IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

United States of America	:	
v.	:	Cr. Act. No. 17-30-LPS
	:	**UNSEALED**
Scott C. Foster	:	
	:	**11/12/2020**
also known as "Chase Reacher,	:	
Defendant.	:	

David C. Weiss, Graham L. Robinson, U.S. ATTORNEY'S OFFICE, DISTRICT OF DELAWARE, Wilmington, DE

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MEMORANDUM OPINION

November 5, 2020
Wilmington, Delaware

STARK, U.S. District Judge:

Defendant Scott C. Foster, also referred to by the government as "Chase Reacher" (hereinafter, "Defendant"), is charged in a 17-count superseding indictment with multiple offenses relating to child pornography and sexual exploitation of children. (D.I. 41) ("Indictment" or "Ind.") Pending before the Court is Defendant's omnibus motion, filed on September 6, 2019, seeking to dismiss certain counts, suppress evidence, compel production by the government, and exclude certain evidence at trial. (D.I. 45) ("Motion" or "Mot.") The government responded on December 6, 2019 (D.I. 54) ("Response" or "Resp."), attaching relevant documents under seal (D.I. 56) ("Exhibits" or "Ex."). Having considered the parties' filings and related materials (*see* D.I. 41, 45, 54, 56), and for the reasons that follow, the Court will deny each of Defendant's motions.

I. BACKGROUND

A. Alleged Criminal Acts

The government alleges that a Facebook account operating under the name "Chase Reacher" contacted multiple minor females in August and September 2016. (Resp. at 3; Exs. A & B at ¶ 1) The individual responsible for the account, who purported to be 18 years old, allegedly enticed at least three female minors (hereinafter "Minors") from the same Maryland high school to send nude photographs of themselves using Facebook's Messenger application. (Resp. at 3; Exs. A & B at ¶¶ 1-2; Ex. I at ¶¶ 20-21) Two of the Minors (K.B. and M.A.) are alleged to have to have sent photographs after "Chase Reacher" threatened to destroy their reputation by publishing other inappropriate photos he had allegedly obtained. (Resp. at 3-4; Ex. I at ¶¶ 24-25, 28) The third Minor (L.C.) is alleged to have contacted "Chase Reacher" in an attempt to get him to stop harassing K.B., and also sent photographs. (Resp. at 3-4; Ex. I at ¶ 21) The individual operating the "Chase Reacher" account sent pictures of a penis to each of the

alleged victims. (Resp. at 4; Ex. I at ¶¶ 20-28)

B. State Investigation

On September 1, 2016, K.B. and M.A. informed high school officials about their interactions with "Chase Reacher." Those officials advised K.B. and M.A. to tell "Chase Reacher" they had contacted police and that he must stop contacting them (but allegedly he continued). (Resp. at 4; Exs. A & B at ¶ 1; Ex. I at ¶ 20) According to the government, M.A. later contacted high school officials again and provided them a "302" telephone number she had obtained from the "Chase Reacher" Facebook profile page. (Resp. at 4; Ex. I at ¶ 20)

On September 14, 2016, Caroline County, Maryland law enforcement officials learned from a Sprint subpoena response that the subscriber information for the phone number provided by M.A. was registered to Defendant Scott C. Foster, having an address of 137 Jaacs Lane, Woodside, Delaware 19980. (Resp. at 5; Exs. A & B at ¶ 10) Two days later, Detective Justin Reibly of the Caroline County Police Department attempted to locate the "Chase Reacher" account on Facebook, but "learned that the account had been deactivated." (Resp. at 5; Exs. A & B at ¶ 9) Detective Reibly later contacted the Minors, took their statements, and, on September 21, 2016, seized each of their cellphones. (Resp. at 5; Ex. I at ¶ 21) While M.A.'s cellphone contained photographs that the government says are consistent with her statement, K.B. and L.C. had apparently deleted their respective photographs. (Resp. at 5; Ex. I at ¶ 21)

C. Facebook Warrants

After the State investigation, Detective Reibly obtained from Maryland state court two search warrants for Facebook, Inc. (*See* Exs. A & B) The first warrant, obtained on September 26, 2016, sought information from the Facebook pages of "Chase Reacher," Defendant, and the Minors. (Ex. A at 9-11) But the electronic preservation request served on Facebook only

contained profile identification numbers for the three Minors and Defendant because, according to the government, Facebook did not know anything about the "Chase Reacher" account other than the name. (Resp. at 6) Consequently, Caroline County law enforcement did not receive Facebook records for "Chase Reacher." (*Id.*)

The second warrant, obtained on October 4, 2016, sought to remedy the gap in the first warrant. (*See* Ex. B) The government contends that once Detective Reibly reviewed M.A.'s Facebook records, he was able to more specifically identify information associated with the "Chase Reacher" account. (Resp. at 6) With this additional information, the second warrant included profile identification numbers associated with the "Chase Reacher" messenger account, along with the 302 area code phone number provided by M.A. as well as an email address. (*Id.* at 6-7; Ex. C at ¶¶ 13-15, 19)

Both electronic preservation requests on Facebook sought (1) "Basic Subscriber Information" (e.g., names associated with the account), (2) "Expanded Subscriber Content (NEOPRINT)" (e.g., profile contact information), (3) "All photos uploaded by the user including EXIF data, META DATA, date uploaded and IP address uploaded from," (4) "Private Messages Chats and E-mail Content" dated between August 24, 2016 and September 16, 2016, (5) "IP Logs," and (6) "Activity Log." (Ex. A at 9-11; Ex. B at 10-12)

The government contends that, with the information obtained from the two Facebook warrants, it was able to confirm that the "Chase Reacher" account listed the 302 area code, Defendant's Facebook account had several IP addresses in common with the IP addresses associated with the "Chase Reacher" account, those IP address were registered to 1342 Walnut Shade Road, Dover, Delaware 19901, and (according to Defendant's probation officer) the 302 phone number and Dover address were Defendant's. (Resp. at 7)

D. Residential Search Warrant

It appears that by October 2016, Maryland law enforcement began working with Delaware State Police in relation to the investigation that led to the charges against Defendant. On October 18, 2016, Detective John Messick of the Delaware State Police, Child Predator Taskforce, obtained a Delaware state search warrant for 1342 Walnut Shade Road, Dover, Delaware 19901. (*See* Ex. C) On October 21, 2016, police executed the residential search. At the time, Defendant, his girlfriend, and her teenage son and daughter were present. (Resp. at 7) Law enforcement seized several electronic items from the property. (*Id.*) (identifying specific models and serial numbers)

E. Subsequent Events

The same day the residential search warrant was executed, Defendant was arrested and provided a recorded statement to Maryland police. (*See* Ex. D) The approximately three-hour video recording shows that Defendant was apprised of his *Miranda* rights and then waived those rights, both verbally and by signing the Caroline County Sheriff's Office *Miranda* Rights Waiver form. (Ex. D at 7:48; Ex. E)

On October 21, 2016, Defendant's girlfriend and her son also provided statements to the police. (Resp. at 8) According to the government, Defendant's girlfriend explained she was aware Defendant was exploiting teenage girls on Facebook and that he had used her son's Facebook page to do so. (*Id.*) She also allegedly confirmed that Defendant had lived at 1342 Walnut Shade Road, Dover, Delaware 19901 for the previous five years. (*Id.*) Three days later, Defendant's girlfriend voluntarily produced eight electronic devices to law enforcement, which Delaware State Police then obtained a search warrant to inspect. (*Id.* at 8-9; Ex. G) On October 27, 2016, Maryland police also obtained search warrants for the devices they had obtained via

the residential search warrant as well as the devices produced by Defendant's girlfriend. (*See* Ex. H)

F. Federal Prosecution

On April 13, 2017, a grand jury for the District of Delaware returned a six-count indictment charging Defendant with child pornography crimes. (D.I. 2) Defendant was arrested on April 21, 2017. (D.I. 8)

On June 24, 2019, Chief Magistrate Thynge issued a warrant authorizing the search of, among other things, the "Chase Reacher" Facebook records, Defendant's Facebook records and cellphone, and memory devices that had been turned over by Defendant's girlfriend. (*See* Ex. I) The next day, on June 25, 2019, the District of Delaware grand jury returned a superseding 17-count indictment, charging Defendant with:

- one count of possession of child pornography in violation of 18 U.S.C. §§ 2252(a)(4)(B), 2252(b)(1), and 2256 (Count 1)
- two counts of production of child pornography in violation of 18 U.S.C. §§ 2251(a),(e) and 2256 (Counts 2-3)
- one count of attempted production of child pornography in violation of 18 U.S.C. §§ 2251(a),(e) and 2256 (Count 4)
- two counts of receipt of child pornography in violation of 18 U.S.C. §§ 2252(a)(2), 2252(b)(1), and 2256 (Counts 5-6)
- and eleven counts of transportation of obscene material in violation of 18 U.S.C. § 1462(a) (Counts 7-17).

(D.I. 41)

Defendant filed the pending motion on September 6, 2019, to which the government

responded on December 6, 2019. (*See* D.I. 45, 54, 56) On January 16, 2020, Defendant's counsel informed the Court that a reply brief would not be forthcoming. The parties also advised the Court they did not believe a hearing was necessary.[1]

II. DISCUSSION

A. Motion No. 1: Dismissal Due to Lack of Metadata

Defendant moves under Federal Rule of Criminal Procedure 12(b) to dismiss Counts 1 through 6 of the Indictment on the basis that the government violated his constitutional right to Due Process by failing to obtain and preserve "potentially exculpatory" metadata relating to illicit photographs transmitted via Facebook Messenger. (Mot. at 6-10)[2] Defendant contends that the government is "unable to reliably determine whether the depictions [sent by the Minors] were taken as a result of (after or during) communications in the Facebook Messenger chats, or whether they were pre-existing photos taken from another source." (*Id.* at 9) To Defendant, "the issue in this case involves the area of constitutionally guaranteed access to evidence." (*Id.* at 7) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982)). This metadata evidence is relevant, he insists, because it may be probative of "whether the [Minors'] photographs were taken as the result of coercion (i.e. if the time(s) of the photograph(s)' creation was directly after the Defendant purportedly coerced the complainants to take the photograph(s))" or "whether they were pre-existing photos taken from another source." (Mot. at 9)

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[1] In any event, the Court agrees with the government that a *Franks* hearing is unnecessary (*see* Resp. at 20-21) due to Defendant's lack of a substantial preliminary showing that the challenged second Facebook warrant contains statements made with reckless disregard for the truth.

[2] Defendant defines metadata as "the information embedded in the file of a digital photograph which could identify the date and time the photograph was produced, where the photograph originated (i.e. what phone/camera was used to take the photo), et cetera." (Mot. at 9)

In response, the government does not deny that metadata associated with at least some of the photographs obtained from Facebook and the Minors' cellphones is missing from its production. To the government, however, dismissal is not appropriate because Defendant does not allege or show that the lack of availability of metadata was due to law enforcement's bad faith. (Resp. at 12-13)[3] More particularly, the government explains that it "has made all of this evidence (and more) available to the defendant and his defense team for inspection in the same condition that law enforcement received it. This includes whatever metadata existed at the seizure of the various devices." (*Id.* at 10; *see also id.* at 11 ("[L]aw enforcement took every step possible to preserve metadata through search warrants and seizures."))

To dismiss an indictment on the grounds of failure to preserve evidence, a defendant must demonstrate that the government breached its duty in bad faith to preserve evidence possessing an exculpatory value, that such value was apparent before the government failed to preserve it, and that the defendant will be unable to obtain comparable evidence by other available means. *See United States v. Haywood*, 363 F.3d 200, 212 (3d Cir. 2004); *see also Arizona v. Youngblood*, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show ***bad faith*** on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.") (emphasis added). Dismissing an indictment for such a violation is a "rare sanction." *Government of Virgin Islands v. Fahie*, 419 F.3d 249, 252-56 (3d Cir. 2005); *see also United States v. Morrison*, 449 U.S. 361, 365 (1981) ("[A]bsent demonstrable

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[3] While it is possible to construe Motion No. 1 as challenging the sufficiency of the government's evidence, in which case it would have to be denied, *see, e.g.*, *United States v. Gillette*, 738 F.3d 63, 74 (3d Cir. 2013) ("[A] district court is prohibited from examining the sufficiency of the government's evidence in a pretrial motion to dismiss because the government is entitled to marshal and present its evidence at trial, and have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29."), the Court views it instead as a challenge to the sufficiency of the Indictment.

prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate.").

The Court will deny Defendant's motion because it does not show, or even allege, bad faith in connection with law enforcement's failure to obtain and preserve metadata. *See Arizona*, 488 U.S. at 58; *see also United States v. Kennedy*, 720 F. App'x 104, 108-09 (3d Cir. 2017). The government's preservation requests to Facebook Inc. expressly sought from the identified accounts "[a]ll photos uploaded by the user including EXIF data, META Data, date uploaded and IP address uploaded from . . . ." (Ex. A at 10; Ex. B at 11) Judicial decisions suggest that Facebook does not retain the metadata Defendant seeks. *See, e.g.*, *Untied States v. Farrad*, 895 F.3d 859, 869 (6th Cir. 2018) (quoting trial testimony that Facebook "strips [a photograph's] metadata as the photograph is uploaded to Facebook," making it impossible to tell when uploaded photo was actually taken); *United States v. James*, 2019 WL 2516413, at *3 (D.D.C. June 18, 2019) ("Facebook can actually make photographic evidence less useful because it strips metadata as the photos are uploaded . . . ."). Defendant has not shown that Facebook's failure to provide the requested metadata constitutes bad faith on the part of law enforcement, justifying dismissal.

Further, the record shows that, notwithstanding Defendant's contention that "the government made no effort to recover the original versions of the photographs that are associated with the charges" (*see* Mot. at 9), the government provided the defense with the contents of the Minors' cellphones and whatever metadata associated with the photographs that law enforcement was provided at the time of the seizure (*see* Resp. at 12). Nothing in the record contradicts the government's representation that "[e]arly in the investigation, [it] seized all three victims' devices, extracted their data, and made the contents of those devices available for the defense

team's inspection." (*Id.* at 12)

Additionally, Defendant identifies no reason to conclude that the metadata would be exculpatory or constitute evidence of a nature that Defendant would be unable to obtain by other available means. *See United States v. Ramos*, 27 F.3d 65, 71 (3d Cir. 1994) ("We think it unwise to infer the existence of *Brady* material based on speculation alone."); *see also Haywood*, 363 F.3d at 212. Defendant merely asserts that the metadata is "potentially exculpatory" (Mot. at 7), which is an insufficient basis on which to provide him the requested relief. It also appears that contemporaneous Facebook communications can offer the type of context (relating to, for example, the alleged possession, receipt, production, and attempted production of child pornography) that Defendant might be hoping to derive from the metadata. (*See* Ex. I at 16-20) Additionally, some amount of evidence comparable to the missing metadata might be derived from the testimony to be offered at trial by the Minors. (Resp. at 13).

For these reasons, Defendant's motion to dismiss Counts 1-6 of the Indictment will be denied.

B. Motion Nos. 2 & 3: Suppression of Evidence Resulting from the Second Facebook Warrant and the Residential Warrant

Defendant moves to suppress all evidence obtained as a result of the second Facebook warrant and the warrant for the residence at 1342 Walnut Shade Road, Dover, Delaware 19004.[4]

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and instructs, among

[4] Defendant also notes in passing that he is seeking relief with respect to "the unlawful search of the four (4) SIM cards, two (2) Micro SD cards, and a Phillips Keychain digital camera." (Mot. at 10; *see also* Resp. at 9 (government itemizing materials provided to law enforcement by Defendant's girlfriend)) Defendant has not developed the bases for this portion of his motion – which, in any event, appears not to present any issues that are not elsewhere addressed in this Opinion.

other things, that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." U.S. Const. amend. IV; *see also* Fed. R. Crim. P. 41(d). In *Illinois v. Gates*, 462 U.S. 213, 238 (1983), the Supreme Court stated that in determining whether probable cause exists, a judge need only "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." In this context, "[t]he role of a reviewing court is not to decide probable cause *de novo*, but to determine whether the [judge who issued the search warrant] had a substantial basis for concluding that probable cause existed." *United States v. Stearn*, 597 F.3d 540, 554 (3d Cir. 2010); *see also United States v. Ritter*, 416 F.3d 256, 264 (3d Cir. 2005) (stating that "conclusions of a neutral [judge] regarding probable cause are entitled to a great deal of deference by a reviewing court, and the temptation to second-guess those conclusions should be avoided").

"To deter Fourth Amendment violations, when the Government seeks to admit evidence collected pursuant to an illegal search or seizure, the judicially created doctrine known as the exclusionary rule at times suppresses that evidence and makes it unavailable at trial." *United States v. Katzin*, 769 F.3d 163, 169 (3d Cir. 2014) (citing *Herring v. United States*, 555 U.S. 135, 139 (2009)). "The exclusionary rule encompasses both the 'primary evidence obtained as a direct result of an illegal search or seizure'" as well as "'evidence later discovered and found to be derivative of an illegality,' the so-called 'fruit of the poisonous tree.'" *Utah v. Strieff*, 136 S.Ct. 2056, 2061 (2016) (quoting *Segura v. United States*, 468 U.S. 796, 804 (1984)). The exclusionary rule is a judicially-created remedy (not a personal constitutional right) "designed to deter police conduct that violates the constitutional rights of citizens." *United States v. Zimmerman*, 277 F.3d 426, 436 (3d Cir. 2002); *see also Katzin*, 769 F.3d at 170 ("Whether to

suppress evidence under the exclusionary rule is a separate question from whether the Government has violated an individual's Fourth Amendment rights.").

That a warrant lacks probable cause is insufficient to mandate the "extreme sanction of exclusion." *United States v. Leon*, 468 U.S. 897, 926 (1984). One exception to the exclusionary rule is the good faith exception, which "instructs that suppression of evidence is inappropriate when an officer executes a search in objectively reasonable reliance on a warrant's authority even though no probable cause to search exists." *United States v. Zimmerman*, 277 F.3d 426, 436 (3d Cir. 2002) (internal citation omitted); *see also Leon*, 468 U.S. at 923 n.23 ("[O]ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization.").[5]

The second Facebook warrant targeted the specific "Chase Reacher" Facebook account that interacted with the Minors. After obtaining information about the Minors' Facebook communications through execution of the first Facebook warrant, the government was able in the Second Facebook warrant to provide the specific profile identification number associated with the "Chase Reacher" account.

Defendant argues the second Facebook warrant was not supported by probable cause because Detective Reibly "incorrectly asserted the manner in which the police discovered" Defendant's phone number. (Mot. at 13) Defendant's theory focuses on the following

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[5] The Third Circuit has identified four circumstances in which the good faith exception does not apply: (1) the judge issued the warrant in reliance of a deliberately or recklessly false affidavit; (2) the judge abandoned her judicial role and failed to perform her other neutral and detached function; (3) the warrant was based on an affidavit so lacking in indicia of probable cause to render official belief in its existence entirely unreasonable; and, (4) the warrant was so facially deficient that it failed to particularize the place to be searched or the things to be seized. *See United States v. Am. Inv. of Pittsburgh, Inc.*, 879 F.2d 1087, 1106-07 (3d Cir. 1989).

statements in the warrant: (#6) M.A. obtained Defendant's phone number when it was displayed on the "Chase Reacher" Facebook profile page; (#9) "[w]hile attempting to locate the 'Chase Reacher' Facebook, Inc. profile on September 16, 2016, [Detective Reibly] learned that the Facebook, Inc. account had been deactivated;" and (#10) a subpoena response from Sprint confirmed that the 302 area code phone number "displayed on [the 'Chase Reacher'] account prior to deletion" showed the number was registered to Defendant and that the registration was current as of September 14, 2016. (*Id.*) (referring to Ex. B at ¶¶ 6, 9-10) According to Defendant, because the warrant reports that Detective Reibly discovered that the "Chase Reacher" account was deactivated, he must not have actually obtained Defendant's number through M.A., but from some other means. (Mot. at 13-14)

Defendant's arguments are unavailing. Considering the totality of the circumstances, the judge who issued the second Facebook warrant had a substantial basis for finding probable cause based on the sexually-explicit Facebook interactions between "Chase Reacher" and the Minors. The warrant's statement #1 explains that "Chase Reacher" coerced the Minors by threatening to post sexually explicit photographs of them; statement #3 describes how the Minors "sent several extremely inappropriate and sexually explicit photographs exposing their breasts, vaginal and buttocks regions" to "Chase Reacher;" and statement #5 states the Minors "received a picture of, what was portrayed to be, ['Chase Reacher's'] naked penis." (Ex. B at 5-6) Defendant does not contest the veracity of these statements. The Court agrees with the government that "these facts alone establish probable cause that the ['Chase Reacher'] Facebook account would contain evidence related to child pornography." (Resp. at 19; *see also United States v. Pavulak*, 700 F.3d 651, 660-61 (3d Cir. 2012) ("When faced with a warrant application to search for child pornography, a magistrate can independently evaluate whether the contents of the alleged images

meet the legal definition of child pornography . . . by having the search-warrant affidavit provide a sufficiently detailed description of the images."))

Additionally, Defendant's speculation as to how the government obtained his phone number is not material to whether there was probable cause to believe that the "Chase Reacher" Facebook account contained child pornography. Whether or not M.A. provided the phone number to the government is not a fact "bear[ing] upon an essential element of the legal claim before the court." *United States v. Hines*, 628 F.3d 101, 107 (3d Cir. 2010).

Furthermore, the Court perceives no reason, on the present record, to question the truthfulness of the sequence of events set out in affidavit supporting the second Facebook warrant. (*See* Resp. at 20; *see also generally United States v. Burton*, 288 F.3d 91, 103 (3d Cir. 2002) ("[E]ven assuming that some factual averments in the affidavit are tainted, they do not vitiate a warrant which is otherwise validly issued upon probable cause reflected in the affidavit."))[6]

Defendant also moves to suppress evidence obtained during execution of the residential warrant at 1342 Walnut Shade Road, Dover, Delaware 19904. (*See* Mot. at 15-18; Ex. C) According to Defendant, probable cause was lacking because the affidavit "does not provide the facts to support why [Detective John Messick of the Delaware State Police, Child Predator Taskforce] is reliable about [his] characterization [of characteristics] common to individuals involved in the collection and receipt of child pornography." (Mot. at 16) He further contends that the information in the affidavit was stale. (*Id.* at 16-17) Again, Defendant's arguments fail.

The Court is not persuaded that probable cause was lacking due to issues relating to the

[6] There is no need for the Court to consider the government's additional contention that the good faith exception applies.

credibility and reliability of Detective Messick. In paragraph 22 of the affidavit supporting the residential warrant, Detective Messick stated that:

> Your affiant knows based on his training and experience that persons with an interest in children as sexual objects keep their collections in their house; that these may be small items which can be secreted in small spaces. Your affiant has reason to believe that cell phones may also have evidence on them and are normally kept on the person for purposes of reviewing messages or images. Your affiant knows from experience it is not unusual for persons with an interest in children as sexual objects to download images of child pornography and to send and receive same on their cell phone.

(Ex. C at ¶ D.22)

Although Defendant argues that Detective Messick does not have the requisite "psychological or sociological training" to support this statement (Mot. at 16), the judge issuing the residential warrant was told, among other things, that Detective Messick had (1) five years of experience investigating child exploitation and pornography cases, including involvement with "the preparation and execution of numerous search and seizure warrants;" (2) attended two training programs on investigative techniques and undercover chats; and (3) participated in four national conferences between 2011 and 2015 on crimes against children, including seminars on peer-to-peer investigations and understanding file sharing networks. (Ex. C at ¶ A.1) Defendant does not challenge the veracity of these representations or cite any authority for the proposition that these credentials do not provide a sufficient basis for an investigator to draw reasonable inferences that could be found to support a finding of probable cause. *See also United States v. Arvizu*, 435 U.S. 266, 273-74 (2002) ("[O]fficers [may] draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.") (internal quotation marks omitted); *see also Ornelas v. United States*, 517 U.S. 690, 699 (1996) (reviewing court must give

"due weight" to factual inferences drawn by resident judges and local law enforcement officers).

Nor was the information in the affidavit supporting the residential warrant stale. *See United States v. Harvey*, 2 F.3d 1318, 1322 (3d Cir. 1993) ("Age of the information supporting a warrant application is a factor in determining probable cause. If too old, the information is stale, and probable cause may no longer exist."). As the Third Circuit has explained, some of the typical evidence in child pornography cases, including that relating to computers and data, often "has a relatively long shelf life." *United States v. Vosburgh*, 602 F.3d 512, 529 (3d Cir. 2010) (four-month old evidence not stale); *see also United States v. Shields*, 458 F.3d 269, 279 n.7 (3d Cir. 2006) (same for nine-month old evidence); *Harvey*, 2 F.3d at 1323 (up to 15-month old evidence not stale). Defendant does nothing more than point to the approximately one- to two-month gap between "Chase Reacher's" communications with the Minors and issuance of the residential warrant. This does not establish staleness of evidence.

Defendant also contends that the residential warrant lacked probable cause for "any other files." (Mot. at 17) However, as the government correctly points out, Defendant overlooks that the unchallenged June 24, 2019 federal warrant authorized the search and seizure of the so-called "other files" Defendant seeks to suppress. (Resp. at 27-28; *see also* Ex. I Attachments A and B)

Accordingly, the Court will deny the motions to suppress the second Facebook warrant and the residential warrant.[7]

C. Motion No. 4: Suppression of Defendant's Statements

Defendant seeks to suppress the statement he gave to Maryland police after his arrest, claiming that it was an involuntary statement because he was not given his required *Miranda*

[7] Given the Court's conclusions as to probable cause, the Court will not address the applicability of the good faith exception.

warnings. (Mot. at 19) The record unequivocally disproves Defendant's contention.

Under *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), the "prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." A defendant may waive his *Miranda* rights "provided the waiver is made voluntarily, knowingly, and intelligently." *Id.* A statement is made voluntarily "when it is the product of an essentially free unconstrained choice by its maker, . . . it was the product of a rational intellect and a free will, and . . . the [defendant's] will was not overborne." *United States v. Andrews*, 231 F. App'x 174, 176 (3d Cir. 2007).

Here, the video recording of Defendant's statement shows that his *Miranda* rights were read out loud to him while he was in custody and that he waived those rights verbally. (*See* Ex D at 7:48) Defendant also signed the Caroline County Sheriff's Office Miranda Rights Waiver form (D.I. 54 Exs. E, F), which "is strong proof as to the validity of a waiver," *United States v. Kabiarets*, 496 F. Supp. 2d 369, 373 (D. Del. 2007). It is clear that Defendant voluntarily provided his statement, waiving his right not to speak to law enforcement. Therefore, the Court will deny Defendant's motion to suppress his statement.

D. Motion No. 5: Production of *Brady* Material

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *See also United States v. Walker*, 657 F.3d 160, 185 (3d Cir. 2011). Defendant moves for a general order compelling the government to disclose evidence favorable to Defendant or adverse to its case against Defendant. (Mot. at 19-20) The government

responds that it "is aware of its obligations under *Brady* and has endeavored to comply with these obligations on an ongoing basis" and that it will continue to do so. (Resp. at 30) Accordingly, the Court will deny Defendant's motion without prejudice.

E. Motion Nos. 6 and 7: Production of Impeachment Material

Defendant moves to compel the government to produce impeachment material relating to agents and law enforcement personnel, as well as any statements made by the Minors and their parents/guardians, including "their school records, history of drug and alcohol abuse, prior criminal records, medical or psychiatric history, [and] evidence of their engaging in the sending and receiving of pornographic images before and after this incident." (Mot. at 22) The Court agrees with the government that Defendant's request is premature, as Defendant identifies no legal authority requiring the production of impeachment material at this stage of the case, before trial has even been scheduled. *See generally United States v. Higgs*, 713 F.2d 39, 44 (3d Cir. 1983) (stating that impeachment material must be furnished to defendant "in time for its effective use at trial"). Further, the government represents that it has already "provided all identifying information it currently has as well as all recorded statements made by the victims." (Resp. at 30 n.16) As trial approaches, the Court will set a deadline for production of impeachment materials. At this time, Defendant's motion will be denied without prejudice to renew.

F. Motion No. 8: Production or Disclosure of Lost or Destroyed Evidence

Defendant seeks "information about any evidence that has been destroyed or lost, whether inadvertently or otherwise" and requests that the government undertake an "inquiry to ensure that no evidence, including case notes, documentation or reports, ha[ve] been lost or destroyed." (Mot. at 23-24) The government responds that it is not aware of any lost or destroyed evidence and that it will notify Defendant if such a situation arises. (Resp. at 32)

Accordingly, Defendant's motion will be denied as moot.

G. Motion No. 9: Production of Rule 404(b) Evidence

Federal Rule of Evidence 404(b) requires the government to provide reasonable notice prior to trial of its intention to use evidence of other crimes, wrongs, or acts for the purpose of proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. "Courts that have considered what constitutes 'reasonable notice' have concluded that notice of intent to use Rule 404(b) evidence seven to ten days prior to trial is sufficient." *United States v. Long-Parham*, 183 F. Supp. 3d 746, 750 (W.D. Pa. 2016) (collecting cases); *see also United States v. Campell*, 2018 U.S. Dist. LEXIS 34936 (D. Del. Mar. 5, 2018) (disclosure 30 days prior to trial may be adequate); *United States v. Smith*, 2017 U.S. Dist. LEXIS 185827 (D. Del. Nov. 9, 2017) (same).

Defendant seeks an order compelling the government to specify what Rule 404(b) evidence it anticipates introducing at trial and requiring the government to demonstrate a proper basis for the admission of each discrete piece of such evidence. (Mot. at 24-25) In response, the government states that, to the extent a decision is made to introduce Rule 404(b) evidence at trial, it will comply with the rule and provide reasonable notice. (Resp. at 32) The Court will, of course, enforce Rule 404(b) and will not admit evidence governed by it unless the requirements of the rule are satisfied. Accordingly, Defendant's motion will be denied without prejudice.

H. Motion No. 10: Production of Expert Tests, Reports, and Summaries

Pursuant to Federal Rule of Criminal Procedure 16(a)(F)-(G), Defendant moves to compel immediate production of all expert tests, reports, and summaries, "so that possible defense investigation can begin at once." (Mot. at 25-26) The government responds that it has already produced expert evidence, and further notes that it has sent a reciprocal request for expert

discovery related to Defendant's expert, Dr. Rebecca Mercuri. (Resp. at 32) There is no basis to provide Defendant any relief at this point. Accordingly, Defendant's motion will be denied without prejudice to renew.

I. Motion No. 11: Production of Written Notice of Evidence to be Used at Trial

Pursuant to Federal Rule of Criminal Procedure 12(b)(4)(C), a defendant may (in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C)) request notice of the government's intent to use (in its case-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16. Defendant moves to compel the government to produce written notice of what evidence it intends to use at trial. (Mot. at 26) The government responds that "not only is [Defendant's] motion is untethered to the rules supporting the request, but it is also premature in concept." (Resp. at 33) The Court finds no ripe dispute. Thus, the Court will deny this motion without prejudice.

J. Motion No. 12: Production of Jencks Act Material

The Jencks Act and Federal Rule of Criminal Procedure 26.2(a) provide that, after a government witness testifies, and upon motion by the defendant, the government must produce "any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b)(2); Fed. R. Crim. P. 26.2(a). "[T]he government has no obligation to produce Jencks material until the witness has testified," although "many federal prosecutors routinely turn over Jencks material a few days before the witness testifies." *United States v. Maury*, 695 F.3d 227, 248 (3d Cir. 2012).

Defendant moves for the production of all Jencks material "in a timely fashion in advance of trial so as to permit an orderly and efficient trial." (Mot. at 26) The government responds that this request is premature because Jencks Act disclosure is a right associated with trial, and no

trial has yet been scheduled in this matter. (Resp. at 33)

There is no ripe dispute for the Court to resolve. Once trial is scheduled, the Court will consider the parties' proposals for the timing of Jencks Act material and will resolve disputes that arise, if any. Defendant's motion will be denied without prejudice.

K. Motion No. 13: Production of Law Enforcement's Rough Notes

Defendant moves to compel the government to preserve and disclose law enforcement rough notes. (Mot. at 29) The government states that it has already produced this information in discovery. (Resp. at 33) Thus, the Court will deny this motion as moot.

L. Motion No. 14: To Strike Alleged Alias "Chase Reacher" from Indictment

"An alias may be stricken where the alias does not serve a relevant purpose, such as to identify the defendant or protect him from double jeopardy." *United States v. Karriem*, 2008 WL 51188200, at *6 (D.N.J. Dec. 4, 2008); *see also United States v. Beedle*, 463 F.3d 721, 725 (3d Cir. 1972). But an alias, even one with negative connotations, is permissible if it is needed to connect the accused to the acts charged. *See United States v. Vastola*, 899 F.2d 211, 232 (3d Cir. 1990). The government bears the burden to prove that the defendant was known by the alleged alias. *Id.*

Defendant moves to strike "also known as Chase Reacher" from the caption and body of the Indictment, arguing that the alleged alias will only serve to make him appear criminal in the minds of the jury and will not serve any useful purpose. (Mot. at 30) The government responds that Defendant's motion is premature, because it pertains to evidence that might be offered at a trial that is not yet even scheduled, and further contends that the government will have to be permitted to refer to the alias in order to carry its burden to prove that Defendant was the "Chase Reacher" who interacted with the Minors on Facebook. (Resp. at 33-34) The government also

observes that it has not yet been determined in this case whether the Indictment will even be shown to the jury. (*Id.*)

The Court agrees with the government. There is no need to decide at this point whether the alleged alias should be stricken from the Indictment, as no decision has been made as to whether the Indictment will be seen by the jury. Defendant's motion will be denied without prejudice.

M. Motion No. 15: Preclude Certain Evidence at Trial

Under Federal Rule of Evidence 403, the Court may exclude relevant evidence if its probative value is substantially outweighed by, among other things, unfair prejudice to the opposing party. Pursuant to Rule 403, Defendant moves to prevent the government from referring to the Minors as "victims" or "child victims" during trial, arguing that these terms "will likely unjustly influence the jury's decision because the term 'victim' is so often associated with the notion of crime and injury," and further that "such label[s] would invoke an emotional response from the jury that could lead to a substantial or injurious effect on their verdict." (Mot. at 32)

The Court agrees with the government that now is not the time to make evidentiary decisions under Rule 403 about the admissibility of certain evidence at a trial that is not yet even scheduled. (*See* Resp. at 34) The parties will both have an opportunity to present Rule 403 issues through motions *in limine* according to a schedule to be provided, once trial is scheduled. Accordingly, Defendant's motion will be denied without prejudice.

N. Motion No. 16: Preclude Prior Criminal Convictions

Federal Rule of Evidence 609 provides that impeachment by evidence of a prior criminal conviction may be permitted under certain circumstances. Defendant moves to preclude the

government from introducing evidence of his convictions for what he characterizes as "a string of armed robberies in 2007, harassment in 2006, threats in 2003, and other offenses prior to 2003." (Mot. at 32-34) The Court agrees with the government that this motion is directed to evidence that may or may not be admitted at trial, making the issues presented by Defendant premature at this time. Hence, the Court will deny the motion without prejudice.

O. Motion No. 17: Request to File Additional Motions as Needed

Defendant's final motion generally seeks leave to file additional motions as the need may arise before trial. (Mot. at 34) The government notes that the deadline for filing certain types of pretrial motions (e.g., motions to suppress relating to warrants and statements) has passed, and also that it does not object to Defendant filing motions *in limine* at appropriate times according to a schedule to be set by the Court. (Resp. at 34-35)

There is no ripe dispute for the Court to resolve. Once trial is scheduled, the Court will also establish timing for the filing and briefing of motions *in limine.* In addition, Defendant is free at any time to seek leave to file any additional motions, which leave will be granted should Defendant provide reasonable and appropriate reasons for the timing of his request. The pending motion will be denied as moot.

III. CONCLUSION

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

United States of America	:	
v.	:	Cr. Act. No. 17-30-LPS
Scott C. Foster,	:	
also known as "Chase Reacher,"	:	
Defendant.	:	

ORDER

At Wilmington this **5th** day of **November, 2020**:

For the reasons stated in the Memorandum Opinion issued this same date,

IT IS HEREBY ORDERED that Defendant's Omnibus Motion (D.I. 45) is **DENIED**, as set out in more detail below and in the Memorandum Opinion:

1. Motions Nos. 1-4 are **DENIED**.

2. Motions Nos. 8, 13, and 17 are **DENIED AS MOOT**.

3. Motions Nos. 5-7, 9-12, 14-16 are **DENIED WITHOUT PREJUDICE** to renew.

IT IS HEREBY FURTHER ORDERED that the Court will hold a status teleconference with the parties on Thursday, November 12, 2020, at 10:45 a.m. The government shall make arrangements for the call and provide call-in information to chambers and defense counsel.

IT IS HEREBY FURTHER ORDERED that the parties shall meet and confer and, not later than November 9, inform the Court whether any information in the Memorandum Opinion should be redacted and why such redactions are appropriate.

HONORABLE LEONARD P. STARK
UNITED STATES DISTRICT JUDGE