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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,)	CR. NO. 08-00513 JMS
)	
Plaintiff,)	GOVERNMENT'S THIRD MEMORANDUM
)	OPPOSING DEFENDANT'S MOTION
vs.)	TO SUPPRESS ALL EVIDENCE;
)	EXHIBIT G; CERTIFICATE OF SERVICE
)	
SIMON JASPER McCARTY,)	
)	
Defendant.)	
_____)	

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GOVERNMENT'S THIRD MEMORANDUM OPPOSING
DEFENDANT'S MOTION TO SUPPRESS ALL EVIDENCE

The Government hereby submits this supplemental memorandum of points and authorities in opposition to Defendant's motion to suppress all evidence. For the reasons previously stated and expanded upon below, the motion should be denied.

I. SUMMARY OF ARGUMENT

The Government's supplemental argument focuses on the issue this Court raised at the hearing on October 20, 2009: whether the evidence discovered during the lawful scope of the TSA administrative search was sufficient to constitute probable cause to arrest Defendant. The Government argues, first, that the HCPD had probable cause to arrest because HCPD lawfully viewed all of the contents of the envelope. Second, if the Court finds that the HCPD officer could lawfully base an arrest decision only on evidence that TSA actually viewed, then the record supports the conclusion that the TSA screeners did view child pornography within the lawful scope of their administrative search. Third, the statements TSA made to the police provided sufficient probable cause to arrest. Fourth, even if the search or arrest of Defendant was technically in violation of the Fourth Amendment, suppression is not warranted because (a) of the minimal culpability of TSA and the police, and (b) Defendant's voluntary consent to search his luggage and laptop was still valid.

II. ARGUMENT

A. The Police Lawfully Viewed And Relied
On All Contents Of The Envelope In Making
Probable Cause Arrest

It is incontrovertible that the HCPD, having viewed all of the photographs in the envelope identified as Exhibit 83 (Tr. Day 2 at 9), had sufficient probable cause to arrest Defendant for possession of child pornography. The issue is whether HCPD lawfully viewed all photographs in the envelope, as opposed to only those photographs and other contents that TSA actually viewed. The Government submits that the police properly viewed and relied on all of the photographs.

1. TSA searched the envelope and its contents
pursuant to a lawful administrative search.

a. The TSA search was reasonable.

Defendant elected to enter the secure area of the airport when he checked his luggage and checked in for a flight, and the TSA screeners conducted a reasonable security search, with the insignificant exception of reading a few lines of one of the notes. See United States v. Aukai, 497 F.3d 955, 961 (9th Cir 2007); citing United States v. Biswell, 406 U.S. 311 (1972)

The screeners had no discretion but to open the bag, remove the laptop, and search the bag. Tr. at 146-147. In addition, Patrick Collins testified that computers can be used as "decoys" or "distractors," to distract from another, actual threatening item located in bag. Tr. at 146-147. Therefore, TSA

procedure requires that a screener who removes a computer from a checked bag after receiving an alert from the x-ray machine must also completely examine the bag. Tr. at 147.

Second, both Collins and Andrade testified that the screeners were required to inspect the photographs and other envelope contents for "sheet explosives," which are "flat and can be easily mistaken for a piece of paper or a thick piece of paper or a piece of cardboard unless you actually touch it." Tr. at 147. Sheet explosives can be hidden in "just about anything," including a laptop, a book, a magazine, a notebook, a binder, a pack of playing cards, or a packet of photographs. Tr. at 147-148. Therefore, if a screener comes across a packet of photographs, after the x-ray machine alerts the screener to a dense mass, he or she must examine the photographs by leafing through them to make sure they do not contain any sheet explosives. Tr. at 148-149.

In this case, the x-ray machine alerted Andrade that Defendant's Travel Pro suitcase contained a laptop computer, and that there was a dense mass near or around the computer. Tr. at 18, 20-21. When she pulled the laptop out of the bag, a portion of the envelope contents spilled onto her table. Tr. at 22.¹

¹ Up to this point at least, the Court has indicated that it credits the testimony and memories of the witnesses, all of which are consistent. The Court has raised concerns, however, about TSA screener Andrade's statement that at some point after seeing the spilled photographs on her table, she read three to four

- b. TSA screeners' reading a few lines of a note does not affect the lawfulness of the rest of the search.

Andrade and Moniz did exceed the scope of their lawful security search, to a minor degree, in reading a few lines of one of two handwritten notes from the envelope. (Tr. at 23, 73, 81). However, the reading of a few lines of a notes was irrelevant to the lawful discovery of the evidence and subsequent arrest of Defendant.

First, Andrade and Moniz discovered the photographs and other contents of the envelope before either of them read the few lines of a note. Andrade first looked at some of the photographs on the table, and then went through the photographs that remained in the envelope. Tr. at 67, 87, 88. Only after viewing the photographs did she read a few lines of a note. Tr. at 85-86. Moniz said that it was after looking at the photos that she read part of an article and one or two lines of a letter. Tr. at 132.

Second, Andrade's and Moniz' actions after reading a few lines of the notes were still pursuant to TSA's lawful security search authority because they were required to continue the inspection of the photos as part of their security search. Patrick Collins testified that even after a screener finds contraband or what the screener believes to be contraband, the

sentences of a note, as well as Andrade's inconsistency as to specifically which photographs she saw and other matters.

screeener must continue and complete his or her security search. Tr. at p. 160-161. Andrade was clear and consistent in her testimony that in examining the photos and items on the table and the rest of the envelope, she was conducting a security search in accordance with protocol. Tr. at 76, 85, 88-89, 95.

Third, Andrade's reading of the few lines of a note did not alter her or the others' course of action. It was the photographs that caused her the most concern, not the note. She said that "the pictures I saw was enough to make me determine that the children weren't in a good situation" (Tr. at 62), that it was "as soon as we saw the pictures" that she became alarmed (Tr. at 75), and that it was within "seconds" of seeing the photographs that she became concerned (Tr. at 30).² The TSA "lead," Tracy Kitamura, testified that when Andrade summoned him to look at what she had found, she told him she had found "some pictures." Tr. at p. 175. There is no doubt that Andrade would have summoned her "lead," Kitamura, even if she had not read any of the notes.

Kitamura spent a "very, very short time" looking at the photographs that were on Andrade's screening table. Tr. at 182. He did not read the notes. Tr. at 178. Based on his quick review of the photographs, Kitamura quickly called the TSA

² At one point she said that it was "everything combined together" that caused her to decide something was wrong (Tr. at 77), but the photos were clearly the main factor.

supervisor, Stephanie "Pilialoha" or "Pili" Kamohai. Kamohai shuffled through the photographs and clippings and read a few lines of a letter. Tr. at 189-190. Kamohai testified that her decision to call the LEO was based on a quick, 15-second review of the photographs and not her reading of a few lines of a letter. See Tr. at p. 197, 200-201. Neither LEO Aurello nor HCPD Det. Serrao read the notes.

Accordingly, the reading of a few lines of the notes by TSA played no role in the decision to arrest Defendant.

- c. There was no violation in TSA continuing to view photographs as suspicions formed.

Even if the screeners' further handling of photographs, after they became concerned about the content, was partially motivated by an interest in confirming that the material warranted notification of their lead, the search was lawful. The results of a "dual purpose" security search may be suppressed where the security agent's actions were based, in part, on a search for criminal evidence, if the agent had discretion in executing the search. See, e.g., United States v. Bulcan, 156 F.3d 963 (9th Cir. 1998) ("where officers have broad discretion as to the parameters of the search, the addition of an impermissible motive extends the scope of the search, regardless of whether the items searched could have been subject to a valid administrative search") (emphasis added). "The fact that an officer is

interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of [...] a valid exception to the warrant requirement." Horton v. California, 496 U.S. 128, 138 (1990). But see City of Indianapolis v. Edmond, 531 U.S. 32, 41-42 (2000) (invalidating search where "primary purpose is to uncover evidence of ordinary criminal wrongdoing.")

Here, Andrade was required to inspect a packet of photographs, and complete her security search even after discovering contraband, rendering any hint of a dual purpose irrelevant. Moreover, her purpose never changed to a general search for criminal evidence. For example, after the envelope spilled, she never examined any other parts of the bag other than where the x-ray machine alerted. At most, she simply took a moment to make sure that what she was viewing was worthy of notifying a supervisor and seizing. It is important to note that the entire TSA inspection of Defendant's bag and photographs lasted only approximately one minute. Though the suspicious and incriminating nature of the contents of the envelope was immediately apparent, it is only natural that the concern the screeners immediately felt solidified into a decision to notify their lead over that minute or less during which they continued their lawful security search. See, e.g., United States v.

Burgess, 576 F.3d 1078 (10th Cir. 2009) ("It would also seem odd to require the officer to attempt to obtain a pornography warrant before confirming his suspicions about a file").

2. The evidence discovered as a result of TSA's lawful administrative search includes the entire contents of the envelope.

a. The "plain view" doctrine extends to the entire contents of the envelope.

Where authorities have a lawful right to search a place or item, the seizure of incriminating items in plain view, although outside the scope of the authorized search, does not constitute an invasion of privacy. Horton, 496 U.S. 128; Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). The incriminating nature of the items in plain view must be immediately apparent, and the authorities must have a lawful right of access to the items themselves. Horton at 129. Here, the TSA screener had a mandate to open Defendant's luggage and search it, including the entire contents of the envelope, after the "dense mass" alert. In removing the items from the envelope and seeing the photographs that were spilled on the table, they quickly noticed the incriminating character of the ensemble of the envelope's contents.

The entire contents of the envelope may be said to have been in "plain view" to the TSA screeners when much of the contents spilled onto the table, and when TSA lawfully removed the rest from the envelope and inspected them pursuant to the

security search. None of them were "concealed" in the sense that there was some "invasion of privacy" in TSA's picking them up or the police viewing all of them. They were not in any kind of sealed container and TSA's viewing of scattered photographs and the police viewing of the stack, did not require a further intrusion into Defendant's privacy of the magnitude that courts have found to go beyond plain view and into a new search. See, e.g., United States v. Miller, 769 F.2d 554 (9th Cir. 1985) (DEA agent used a knife to cut into a sealed container of cocaine); United States v. Carey, 172 F.3d 1268 (10th Cir. 1999) (only the first of over 200 child pornography photographs discovered by police in narcotics investigation was properly in "plain view" where police completely abandoned search for narcotics evidence, engaged in a five hour search for child pornography, and had to open closed computer files to view each image); Frasier v. State, 974 N.E.2d 449 (Ind.App. 2003) ("a computer image file is akin to a photograph sealed in an envelope or folder" that must be opened).

Common sense suggests there can be no legitimate, reasonable expectation of privacy in a pile of loose photographs, spilled and scattered onto a TSA screening table. See, e.g., United States v. Jacobsen, 466 U.S. 109 (1984) ("Legitimate expectations of privacy by law must have a source outside the Fourth Amendment, either by reference to concepts of real or

personal property law or to understandings that are recognized and permitted by society").³ This is especially true where a quick examination of the fully exposed photos and other items indicated that it was virtually certain that the envelope had included nothing but evidence of criminal activity. See, id. (no expectation of privacy for container of white powder where there was virtual certainty that it contained nothing but contraband).

The facts of this case may be likened to the facts of United States v. Woody, 55 F.3d 1257 (7th Cir. 1995). In Woody, police conducted a lawful, warrantless, automobile search. As part of their lawful search for weapons, they opened the glove box and found a white, unsealed envelope filled with 73 personal checks and money orders that aroused the officer's suspicion. Id. The officer transported the defendant to the police station and gave the envelope of all the checks to a detective who questioned the defendant about them. All of the checks were admitted as evidence at trial. In the defendant's appeal, he claimed that the checks had been recovered as part of an unlawful search. The Seventh Circuit's opinion focused on the lawfulness of the search of the glove box, without any discussion of whether the initial officer actually viewed every check or whether the

³ In addition, this pile of photos was from checked luggage, where there is already a reduced expectation of privacy. United States v. Mines, 883 F.2d 801, 804 (9th Cir. 1989) (A person's expectation of privacy in an airport is "sharply reduced by ubiquitous searches of persons and luggage" for safety reasons).

police should have obtained a warrant following the seizure before viewing every check in the envelope.

Similar to the checks in the envelope in Woody, the authorities in this case discovered an envelope whose entire contents appeared obviously incriminating. A quick review of any substantial portion of the contents of Defendant McCarty's envelope revealed that this was the stash or collection of a pedophile. Not only did the envelope contain specific images of child pornography, on which the arrest was based, but the incriminating nature of the envelope's collective contents suggested child molestation.

The Court should be guided by practical considerations in assessing the TSA and police actions here. To deem the police review of the spilled, reassembled photos to be an intrusion of the type that would require a search warrant would place an unrealistic and impractical burden on the government. One would never expect that TSA and law enforcement would have left all the photographs scattered on the table until they obtained a warrant to pick them up and glance at them. In addition, it would be impossible for TSA now to recreate the scene and identify specific individual photographs that were entirely in view, partially in view, or completely hidden from view, at the moment they spilled out of the envelope, before anyone touched the pile. One would also not expect the HCPD officers, upon being handed

the packet of discovered photographs and told there was child pornography inside, to have asked, "Are you sure you have already viewed every one of these?" and to try to sort viewed from unviewed images if the answer was "no." The conduct of the TSA and HCPD actors in discovering and reviewing the envelope and its entire contents was reasonable under the circumstances and involved no meaningful intrusion on Defendant's Fourth Amendment rights.

- b. TSA would have discovered the entire contents of the envelope had they not stopped to call law enforcement.

Evidence that would have been inevitably discovered by lawful means is not subject to suppression. United States v. Lang, 149 F.3d 1044 (9th Cir. 1998), citing Nix v. Williams, 467 U.S. 431 (1984). The Government must demonstrate inevitable discovery only by a preponderance of the evidence. Id.

Which individual photographs were exposed to or actually viewed by TSA is not relevant because a lawful administrative search conducted in the circumstances of the present case could and would have led to the inevitable discovery of all the photos. The TSA screeners had not only the authority but the mandate to inspect all photographs in that envelope by leafing through them. Tr. at 151. Had they not stopped their search to notify their supervisors and, in turn, law enforcement, they would have picked up all the photos that were scattered on

the table, and continued their security search. In so doing, they would have seen all of the photographs from Defendant's envelope. When defense counsel asked whether screeners can examine photos "willy-nilly" to see the contents, Collins pointed out that as they leaf through them for security purposes, "of course they would be able to observe what they are." Tr. at 151.

Because the TSA had not only the authority but the mandate to look through all photos in that envelope, the discovery of those same photos by unlawful means should not subject them to suppression.

B. Even If The Police Could Only Lawfully View And Rely Upon What TSA Actually Observed, They Still Had Probable Cause to Arrest Because TSA Viewed Child Pornography During Lawful Administrative Search

The evidence establishes that TSA screeners actually did view photographs that constituted child pornography during their lawful administrative search. The government acknowledges the Court's oral indication at the hearing on October 20, 2009 that Andrade's memory as to which specific photographs she saw is not reliable. Indeed, Andrade admitted that she cannot remember specifically which photographs she saw. Tr. at p. 60, 63. It is entirely understandable that she would not be able to recall specific photographs that she saw out of a packet of 82 items given that she spent only about a minute viewing them, that she is not accustomed to viewing this type of matter, and that she

was upset by it to the point that she did not want to continue looking. See Tr. at p. 61. Andrade's memory and testimony as to the general nature of what she saw, however, was clear, consistent, and corroborated and indicates that she, indeed, viewed child pornography.

1. Andrade and Moniz viewed a substantial portion of the envelope's contents.

While Andrade did not view every photograph and item in the envelope, she viewed a substantial portion of them. Andrade said there were "numerous" photographs of children spilled on the table that she could see. Tr. at 57. In response to further questions on cross examination as to how many photographs were visible on the table at that point, she affirmed that it was more than 10. Tr. at 54-55.⁴ In addition to the photos on the table, she removed the remaining contents from the envelope to review them, as part of her security search.

Moniz corroborated Andrade's testimony that photos were scattered on the table. Tr. at 121. Moniz testified that she

⁴ Andrade also used the words "a couple of pictures," but the word "couple" to her obviously does not mean "two" as commonly understood. In response to Andrade's use of the word "couple," defense counsel and Andrade had the following exchange:

Q: Okay, so there were at least two pictures that you actually could see - photographs you could see?"

A: What do you mean two pictures?

Q: You just said there were two pictures?

A: I said a couple pictures.

Q: Okay. A couple pictures. How many is a couple?

A: More than 10.

was there with Andrade immediately upon Andrade's opening of the bag. Tr. at 125. Moniz said there were "a lot" of photos she was putting back in the envelope. Tr. at 131.

The fact that there were "a lot" of photographs scattered on the table, that Andrade removed all of the remaining contents from the envelope and inspected at least some of those, as well as the fact that Moniz saw other photographs as she picked up the spilled photographs to put them back in the envelope, means that Andrade and Moniz, together, viewed a substantial subset of exhibits 1-82 as part of their lawful search.

2. The portion Andrade and Moniz viewed included child pornography.

That the subset of photographs that Moniz and Andrade viewed included at least one image of child pornography is a conclusion that easily can be drawn from the combined testimony of both witnesses, including their descriptions of what they viewed and their strong reactions to it. Most significantly, both specifically recall seeing photographs, in the plural, of nude minors, as well as partially clothed minors. There is probable cause to believe that all of the nude photographs from Defendant's envelope, which are identified as Exhibits 1-10 are child pornography. If one accepts that conclusion, then TSA lawfully discovered child pornography.

The Court has indicated that perhaps exhibits 7 and 10 are not child pornography. Of course, the government need not establish, for purposes of the search or lawful arrest of Defendant, that an image is child pornography, but simply that there is probable cause to believe that the image is child pornography. The Ninth Circuit's guidance compels a finding of probable cause with respect to Exhibit 7, in particular, as discussed below.⁵

Probable cause means only a fair probability, not certainty, and requires consideration of the totality of the circumstances. United States v. Hill, 459 F.3d 966, 970 (9th Cir. 2006), citing Illinois v. Gates, 462 U.S. 213, 238 (1983). It is a practical, common-sense determination. Id. at 972. In this case, there is a "fair probability" that Exhibit 7 is "lascivious."

The Ninth Circuit has adopted the Dost factors for determining whether a depiction of a child's genitalia or pubic area is lascivious.⁶ Exhibit 7 meets at least three of the Dost

⁵ The Government concedes that Exhibit 10 is borderline, but submits that that image is not one of the nude photographs Andrade and Moniz were recollecting in their statements that they saw "photographs" of nude children. While the Government included this as a "photograph" in its exhibits, it is actually not a photograph. It is a tiny, 2 ½ x 1 inch magazine clipping, and is not one that would stick out in a person's mind.

⁶ The Dost factors are: (1) whether the focal point of the depiction is the child's genitals or pubic area; (2) whether the setting of the depiction is sexually suggestive, for instance,

factors. The child is fully nude and in an unnatural pose for his age, appearing to have been posed or coached to put his hand on his hip, cock his head, and lean on the doorframe with the other hand. As for the final Dost factor, it is the intended impact on the pedophile viewer that is critical, not the average, healthy viewer. See, e.g., United States v. Banks, 556 F.3d 967, 980 (9th Cir. February 25, 2009) ("Lasciviousness focuses on the effect on the pedophile"). Exhibit 7 would undoubtedly have an effect on a pedophile viewer.

In addition, the Ninth Circuit has recognized that the Dost factors are "neither exclusive nor conclusive," and that, "in some instances, the factors may be over generous to defendants." Hill, 459 F.3d at 972, citing Wiegand, 812 F.2d at

the setting is in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose or in inappropriate attire, considering the age of the child; (4) whether the child is fully, or partially clothed, or is nude; and (5) whether the depiction is intended or designed to elicit a sexual response in the viewer. Hill, 459 F.3d at 971, citing United States v. Dost, 636 F.Supp. 828, 832 (S.D. Cal. 1986), aff'd sub nom. United States v. Wiegand, 812 F.2d 1239 (9th Cir. 1987).

1244.⁷ Not all of the Dost factors need be met in order for an image to be lascivious. See, e.g., Banks, 556 F.3d 967.

The final factor, the intended effect on the pedophile viewer, is especially significant where there is some evidence that the defendant participated in producing the image. See United States v. Overton, 2009 WL 1694228 (9th Cir. June 18, 2009). In Overton, the Court considered other photographs in the possession of the defendant, which were not found to be lascivious themselves, as additional evidence "dispelling any notion that the March 2005 images were created for innocent artistic or educational reasons." Id.

Similarly, in this case, the final Dost factor is significant because all indications were that Defendant played a role in producing the image. Exhibit 7, found in Defendant's exclusive possession, is printed on photographic paper and was in a photo envelope. Defendant also had photographic negatives in

⁷ The Ninth Circuit has also indicated that Dost is not always useful. See Hill, 459 F.3d at 971. In Hill, the district court had set aside the Dost factors as "not particularly helpful" and created a new test that applied a presumption of lasciviousness, and therefore probable cause, "[i]f an image of a minor displays the minor's naked genital area . . . [,] unless there are strong indicators that [the image] is not lascivious. Hill, 459 F.3d at 971. While the Ninth Circuit chose not to use that new test in Hill, the Ninth Circuit "appreciated" the critique of Dost, and acknowledged, in a footnote, that the "district court's test might be an improvement over the Dost six-factor inquiry, at least when the magistrate can see and evaluate the images first hand." Id. at 972. Exhibit 7 would clearly qualify for the presumption under that test.

that envelope. Ex. 82. Also in the envelope were over 50 other photographs on photographic paper. Given these indicia of Defendant's participation in shooting the photograph, the factor regarding the intended effect of the photo is especially important, and one should consider the other contents of the envelope as indicators of the intended effect of Exhibit 7. The other photographs and items TSA discovered in the envelope, which all signaled pedophilia, "provide[d] profound insight into the [sic] seen within the four corners of [Exhibit 7] and [support] the conclusion that [Exhibit 7] is a sufficient predicate" for Defendant's arrest. See Id.

Even if the Court finds that there is not probable cause for Exhibits 7 or 10, it is evident that Andrade and/or Moniz saw child pornography images other than those. Both stated consistently and repeatedly that they saw photographs, in the plural, of nude minors, including when the photos first scattered on the table. Andrade replied in the affirmative when defense counsel asked her if she remembered telling the police that she "noticed that the children appeared to be in various sexually explicit positions and of inappropriate ages." Tr. at 80-81. In addition, Moniz testified that she specifically recalled seeing "a child that was naked like a pond setting by a rock" and a "child that was naked standing - maybe like two or three years old and just standing there nude." A review of all the

photographs from the envelope demonstrates that the naked child in a pond setting by a rock could only be Exhibit 4, 5 or 6, all three of which are child pornography. Certainly, it is not Exhibit 7 or 10.

Andrade and Moniz both had immediate reactions of concern for the children depicted. Andrade was concerned within "seconds" upon seeing the pictures and felt that the children "were in a situation where they might be harmed." Tr. at 24, 30. Moniz "immediately" felt "disgust" upon seeing the photos. Tr. at 124. She quickly noticed something "improper" because there were "photos of a nude child." Tr. at 123-124. She felt that the children looked "like they were in harm." Tr. at p. 123. In response to defense counsel's questions about what photos Moniz first saw when she came to the table, Moniz said, "children that looked uncomfortable, upset, unhappy. Like they were in harm's way" and that she saw "faces and I seen children that were nude." Tr. at 130. While the entire contents of the envelope are suspicious, the nude, child pornography photographs are the most likely to have caused that type of response.

In sum, the only way to conclude that Andrade and Moniz did not actually view child pornography during their administrative search is to find (1) that when they testified that they saw "some" nude photographs of children, that they meant only two, (2) those two nude "photographs" of nude children

included both Exhibit 7 and the tiny, 2 ½ x 1 inch magazine clipping of a nude girl (Exhibit 10), and no others, (3) and that there is not a fair probability that either Exhibit 7 or Exhibit 10 are child pornography. As set forth above, none of those would be fair conclusions under the circumstances. The Government need only show by a preponderance of the evidence that an arrest was supported by probable cause. See United States v. Ladley, 517 F.2d 1190 (9th Cir. 1975). The preponderance of the evidence is that the TSA screeners saw at least one item of child pornography, and one is enough.

C. TSA's Statements To The Police Provided Sufficient Probable Cause To Arrest.

If the TSA search was lawful, but HCPD violated the Fourth Amendment by viewing all of the contents in the envelope, then HCPD still had probable cause to arrest Defendant based on the statements of TSA. See, e.g., United States v. Hall, 142 F.3d 988 (7th Cir. 1998). The HCPD responded to the airport due to the reported discovery of child pornography. When they arrived, TSA screener Andrade told Officer Reyes that she had seen nude photographs of children who appeared to be in various sexually explicit positions and of inappropriate ages. Tr. at 79-80.⁸ If TSA conducted a lawful search, then their statements

⁸ Andrade testified that she could not remember whether she told the police that she had seen photos of nude children (Tr. at 79), but the HCPD report identified as Defense Exhibit A indicates that she did tell Officer Reyes that. The report also

are not the fruit of any illegality. Thus, even if the police had no lawful right to view the envelope full of photographs, the TSA statements that they had discovered photos of nude children in sexually explicit positions and of inappropriate ages would have been sufficient probable cause to arrest Defendant.

D. If Police Did Not Have Probable Cause To Arrest, Suppression Is Not Appropriate

If the Court should find that the TSA search, or the police viewing of all the contents of the envelope, somehow violated the Defendant's Fourth Amendment rights, the Government argues that suppression of all evidence is not appropriate because of the principles of United States v. Herring, and the fact that Defendant's consent to search was still valid.

1. Suppression is not appropriate because there was no flagrant or deliberate violation of Defendant's rights

_____The Government wishes to reiterate and emphasize the argument made in our July 9, 2009 memorandum based on the Supreme Court's recent clarification of the exclusionary rule in United States v. Herring, 129 S.Ct. 695 (2009). While it would be easy to view Herring narrowly based on its facts, and simply hold that

_____ states that Moniz told Officer Reyes that she had seen numerous photographs of naked children, mostly boys, and various newspaper clippings about incidents of child abduction. Defense Exhibit A may not have been formally admitted into evidence, but copies were provided by the defense to the Government and the Court. The Government attaches a copy of Defense Exhibit A, as Exhibit G hereto.

it only applies to negligent, clerical errors that do not implicate the arresting officer, doing so would ignore the much louder message delivered by a majority of the Court:

"The fact that a Fourth Amendment violation occurred - i.e., that a search or arrest was unreasonable - does not necessarily mean that the exclusionary rule applies. Illinois v. Gates, 462 U.S. 213, 223, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Indeed, exclusion "has always been our last resort, not our first impulse," Hudson v. Michigan, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), and our precedents establish important principles that constrain application of the exclusionary rule."

Id. at 700. (Emphasis added.)

So, it is incumbent upon any Court considering whether to suppress evidence to not simply stop upon reaching the conclusion the Fourth Amendment has been violated. Defendant has no "right" to suppression of evidence simply because his Fourth Amendment rights were violated. Id. The Supreme Court has "repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation." Id. (Emphasis added). Instead, before applying the exclusionary rule, this Court must determine that the imposition of the evidentiary sanction will deter such violations in the future. Id. The deterrent effect must be "appreciable." Id. If the deterrent effect is only "marginal" or "incremental", the Court must then balance the "substantial social costs" of applying the rule against such deterrence. Id. at 701 (quoting Illinois v. Krull, 480 U.S. 340, 352-353 (1987)).

This case simply does not involve any deliberate or flagrant violation of Defendant's rights by either TSA or the police in the discovery of the photographs in Defendant's suitcase, and suppression would not provide deterrence. The Government submits that there was no violation by TSA or police. To the extent the Court finds otherwise, the only possible violation by TSA was, at most, in viewing, for a matter of seconds, a few lines of a note and some photographs that were already scattered onto their table and removed from their envelope, based in some part on a desire to confirm their suspicion that they had discovered criminal evidence. Indeed, the Court has stated that TSA was not acting in bad faith. Tr. at 118.

To the extent the Court finds HCPD violated Defendant's Fourth Amendment rights, it could only be in viewing the contents of the envelope without a search warrant. When the police arrived, knowing the call concerned the discovery of possible child pornography, HCPD Detective Serrao was handed the envelope with photographs and other items. A reasonably well-trained law enforcement officer, under those circumstances, would assume TSA had followed their lawful security search procedure and had already viewed the envelope's contents. Therefore, the police acted in good faith, and without negligence or disregard for Defendant's rights.

On the other hand, Defendant is accused of extremely serious crimes involving producing child pornography. The evidence he seeks to suppress includes dozens video clips of himself sexually abusing young boys. The societal cost at issue here is huge. This case is a prime illustration of the Supreme Court's concerns, in Herring, about the extreme cost to society in letting potentially dangerous people go free as a result of innocent errors or minor violations on the part of law enforcement.

2. Defendant's voluntary consent to search his luggage and laptop was not tainted by an illegal arrest.

Alternatively, the lack of probable cause to arrest Defendant does not warrant suppression of the evidence in this case because Defendant provided voluntary consent to search his luggage and laptop which was not tainted by the illegal arrest. The Court "need not hold that all evidence is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Brown v. Illinois, 422 U.S. 590, 599 (1975), quoting Wong Sun v. United States, 371 U.S. 471, 486 (1963).

When an individual gives consent to search his belongings after an arrest is made without probable cause, the Court must determine whether the consent is tainted by the illegal arrest, thus making the consent and evidence derived from it suppressible. United States v. Patzer, 277 F.3d 1080, 1084 (9th Cir. 2002). The Court must consider the following factors in determining whether the consent was tainted: (1) the temporal proximity of the arrest and the giving of consent to search, (2) the presence of intervening circumstances and (3) the purpose and flagrancy of the official misconduct. United States v. Wellins, 654 F.2d 550, 553 (9th Cir. 1981), citing Brown, 422 U.S. at 603-604 and United States v. Perez-Esparza, 609 F.2d at 1284, 1289 (9th Cir. 1980). The giving of Miranda warnings is also an important factor to be considered. Id.

The length of time that passed between the illegal arrest and consent is an essential factor in determining whether the consent was tainted. In United States v. Delgadillo-Velasquez, the Ninth Circuit held that a consent to search which was obtained within minutes of an arrest was not sufficiently attenuated from the illegal arrest. 856 F.2d 1292 (9th Cir. 1988). In the present case, over three hours passed between the arrest and consent. While the Ninth Circuit has previously found a three hour delay between a border stop and a consent to be insufficient to purge the taint, it was unclear in

that case at what point the initial border stop became an illegal detention. See Perez-Esparza at 1286, 1300.

Importantly, the Defendant in this case was advised of his constitutional right to refuse consent at the time he provided it. While Courts have enunciated this factor as a requirement of whether Miranda warnings were given, in this case, the Detective went through a thorough reading of Defendant's constitutional right to refuse consent and had Defendant follow along while these rights were read to him. Ex. A at 27-31. Furthermore, Defendant was given his full Miranda warnings immediately after providing consent to search his two pieces of luggage. Ex. A at 31. Defendant even provided an additional consent to search his laptop after he was given his Miranda warnings. This demonstrates that the Miranda warnings did not affect the Defendant's decision to consent. Ex. A at 38. The Detective's thorough advisement of Defendant's right to refuse consent prior to consenting to a search of his two pieces of luggage, the advisement of his full Miranda rights immediately thereafter, and his consenting to a search of his laptop after Miranda, establish that this factor weighs in favor of the Government.

The final factor weighing in favor of the Government is the complete lack of police misconduct in this case. The purpose or flagrancy of the official misconduct is considered

"particularly" important. Brown, 422 U.S. at 604 (officers waited for Defendant at his home and pointed guns at him when he entered his home). As discussed above, the present case involves no flagrant misconduct. Even if officers lacked probable cause to arrest, the fact that a defendant is not subject to threats, shows of force, or intimidation designed to induce consent weighs against a defendant. Wellins, 653 F.2d at 556-57. The transcript and recording of Defendant's interview, as well as his own admissions demonstrate that Defendant was not subject to any threats, shows of force, or intimidation. Tr. Day Two at 91.

While no intervening circumstances may exist in this case, the evidence still demonstrates that all three of the consent forms signed by Defendant were obtained sufficiently free of any taint from the illegal arrest. More than three hours passed between the arrest and Defendant's consent, he was fully advised of his constitutional right to refuse consent and given Miranda warnings either before or immediately after giving consent, and the police conduct in this case is completely void of any shows of force, threats, intimidation or deliberate violations. Balancing these factors together, it is evident that all three consent forms signed by Defendant, allowing the search of his belongings, were "sufficiently an act of free will" as to purge the acts of any taint from the illegal arrest. Brown, 422 U.S. at 599. Thus, the evidence obtained as a result of the

consent, which includes all the evidence in this case should not be suppressed.

E. Defendant's Statements Were Voluntary

Finally, the Government briefly supplements its previous arguments that Defendant's statements were voluntary. Defendant admitted that the exchange with Det. Ancheta was friendly, that he was not handcuffed, that he understood that he did not have to give a statement at all, and that he understood the meaning of the plain English warnings he was given, except for one point that Det. Ancheta had to clarify.

As it turns out, Det. Ancheta was correct in his impression that Defendant might have misunderstood the rights advisement to mean that a lawyer was actually present right "now" or could be brought in by the police immediately. Defendant testified that as a result of the "cop shows" he had watched (Tr. at 84), he thought he could be provided an attorney right away. Of course, he had the right to call an attorney if he wanted, and he said at one point that he would have had he understood that. But his testimony also indicated that he expected that one could be summoned for him immediately. He testified, "if he said, 'Shall we call an attorney for you now,' then I would have gone for that." Tr. at 84. Det. Ancheta clarified that an attorney was not actually present to be provided right "now" but that he could get one in court and there would be no questioning now.

The statements of Det. Andrade about going to court to get a lawyer are distinguishable from other cases in which courts have found that conditioning the right to an attorney to a future point in time is a Miranda violation. See, e.g., United States v. Garcia, 431 F.2d 134 (9th Cir. 1970) (not clear that there would be no questioning now if suspect invoked); United States v. Connell, 869 F.2d 1349 (9th Cir. 1989) (suspect was advised that an attorney "might" be appointed and warning was followed by strong assertion that attorney could not be obtained at government expense); United States v. Noti, 731 F.2d 610 (9th Cir. 1984) (defendant not advised of right to attorney during questioning).

III. CONCLUSION

Based on the foregoing, the Government requests that Defendant's motion be denied.

DATED: November 3, 2009 at Honolulu, Hawaii.

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CERTIFICATE OF SERVICE

I hereby certify that, on the dates and by the methods of service noted below, a true and correct copy of the foregoing was served on the following at their last known address:

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DATED: November 3, 2009, at Honolulu, Hawaii.

/s/ Kari Cadelinia

U.S. Attorney's Office