

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CR 06-001 HE
)	
MICHAEL A. BARROWS,)	
)	
Defendant.)	

**DEFENDANT'S MOTION AND BRIEF IN
SUPPORT OF MOTION TO SUPPRESS**

Defendant hereby moves to suppress any and all evidence obtained herein by the government. In support of his position, Defendant offers the following:

STATEMENT OF FACTS

On January 17, 2006 Defendant was indicted for allegedly being in possession of material containing images of child pornography, in violation of 18 USC § 2252 A(a)(5)(B).

The items involved in this case are files that were seized from Defendant's personal computer, which was at his desk in the town hall at Glencoe, Oklahoma. At the time of the seizure, Defendant was the treasurer for the City of Glencoe, but was not at work at the time of the search and subsequent seizure challenged herein.

On the morning of May 15, 2005 Michael McQuown, a police officer for the City of Glencoe, without either Defendant's permission or a search warrant, started going through Defendant's computer files. In the course of his unauthorized search, Officer McQuown noted the names of some files that had apparently been downloaded into

Defendant's computer. McQuown believed, due to the file names, that the files contained images that depicted children having sexual intercourse.

McQuon called Geron Loveland, the Chief of Police for Glencoe, and McQuon and Chief Loveland opened some of the files and found that the files did contain images that appeared to involve child pornography. McQuon continued to rummage through Defendant's computer. Subsequently, the officers contacted the Glencoe mayor and Chief Loveland called the Stillwater office of the Federal Bureau of Investigation. Around 11:22 am the same day, McQuon seized the computer as evidence and subsequently turned it over to the FBI.

Three days later, on May 20, 2005, McQuon applied for and obtained a search warrant to search Defendant's computer, which was then in the possession of the FBI.

ARGUMENT & AUTHORITIES

PROPOSITION ONE: The Viewing Of The Files On Defendant's Computer Was A Warrantless Search And, Therefore, Any Evidence Connected Thereto Must Be Suppressed.

The application of the Exclusionary Rule is appropriate in this case. When a government agent, Officer McQuon, took it upon himself, without authorization or permission, to go into Defendant's computer files, any evidence recovered or subsequently developed is inadmissible. No matter how well-meaning the officer's intentions, for almost a century it has been the law that an illegal search will not be countenanced by the courts. *Weeks v. U.S.*, 232 U.S. 383 (1914).

Defendant had an expectation of privacy when he took his personal computer to his workplace at the town hall. It was his private property and was not used by any of the

other city employees. The officer reviewed (i.e. searched) the computer's files absent permission from Defendant or a warrant permitting the search to occur. See, *Illinois v. Andreas*, 463 U.S. 765 (1983) where it was stated that, "(t)he plain-view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity." *Id* at 771.

No matter how well intentioned the officer might have been, he went too far. Officers can often go too far. In *Arizona v. Hicks*, 480 U.S. 321 (1987), writing for the majority, in a case where police officers entered an apartment to search for guns and related items took it upon themselves to turn over a stereo to look for a serial number, Justice Scalia said, "A search is a search even if it happens to disclose the bottom of a turntable (and)...moving it even a few inches is much more than trivial for Fourth Amendment purposes." *Id* at 325.

Not only was the computer searched but it was also seized, absent a warrant or permission of the owner. There was a meaningful interference with Defendant's property and, therefore, a seizure occurred. *U.S. v. Place*, 462 U.S. 696 (1983).

PROPOSITION TWO: The Plain View And Exigent Circumstances Doctrines Are Not Applicable

The computer certainly was in plain view. Its contents, however, were not. The plain view exception is, therefore, not available to the government as an exception to the warrant requirement imposed by the 4th Amendment to the Constitution of the United States.

Once the officer started using the Defendant's computer, the officer became aware of some files thereon that were not in plain view. At that point the officer undertook a far more than cursory inspection. He undertook a search of items that were not in plain view—until he placed them there. There was no *nexus* to any criminal activity, at least not until the officer's warrantless search established the possibility of probable cause. See, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) and *U.S. v. Donnes*, 947 F. 2d 1430 (C.A. 10th Cir 1991).

By way of further analysis, when the searching officer first detected what he thought was evidence of criminal activity what did he do? He searched further. He did not stop his search and present the information to a magistrate and ask for a search warrant. He could have but did not--at least not until days later, after the computer had been seized and was in the possession of the FBI. There were no exigent circumstances present. See, *McDonald v. U.S.*, 335 U.S. 451 (1948). The computer could have been secured, thereby eliminating any concern that possible evidence might be destroyed. Also, neither the police nor others were in danger. See, *Illinois v. McArthur*, 121 S.Ct 946 (2001).

CONCLUSION

In *United States v. Carey*, 172 F.3d 1268 (10th Cir. 1999), a case quite similar to the present case, the police seized a computer, took it to the police station and obtained a warrant permitting them to search the computer for evidence relating to the sale and distribution of controlled dangerous substances. During the search, they discovered, as in the instant case, files with sexually suggestive titles. The officers felt that, since they had a warrant, anything in the computer could be viewed and searched. The 10th Circuit

disagreed and suppressed the evidence. See, also, *United States v. Turner*, 169 F.3d 84 (1st Cir. 1999), quoted with approval in *Carey*, Supra, wherein the court held that, “(w)e cannot accept the government's contention that the sexually suggestive image which suddenly came into "plain view" on the computer screen rendered [the defendant]'s computer files "fair game"... . *Id* at 1274.

Mr. Barrows computer was searched and seized and the items recovered from this warrantless search and seizure are the foundation upon which the government has built its case. The violation of Defendant's Fourth Amendment rights require the suppression of all the evidence in this case.

WHEREFORE, Defendant prays that the Court set this matter for evidentiary hearing and thereafter grant the relief above requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 6th day of March, 2006 a true and correct copy of the foregoing motion was sent via ECF to the following:

Timothy Ogilvie, Esq.
Assistant United States Attorney

S/ Robert A. Manchester, III
Robert A. Manchester, III