IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KATHRYN LESOINE,	:	
	:	CIVIL ACTION NO. 3:98-CV-0764
Plaintiff,	:	
	:	
vs.	:	
	:	(JUDGE CAPUTO)
COUNTY OF LACKAWANNA, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

Plaintiff filed the present civil rights action pursuant to 42 U.S.C. § 1983, alleging a violation of her First, Fourth, Fifth and Fourteenth Amendment rights. The defendants are: the County of Lackawanna ("Lackawanna"); Lackawanna County district attorney Michael J. Barrasse, Esq. ("Barrasse"); assistant district attorney Eugene M. Talerico, Jr., Esq. ("Talerico"); assistant district attorney Amy Shwed, Esq. ("Shwed"); detective John Fox ("Fox"); detective Joseph Jordan ("Jordan"); and detective James M. Reilly ("Reilly"). Plaintiff's complaint alleges the following: I) Unlawful seizure of photographs during search on May 9, 1996 by defendants Fox, Jordan, and Reilly in violation of plaintiff's Fourth Amendment rights; II) Unlawful seizure of plaintiff's computer and computer software during search on May 10, 1996 by defendants Fox, Jordan, and Reilly in violation of plaintiff's Fourth Amendment rights; III) Failure to grant a pre- or post-seizure hearing by defendants Barrasse, Talerico, and Shwed in violation of plaintiff's First Amendment rights; IV) Failure to provide plaintiff with timely notice of the procedures necessary to reacquire the photographs seized during the search of plaintiff's residence by defendants Barrasse, Talerico, and Shwed in violation plaintiff's Fifth Amendment

rights; V) Engagement in continued "investigation, oppression, and harassment" of plaintiff by defendants County of Lackawanna and defendants Barrasse and Talerico in violation of plaintiff's First Amendment rights, and; VI) Negligent failure to train and supervise detectives and employees of the District Attorney's Office by defendants County of Lackawanna and Barrasse. (Complaint, Doc. 1 at 13-18.)

On September 21, 1998, defendants filed a Motion to Dismiss Plaintiff's Complaint (Doc. 10), alleging that: 1) defendants Barrasse, Talerico, Shwed, Fox, Jordan, and Reilly were entitled to absolute prosecutorial immunity or, in the alternative, qualified immunity, and; 2) Lackawanna could not be found liable for the actions of defendant Barrasse. On June 15, 1999, this Court denied defendants' motion to dismiss, finding that:
1) defendants were not entitled to absolute prosecutorial immunity; 2) defendants were not entitled to qualified immunity if they knew or should have known that the search warrants violated plaintiff's constitutional rights; 3) Lackawanna can be found liable if Barrasse acted as a policymaker for the county. (Memorandum and Order, Doc. 37.)

Presently before this Court is Plaintiff's Motion for Summary Judgment Or, In the Alternative, Summary Adjudication of Issues Re: Declaratory Relief. (Doc. 24.) First, plaintiff seeks summary judgment or summary adjudication as to Counts I and II of the complaint, that defendants Fox, Jordan and Reilly violated her Fourth Amendment rights. (Plaintiff's Motion for Summary Judgment, Doc. 24.) Specifically, plaintiff alleges the following Fourth Amendment violations: 1) The issuance of search warrants were not supported by probable cause; 2) The search warrants were unconstitutionally overbroad; 3) Defendants' search exceeded the scope of the warrants. (See Id.) Second, plaintiff seeks summary judgment or summary adjudication as to Count III of the complaint, that

the failure of defendants Barrasse, Talerico, and Shwed to obtain a pre-seizure or post-seizure adversarial hearing violated plaintiff's First Amendment rights. (See Id.) The motion is now fully briefed and ripe for disposition. Because I find that the warrants executed by defendants Fox, Jordan, and Reilly were unsupported by probable cause and, in addition, failed to state with reasonable particularity the items to be seized, plaintiff's motion for summary adjudication as to those issues raised in Counts I and II of her complaint will be granted. Because I find that plaintiff was not entitled to a pre-seizure or post-seizure hearing, her motion for summary judgment or summary adjudication as to Count III will be denied. While summary adjudication concerning probable cause and reasonable particularity will be granted, the issue of whether defendants Fox, Jordan and Reilly are entitled to qualified immunity with respect to the search and seizure of items in plaintiff's residence will be resolved at trial.[1]

BACKGROUND

The undisputed facts of the case are as follows. In July of 1995, plaintiff took photographs of her step-daughter and two friends while vacationing at plaintiff's residence in Martha's Vineyard, Massachusetts. (Plaintiff's Statement of Undisputed Material Fact, Doc. 26 at ¶1; Defendants' Response to Plaintiff's Statement of Undisputed Material Fact, Doc. 52 at ¶1.) The photographs depict the girls, ages 15, 16 and 16, standing nude under an outdoor shower and on the beach. (See Id. at ¶2.) The photographs were

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[1] In denying defendants' Motion to Dismiss Plaintiff's Complaint (Doc. 10), this Court held that a ruling on the issue of whether defendants Fox, Jordan, and Reilly were entitled to a defense of qualified immunity was premature. (Memorandum and Order, Doc. 37.) As plaintiff does not move for summary judgment or declaratory relief on the issue of whether Fox, Jordan, and Reilly are entitled to qualified immunity, I shall reserve a decision on the issue for trial.

taken with the knowledge of the girls. (See Id. at ¶3.)

In April 1996, Trish Heil ("Heil"), an amateur photographer, visited plaintiff's home and art studio for the stated purpose of borrowing a mat cutter. (See Id. at ¶4) During her visit, plaintiff showed Heil much of her photographic work, including prints of the photographs taken in Martha's Vineyard, and answered Heil's questions concerning plaintiff's photographic techniques. (See Id. at ¶5,6.) Heil recognized the girls in the photographs as the children of parents with whom she was acquainted. (Plaintiff's Statement of Undisputed Material Fact, Doc. 26 at ¶7; Defendants' Response to Plaintiff's Statement of Undisputed Material Fact, Doc. 52 at ¶7.) Heil then contacted the parents of the girls to inform them of the photographs. (See Id.)

_____Upon learning of the photographs, the parents contacted the Lackawanna County District Attorney's Office ("DA's Office") and requested the Office investigate plaintiff's work. (See Id. at ¶11.) On May 9, 1996, defendants Reilly and Jordan went to plaintiff's home and identified themselves as detectives from the DA's Office. (See Id. at ¶12.) Defendants Reilly and Jordan presented plaintiff with a Consent to Warrantless Search form, requesting that plaintiff allow them to search for evidence of "Sexual Abuse of Children." (Consent to Warrantless Search, Doc. 26, Exhibit A.) Plaintiff signed the Consent to Warrantless Search form and helped defendants search her home studio. (Plaintiff's Statement of Undisputed Material Fact, Doc. 26 at ¶7; Defendants' Response to Plaintiff's Statement of Undisputed Material Fact, Doc. 52 at ¶7.)

During the search, defendants Reilly and Jordan seized a box of plaintiff's photographic prints. (Receipt/Inventory of Seized Property Form, Doc. 26, Exhibit D.) Defendants returned later on May 9, 1996 with a search warrant issued by a local district

justice. (Search Warrant and Affidavit, Doc. 26, Exhibit B.) The warrant described the identity of the items to be searched for and seized as: “Photographs, nude and semi-nude photographs of minor children, business records pertaining to photography business, computers and computer equipment and records, telephone logs or records.” (See Id.) The search resulted in seizure of numerous photographs, including studies of nude and semi-nude adult models. (Receipt/Inventory of Seized Property Form, Doc. 26, Exhibit E.)

On May 10, 1996, defendants returned with a second search warrant, identical to the first search warrant, and seized plaintiff’s personal computer, software, floppy disks and digital audio tapes. (Receipt/Inventory of Seized Property Form, Doc. 26, Exhibit F.) Plaintiff thereafter filed a complaint against defendants, alleging violations of her First, Fourth, Fifth and Fourteenth Amendment Rights. (Complaint, Doc. 1.) Her present motion seeks summary judgment or, in the alternative, summary adjudication as to Counts I, II and III of the complaint.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that the moving party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A fact is “material” if proof of its existence or non-existence might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). “Facts that could alter the outcome are material facts.” Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 197 (3d Cir. 1994), cert.

denied, 115 S. Ct. 590 (1994). "Summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248, 106 S. Ct. at 2510.

Initially, the moving party must show the absence of a genuine issue concerning any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 329, 106 S. Ct. 2548, 2554 (1986). All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. White v. Westinghouse Elec. Co., 862 F.2d 56, 59 (3d Cir. 1988); Continental Ins. Co. v. Bodie, 682 F.2d 436 (3d Cir. 1982). Once the moving party has satisfied its burden, the nonmoving party "must present affirmative evidence to defeat a properly supported motion for summary judgment." Anderson, 477 U.S. a1t 256-57, 106 S. Ct. at 2514. Mere conclusory allegations or denials taken from the pleadings are insufficient to withstand a motion for summary judgment once the moving party has presented evidentiary materials. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Rule 56 requires the entry of summary judgment, after adequate time for discovery, where a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S. Ct. at 2552. "The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323.

DISCUSSION

I. Plaintiff's Motion for Summary Adjudication As To Fourth Amendment

Issues

A. Whether the Search Warrants Alleged in the Complaint Were Supported by Probable Cause

Plaintiff first alleges that the affidavits in support of the search warrants issued on May 9, 1996 and May 10, 1996 "wholly failed to aver facts upon which the [magistrate] could make a probable cause determination." (Brief in Support of Plaintiff's Motion for Summary Judgment, Doc. 25 at 7.) Specifically, plaintiff argues that "nothing in the affidavits or the warrants suggests that the 'photographs, nude or semi-nude photographs of minor children' have evidentiary or investigatory value in proving a violation of either Pennsylvania or any federal statutes." (See Id. at 8.) Therefore, plaintiff contends that the searches conducted pursuant to the warrants violated her Fourth Amendment rights. (See Id.) Defendant responds that plaintiff's motion should be denied because she has failed to allege a violation of a constitutional right cognizable under 42 U.S.C. §1983[2] and, in the alternative, the affidavits in support of the search warrants contained facts sufficiently specific to enable a magistrate to formulate the requisite probable cause.

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[2] Defendants argue that plaintiff's Fourth Amendment complaint should be dismissed for failure to allege a violation of a constitutional right under 42 U.S.C. §1983. Defendants cite Franks v. Delaware, 438 U.S. 154 (1978), in support of its position. In that case, the Supreme Court held that a plaintiff alleging a Fourth Amendment violation based on an improper search warrant must prove (1) that the affiant knowingly, or with a reckless disregard for the truth, made false statements or omissions that create a falsehood in applying for a warrant; and, (2) that such statements or omissions are material to the finding of probable cause. Id. at 171-172. That case, however, involved a warrant issued on the basis of a falsified affidavit. Id. In the present case, plaintiff is not attacking the truthfulness of defendant Reilly's testimony or suggesting that material facts were omitted. Rather, plaintiff states that defendant Reilly's affidavit did not provide substantial basis for the issuing justice to make a probable cause determination. Therefore, the two-prong test articulated in Franks is not applicable to plaintiff's complaint.

(Defendants' Brief in Opposition to Plaintiff's Motion, Doc. 51 at 2-9.)

A search warrant may be issued only if there is probable cause to believe that evidence of criminal activity will be found on the premises or person searched. U.S. CONST. amend. IV ("...no Warrants shall issue, but upon probable cause,..."); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925). To obtain a warrant, the requesting law enforcement officers must submit to a neutral and detached magistrate an affidavit containing sufficient facts and circumstances to enable an independent finding of probable cause of evidence of a crime. United States v. Ventresca, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965).

In determining the existence of probable cause, the magistrate must make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him...there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 235, 103 S.Ct. 2317, 2330, 76 L.Ed.2d 527 (1983).

The flexible "totality of the circumstances" method of analysis first adopted in Gates diverges from previous Supreme Court decisions which required fulfillment of a stringent, two-prong test for a finding of probable cause. Gates, 462 U.S. at 217, 103 S.Ct. at 2324; See also Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) (holding that probable cause did not exist for issuance of a warrant since the affidavit failed to satisfy the "two pronged test" of (1) revealing the informant's "basis of knowledge" and (2) providing sufficient facts to establish either the informant's "veracity" or the "reliability" of the informant's report.)

The facts in Gates are as follows: Police officers in Illinois received an anonymous letter containing details about an upcoming interstate drug transaction involving the defendant and his wife. Id. at 224, 2325. After receiving the letter, the police made arrangements with an agent from the Drug Enforcement Agency ("DEA") to conduct surveillance of the defendant. Id. The agent's surveillance confirmed the contents of the anonymous letter, including the defendant's purchase of drugs in Florida and return by car to Illinois. Id. Thereafter, an affidavit setting forth the foregoing facts was submitted to a judge, together with a copy of the anonymous letter. Id. at 225, 2326. The judge found that the letter and subsequent surveillance established probable cause and a search warrant was issued for the defendant's residence and automobile. Id. In affirming the validity of the warrant, the Supreme Court found that demonstration of the informant's "basis of knowledge" was not essential to a finding of probable cause. Id. at 230, 2328 (quoting Aguilar, 378 U.S. at 108, 84 S.Ct. at 1509.) Rather, the Court determined that probable cause is a "practical, nontechnical conception" that may be formulated through common sense analysis rather than adherence to "separate and independent requirements...rigidly exacted in every case." Id. (quoting Brinegar v. United States, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949)) (...a "totality of the circumstances approach is far more consistent with our prior treatment of probable cause than is any rigid demand that specific 'tests' be satisfied.")

The Gates standard is applicable in cases involving warrants to search for child pornography. See United States v. Cochran, 806 F.Supp. 560 (E.D.Pa. 1992). In United States v. Cochran, the United States District Court for the Eastern District of Pennsylvania held that probable cause existed for issuance of a search warrant. Cochran, 806 F.Supp.

at 560, 563. In that case, employees of a furniture moving company observed several photographs of naked children in the defendant's home. Id. A search warrant was prepared and presented to a bail commissioner, who approved the warrant. Id. at 562. In upholding the warrant, the District Court relied upon the following facts: 1) The movers reported viewing "'many' photographs of naked children...some of which were 'posed'"; 2) At least one of the pictures "appeared to have been produced 'unprofessionally'"; 3) The movers described the children "as being of both white and Asian descent, suggesting that all of the pictures were not of defendant's family members"; 4) The defendant "apparently possessed an extensive 'pornography' collection...and large amounts of video and camera equipment." Id. at 563. The Court noted that while none of the above facts, by itself, would give rise to probable cause, "a set of otherwise innocent facts can, in combination, meet [the Gates "totality of the circumstances"] standard." Id. at 563.

Several circuit courts have addressed the issue of probable cause with respect to search warrants for child pornography. See United States v. Hall, 142 F.3d 988 (7th Cir. 1998) (finding that probable cause existed for issuance of search warrant as affiant testified that he had viewed "three to five files that depicted minors engaged in sexual activity" and approximately 1,000 files "with names indicative of child pornography" on hard drive of defendant's computer.); United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987) (finding that probable cause existed for issuance of search warrant based upon reliable informant's testimony that "he had visited [the defendant's] home and viewed films of children as young as nine or ten engaged in sexual intercourse with adults."); United States v. Simpson, 152 F.3d 1241, 1245 (10th Cir. 1998) (holding that probable cause existed for issuance of search warrant based on affiant's "minimal" description of

an "agreement [between defendant and an undercover officer] to send a computer diskette with images of prepubescent children under the age of thirteen" made during a conversation in an Internet chat room designated as "...kidsexpics.")

In reviewing a contested search warrant, the duty of a district court is "simply to ensure that the magistrate had a 'substantial basis for...conclud[ing]' that probable cause existed." Illinois v. Gates, 462 U.S. 213, 235, 103 S.Ct. 2317, 2330, 76 L.Ed.2d 527 (1983) (quoting Jones v. United States, 362 U.S. 257, 271, 80 S.Ct. 725, 736, 4 L.Ed.2d 697 (1960)). A magistrate's determination of probable cause should be paid great deference by reviewing courts. Id. (citing Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969)) ("...we have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review.") This deferential standard, however, "does not mean that the reviewing courts should simply rubber stamp a magistrate's conclusions..." United States v. Loy, 191 F.3d 364 (3d Cir. 1999) (quoting United States v. Tehfe, 722 F.2d 1114, 1117 (3d Cir. 1984).

In the present case, defendant Reilly prepared separate warrants on May 9, 1996 and May 10, 1996 to search plaintiff's home for items relating to a possible violation of 18 Pa. C.S.A. §6312. (Search Warrant and Affidavit, Doc. 26, Exhibits B,C.) Section 6312, Sexual Abuse of Children, states in pertinent part:

> (a) Definition.--As used in this section, "prohibited sexual act" means sexual intercourse as defined in section 3101 (relating to definitions), masturbation, sadism, masochism, bestiality, fellatio, cunnilingus, lewd exhibition of the genitals or nudity if such nudity is depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction (emphasis added.)
>
> (b) Photographing, videotaping, depicting on computer or filming sexual acts.--Any person who causes or knowingly permits a child under the age of 18 years to engage in a prohibited sexual act or in the simulation of such act is guilty of a

> felony of the second degree if such person knows, has reason to know or intends that such act may be photographed, videotaped, depicted on computer or filmed. Any person who knowingly photographs, videotapes, depicts on computer or films a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such an act is guilty of a felony of the second degree (emphasis added.)

The magistrate approved both warrants, basing his probable cause finding on an affidavit submitted by defendant detective Reilly. (Search Warrant and Affidavit, Doc. 26, Exhibits B, C). In his affidavit, defendant Reilly testifies to the following:

> On 05-08-96, your affiant, interviewed the alleged victims of the above specified violation...[t]wo of the minor females told this affiant that the pictures were taken by [plaintiff.] The photographs were taken of the minor children while they were naked in the shower and on the beach at Martha's Vineyard, MA. (Search Warrant and Affidavit, Doc. 26, Exhibits B,C.)

> On 05-08-96, your [a]ffiant interviewed one Trish Heil, who stated that she had seen full frontal nude pictures of one of the minor children at the residence of [plaintiff]. Heil said that about three to six weeks ago she saw more pictures of the minor females in the loft area of the [plaintiff's] residence showing full frontal nudity in scenes in a shower and on a beach. (See Id.)

Defendant Reilly also testified that he was provided with nude and semi-nude photographs removed from the plaintiff's home by a brother of one of the girls:

> I was given photographs and negatives of the victim children. These photographs were of the girls in full nude shots that were taken in a shower. I was advised that the pictures were retrieved at the [plaintiff's] residence by the older brother of one of the victims. (See Id. at unmarked p. 2.)

Finally, defendant Reilly testified to his findings during the warrantless consent search:

> On 09 May 1996, this affiant and Det. Joseph Jordan went to the [plaintiff's] residence and a Consent to Warrentless Search was signed by [plaintiff]. During that search, 35 photographs and 7 sleeves of negatives depicting young nude or semi-nude children were seized. (See Id.)

Based upon the above testimony, I find that defendant Reilly's affidavit failed to establish even a "fair probability" of criminal activity. See Illinois v. Gates, 462 U.S. 213,

235, 103 S.Ct. 2317, 2330, 76 L.Ed.2d 527 (1983) ("...'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'")(quoting Spinelli v. United States, 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969)). As stated above, issuance of a valid search warrant for a suspected violation of 18 Pa.C.S.A. §6312 requires a "fair probability" that an individual took photographs of minor children engaged in or simulating "sexual intercourse...masturbation, sadism, masochism, fellatio, cunnilingus, lewd exhibition of the genitals" or took photographs of nude children and "such nudity was depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." See 18 Pa.C.S.A. §6312(a); Illinois v. Gates, 462 U.S. 213, 235, 103 S.Ct. 2317, 2330, 76 L.Ed.2d 527 (1983). Clearly, defendant Reilly presents no information in his affidavit indicating that plaintiff took photographs of minor children engaged in or simulating "sexual intercourse... masturbation, sadism, masochism, fellatio, cunnilingus, lewd exhibition of the genitals." See 18 Pa.C.S.A. §6312(a). More troubling, though, is whether the photographs taken by plaintiff portray nude children "for the purpose of sexual stimulation or gratification of any person who might view such depiction." See 18 Pa.C.S.A. §6312(a); Commonwealth of Pennsylvania v. Savich, 716 A.2d 1251 (Pa. 1998) (holding that man who surreptitiously videotaped nude children changing in park bathhouse committed "prohibited sexual act" under 18 Pa.C.S.A. §6312.) While "states have a compelling interest and great leeway in protecting children from sexual exploitation," it is still the responsibility of the affiant to provide facts by which a magistrate may find probable cause of evidence of a crime. Commonwealth of Pennsylvania v. Savich, 716 A.2d 1251 (Pa. 1998) (citing New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)). Defendant Reilly,

however, did not state in his affidavit that he or any other person considered that the photographs of nude children had been taken "for the purpose of sexual stimulation or gratification of any person who might view such depiction" or were otherwise prohibited under 18 Pa.C.S.A. §6312. (See Id.) In order to satisfy the requirement of probable cause to believe there was evidence of criminal activity, it was necessary to describe that evidence in terms of the criminal activity found to be probable. See Gates, 462 U.S. at 235, 103 S.Ct. at 2330. While I recognize the difficulty in dealing with this subjective portion of 18 Pa.C.S.A. §6312, if it is relied upon as the basis for the criminal activity, the affidavit should attest to such a violation, or there must be other factors, as in Cochran, which would, upon a totality of circumstances, "common sense" analysis, allow the conclusion that this requirement of the statute was satisfied. See United States v. Cochran, 806 F.Supp. 560 (E.D.Pa. 1992). Without some testimony in the supporting affidavit describing the criminal evidence and/or other factors which in combination can be said to create the requisite probable cause, all photographs of nude or semi-nude minors would be fair game for search warrants under this act. Such a result is constitutionally unacceptable.

Defendant Reilly failed to present a series "otherwise innocent facts" that, in combination, established probable cause. See Cochran, 806 F.Supp. at 560. Unlike the affiant in Cochran, defendant Reilly did not state that the minors in the photographs were "posed" in a pornographic manner or otherwise. Id. at 563. Rather, his affidavit merely states that the "photographs were of the girls in full nude shots that were taken in the shower." (See Search Warrant and Affidavit, Doc. 26, Exhibits B,C.)

Moreover, the photographs at issue were never characterized as "unprofessional."

(See Id.) On the contrary, the photographs which gave rise to the present complaint were first shown by plaintiff to Ms. Heil for the purpose of "answer[ing]...questions concerning photographic techniques." (See Aff. of Lesoine, Doc. 27 at ¶3.)

Further, in contrast to the Cochran photographs which depicted Asian children of no apparent relation to the defendant, the pictures in the present case are of plaintiff's step-daughter and two of her friends. See Cochran, 806 F.Supp. at 563. Similarly, unlike the surreptitious videotaping that the Savich court found violative of 18 Pa.C.S.A. §6312, the photographs at issue here were taken with the pictures were taken with the knowledge of the girls. See Commonwealth of Pennsylvania v. Savich, 716 A.2d 1251 (Pa. 1998).

Also, defendant Reilly's affidavit provides no indication that plaintiff possesses an extensive collection of pornography or electronic devices used for video recording and playback. See Cochran, 806 F.Supp. at 563. In fact, the exhaustive searches conducted by defendants uncovered no pornographic materials in plaintiff's home or studio. (See Receipt/Inventory of Seized Property, Doc. 26 Exhibit E.)

Finally, plaintiff consented to a search of her home prior to defendant Reilly's request for a search warrant. (See Consent to Warrantless Search, Doc. 26, Exhibit A.) His affidavit, however, provides no indication that the consent search yielded any photographs which violate the Pennsylvania child pornography statute. Based upon the these facts, I find that a "common sense," totality of the circumstances analysis, at best, gives rise to a finding that child pornography might be found in plaintiff's residence. Issuance of a valid search warrant, however, requires facts that transcend a finding of what "might be" and yield a fair probability of evidence of a crime. Therefore, I find that,

even when viewed in light of the deference afforded by reviewing courts, the magistrate lacked a substantial basis for his finding of probable cause. Accordingly, plaintiff's motion for summary adjudication of this issue will be granted.

B. Whether the Warrants Described With Reasonable Particularity the Photographs, Writings, and Computer Hardware and Software

Plaintiff also alleges that the warrants fail to describe the photographs, writings and computer hardware and software to be seized with reasonable particularity in violation of her Fourth Amendment rights. (Brief in Support of Motion for Summary Judgment, Doc. 25 at 10.) Defendant counters that the warrants "reasonably specify the primary items to be search for and seized, i.e. 'photographs, nude and semi-nude photographs of minor children...'" (Defendants' Brief in Opposition to Plaintiff's Motion for Summary Judgment, Doc. 51 at 11.)

I have already determined that the warrant in question was unsupported by probable cause of evidence of criminal activity. I will assume, however, for the purpose of considering whether the warrant described with reasonable particularity the items to be seized that probable cause existed, as it is only then that the reasonable particularity issue arises. See United States v. Cochran, 806 F.Supp. 560 (E.D.Pa. 1992).

Under the Fourth Amendment, a warrant must describe with reasonable precision the place to be searched and the items to be seized. U.S. CONST. amend. IV ("no warrants shall issue, but upon probable cause,...and particularity describing the place to be searched, and the persons or things to be seized.") Only fruits, instrumentalities, and evidence of crime are lawfully subject to seizure under the Fourth Amendment. Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970, 1972, 56 L.Ed.2d 525 (1978).

The particularity requirement is strictly enforced in cases where a warrant authorizes the seizure of items potentially protected by the First Amendment. See Id. (Where presumptively protected materials are sought to be seized, such as books or photographs, the warrant requirements should be administered to leave as little as possible to the discretion or whim or the officer.) (citing Stanford v. Texas, 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965)). While "probable cause for seizing film is not different from probable cause in other searches," the seizure of materials "presumptively protected by the First Amendment" must be supported by affidavits "setting forth specific facts." United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987) (quoting New York v. P.J. Video, --- U.S. ----, 106 S.Ct. 1610, 1614, 89 L.Ed.2d 871 (1984)).

Pennsylvania law prohibits photographs of a child under the age of 18 years "engaging in or simulating sexual intercourse...masturbation, sadism, masochism, fellatio, cunnilingus, lewd exhibition of the genitals" or photographs in which nude children are "depicted for the purpose of sexual stimulation or gratification of any person who might view such depiction." See 18 Pa.C.S.A. §6312(a) " See 18 Pa.C.S.A. §6312. The law, however, does not ban photography of nude children under other circumstances. See Id.; United States v. Cochran, (E.D. Pa. 1992) ("Any other interpretation [of Pa.C.S.A. §6312] would permit an absurd result.")

In Cochran, 806 F.Supp. at 560, 563, the Court invalidated the portions of the warrant permitting seizure of "all depictions involving nudity," reasoning that 18 Pa.C.S.A. §6312 does not prohibit all visual depictions of nude children and, therefore, the seizure of such depictions is unconstitutional under the First and Fourth Amendments. Id. ("If a state may not criminalize the possession of pictures which do not depict children involved

in sexual conduct or poses, it goes without saying that such pictures are beyond the scope of a valid warrant absent a showing of evidentiary value.") The Court found further that the invalid portions of the warrant were "'so facially deficient' that the officers could not have relied on them [in good faith]" Id. (quoting Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969)).

In the present case, the warrants approved by the magistrate authorized seizure of "photographs, nude and semi-nude photographs of minor children, business records pertaining to photography business, computers and computer equipment and records, telephone logs or records." (Search Warrant and Affidavit, Doc. 26, Exhibits B,C.) In executing the search warrants, defendants Reilly and Jordan seized the following items: 1) Three photographs, labeled as "3x5 photos nude girls [indecipherable] water"; 2) 79 photographs, labeled as "various sizes"; 3) One photograph, labeled as "framed nude photo"; 4) Six photographs, labeled as "photos nude/semi-nude"; 4) Four photographs, labeled as "photos nude from albums." (Receipt/Inventory of Seized Property Form, Doc. 26, Exhibit E.) Defendants Reilly and Jordan also seized an "Adobe Photoshop 3.0" cd-rom, a computer, three boxes containing 104 floppy disks, and two digital audiotapes. (See Id., Exhibit E, F)

I find that the May 9, 1996 and May 10, 1996 warrants used to seize the above materials were impermissibly overbroad as both permitted seizure of lawfully possessed material in violation of the plaintiff's Fourth Amendment rights. First, the warrants approved seizure of "photographs." (See Search Warrant/Affidavit, Doc. 26 at Exhibits B, C.) Clearly, photographs, unless obscene or criminal, are considered protected speech under the First Amendment. See U.S. CONST. Amend. I ("Congress shall make no law ...

abridging the freedom of speech"); See also Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957) (holding that obscene material is not protected by the First Amendment); Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 413 (1973) (holding that a work may be subject to state regulation where that work, taken as a whole, appeals to the prurient interest in sex; portrays, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and does not have serious literary, artistic, political or scientific value). Here, no descriptive information about the content of the photographs sought was provided in the warrants. (See Search Warrant/Affidavit, Doc. 26 at Exhibits B, C.) Therefore, seizure of any photograph was authorized by the warrants, resulting in the seizure of 79 photographs of "various sizes" which contained no nudity in any form. (See Stolen Property Form, Doc. 26 at Exhibit F.)

Second, the warrants also authorized seizure of "nude and semi-nude photographs of minor children." (See Search Warrant and Affidavit, Doc. 26, Exhibit B,C.) As previously noted, Pennsylvania law does not prohibit all visual depictions of nude children. See Pa.C.S.A. §6312. Moreover, such a blanket prohibition would fail under the First Amendment. See Ferber, 458 U.S. at 747, 756-64, 102 S.Ct. at 3348, 3356-60. The warrants in this case, however, lacked any clarification or limiting instructions consistent with the language and prohibitions of Section 6312. Instead, the warrants improperly permitted the officers to seize "photographs" and "nude and semi-nude photographs of minor children" at their discretion. (See Search Warrant and Affidavit, Doc. 26, Exhibit B,C.) There is simply no reasonably particular description of the material to be seized in terms of connecting it to criminal conduct. Therefore, I find the language in the warrants involving seizure of "photographs" and "nude and semi-nude photographs

of minor children" fails to state with reasonable particularity the items to be seized in violation of plaintiff's Fourth Amendment rights.

Plaintiff also alleges that the warrants fail to describe the writings and computer hardware and software to be seized with reasonable particularity in violation of her Fourth Amendment rights. As the seizure of photographs depicting nude children formed the primary purpose of the search, I find that the invalid "photographs" and "nude and semi-nude photographs" provisions taint the entire warrant.[3] Therefore, the question of whether the seizure of related computer equipment and business records was constitutionally permissible is moot.

Plaintiff also argues that the search conducted by defendants exceeded the scope of the warrants. (Motion for Summary Judgment, Doc. 24.) As I have determined that the warrants used by defendants to search plaintiff's home and studio were unsupported by probable cause and failed to state with reasonable particularity the items to be seized, it is unnecessary to address this claim. Accordingly, plaintiff's motion for summary adjudication of the issue that the warrants used by defendants to conduct the search

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[3] In United States v. Christine, 687 F.2d 749, 750 (3d Cir. 1982), the United States Court of Appeals for the Third Circuit held that a reviewing court has the discretion to strike from a warrant invalid phrases and clauses so that evidence obtained pursuant to "valid, severable portions of a warrant need not be suppressed." The court, however, stated that such redaction is improper if the valid portions of the warrant are "not meaningfully severable from the whole." Id. at 754. In the present case, the majority of the warrant contains impermissibly overbroad provisions regarding the seizure of nude and semi-nude photographs of children. As defendants admit, the business records, diaries, and computer equipment described in the warrant were seized to provide additional evidence that plaintiff had taken the photographs. (See Defendants Brief in Opposition, Doc. 51.) Therefore, I find that the portions of the warrant involving items other than the photographs at issue are not "meaningfully severable" from the invalid portions of the warrant. See also United States v. Cochran, 806 F.Supp. 560 (E.D.Pa. 1992).

violated plaintiff's Fourth Amendment rights will be granted.

II. Plaintiff's Motion for Summary Judgment Against Defendants Barrasse, Talerico, and Shwed for Failure to Obtain a Pre- or Post-Seizure Adversarial Hearing

Plaintiff also seeks summary judgment on the issue that the failure of defendants Barrasse, Talerico and Shwed to obtain a pre-seizure or post-seizure adversarial hearing violated her First Amendment rights. (Brief in Support of Plaintiff's Motion for Summary Judgment, Doc. 25 at 13.) Plaintiff argues that an evidentiary hearing must be held prior to the issuance of a search warrant authorizing seizure of material "presumptively protected by the First Amendment." (Id.) Defendants respond that a hearing is not required when material is seized pursuant to a search warrant for use in a criminal prosecution. (Defendants' Brief in Opposition to Plaintiff's Motion, Doc. 51 at 15.)

There exists "no absolute First or Fourteenth Amendment right to a prior adversary hearing where allegedly obscene material is seized pursuant to warrant to preserve material as evidence in a criminal prosecution." Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973). Where materials such as film or photographs are "seized,...pursuant to a warrant issued after a determination of probable obscenity by a neutral magistrate," and "following the seizure a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party," the seizure is constitutionally permissible. Id.

The Pennsylvania Rules of Criminal Procedure provide for a party to regain his or her property following a search. See Pa. R. Crim. P. 324. The applicable rule reads:

> (a) A person aggrieved by a search and seizure, whether or not executed pursuant to a warrant, may move for the return of the property on the ground that he is entitled to lawful possession thereof. Such motion shall be filed in the Court of

Common Pleas for the judicial district in which the property was seized.

(b) The judge hearing such motion shall receive evidence on any issue of fact necessary to the decision thereon. If the motion is granted, the property shall be restored unless the court determines that such property is contraband, in which case the court may order the property to be forfeited.

In the present case, the photographs in question were seized pursuant to a search warrant for evidence of criminal activity. (See Search Warrant and Affidavit, Doc. 26, Exhibits B,C.) As such, plaintiff was not entitled to a pre-seizure hearing. See Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973). Additionally, while plaintiff was permitted under the Pennsylvania Rules of Criminal Procedure to file a motion for return of the items seized, defendants were not otherwise obligated to provide for a post-seizure hearing. See Pa. R. Crim. P. 324. The record indicates that such a motion was never filed by plaintiff. Therefore, I find that the failure of defendants Barrasse, Talerico and Shwed to obtain a pre-seizure or post-seizure adversarial hearing did not violate plaintiff's First Amendment rights. Accordingly, plaintiff's motion for summary judgment or declaratory relief on this issue will be denied.

An appropriate order will follow.

_____ _____

Date A. Richard Caputo
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

KATHRYN LESOINE,	:	
	:	CIVIL ACTION NO. 3:98-CV-0764
Plaintiff,	:	
	:	
vs.	:	
	:	(JUDGE CAPUTO)
COUNTY OF LACKAWANNA, et al.,	:	
	:	
Defendants.	:	

ORDER

NOW, this 5th day of May, 2000 it is hereby ORDERED that:

The Plaintiff's Motion for Summary Judgment or, In the Alternative, Summary Adjudication of Issues Re: Declaratory Relief (Doc. 24) is GRANTED IN PART and DENIED IN PART:

A. Plaintiff's Motion for Summary Adjudication of the issues that there was no probable cause to issue the search warrants of May 9, 1996 and May 10, 1996 and that the warrants did not state with reasonable particularity the items to be seized is GRANTED; The issue of whether defendants Fox, Jordan, and Reilly are entitled to qualified immunity is RESERVED FOR TRIAL.

B. Plaintiff's Motion for Summary Judgment Against Defendants Barrasse, Talerico, and Shwed as As To Failure to Grant a Pre- or Post-seizure Hearing in Violation of Plaintiff's First Amendment Rights (Count III) is DENIED.

FILED 5/6/00

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A. Richard Caputo
United States District Judge