent supervisor. Doc. 62 at 147-48.

f. Corrado Lazzizzera²⁰

Corrado Lazzizzera is an investigator with the Federal Public Defender's Office in Fort Myers who assisted defense counsel with the investigation and preparation of this case.²¹ Doc. 62 at 184-85. Through Mr. Lazzizzera, and over the Government's objection,²² counsel for Defendant introduced a portion of Special Agent Cramsey's grand jury testimony during which he testified that, when he interviewed ND, she "didn't have much of a recollection of exactly what she saw but she did recognize [the content of the USB drive] as child pornography." Doc. 62 at 189; Def's Ex. A. The defense also introduced through Mr. Lazzizzera, over the Government's objection,²³

²⁰ Mr. Lazzizzera was called after the defense attempted to call Special Agent Keith Cramsey, the Government's case agent, as a witness. The Government objected on grounds that the defense failed to comply with the *Touhy* regulations, as applied by the Department of Homeland Security. See *United States v. Touhy*, 340 U.S. 462 (1951) (describing procedures for seeking the testimony of law enforcement witnesses); 5 U.S.C. § 301 (authority by which executive agencies may prescribe regulations governing the department); 28 C.F.R. §§ 16.21-16.29 (procedure to subpoena testimony of federal agents). The Court offered to adjourn the hearing to allow Defendant to provide the proper notice, but counsel for Defendant declined, stating that he could present the documents he intended to use with Agent Cramsey through his investigator. Doc. 62 at 183, 209-10.

²¹ Prior to becoming an investigator for the Federal Public Defender's Office, Mr. Lazzizzera was employed as a state probation officer, during which he received specialized training, including in the detection of child pornography. Doc. 62 at 194-95.

²² The Government objected to defense counsel's attempt to enter into evidence through its investigator a single page excerpt from Agent Cramsey's grand jury testimony as a business record of the Federal Public Defender's Office, noting that the document was provided to the defense as part of discovery and was not a record created by the Federal Public Defender's Office or maintained in the ordinary course of business, based upon improper foundation. Doc. 62 at 185-89. Counsel for Defendant sought to introduce the document to emphasize the alleged discrepancies between the agent's testimony before the grand jury and ND's testimony at the hearing. Doc. 62 at 187. The Court admitted the document, noting that it had given both sides "a lot of leeway" during the hearing and would accord the document appropriate weight. Doc. 62 at 188.

²³ The Government again objected on grounds of improper foundation, see note 22, *supra*, improper impeachment of a non-testifying witness, and that the report contained hearsay. Doc. 62 at 190-91.

a single page (page 5) from one of Agent Cramsey's reports that memorialized his interview with ND. Gov't Ex. D. The report stated that, after recognizing the thumbnail images as child pornography, ND was "very disturbed at what she saw" and

never looked at any of the images or other drives again although she said her Mother did continue to look at the other two drives and told her she found more child pornography videos and images.

Doc. 62 at 194; Defs Ex. D. Page 5 of Agent Cramsey's report also relayed ND's description of one of the images she saw on the USB drive: "a very young white boy naked, and on a bed with a floral brown pattern to the blanket or sheets." Gov't Ex. D; *see* Doc. 62 at 194. Mr. Lazzizzera testified that, based on his training and experience, that particular description "in itself is not child pornography," but admitted on cross-examination that other descriptions of images viewed by AD contained in the affidavits for search warrants were consistent with child pornography. Doc. 62 at 194, 197-202; *see* Gov't Ex. 8A.

g. Search warrant for USB drives

Detective Meeks prepared the Affidavit and Application for Search Warrant ("USB Affidavit") for the five USB drives. Gov't Ex. 8A. Specifically, the USB Affidavit included the following "description of premises to be searched":

Evidence item 1, one (1) black and white eight (8) gigabyte SanDisk Cruzer thumb drive, with the number SDCZ36-008G and B10904NVPN, Evidence item 2, one (1) eight (8) gigabyte black and blue PNY Attache thumb drive, Evidence item 3, one (1) gray Memorex one (1) gigabyte Travel Drive thumb drive, Evidence item 4, one (1) black and red four (4) gigabyte Lexar thumb drive and Evidence item 5, one (1) black eight (8) gigabyte PNY thumb drive.

These items are currently located at the Fort Myers Police Department located at 2210 Widman Way, Fort Myers, Lee County, Florida under report number 2013-06800[.] These items are hereinafter referred to as "The Premises."

Gov't Ex. 8A at 1. The USB Affidavit noted that the search was to include The Premises, and any seizure was to include, *inter alia*, any evidence pertaining to the possession or receipt of child pornography, including books, magazines, and film, as well as any evidence on the drives indicating Defendant's relationship to the minors in the images, and any evidence used to manufacture, store or distribute child pornography, and evidence establishing possession or control of the drives. Gov't Ex. 8A at 2-3. Those items were collectively referred to as "The Property." Gov't Ex. 8A at 3.

As probable cause for seeking the search warrant, the USB Affidavit stated:

On July 4th, 2013 at approximately 12:15 p.m., [FMPD] Officer Dominic Zammit was dispatched to 4790 Cleveland Avenue, unit B204, in reference to found articles. The complainant identified as Nicole Dunwody advised that she found three (3) USB thumb drives containing child pornography in her apartment while she was moving in.

Gov't Ex. 8A at 5. The USB Affidavit further described the interaction between ND and Defendant, including that Defendant texted ND "Ok I think I got everything. If I missed anything let me know." Gov't Ex. 8A at 6. As to the discovery of the drives, the USB Affidavit described how ND accidentally dislodged the drives from the top of the hall closet while unpacking a large drawing pad, and "[f]inding this suspicious," contacted her mother, who advised ND to bring the USB drives to her house. Gov't Ex. 8A at 6.

The USB Affidavit included the following description of the actions and observations of ND and AD:

A. Dunwody inserted one (1) thumb drive at a time into her computer and opened them. According to A. Dunwody, she accessed each of the three (3) thumb drives by first clicking on the My Computer icon, then clicking on the thumb drive icon, then maximizing the window and enlarging the icons, which displayed the file names and thumbnail images, revealing the content's [sic] of each drive. For the first drive they reviewed, Dunwody and A. Dunwody reported seeing dozens of JPEG images depicting children appearing to be under the age of ten (10) naked and in some cases posing erotically or engaging in sexual acts. A. Dunwody specifically described some of the images including one depicting five (5) young boys naked in the shower, another of two (2) young boys naked looking sad on a couch, and another of one (1) young girl dressed provocatively. She recalled some of the pictures showed the boys erect and some showed the children touching each other in a sexual manner.

At that point, A. Dunwody instructed Dunwody to call the police. A. Dunwody then inserted the second thumb drive. Dunwody advised that she did not look at the contents of the other two (2) drives based on the graphic nature of the images. A. Dunwody, however, continued to review the thumb drives and described the second thumb drive that she accessed as one containing mostly movie files with some JPEG files. She recalled some of the movie file names to be consistent with children engaging in sexual acts, such as, "Man with 12 year old boy." A. Dunwody advised that she clicked on one (1) movie file thinking it may be a video of Harling. After briefly watching the video, she realized the man was not Harling and she immediately clicked off. She described the video she saw as an adult male anally penetrating a minor boy.

A. Dunwody then inserted the last thumb drive and observed what she thought to be cleaning software programs to erase or delete files from the computer system. Dunwody and A. Dunwody returned to Dunwody's new apartment to meet with [FMPD] Officers.

Gov't Ex. 8A at 6-7. The USB Affidavit further stated that:

[ND] handed Officer Zammit three (3) USB thumb drives, which were contained in a zip loc bag. Dunwody then advised Officer Zammit of her findings and showed him where she located the items in her residence. As Officer Zammit looked up from where Dunwody advised the drives fell from, he observed two (2) additional thumb drives.

Gov't Ex. 8A at 7-8. The USB Affidavit also details how Officer Zammit and Sergeant Doro viewed the USB drives "in an attempt to verify the child pornography" by inserting two of the three drives ND and AD viewed and opening one file on each drive, and how Detective Meeks conducted the forensic preview. Gov't Ex. 8A at 8-10. A search warrant authorizing a search of The Premises and seizure of The Property was issued on July 11, 2013. Gov't Ex. 8B.

h. First search warrant for Defendant's Cape Coral residence

FDLE Special Agent Grant Wagner prepared an Affidavit and Application for Search Warrant for Defendant's residence located at 711 NE 15th Terrace, Cape Coral, Florida ("Residence Affidavit"). Gov't Ex. 14A. In the section entitled "Summary of Investigation," Agent Wagner included verbatim language from the "Probable Cause" section of Detective Meeks' USB Affidavit. Gov't Ex. 14A at 3-10. That section also noted that Detective Meeks sought and obtained a search warrant for the five USB drives on July 11, 2013, after which Detective Meeks "performed a more comprehensive forensic examination" of the drives that revealed additional images of child pornography. Gov't Ex. 14A at 10.

The Residence Affidavit also included sections entitled "Characteristics of Child Pornography Collectors" and "Computer Evidence," which described various

types of computer evidence, how it is utilized in cybercrime, particularly as it relates to exploitation of children, and how it may be collected and stored. Gov't Ex. 14A at 10-15. The Residence Affidavit requested a warrant to search various items of computer hardware and software, storage media, items pertaining to or demonstrating an interest in sexual exploitation of children, items demonstrating ownership or control of the various items, and children's items such as toys and clothes. Gov't Ex. 14A at 15-18. A search warrant authorizing the search of Defendant's Cape Coral residence and seizure of the property set forth above was issued on July 12, 2013. Gov't Ex. 14B.

i. Second search warrant for Defendant's Cape Coral residence

Agent Wagner testified that, during the execution of the search warrant for Defendant's Cape Coral residence, he observed items matching descriptions of those featured in some of the images on the USB drives and sought a second search warrant for those items. Doc. 62 at 157-60. Wagner completed another Affidavit and Application for Search Warrant for items located within Defendant's residence at 711 NE 15th Terrace, Cape Coral, Florida ("Personalty Affidavit"), repeating verbatim the "Summary of Investigation" section from the Residence Affidavit, and including the information that Agent Wagner obtained a search warrant for computer-related evidence at the residence. Gov't Ex. 15A at 10. The Personalty Affidavit further stated:

During the search of the residence, your Affiant and other law enforcement agents assisting in the search located additional items of evidentiary value not listed in the original search warrant. These items include bedding,

pillows and other home décor items that appear to match items in the background of the child pornography photographs previously found on the thumb drives. Also located within the residence were family photographs including photographs of the victim.

Gov't Ex. 15A at 10.

The Personalty Affidavit included the same "Characteristics of Child Pornography Collectors" and "Computer Evidence" sections as the Residence Affidavit and incorporated paragraphs 1-17 from the Residence Affidavit detailing the items to be seized, but included as additional property to be seized home décor and other items that were potentially those visible in the images on the USB drives, and photographs of the victim. Gov't Ex. 15A at 16-18; *see* Gov't Ex. 14A at 15-18. A search warrant authorizing a search of Defendant's Cape Coral residence and seizure of the additional property was issued on July 12, 2013. Gov't Ex. 15B.

III. Analysis

a. The private party doctrine

A preliminary issue the Court must address is whether the Fourth Amendment was implicated by the warrantless viewing by law enforcement of the three USB drives initially viewed by ND and AD. For the reasons more fully discussed below, the Court concludes that, with respect to Government Exhibits 9, 10 and 11, the viewing by ND and AD, acting as private citizens, frustrated Defendant's expectation of privacy such that the subsequent warrantless views by law enforcement did not violate the Fourth Amendment.

The Fourth Amendment "proscrib[es] only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private

individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.” *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (internal quotation marks omitted); *United States v. Meister*, No. 8:10-cr-339-T-26AEP, 2012 WL 252447, *4 (M.D. Fla. Jan. 26, 2012). *See also Rann v. Atchinson*, 689 F.3d 832, 836 (7th Cir. 2012) (“When a private party provides police with evidence obtained in the course of a private search, the police need not stop her or avert their eyes.” (internal citation and quotation marks omitted)); *United States v. Young*, 350 F.3d 1302, 1307 (11th Cir. 2003) (“Per *Jacobsen*, [the defendants’] privacy interest *would have been eliminated* had the Federal Express employee inspected the package, discovered the currency, and then contacted the IRS agents to replicate the search.”).

In this case, at least a portion of the contents of two of the three initially discovered USB drives (Gov’t Exs. 9, 10 and 11)²⁴ were unquestionably first viewed by ND and/or AD, and the drives were neither password protected nor required any special software to open or view. After ND and AD viewed the first drive, and AD viewed the second drive and attempted to view the third, ND called police and advised Officer Zammit that the drives contained what to them appeared to be child pornography, described the nature of the images and voluntarily turned over the USB drives. Neither ND nor AD were acting as agents of the government when they viewed the drives or when ND voluntarily gave them to police, and law enforcement’s

²⁴ It is not clear from the testimony which of the three drives was the drive that Ada Dunwoody attempted to access but was unable to view any images; however, it was one of Gov’t Exs. 9, 10 or 11.

“viewing of what a private party ha[s] freely made available for [] inspection [does] not violate the Fourth Amendment.” *Jacobsen*, 466 U.S. at 119.

Thus, Defendant’s privacy interest in at least two of the USB drives had already been eliminated at the time ND turned the drives over to Officer Zammit. *Young*, 350 F.3d at 1307; *see also United States v. Durdley*, 436 Fed. Appx. 966, 968 (11th Cir. 2011) (defendant did not have expectation of privacy in thumb drive left in public shared computer). “[A]n individual’s expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers,” and “the police do not engage in a new ‘search’ for Fourth Amendment purposes each time they examine a particular item found within the container.” *United States v. Runyan*, 275 F.3d 449, 465 (5th Cir. 2001) (citing *Jacobsen*, 466 U.S. at 119).

Moreover, “warrantless searches are constitutional where permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.” *United States v. Shields*, 675 F.2d 1152, 1159 (11th Cir. 1982) (internal quotation marks omitted). Here, Defendant agreed to rent the condo to ND and provided her with a key and full access to the premises. ND, as the legal tenant of the condo where the USB drives were discovered, had “sufficient relationship to the premises or effects sought to be inspected” to consent to their inspection. *Shields, supra*. When ND gave the drives to police, neither Officer Zammit nor any other law enforcement officer “need stop her or avert their eyes” to the contents. *Rann*, 689 F.3d at 836.

Consequently, because ND and AD were acting as private citizens when they initially accessed and viewed Government Exhibits 9, 10 and 11, the officers' subsequent viewing of the USB drives prior to obtaining the warrant did not violate the Fourth Amendment, unless they exceeded the scope of the search by ND and AD. The Court must therefore determine whether the police exceeded the scope of the private search by viewing (1) more images than the private parties on the two USB drives that had been viewed by AD and/or ND; (2) the contents of the third drive that AD accessed but on which she was unable to view any images; or (3) the two USB drives discovered later (Gov't Exs. 12 and 13) that neither ND nor AD had viewed. *See Meister*, 2012 WL 252447, *4; *Runyan*, 275 F.3d at 461.

b. The scope of the private search

i. First two USB drives viewed by the Dunwodys

Although ND and AD's viewing of the first two USB drives was sufficient to frustrate Defendant's expectation of privacy and invoke the private party exception to the Fourth Amendment's warrant requirement, neither ND nor AD were able to view any images on the third USB drive discovered by ND. Moreover, officers viewed more images on each of the drives than AD and/or ND had previously viewed prior to obtaining a warrant.

The Supreme Court has held that "additional invasions of respondents' privacy by the government agent must be tested by the degree to which they exceeded the scope of the private search[.]" and "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not

already been frustrated.” *Jacobsen*, 466 U.S. at 115, 117. “As long as police officers do not exceed the scope of the private search, they may view or replicate the results of that search without violating the Fourth Amendment.” *Meister*, 2012 WL 252447, *4 (internal quotation marks omitted).

Examining more files on drives already viewed by private parties or attempting to confirm the contents of those drives does not exceed the scope of a prior private search. *United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990) (government agents’ “search of the box and videotapes did not exceed the scope of the prior private searches for Fourth Amendment purposes simply because they took more time and were more thorough” than the private parties). This is particularly true when police are already substantially aware of their contents. *See Rann*, 689 F.3d at 838 (police did not exceed or expand the scope of the initial private search where they were “substantially certain” the memory card and computer zip drive contained child pornography based upon private parties’ descriptions); *Runyan*, 275 F.3d at 463, 464 (police do not exceed the scope of a private search where they are already substantially aware of what is inside the container “based on the statements of the private searchers, their replication of the private search, and their expertise”).

Similarly, government conduct that merely confirms the illicit nature of evidence discovered by private parties does not compromise any protected privacy interests. *Jacobsen*, 466 U.S. at 123. “Protecting the risk of misdescription hardly enhances any legitimate privacy interest, and is not protected by the Fourth Amendment” because the only “advantage” the government gains by reexamining

contents viewed by private parties is "avoiding the risk of a flaw" in the private parties' description. *Id.* at 119.

Both Officer Zammit and Detective Meeks testified that their purposes in viewing all five of the USB drives without having first obtained a search warrant were to see if they could identify the owner of the drives and to confirm that images on the drives were in fact child pornography. Doc. 61 at 166, 170-71; Doc. 62 at 28-29, 38. Officer Zammit and Sergeant Doro only accessed a single photo and video on each of the five USB drives. Doc. 61 at 170. Detective Meeks testified that he was able to determine the content of the thumbnail images without having to enlarge or open them, and it was not until he saw the series that appeared to be taken with a digital camera that he examined additional folders on the Memorex USB drive to determine if there were live child victims. Doc. 62 at 43, 45-46.

Thus, the conduct of Officer Zammit, Sergeant Doro and Detective Meeks in attempting to confirm the illicit nature of the drives' contents did not exceed the scope of the prior search by ND and AD as to the two USB drives on which ND and/or AD viewed images they believed to be child pornography. Law enforcement's attempts to confirm the nature of those images does not exceed the scope of the private party search, particularly where law enforcement is already substantially certain of the contents. *Simpson*, 904 F.2d at 610; *Runyan*, 275 F.3d at 464; *Rann*, 689 F.3d at 838.

ii. Third USB drive Ada Dunwoody attempted to access

A closer question arises with respect to the third drive among the three initially discovered by ND, which AD inserted into her computer and attempted to access, but on which she did not view any images. While Defendant acknowledges that “[o]f the first three drives found by ND, two did involve private search” and that a “private party search can destroy an individual’s reasonable expectation of privacy” if the defendant’s conduct creates a reasonably-foreseeable risk of intrusion by private parties, he argues that “[t]he contents of [the third] drive [were] not viewed by the Dunwodys, and hence the private search exception would not apply as to that drive.” Doc. 66 at 12-14.

Some courts in other circuits that have addressed the issue²⁵ have determined that, by viewing additional items not previously viewed by private parties, police conduct exceeds the scope of a prior private search. *See Runyan*, 275 F.3d at 461. Although it is not binding on this Court, the Fifth Circuit’s analysis in *Runyan* is particularly instructive. The court there summarized the two lines of authority among the circuits when called to address questions similar to those at issue in this case. The first holds that police exceed the scope of a prior private search when they open a container that private parties did not. *Id.* (citing *United States v. Rouse*, 148 F.3d 1040, 1041 (8th Cir. 1998); *United States v. Kinney*, 953 F.2d 863, 866 (4th Cir.

²⁵ The Eleventh Circuit has not ruled on the specific at issue in this case, but has held that law enforcement did not exceed the scope of a private search when they examined individual boxes that had not been viewed by private parties when they were determined to be part of “one package” for Fourth Amendment purposes. *See United States v. Garcia-Bercovich*, 582 F.3d 1234 (11th Cir. 2009).

1992); *United States v. Donnes*, 947 F.2d 1430, 1434 (10th Cir. 1991)). The other suggests that law enforcement's warrantless viewing of identical items found in the same location as those viewed by private parties, even where they had not previously been opened by the private parties, is not constitutionally problematic. *Id.* at 462-63 (citing *United States v. Bowman*, 907 F.2d 63 (8th Cir. 1990)).

Relying on the Supreme Court's decision in *Jacobsen* to reconcile the two competing approaches to determining whether police exceed the scope of a prior private search, the Fifth Circuit stated:

A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search.

Runyan, 275 F.3d at 463-64. The *Runyan* court determined that police exceeded the scope of a prior private search of computer disks because officers could not have been substantially certain of the contents of the computer disks or other media storage devices found near the computer that were not previously viewed by private parties, and therefore all evidence obtained as a result of the warrantless views was subject to suppression. *Id.* at 464.

The Eleventh Circuit has addressed this issue in similar, but not identical, circumstances. In *Simpson*, the Court examined the scope of law enforcement searches that followed a private search with respect to a package that was first opened by FedEx employees, who discovered printed materials and videotapes containing child pornography. The contents were later viewed by law enforcement

and an Assistant United States Attorney prior to obtaining a warrant. 904 F.2d at 609. The Court held that law enforcement's subsequent viewing of the videotapes and printed materials did not exceed the scope of the prior private search, even though agents took more time and were more thorough than the private parties. *Id.* at 610. There, the subsequent views by law enforcement were limited to the same four videotapes that had been viewed by the FedEx employees. *Id.* at 609.

The Eleventh Circuit has also upheld a district court's determination that law enforcement did not exceed the scope of a prior private search by opening and viewing more boxes than the private parties because the boxes were all part of "one package" for Fourth Amendment purposes. *United States v. Garcia-Bercovich*, 582 F.3d 1234 (11th Cir. 2009). In that case, upon opening a large, shrink-wrapped pallet containing thirteen boxes after it sat unclaimed for days at their facility, employees of a private commercial shipper discovered they contained marijuana. *Id.* at 1236. Prior to trial, the defendant sought to suppress the evidence, contending that the officers expanded the scope of the prior private search. *Id.* The district court denied the motion to suppress, finding that the entire shipment constituted a single package, because the boxes were located in the same place—shrink-wrapped together and shipped under a single manifest—and, therefore, officers did not exceed the scope of the private search. *Id.* at 1236-37.

The court of appeals affirmed, finding the lower court's determination that the entire shipment constituted a single package was not clearly erroneous:

As it was only a single package that was searched by the Gainesville officers, there was no legal error in denying

[the defendant's] motion to suppress because a police search following an unsolicited private search does not constitute a search under the Fourth Amendment as long as the search is confined to the same scope as the initial private search.

Id. at 1238.

Here, the third USB drive that AD attempted to access was discovered at the same time and in the same manner as the two that ND and/or AD viewed. When ND voluntarily gave the drives to police, all three were in a single plastic bag. Moreover, ND represented to Officer Zammit when she turned them over that all three drives had been viewed and that all three contained child pornography. Although a closer call than with the first two drives, the Court finds that officers did not exceed the scope of the prior private search by also viewing the third drive on which no images were actually viewed by ND or AD in an effort to confirm its contents prior to seeking a warrant.

iii. USB drives discovered later - Government Exhibits 12 and 13

A different analysis applies to the two drives discovered by Officer Zammit and ND later on the evening of July 4, 2013 (Gov't Exs. 12 and 13) as to whether officers' warrantless viewing would also be within the private party doctrine. On one hand, these two drives were found in the same location as the first three, on two of which ND and AD viewed images they described as child pornography. The Government therefore contends that it was "reasonable and probable to believe that these two thumb drives were part of a collection of child pornography." Doc. 72 at 5.

Jacobsen held that "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not

already been frustrated.” 466 U.S. at 115, 117. The Eleventh Circuit similarly has stated that the threshold question when determining whether evidence should be suppressed is whether the defendant had a legitimate expectation of privacy in the challenged items. *Durdley*, 436 Fed. Appx. at 968. Therefore, for evidence to be suppressed, the expectation of privacy cannot have already been frustrated, and

[t]he party alleging an unconstitutional search must establish both a subjective and an objective expectation of privacy. The subjective component requires that a person exhibit an actual expectation of privacy, while the objective component requires that the privacy expectation be one that society is prepared to recognize as reasonable.

United States v. Segura-Baltazar, 448 F.3d 1281, 1286 (11th Cir. 2006) (citation and quotation marks omitted).

The Eleventh Circuit has determined that a defendant did not have a legitimate expectation of privacy in computer files containing child pornography because, although the defendant exhibited a subjective expectation of privacy in the files, that expectation was not objectively reasonable since the defendant had a peer-to-peer file sharing program on his computer and the files were therefore in the public domain. *United States v. Norman*, 448 Fed. Appx. 895, 897 (11th Cir. 2011). The court has also held that a defendant had no legitimate expectation of privacy in a thumb drive containing child pornography that he left in a county-owned, common-use computer. *Durdley*, 436 Fed. Appx. at 968.

The facts of this case are distinguishable from cases in which officers limited their viewing to the same storage media devices that had previously been viewed, or in which the items were actually bound together as part of one large package which

permitted the Court to find that law enforcement had not exceeded the scope of the prior search. *Simpson*, 904 F.2d at 609; *Garcia-Bercovich*, 582 F.3d at 1238. Moreover, there is no evidence that Defendant ever placed the images in the public domain, and the thumb drives at issue in this case were found in a private condo unit in which Defendant formerly lived and that he still owned.

Thus, to the extent that Defendant may have at one time had a subjective expectation of privacy in the drives, that expectation of privacy had not been frustrated or eliminated by the private search as to Government Exhibits 12 and 13. Nor can the Court affirmatively say that officers could have been substantially certain of their contents, or that the contents of Government Exhibits 12 and 13 were rendered obvious by the private search. While, as the Government contends, it may have been reasonable for officers to believe that the two separately-discovered drives would also contain child pornography, a reasonable belief does not rise to the level of substantial certainty. Accordingly, the Court finds that the private party doctrine does not apply to the later-discovered drives, Government Exhibits 12 and 13.

c. The independent source doctrine—Government Exhibits 12 and 13

While the Court finds that as to Government Exhibits 9, 10 and 11, the law enforcement searches did not exceed the scope of the private party search by ND and AD, suppression of those drives also would not be required if the observations by ND and AD provided an independent source of information sufficient to support a finding of probable cause. The same is true if the observations of ND and AD would have provided an independent source of sufficient probable cause to obtain a warrant as to

Government Exhibits 12 and 13, which were not viewed by the private parties and therefore to which the private party doctrine would not apply.

If law enforcement's warrantless views of Government Exhibits 12 and 13 were "searches" subject to the Fourth Amendment, the question is whether the evidence should be suppressed. When determining whether evidence must be suppressed as "fruit" of an unconstitutional search, the question is whether the challenged evidence has been sufficiently purged of the primary taint. *United States v. Miranda*, 325 Fed. Appx. 858, 861 (11th Cir. 2009); *see also Wong Sun v. United States*, 371 U.S. 471 (1963). The Government can establish that the primary taint has been purged by showing that the challenged evidence would have been discovered by lawful means or through an independent source. *Miranda*, 325 Fed. Appx. at 861.

"The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that [sic] they would have been in if no police error or misconduct occurred." *Nix v. Williams*, 467 U.S. 431, 443 (1984). Thus, "[w]hen the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Id.*

Where "the search warrant affidavit is based on information acquired as a result of an illegal entry," the Court "must look to whether the other information provided in the affidavit is sufficient to support a probable cause finding. If so, suppression is not required because the exclusionary rule has no application where

the government learned of the evidence from an independent source” *United States v. Chaves*, 169 F.3d 687, 692-93 (11th Cir. 1999) (citation and quotation marks omitted). “A sufficient basis for probable cause for a search exists when under the totality of the circumstances there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *United States v. Lopez*, 649 F.3d 1222, 1245 (11th Cir. 2011) (internal quotation marks omitted). “A fair probability, in turn exists when the facts and circumstances would lead a reasonably prudent person to believe that the place to be searched contains contraband or evidence of a crime.” *Id.* (internal quotation marks omitted).

Detective Meeks ultimately obtained a state search warrant for all five USB drives. Gov’t Ex. 8B. Defendant argues that the USB drives and evidence found at Defendant’s Cape Coral residence must nevertheless be suppressed because the affidavit upon which the warrant ultimately issued “included evidence illegally obtained by Officer Zammit and Sergeant Doro, evidence illegally obtained by Detective Meeks, a false account of the findings of the Dunwodys, and other misleading statements.” Doc. 66 at 20. The Government contends that the observations of ND and AD, standing alone, would have been sufficient probable cause to obtain a search warrant and therefore provide an independent source for the information supporting the issuance of the search warrants.

The USB Affidavit included observations of both ND and AD, and information Detective Meeks learned from Officer Zammit’s report and warrantless viewing of the drives and Detective Meeks’ forensic preview. Gov’t Ex. 8A. Thus, the Court must

determine whether, absent the information obtained from the warrantless views by law enforcement, there was sufficient probable cause for the warrant to search the five USB drives to have been sought and issued. *Runyan*, 275 F.3d at 467. The Court finds that ND's and AD's descriptions of the images they viewed provided sufficient probable cause for police to have sought and obtained a search warrant for all five USB drives.

The USB Affidavit described how ND "advised that she found three (3) drives containing child pornography in her apartment while she was moving in." Gov't Ex. 8A at 5. The affidavit further stated:

[ND and AD] reported seeing dozens of JPEG images depicting children appearing to be under the age of ten (10) naked and in some cases posing erotically or engaging in sexual acts. A. Dunwody specifically described some of the images including one depicting five (5) young boys naked in the shower, another of two (2) young boys naked looking sad on a couch, and another of one (1) young girl dressed provocatively. She recalled some of the pictures showed the boys erect and some showed the children touching each other in a sexual manner.

Gov't Ex. 8A at 6-7. AD also "described the video she saw as an adult male anally penetrating a minor boy" and "recalled some of the movie file names to be consistent with children engaging in sexual acts, such as 'Man with 12 year old boy.'" Gov't Ex.

8A at 7. The USB Affidavit also stated:

Officer Zammit and Sergeant Doro in an attempt to verify the child pornography, inserted two (2) of the three (3) thumb drives the Dunwody's [sic] had looked at into a computer and observed that each thumb drive contained several image and video files consistent with child pornographic filenames. They did not see any thumbnail images. Officer Doro advised that he therefore clicked on

one of the files on each drive and verified it was in fact images of children engaged in sexual acts. . . .

Gov't Ex. 8A at 8-9. It further described in detail Detective Meeks' "forensic preview" of the USB drives. Gov't Ex. 8A at 9-10.

Even without the information gleaned from the law enforcement views of the drives, the Court finds that the descriptions of the images viewed by ND and AD and relayed to the police constituted sufficient probable cause for law enforcement to have sought and obtained a search warrant for the five USB drives, because "[t]he connection between the objects to be seized and the premises to be searched can be established from the particular circumstances involved and need not rest on direct observation." *Lopez*, 649 F.3d at 1245 (internal quotation marks omitted). Thus, when viewed in the totality of the circumstances, the observations of ND and AD standing alone provided sufficient probable cause to support the issuance of a search warrant for all five USB drives. Therefore, they constitute an independent source for the challenged evidence (Gov't Exs. 12 and 13), and the evidence obtained pursuant to the warrants need not be suppressed. *See Lopez*, 649 F.3d at 1245.

d. Other information within the USB Affidavit

Defendant also alleges that "[o]f the remaining allegations contained in the affidavit, many were false or untrue, and with the exercise of any due diligence should have been known to Detective Meeks, or in the alternative he crafted the affidavit with indifference to the facts." Doc. 66 at 21. For example, Defendant highlights Detective Meeks' statement in the affidavit that he became involved in the investigation of Defendant on July 11, 2013, instead of the date on which his actual

involvement began, July 10, 2013, when he conducted the “forensic preview” of the five USB drives. Doc. 66 at 22. Defendant suggests the incorrect date was used “to either intentionally conceal the fact that he had previously conducted his first illegal search of the drives prior to his application for a search warrant, or negligently by choosing the wrong date.” Doc. 66 at 22. “Either way,” Defendant contends, the wrong date “would be misleading to the issuing Judge” because it would “cause a judge to miss the fact that the actions of the officer were illegal. . . .” Doc. 66 at 22.

Defendant also makes much of the fact that Detective Meeks’ USB Affidavit did not “advise the court that neither Dunwody had any background in the identification of child pornography” and thus could not distinguish between actual pornography and child erotica, nor did the affidavit clearly state that AD and ND accessed only two of the original three USB drives, but “instead led the court to conclude, on a reasonable reading . . . that the Dunwody’s accessed all three drives, and that all 3 drives contained child pornography.” Doc. 66 at 22-23. Defendant also argues that Detective Meeks’ statement that he used a “write blocker,” which enabled him to “view the contents of the thumb drives in the same manner” as ND and AD, was misleading because the relevant inquiry is not what the Dunwody’s *could* have viewed, but, rather, what they actually viewed. Doc. 66 at 23.

The Court is not persuaded that the inclusion of this information caused the issuing magistrate such confusion so as to abdicate her responsibility to independently determine whether probable cause existed for issuing a search warrant for the USB drives. Moreover, the Court does not find that any statements

in the USB Affidavit, to the extent it may contain any misleading or inconsistent information, rise to the level of “deliberate falsehood or reckless disregard for the truth” required to invalidate the warrant, and the information regarding the observations of ND and AD alone was sufficient to support a finding of probable cause. *See Franks v. Delaware*, 438 U.S. 154, 171-72 (1978); *Durdley*, 436 Fed. Appx. at 968.

e. Abandonment

Defendant further argues that officers were required to obtain warrants prior to viewing the contents of the USB drives because he never manifested an intent to abandon the drives, and specifically indicated an intent to the contrary by asking ND to let him know if he left anything behind. Doc. 66 at 9-10. Defendant also posits that ND’s belief that Defendant may have returned to the condo to retrieve the USB drives after he was contacted by ND and Officer Zammit regarding the “noise complaint” further evinces his intent not to abandon the drives. Doc. 66 at 10.

ND and AD’s views of the USB drives eliminated any privacy interest Defendant may have had in the drives, at least with respect to Government Exhibits 9 and 10, and though a closer call, as discussed *supra*, arguably also as to Government Exhibit 11. Although the burden is on the government to prove abandonment, the burden is on the defendant to prove a legitimate expectation of privacy in the items. *United States v. Coffield*, 272 F.3d 1303, 1306 (11th Cir. 2001). Since the Court has already determined that Defendant did not retain any expectation of privacy in Government Exhibits 9, 10 and 11 following the private search, the Court need not determine whether the Government has proven abandonment as to those drives.

As to Government Exhibits 12 and 13, the Court determined that Defendant may have retained an expectation of privacy in those drives that was not frustrated by the private search, since neither ND nor AD accessed or viewed those drives. Thus, the Court would ordinarily proceed to determine whether the Government had met its burden of proving abandonment. *Coffield*, 272 F.3d at 1306.

In this case, there is no conclusive evidence that Defendant returned to the condo seeking the USB drives, nor did he ever ask ND if she found them and, if so, express an intent to reclaim them, other than Defendant's general text asking ND to "let him know" if he forgot anything when he moved out. The Government argues that by vacating the condo, Defendant's privacy interest in the drives was at least diminished, because the drives had been lost, mislaid or abandoned, and, because officers did not seize the drives from Defendant, they did not deprive him of any property interest therein. Doc. 72 at 3. Moreover, the Government argues by providing ND complete access to the condo he assumed the risk she would consent to a search of the condo or items therein by law enforcement. Doc. 72 at 2-3.

Were the Court required to reach the question of abandonment as to Government Exhibits 12 and 13, it would be inclined to determine that, even if Defendant did retain an expectation of privacy in the drives, Defendant relinquished his property interest therein by leaving them behind when he moved out. The Court need not reach this conclusion, however, due to its determination that the observations of ND and AD provided an independent source of sufficient probable

cause for the warrant to search all five USB drives to have issued, and a lawful search pursuant to a valid warrant does not violate the Fourth Amendment.

f. Inconsistent testimony

Defendant also highlighted several portions of witnesses' testimony elicited at the suppression hearing which he contends are inconsistent, either with prior statements of the individual witness, or inconsistent with the statements of other witnesses. The Court finds that any arguably inconsistent testimony is not material to the resolution of the Motion, and does not undermine the credibility of the offering witness such that their testimony should be disbelieved or otherwise discredited.

For example, Defendant highlights that ND and Officer Zammit provided inconsistent testimony as to the number of officers present when ND gave the original three USB drives to Officer Zammit. *See* Doc. 66 at 3 n.2. Though ND stated at one point that there were two officers present at that time, and Officer Zammit testified that he arrived alone and it was only after dispatch was unable to reach him on his radio that another unit arrived, the number of officers present is a wholly irrelevant matter, and does not rise to the level of inconsistency that undermines other testimony given by these witnesses.

g. Additional evidence from Defendant's Cape Coral residence

The Court also declines to recommend suppression of other evidence found at Defendant's Cape Coral residence, or any statements made by Defendant or his son, having already determined that officers had sufficient probable cause to seek and obtain a search warrant for the USB drives based upon ND's and AD's descriptions

of their contents contained within Detective Meeks' USB Affidavit. Agent Wagner later sought and obtained a valid search warrant for Defendant's residence, relying on both the observations of ND and AD contained in Detective Meeks' USB Affidavit and information from Detective Meeks' warrantless "forensic preview," and noting further that Detective Meeks had previously sought and obtained a search warrant for the USB drives. Gov't Ex. 14A.

As to the home décor or "personalty" evidence, consisting primarily of the bedding featured in the digital video images and seen during the protective sweep, Agent Wagner completed a second affidavit, the Personalty Affidavit, and obtained a valid warrant for those items after observing them in plain view in Defendant's home. Gov't Ex. 15A-B. Moreover, the Court finds that those items would have been inevitably discovered during the execution of the valid search warrant for Defendant's home.

Finally, as to Defendant's statements, he was not under arrest at the time the statements were made, Defendant was always free to leave or end the interview, which he ultimately did, and Defendant chose to make identifications or statements even after he was read his *Miranda* rights. Defendant's statements were freely and voluntarily made, and Defendant does not argue otherwise. Instead, Defendant argues they should be suppressed on grounds that they were "fruits" of an illegal search. This argument must be rejected, as the Court has concluded that the searches of the USB drives and Defendant's home did not violate the Fourth Amendment. As to the identifications and statements made by Defendant's son, the

Court also declines to recommend suppression, as Defendant has established no basis for such a recommendation given the Court's determination that officers were lawfully present at the residence.

IV. Conclusion

Government Exhibits 9, 10 and 11 were first accessed or viewed by ND and/or AD, thereby frustrating Defendant's expectation of privacy in those drives. The subsequent views by law enforcement of those three drives prior to obtaining a warrant did not violate Defendant's expectation of privacy, and were not otherwise constitutionally problematic. As to Government Exhibits 12 and 13, the two USB drives discovered later by Officer Zammit, although those drives were found in the same location on the same day as Government Exhibits 9, 10 and 11, they lack the additional nexus to those drives to bring the warrantless views within the scope of the private party search. Defendant therefore may have retained an expectation of privacy in those drives because law enforcement could not have been substantially certain that they also contained child pornography, rendering Government Exhibits 12 and 13 potentially subject to suppression.

To the extent, however, that officers' pre-warrant viewing of Government Exhibits 9, 10 and 11 exceeded the scope of the initial private search, and to the extent that Defendant may have retained a privacy interest in Government Exhibits 12 and 13, the observations by AD and ND provided an independent source of the information officers learned from their warrantless views of those drives. Thus, even excluding the information obtained from the warrantless views by law

enforcement from the USB Affidavit, there was sufficient probable cause to obtain a search warrant for all five USB drives. The Court therefore concludes that officers would have sought and obtained a search warrant for the USB drives even if they had not independently viewed their contents.

Moreover, because the observations of ND and AD provided an independent source for the information leading to the issuance of the USB search warrant, and that warrant served as the basis for the two search warrants issued for Defendant's Cape Coral residence, all three state search warrants were therefore valid and evidence obtained pursuant to those warrants need not be suppressed.

Accordingly, it is **RESPECTFULLY RECOMMENDED**

That Defendant's Motion to Suppress (Doc. 29) be **DENIED**.

DONE and **ENTERED** at Fort Myers, Florida on this 29th day of April, 2014.


CAROL MIRANDO
United States Magistrate Judge

Copies:

The Honorable Sheri Polster Chappell
United States District Judge

Counsel of Record