IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. **10-12255-BB**

United States of America,

Appellee,

- versus -

Barry Whaley,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

Wifredo A. Ferrer
United States Attorney
Attorney for Appellee
99 N.E. 4th Street
Miami, Florida 33132-2111
(305) 961-9130

Anne R. Schultz
Chief, Appellate Division

Emily M. Smachetti
Assistant United States Attorney

Kathleen M. Salyer
Assistant United States Attorney

Of Counsel

United States v. Whaley, Case No. 10-12255-BB

Certificate of Interested Persons

Undersigned counsel for the United States of America hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case who were not included in the Certificate of Interested Persons set forth in appellant's brief:

Acosta, R. Alexander

Salyer, Kathleen M.

Sloman, Jeffrey H.

Smachetti, Emily M.

Kathleen M. Salyer
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

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Statement of Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

Statement of the Issue

Appellant Barry Whaley has entered into a conditional guilty plea, in which he has reserved the right to appeal the following issue:

> Did the district court err in adopting the report and recommendation of the magistrate judge recommending that Whaley's motion for suppression of physical evidence and statements be denied?[1]

(DE:64).

Statement of the Case

1. Course of Proceedings and Dispositions in the Court Below

On April 16, 2009, a federal grand jury in the Southern District of Florida returned an indictment that charged appellant Barry Whaley with knowing possession of child pornography, in violation of 18 U.S.C. §§ 2256(2) and 2252(a)(4)(B) (Count 1) (DE:3). The indictment also contained a forfeiture count (*id.*).

After the district court denied Whaley's motion to suppress physical evidence and statements (DE:24 (motion); DE:61 (order denying motion)), Whaley entered a conditional guilty plea, in which he reserved the right to appeal the district court's denial of his motion to suppress (DE:63 (plea agreement); DE:62 (minute entry for

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[1] Although Whaley has preserved for appellate review his challenge to the denial of his motion to suppress both physical evidence and statements, the arguments he has presented in his brief challenge only the denial of the motion to suppress physical evidence.

plea proceedings)). The district court sentenced Whaley to 120 months' imprisonment, to be followed by a lifetime term of supervised release, and assessed him $100.00 (DE:70).

Whaley filed a timely notice of appeal (DE:71). He remains incarcerated.

2. Statement of the Facts

A. The Offense Conduct

The factual basis for Whaley's guilty plea was set out in an Agreed Factual Proffer (DE:64).[2] The factual basis can be summarized as follows.

Whaley is a convicted sex offender. He was convicted in Alaska in 1993 of sexual abuse of a minor (*id.*). Whaley moved to Miami Beach, Florida, in 2008 and registered his address at 622 15th Street, Apartment 4, Miami Beach, with the Florida Department of Law Enforcement's sex offender registry (*id.*). The law requires a registered sex offender to update his registration within 48 hours of changing his address (*id.*).

On June 26, 2008, Miami Beach Police Department Detective Ivette Dominguez went to the 15th Street address as part of a routine verification of the addresses of registered sex offenders (*id.*). Det. Dominguez discovered that

[2] For the Court's convenience, the Agreed Factual Proffer is attached hereto as Appendix "A."

Apartment 4 had been condemned as a result of a recent fire (*id.*). Det. Dominguez learned from Sergeant Howard Bennett, an arson investigator, that the fire at the apartment had occurred on June 17, 2008 (*id.*). Although 9 days had elapsed since the fire had rendered the apartment uninhabitable, Whaley had not updated his address in the sex offender registry (*id.*).

During the course of his conversation with Det. Dominguez, Sgt. Bennett realized that Whaley had identified himself to Sgt. Bennett with a different name (*id.*). As a result, Sgt. Bennett called Whaley and asked him to come to the police station (*id.*). Whaley drove himself to the Miami Beach Police Department (*id.*). He admitted to Sgt. Bennett that he had given a false name at the scene of the fire (*id.*). Sgt. Bennett arrested Whaley for giving false information during an arson investigation and for disguising his identification (*id.*). Det. Dominguez then arrested Whaley for failing to update his sex offender registration (*id.*).

After he was arrested, Whaley became concerned about a laptop computer that he had left in his car, which was parked on the street (*id.*). Whaley claimed that his laptop was worth $4,000 because it contained an expensive flight simulator program; he expressed concern that his car might be burglarized (*id.*). Whaley asked Sgt. Bennett to retrieve the laptop from his car and Sgt. Bennett refused (*id.*). Another officer who was present, Sgt. Mark Schoenfeld, had some flight experience and was

interested in the flight simulator program (*id.*). Whaley offered to show Sgt. Schoenfeld the program and the sergeant agreed to retrieve the laptop from Whaley's car (*id.*).

After Sgt. Schoenfeld had retrieved the laptop, he removed Whaley's handcuffs to permit Whaley to enter his password (*id.*). Sgt. Schoenfeld and Whaley sat side by side as Sgt. Schoenfeld clicked on an icon entitled "auto racing 13" (*id.*). A video began to play that depicted two minor females, partially nude, engaged in activity of a sexual nature (*id.*). After a few seconds, Whaley reached over and pressed the power button to place the laptop in hibernation mode (*id.*).

Sgt. Schoenfeld immediately recognized the video as child pornography. He asked Whaley to reenter his password (*id.*). After Whaley reentered his password, the video continued to play (*id.*). Sgt. Schoenfeld then showed the video to other officers who were present (*id.*).

Whaley was given his *Miranda* warnings. He waived his rights verbally and in writing (*id.*). He gave verbal and written consent to law enforcement to examine his laptop (*id.*). In a recorded statement, Whaley admitted that the laptop was his, that he had purchased in on Ebay, that it had been in his custody and control since he had purchased it, and that only he had used it (*id.*). Whaley's post-*Miranda* statements also demonstrated a working knowledge of peer-to-peer (P2P) file sharing over the

internet (*id.*). He admitted that he had used Bearshare, a popular P2P program, to download images of children engaged in sexual activity (*id.*).

Following his arrest, Whaley left numerous voice-mail messages with the Miami Beach Police Department in which he acknowledged that he had downloaded illegal material (*id.*). A forensic examination of Whaley's laptop revealed images and movies of child pornography (*id.*).

B. Proceedings on Whaley's Motion to Suppress Evidence and Statements

a. Whaley's Motion to Suppress

Whaley filed a motion to suppress the evidence of child pornography that was on his laptop (DE:24). He argued that the police officers had neither a warrant not probable cause to arrest him (*id.*). His post-arrest statements and the physical evidence that was seized from him were fruits of an illegal arrest and were due to be suppressed (*id.*). Whaley also argued that the police officers had seized his laptop and searched it without a warrant and without probable cause to believe it contained contraband. As a result, Whaley's consent to search the laptop and the subsequent forensic search were the fruits of the poisonous tree (*id.*). Whaley argued that he had been coerced to sign the written consent-to-search form (*id.*). Finally, Whaley argued that the length of the delay between the seizure of his laptop and the search of his

laptop was unreasonable and significantly interfered with his possessory interest in violation of his Fourth Amendment rights (*id.*).

b. The Government's Response to the Motion to Suppress

The United States filed a written response to Whaley's motion to suppress (DE:39; DE:40 (corrections to response)). The government explained the factual circumstances that led to the discovery of the child pornography on Whaley's laptop computer (*id.*). The government argued (1) that Whaley's arrest on the state charges was proper; (2) that he had voluntarily shown his computer to the officers and the child pornography video was in plain view when the officer looked at Whaley's computer in response to Whaley's offer to show him the flight simulator software; (3) once the officer saw the child pornography in plain view, he could not ignore it and was obligated to seize the laptop and investigate the matter; (4) Whaley consented in writing to a search of his laptop; (5) Whaley's statements concerning the laptop and the child pornography were knowing and voluntary; and (6) the forensic examination of the laptop was proper (*id.*). The government also argued that *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009), which Whaley had relied upon, was not relevant because the officers had obtained Whaley's consent to search the laptop on the day the seized it and were not required to obtain a warrant to search it (*id.*).

c. The Hearing on the Motion to Suppress

1. The Presentation of Evidence

The magistrate judge to whom the motion had been referred conducted a hearing on the motion. The government's witnesses testified to the confluence of events that led to the initial discovery of a video of child pornography on Whaley's laptop computer, his post-arrest statements, and the consent search that yielded additional child pornography[3].

On June 26, 2008, Detective Ivette Dominguez of the Miami Beach Police Department was conducting a routine check to verify the addresses of registered sexual offenders on Miami Beach (DE:56 at 5-8). Sergeant Mark Schoenfeld and United States Secret Service Agent Timothy Aucoin accompanied her (*id.* at 69). Their goal was to verify the addresses of registered sexual offenders; they were not looking for evidence of computer crimes or child pornography (*id.* at 69, 153). One of the addresses Det. Dominguez sought to verify was that of appellant Whaley (*id.* at 9).Whaley had registered his address as 622 15th Street, Apartment 4, Miami Beach (*id.*). When Det. Dominguez arrived at that address, she discovered that there had been a fire at the apartment approximately nine days earlier and that the apartment was uninhabitable (*id.* at 9-10, 70).Although Whaley was required to

[3] Whaley did not call any witnesses at the hearing.

change his address in the sex offender registry within 48 hours of moving, he had not done so (*id.* at 7, 10).

Det. Dominguez returned to the police station where she met Sergeant Howard Bennett, an arson investigator, and learned that Sgt. Bennett was investigating the fire at the 15th Street address (*id.* at 10, 51). Det. Dominguez and Sgt. Bennett compared notes and discovered that Sgt. Bennett had spoken to Whaley at the scene of the fire, although Whaley had provided Sgt. Bennett with a different name (*id.* at 11, 51). Sgt. Bennett called Whaley and asked him to come to the police station to be interviewed concerning the fire (*id.* at 13, 52).

Whaley drove himself to the police station and parked his car on the street outside the station (*id.* at 52). Sgt. Bennett interviewed Whaley in his office (*id.* at 53). Initially, Whaley gave Sgt. Bennett the false name he had given at the scene of the fire (*id.* at 54). In fact, even after Sgt. Bennett had read Whaley his *Miranda* warnings, Whaley persisted in using the false name (*id.*). It was only after Sgt. Bennett established that he knew Whaley's identity that Whaley admitted that he had been lying about his identity (*id.*). Sgt. Bennett arrested Whaley for providing false information during an arson investigation (*id.* at 14). Det. Dominguez then arrested Whaley for failure to report his change of address in the sexual offender database within 48 hours of moving from the 15th Street address (*id.* at 14).

After Whaley was placed under arrest, Det. Dominguez placed Whaley in a chair inside her office while she completed the necessary paperwork relative to the arrest (*id.* at 14-15). Whaley told Sgt. Bennett that he was concerned about the safety of an expensive laptop computer that he had left in his car, which was parked on the street (*id.* at 15, 56-57). Sgt. Bennett testified that Whaley "kept asking me to go down and get the laptop out. He didn't care whether it went with him or we impounded it, but he wanted us to make sure that we got the laptop out of the car" (*id.* at 57). Sgt. Bennett refused to retrieve Whaley's laptop (*id.* at 57).

Whaley then asked Sgt. Schoenfeld to retrieve the laptop (*id.* at 71). Whaley claimed that the laptop was very expensive because it had the latest flight simulator program (*id.* at 71). Sgt. Schoenfeld responded, "[o]h, man, I'm interested in that, you know, I used to fly" (*id.* at 71). Whaley replied, "[W]ell, go to my car, get my laptop and I'll show it to you" (*id.*). Sgt. Schoenfeld agreed to retrieve the laptop from Whaley's car (*id.* at 58, 72).

According to Det. Dominguez, who overheard the conversation while she completed the paperwork incident to her arrest of Whaley, the conversation was friendly, "they were just talking about laptops and the programs how that flight simulator program worked" (*id.* at 17). Sgt. Bennett also testified that the tone of the conversation was friendly:

> It seemed very friendly actually. Sergeant Schoenfeld seemed to be continuing my stance, that no computer is worth four thousand dollars. Mr. Whaley was trying to tell him about the graphics capability of the computer and that it was fast and that the pictures looked really good. Sergeant Schoenfeld had come up with the laptop there and I heard Mr. Whaley tell him, no, it's got this great whatever graphics card. He kept telling him, let me show you, let me show you.

(*id.* at 60). Sgt. Schoenfeld did not demand that Whaley give him his car keys (*id.* at 16 (Dominguez); *id.* at 61-62 (Bennett)). Sgt. Schoenfeld did not demand that Whaley show him the laptop (*id.* at 16 (Dominguez); *id.* at 62 (Bennett)).

Sgt. Schoenfeld, accompanied by two other officers, went to Whaley's car and retrieved a bag that contained the laptop (*id.* at 73). Sgt. Schoenfeld returned to the office with the laptop, and, at Whaley's request, removed Whaley's handcuffs to permit him to unlock the computer, which was password protected (*id.* at 74). Whaley and Sgt. Schoenfeld were sitting side by side and Sgt. Schoenfeld began to scroll through the icons on the desktop (*id.* at 75). Sgt. Schoenfeld explained:

> The mouse pad, if you know most laptops, have a keyboard with a mouse pad in the middle, the mouse pad was disabled, it would not work. I hit the tab button, and it went from icon – each icon got highlighted until it went to the one that said Racing. When it got to the Racing one, I hit enter and all of a sudden a movie started playing.

(*id.* at 75). Sgt. Schoenfeld testified that, at the time, he thought the "Racing" icon would take him to the program he was looking for (*id.* at 77). At a later point, he realized that there was an icon entitled "Microsoft Flight SI," but he did not remember seeing that icon as he tabbed through the icons on Whaley's desktop on June 26, 2008 (*id.*).

Det. Schoenfeld immediately realized that he was viewing a video of child pornography (*id.* at 78-79 "In this movie it is obvious that this is child pornography"). After 20-25 seconds, Whaley reached over and pressed the power button, which put the laptop in hibernation (*id.* at 78-79). Det. Schoenfeld inquired of Whaley, "[W]hat's this?" and Whaley replied, "[O]h, that's nothing, that's nothing" (*id.* at 79). Sgt. Schoenfeld then stated, "[C]ome on, Barry, I already saw it" (*id.*). Sgt. Schoenfeld asked Whaley to reenter his password and Whaley complied (*id.*). At that point, the pornographic video continued (*id.*). Sgt. Schoenfeld asked two other officers who were present to look at the video and they recognized it as child pornography (*id.* at 79, 127-28).

Immediately after the officers confirmed that they had observed child pornography on Whaley's laptop, Det. Dominguez read Whaley his *Miranda* rights (*id.* at 18-22, 128). Neither Det. Dominguez nor any of the other officers were investigating Whaley for possession of child pornography (*id.* at 17-18, 76, 120, 125).

Following the discovery of the pornographic video on Whaley's laptop, Det. Alessandri and United States Secret Service Agent Tim Devine took Whaley to a separate interview room to interview him concerning the discovery (*id.* at 21, GX8[4]). Whaley admitted that the laptop was his, that he was the sole user of the laptop, that he had downloaded the pornographic video, and that he understood that the children in the video were minors under the age of 18 (*id.* at 133). The agents obtained verbal consent and written consent to search Whaley's laptop (*id.* at 134-35; GX11). Another Agent testified that the hard drive was imaged in July 2008 and he reviewed the results of the search in January 2009; there was no evidence when the hard drive was searched (*id.* at 154-55). When a computer is found to contain child pornography, it is not customarily returned to its owner (*id.* at 157).

Whaley was not arrested on the child pornography charges until several months later (*id.* at 137). In the interim, he frequently went to the Miami Beach police station and asked to speak with one of the detectives (*id.* at 22). Whaley also placed numerous phone calls to the officers with whom he had interacted at the police station on June 26, 2008, and left voice mail messages for them (*id.* at 81-82, 138). In those

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[4] Government's Exhibit 8 is a compact disk that contains recordings of all the voice mail message Whaley left the officers as well as the recording of his interview with Det. Alessandri and Agent Devine. The interview is in two parts and can be found at WS_30050 and WS_30051, the last two entries on the compact disk.

messages, Whaley stated that he was waiving his right to silence (GX:8); admitted that he had "downloaded stuff from peer to peer and that's all" and acknowledged that what he had done was "in bad taste" (GX:8); informed the officers that he had moved back to Alaska (GX:8); complained about the way that Sgt. Schoenfeld had gained access to the program that contained child pornography on Whaley's laptop and attempted to discredit Sgt. Schoenfeld's testimony that the discovery of the child pornography was inadvertent (GX:8); and stated his willingness to cooperate with the authorities (GX:8 "I am willing to work with you . . . ."). Whaley also stated that he wanted the laptop returned to him "even it if was minus the hard drive" (GX:8 (6/30/08 at 9:39)).

2. The Arguments of Counsel

Following the presentation of evidence, the magistrate judge entertained argument on the motion. The government argued that there had been no illegal search of Whaley's computer (*id.* at 160-61). The government noted that Whaley had requested that one of the officers retrieve the laptop from his car; Whaley had voluntarily entered his password; and Whaley had invited the officer to look at the flight simulator program (*id.*). When Sgt. Schoenfeld clicked on the icon entitled

"Racing," the child pornography was in plain view[5] (*id.* at 160-61, 186). Sgt. Schoenfeld was not investigating child pornography and did not expect to find any on Whaley's computer (*id.* at 161). He made a "simple mistake" when he clicked on the wrong icon (*id.* at 163). There was nothing about the title of the "Racing" icon that suggested that it was a link to contraband (*id.* at 165). The government also argued that Whaley had provided written and verbal consent to the search of his laptop during his subsequent interview by officers other than Sgt. Schoenfeld (*id.* at 165). Moreover, the content of Whaley's voice mail messages to the officers, in which he stated that the officers were free to keep the computer's hard drive but requested that they return the computer itself, was consistent with Whaley's initial consent to a search of the laptop (*id.*).

The defense viewed Whaley's initial invitation to Sgt. Schoenfeld to view the flight simulator program as a consent to search the laptop and argued that Sgt. Schoenfeld had exceeded the scope of the initial consent when he clicked on the "Racing" icon (*id.* at 167). Whaley's subsequent written consent to search the laptop was not voluntary, in light of what had gone before. The illegal search had tainted

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[5] The government argued that an item is in plain view if the following three elements are met: (1) the officer has independent justification of being in the position where he sees the item in question; (2) the officer discovers the item inadvertently; and (3) the officer immediately observes that the item is evidence of a crime (*id.* at 187, citing *United States v. Jenkins*, 901 F.2d 1075 (11th Cir. 1990)).

Whaley's subsequent consent to search (*id.* at 179). Citing *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009), Whaley argued that law enforcement was not entitled to keep Whaley's computer indefinitely, notwithstanding that he had consented to a search of the computer (*id.* at 183).

d. The Magistrate Judge's Report and Recommendation

The magistrate judge to whom the motion had been referred issued a report recommending that the motion be denied (DE:46). The magistrate judge reviewed the testimony of each of the government's witnesses (*id.* at 2-14) and concluded that both Sgt. Bennett and Det. Dominguez had probable cause to arrest Whaley for state-court violations and he was lawfully in custody when he began to discuss his laptop computer (*id.* at 14-17). As to the facts that ultimately led to the discovery of child pornography on Whaley's laptop, the magistrate judge found that (1) none of the officers present at the police station (and no officer known to those officers) was investigating Whaley for possession of child pornography (*id.* at 17); (2) Whaley's laptop was brought into the police station and turned on solely as a result of Whaley's actions (*id.*); (3) Whaley volunteered to show Sgt. Schoenfeld the expensive computer graphics on his laptop, specifically the flight simulator program; (4) Whaley voluntarily unlocked the laptop after his handcuffs had been removed (*id.*). Based on these facts, the magistrate judge concluded that Whaley invited the officers to look

at his computer and provided the means for them to do so. As of that moment, no search had been conducted and anything the officers might have seen was within their plain view (*id.*).

While the magistrate judge noted that Whaley had agreed to show Sgt. Schoenfeld a specific graphics program, and any attempt by the officer to look through other files would have been improper, the facts showed that Sgt. Schoenfeld was not looking for anything other than the flight simulator program when he inadvertently clicked on the "auto racing 13" icon and discovered the child pornography (*id.* at 19-20). The magistrate judge found that Sgt. Schoenfeld's testimony concerning his inadvertent discovery was plausible (*id.* at 20). The mouse connected to the laptop was not working properly and Sgt. Schoenfeld was required to use the "tab" key to scroll through all the icons on the desktop; he clicked on the first icon he came to that he thought was the flight simulator program (*id.* at 20-21). The magistrate judge credited Sgt. Schoenfeld's testimony that nothing in the title "auto racing 13" suggested anything to him regarding child pornography, internet crimes against children, or any other illegal activity (*id.* at 21). In fact, if Sgt. Schoenfeld had been looking for evidence of criminal activity by a known sex offender, there were other icons on the desktop with more suggestive titles (*id.*). The child pornography that Sgt. Schoenfeld discovered was in plain view because (1) Sgt.

Schoenfeld had an independent justification for being in a position to see it; (2) he discovered it inadvertently; and (3) he immediately observed that it was evidence of a crime (*id.* at 22).

The magistrate judge also concluded that Whaley had voluntarily consented to a search of the laptop following Sgt. Schoenfeld's inadvertent discovery of the child pornography (*id.* at 23-24). While Whaley was under arrest at the point, he had not been arrested on child pornography charges (*id.* at 24). Although Whaley was not told that he could refuse to re-enter his password, he had been advised of his *Miranda* rights (*id.*). The magistrate judge noted that Whaley "could not undo what the sergeant had already seen" (*id.* at 25). At that point, Whaley had "made a calculated decision to re-enter his password because in doing so, he might benefit from cooperating with the officers" (*id.*). The magistrate judge also found it significant that Whaley "gave explicit verbal and written consent" to search the laptop during the interview that followed (*id.*). Whaley made similar statements in the voice-mail messages he left for various officers at the Miami Beach Police Department, which indicated his willingness to permit the officers to keep the hard drive on which the incriminating evidence was stored (*id.* at 25-26).

Even if Sgt. Schoenfeld's conduct was coercive in requesting that Whaley re-enter the password after he had seen the child pornography, any taint was dissipated

by the time Whaley gave verbal and written consent to search to two other officers at the police department two hours later (*id.* at 26-29).

The magistrate judge agreed with the government's position that *United States v. Mitchell* was inapposite and should not control the outcome here (*id.* at 29). Unlike the defendant in *Mitchell*, Whaley had voluntarily consented to a search of his laptop and there was no need for the officers to get a search warrant. Moreover, in his voice-mail messages in the days following the seizure of his laptop, Whaley continually indicated his willingness to permit the officers to retain the hard drive (*id.* at 29).

e. The Written Objections to the Report and Recommendation

Whaley objected to the report and recommendation (DE:50). He reiterated his argument that he had limited the scope of the search of his laptop to the flight simulator program (*id.*). Sgt. Schoenfeld's accidental opening of the "auto racing 13" program exceeded the scope of the consent and constituted an illegal search (*id.*). The illegality of the search tainted Whaley's subsequent consent to search (*id.*).

Whaley also argued that he had continuously requested that the officers return his computer (*id.*). These requests amounted to a withdrawal of his initial consent to search (*id.*).

The government argued in response that the magistrate judge had correctly concluded that Whaley voluntarily showed the contents of his laptop to the officers and Sgt. Schoenfeld could not ignore the child pornography that was in plain view (DE:59). Whaley's written consent to search was sufficiently removed from his arrest and the initial viewing of the child pornography to dissipate any taint if Whaley's initial consent to the search had been coerced (*id.* at 9). Moreover, Whaley had left numerous voice-mail messages with the police department in which he agreed that the officers could keep the hard drive to his laptop and search it (*id.*).

In reply, Whaley reiterated, again, his claim that the search exceeded the scope of his consent because he had only consented to a search of the flight simulator module (DE:60). Whaley claimed that the officers' interest in the flight simulator was simply a pretext for searching for child pornography and that Sgt. Schoenfeld's testimony concerning his interest in Whaley's laptop was "wholly unbelievable" (*id.* at 3). The search of Whaley's laptop after Sgt. Schoenfeld had discovered the pornography was tainted by the initial unlawful search (*id.*). A reasonable person would not have thought that Whaley was free to refuse to consent to a search of his computer after Sgt. Schoenfeld had discovered the child pornography (*id.*).

Whaley noted that he had taken prescription Xanax and Lithium on the day he reported to the Miami Beach Police Department (*id.*). To the extent that he consented

to the search, his ingestion of those drugs was relevant to the involuntariness of the consent, although law enforcement had not inquired about the effects of those drugs on Whaley (*id.*).

Whaley also argued that he maintained a possessory interest in the laptop computer. Under *Mitchell*, the delay in searching his computer violated his Fourth Amendment rights (*id.*).

f. The District Court's Order Denying the Motion to Suppress

Following a *de novo* review of the record, the district court entered an order adopting the magistrate judge's report and recommendation and denying Whaley's motion to suppress (DE:61).

3. Standard of Review

This Court reviews the district court's denial of a motion to suppress evidence as a mixed question of law and fact, with the rulings of law reviewed *de novo* and the findings of fact reviewed for clear error, in the light most favorable to the prevailing party. *United States v. de la Cruz-Suarez,*, 601 F.2d 1202, 1214 (11th Cir. 2010); *United States v. Boyce*, 351 F.3d 1102, 1105 (11th Cir 2003).

Whether consent to search is voluntary is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 217, 277,

93 S. Ct. 2041-2047-48 (1973); *United States v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989).

Summary of the Argument

The district court did not err in denying Whaley's motion to suppress evidence of child pornography that was discovered, inadvertently, on his laptop computer. The pornographic video was in plain view when the officer saw it and Whaley verbally consented to a search immediately after its discovery. Whaley's subsequent verbal and written consent to search the laptop was sufficiently attenuated from the initial verbal consent to dissipate any alleged taint from that consent. Whaley reaffirmed his consent in his voice mail messages to the officers in which he stated that the officers could keep the hard drive from his laptop.

There is no merit to Whaley's claims that law enforcement's continued retention of his laptop violated his possessory interest. The officers had discovered child pornography on the laptop before it was seized; Whaley had consented verbally and in writing to a search of the laptop; and Whaley had reaffirmed his consent in voice mail messages in which he stated that law enforcement could retain the hard drive.

Argument

The District Court Did Not Err as a Matter of Law in Denying Whaley's Motion to Suppress the Evidence of Child Pornography That Was Discovered Inadvertently on His Laptop Computer.

Whaley has preserved for appellate review his challenge to the district court's denial of his motion to suppress evidence. He argues that Sgt. Schoenfeld's "search" of his laptop in response to Whaley's offer to show Sgt. Schoenfeld a flight simulator program exceeded the scope of Whaley's consent to search and that his subsequent verbal and written consent to search the laptop was tainted by the initial impermissible search of the laptop. In addition, Whaley contends that the evidence discovered on his laptop computer should have been suppressed because a lengthy delay between the seizure and a subsequent search violated his possessory interest in the computer.

Neither claim has merit. The record amply supports the magistrate judge's conclusions, which were affirmed by the district court, that Whaley freely and voluntarily consented to a search of the laptop after Sgt. Schoenfeld discovered child pornography in plain view on the laptop; that Whaley freely provided written and oral consent to a search of the laptop several hours later; and that law enforcement's failure to return the laptop on which they had discovered child pornography before it was seized did not run afoul of Whaley's Fourth Amendment rights.

A. Whaley Voluntarily Consented to a Search of His Laptop Following Sgt. Schoenfeld's Inadvertent Discovery of Child Pornography on the Laptop in Plain View.

Whaley contends that his oral and written consent to search the contents of his laptop, following Sgt. Schoenfeld's discovery of a child pornography video on the laptop, was invalid because the sergeant's earlier impermissible search of the laptop tainted his subsequent consent (Br. at 10-16). Both the facts and the law defeat Whaley's claim.

1. The Pornographic Video Sgt. Schoenfeld Discovered Inadvertently Was in Plain View.

As the magistrate judge found, Whaley invited Sgt. Schoenfeld to look at his computer and provided the means for him to do so (DE:46). Sgt. Schoenfeld was not looking for anything other than the flight simulator program when he inadvertently clicked on the "auto racing 13" icon and discovered the child pornography (*id.*). As of that moment, no search had been conducted and anything Sgt. Schoenfeld might have seen was in plain view (*id.*). Whaley's subsequent consent to search the laptop was voluntary (*id.*).

The "plain view" doctrine permits an officer to seize evidence that is in plain view despite the failure to obtain a search warrant, as long as the officer has lawful access to the object seized and the incriminating nature of the object seized is

immediately apparent. *Horton v. California*, 496 U.S. 128, 110 S. Ct. 2301 (1990); *United States v.* Smith, 459 F.3d 1276, 1290 (11th Cir. 2006); United *States v. Hromada*, 49 F.3d 685, 690 n.11 (11th Cir. 1995). The initial intrusion can also be justified by one of the recognized exceptions to the warrant requirement, such as consent. *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S. Ct. 2022, 2301 (1971).

An item is in plain view if (1) the officer has independent justification for being in a position to see the item; (2) the officer discovers the item inadvertently; and (3) the officer observes immediately that the item is evidence of a crime. *United States v. Jenkins*, 901 F.2d 1075, 1081-82 (11th Cir. 1990). Each of these criteria was met in this case.

First, Sgt. Schoenfeld had independent justification for being in a position to see the pornographic video. The magistrate judge found that (1) Whaley's laptop was brought into the police station and turned on solely as a result of Whaley's actions (IDE:46); (2) Whaley volunteered to show Sgt. Schoenfeld the expensive computer graphics on his laptop, specifically the flight simulator program (*id.*); (3) and Whaley voluntarily unlocked the laptop after his handcuffs had been removed (*id.*). Second, Sgt. Schoenfeld discovered the pornographic video inadvertently when he clicked on an icon marked "auto racing 13" while he was attempting to locate the flight

simulator software on Whaley's laptop (*id.*). Finally, Sgt. Schoenfeld immediately recognized that the video depicted child pornography (*id.*).

The magistrate judge concluded that Whaley had invited the officers to look at his computer and had provided the means for them to do so (*id.*). Whaley did not object when Sgt. Schoenfeld sat beside him and turned on the computer. After Whaley typed in his password, he did not take control of the computer and he did not object when Sgt. Schoenfeld began to scroll through the icons (DE:46 at 18, n. 11). As of that moment, no search had been conducted and anything the officers might have seen was within their plain view (*id.* at 17). While the magistrate judge recognized that Whaley had agreed to show Sgt. Schoenfeld a specific graphics program, and that any attempt by the officer to look through other files would have been improper, the magistrate judge concluded that Sgt. Schoenfeld was not looking for anything other than the flight simulator program when he inadvertently clicked on the "auto racing 13" icon and discovered the child pornography (*id.* at 19-20). The record amply supports the magistrate judge's conclusions. The child pornography video was in plain view.

2. Whaley Freely and Voluntarily Consented to the Search of His Laptop Following the Inadvertent Discovery of Child Pornography in Plain View.

Within seconds after Sgt. Schoenfeld realized that he had inadvertently opened a child pornography video, Whaley pressed the power button on the laptop, which sent it into "hibernation" mode (DE:56 at 77-78). Sgt. Schoenfeld asked Whaley to reenter his password to turn the computer on, stating "Come on, Barry, I already saw it" (DE:56 at 79). Whaley complied and the pornographic video continued to play (*id.*). Whaley now claims that his acts were not voluntary because "[a] reasonable person would not think he was free to refuse consent after an impermissible search had already revealed contraband" (Br. at 16).

The Fourth Amendment protects individuals from unreasonable searches and seizures by law enforcement authorities. *United States v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989). A search conducted without a warrant based on probable cause is *per se* unreasonable, subject to a few specifically established and well delineated exceptions. *Id.*. One of the well established exceptions to the warrant requirement if a search conducted to voluntary consent. *Id.* The government bears the burden of providing that the consent was voluntary. *United States v. Blake*, 888 F.2d 795, 798 (11th Cir. 1989). Voluntariness is a question of fact to be determined from all of the

facts and circumstances. *Garcia*, 890 F.2d at 358 (quoting *Schneckloth*, 412 U.S. at 248-49, 93 S. Ct. at 1058-59).

In examining the totality of the circumstances underlying consent, the court should look at several indicators, including the presence of coercive police procedures, the extent of the defendant's cooperation with the officer, the defendant's awareness of his right to refuse consent, the defendant's education and intelligence, and the defendant's belief that no incriminating evidence will be found. *United States v. Purcell*, 246 F.3d 1274, 1281 (11th Cir. 2001).

As the magistrate judge concluded, Whaley's consent to search came after Sgt. Schoenfeld had inadvertently discovered the child pornography on Whaley's laptop and Whaley had reached over and turned it off (*see* DE:46 at 17 "As of that moment, no search had been conducted and anything the officers might have seen was within their plain view"). The totality of the circumstances here supports the magistrate judge's conclusion that Whaley had freely and voluntarily consented to a search of his laptop by turning it back on in response to Sgt. Schoenfeld's request, which was accompanied by the statement, "[C]ome on, Barry, I already saw it"(DE:46 at 24; *see* DE:56 at 79). Although Whaley was under arrest, his arrest had nothing to do with child pornography. Moreover, Whaley could not undo what Sgt. Schoenfeld had already seen. The magistrate judge concluded that Whaley made a calculated

decision at that point to cooperate with the officers (DE:46 at 25). Whaley's subsequent statements concerning his willingness to cooperate substantiate the magistrate judge's conclusion (*see* GX:8, 6/30/08 9:39 (Whaley asks to play "Let's make a deal")). Moreover, Whaley did not object to these findings in his objections to the report and recommendation (*see* DE:50; DE:60). As a result, he has waived his right to further review of these findings. *See* Fed. R. Crim. P. 59(b)(2).

3. Whaley's Subsequent Verbal and Written Consent to Search the Laptop Was Not Tainted by Sgt. Schoenfeld's Allegedly Coercive Conduct in Requesting That Whaley Consent to a Search.

Following Sgt. Schoenfeld's discovery of the child pornography on Whaley's computer, Whaley was interviewed by Sgt. Alessandri and Agent Devine in a separate interview room at the police station (DE:56 at 128-29). The interview began at 1:47 p.m. (DE:56 at 30; GX8). During that interview, Whaley consented in writing to a search of his laptop computer. The written consent was sufficiently attenuated from the oral consent Whaley had given Sgt. Schoenfeld to dissipate any taint that might have resulted from the coercive nature of Sgt. Schoenfeld's request.

This Court considers the following factors in determining whether a consent to search is attenuated from any illegality that precedes it: the temporal proximity; the presence of intervening circumstances; and the purpose and flagrancy of officers'

alleged misconduct. *United States v. Edmondson*, 791 F.2d 1512, 1515 (11th Cir. 1996). In this case, nearly two hours elapsed between Sgt. Schoenfeld's initial discovery of the child pornography and Whaley's verbal and written consent to a search of the laptop computer[6]. This certainly was sufficient time to dispel any feeling of coercion caused by Sgt. Schoenfeld's allegedly coercive request for consent to search the laptop. Whaley was informed of and understood his right to refuse to give his consent (GX:8, WS_30050, WS_30051). There were no threats; the officers were polite and spoke in conversational tones (*id.*). Sgt. Schoenfeld did not participate in the interview. Whaley was not handcuffed during the interview. Although the officers told Whaley that they would seek a warrant if he did not consent to the search of his laptop, the choice to consent remained with Whaley. Consequently, viewing the totality of the circumstances, even if Whaley's initial verbal consent to Sgt. Schoenfeld was coerced, Whaley's subsequent oral and written consent to search was knowing and voluntary.

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[6] Det. Dominguez testified that she gave Whaley his *Miranda* warnings immediately after Sgt. Schoenfeld discovered the child pornography of Whaley's laptop (DE:56 at 29). The *Miranda* rights form showed that this occurred at 1:30 p.m. Whaley provided written consent to the search of his laptop near the end of his interview with Det. Alessandri and Agent Devine. That interview terminated at 3:30 p.m. (GX:8, WS_30051).

There is no merit to Whaley's argument (Br. at 13) that the search of the computer was pretextual because the law enforcement officers knew that he was a registered sex offender. The evidence showed that none of the officers present at the police station (and no officer known to those officers) was investigating Whaley for possession of child pornography (DE:56 at 17-18, 56, 76, 125). The officers did not arrest Whaley for possession of child pornography that day. Moreover, there was a plausible reason for Agent Devine and Sgt. Alessandri to accompany Sgt. Schoenfeld when he went to retrieve the laptop from Whaley's car and the fact that these law enforcement officers accompanied Sgt. Schoenfeld does not compel the conclusion that they were investigating Whaley for any crimes involving child pornography. Sgt. Alessandri testified that he accompanied Sgt. Schoenfeld to protect the officers from any claims by Whaley of theft from or damage to his car (*id.* at 124).

The fact that Whaley had taken prescription doses of Xanax and Lithium on the morning of June28, 2008, did not render his consent involuntary. Sgt. Bennett was aware that Whaley had taken prescription medications earlier in the day when he administered *Miranda* warnings to Whaley following his arrest for providing false information (DE:56 at 62-63). At least two of the officers testified that Whaley did not appear intoxicated or under the influence of drugs, alcohol, or medication; he remained coherent and appeared to understand everything going on (DE:56 at 62-63,

129). Whaley has not argued that this testimony was unbelievable on its face or that there was any other reason why the magistrate judge could not have relied on it.

B. There Was No Violation of Whaley's Possessory Interest in His Laptop That Warrants Suppression of the Evidence Discovered There.

Whaley argues, briefly, that the delay in conducting the search of his laptop computer and its continued seizure by law enforcement interfered with his possessory interests (Br. at 16-17). Citing *United States v. Mitchell*, 565 F.3d 1347 (11th Cir. 2009), Whaley argues that a seizure that is lawful at its inception can nevertheless violate the Fourth Amendment because the manner of execution reasonably infringes possessory interests protected by the Fourth Amendment. His claim has no merit.

The defendant in *Mitchell*, who was a target of an investigation of individuals involved in distribution of child pornography, admitted to officers who were present at his residence to conduct a "knock and talk" that his desktop computer "probably" contained child pornography. One of the officers took the hard drive from that computer when he left Mitchell's residence. The officer did not apply for a warrant to search the hard drive until 21 days later. In the meantime, the officer attended a two-week training course.

On appeal of the district court's denial of Mitchell's motion to suppress electronic images of child pornography seized from that hard drive, this Court

weighed Mitchell's possessory interest in the computer hard drive against the government's justification for the delay in obtaining a warrant to search the hard drive. This Court noted that computers are relied upon heavily for personal and business use and the detention of the hard drive for over three weeks before a warrant was sought constituted a "significant interference with Mitchell's possessory interest." *Id.* at 1351. That interference was not eliminated by Mitchell's admission that the computer "probably" contained child pornography. This fact could not be determined until an agent examined the hard drive's contents, "because a defendant who admits that his computer contains such images could be lying, factually mistaken, or wrong as a matter of law." *Id.* This Court concluded that the excuse offered for the delay in applying for the search warrant (the officer's two-week absence for training and the perceived lack of urgency in obtaining a warrant) was insufficient to justify the delay. *Id.* at 1352.

The concerns in *Mitchell* are not present in this case because it was clear that Whaley's laptop contained images of child pornography when the officers sought (and obtained) Whaley's permission to search it. Sgt. Schoenfeld had immediately recognized the images of child pornography when opened the "auto racing" icon on Whaley's laptop (DE:56 at 79). Two other officers who were present looked at the video briefly and they confirmed that it was child pornography (*id.* at 79, 127-28).

Moreover, during his interview with Det. Alessandri and Agent Devine later that day, Whaley admitted that he had four or five videos of child pornography on the laptop (GX:8). The concern in *Mitchell* about prolonged interference with a substantial possessory interest was not present here. The hard drive contained contraband and it was subject to seizure.

Moreover, during the time that law enforcement held the hard drive, Whaley stated in voice mail messages to the officers that the officers could keep the hard drive to his computer (*see e.g.*, GX:8, stating in voice mail message that he would like his computer back, even it is was "minus the hard drive").

In sum, numerous aspects of this case distinguish it from *Mitchell* and Whaley's reliance on *Mitchell* is misplaced. Before the law enforcement officers seized Whaley's laptop, they had discovered child pornography on the laptop. Whaley had admitted that he had child pornography on his laptop. Whaley consented to the search of the hard drive of his laptop. And, while Whaley requested that the officers return his laptop, he agreed that they could retain the hard drive, which contained the child pornography.

Conclusion

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,

Wifredo A. Ferrer
United States Attorney

By: _____
Kathleen M. Salyer
Assistant United States Attorney

Anne R. Schultz
Chief, Appellate Division

Emily M. Smachetti
Assistant United States Attorney

Of Counsel