NO. 10-12255-B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/appellee,

v.

BARRY WHALEY,
Defendant/appellant.

On Appeal from the United States District Court
for the Southern District of Florida

CORRECTED INITIAL BRIEF OF THE APPELLANT BARRY WHALEY

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Barry Whaley
Case No. 10-12255-B

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Dopico, Hector, Assistant Federal Public Defender

Ferrer, Wilfredo, Acting United States Attorney

Moreno, Hon. Federico, Chief United States District Judge

Rodriguez, Marlene, Assistant United States Attorney

Schultz, Anne R., Assistant United States Attorney

Torres, Edwin G., United States Magistrate Judge

United States of America, Plaintiff/Appellee

Whaley, Barry, Defendant/Appellant

Williams, Kathleen, Federal Public Defender

Wylie, John W., Counsel for Appellant

STATEMENT REGARDING ORAL ARGUMENT

Mr. Whaley respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS C-1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF CITATIONS ..... iv-vi

STATEMENT OF JURISDICTION 1

STATEMENT OF THE CASE 1

STATEMENT OF THE ISSUES 1

Course of Proceedings and Disposition in the District Court 2

Statement of Relevant Facts 3

Standard of Review 8

SUMMARY OF THE ARGUMENTS 9

ARGUMENT AND CITATIONS OF AUTHORITY 10

I. The district court should have suppressed the results of the search of Mr. Whaley's computer because the initial search by law enforcement exceeded the scope of consent. 10

II. The district court should have suppressed the results of the search of Mr. Whaley's computer because the search was untimely and in violation of his possessory interest in the computer. 16

CONCLUSION 17

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF SERVICE 18

TABLE OF CITATIONS

CASES:

Florida v. Bostick,
501 U.S. 429 (1991)..... 11

Katz v. United States,
389 U.S. 347 (1967)..... 10

Mapp v. Ohio,
367 U.S. 643 (1961)..... 10

Mincey v. Arizona,
437 U.S. 385 (1978)..... 10

United States v. Barbour,
70 F.3d 580 (11th Cir. 1995) 8

United States v. Brown,
No. 405-CR-280, 2006 WL 1835006, (S.D. Ga. July 3, 2006) 11, 12

United States v. Butler,
102 F.3d 1191 (11th Cir. 1997) 15

United States v. Chemaly,
741 F.2d 1346 (11th Cir. 1984) 12

United States v. Elrod,
441 F.2d 353 (5th Cir. 1971) 12

United States v. Garcia,
890 F.2d 355 (11th Cir. 1989) 11

United States v. Glover,
431 F.3d 744 (11th Cir. 2005) 8

United States v. Gordon,
294 Fed.Appx. 579 (11th Cir. 2008)..... 12

United States v. Jacobsen,
466 U.S. 109 (1984)..... 17

United States v. Magluta,
418 F.3d 1166 (11th Cir. 2005) 8

United States v. Mendenhall,
446 U.S. 544 (1980)..... 11

United States v. Mitchell,
565 F.3d 1347 (11th Cir. 2009) 17

United States v. Tovar-Rico,
61 F.3d 1529 (11th Cir. 1995) 15

United States v. Walton,
No. 07-CR-10785, 2008 WL 313916 (S.D. Fla. Feb 4, 2008) 11

Weeks v. United States,
232 U.S. 383 (1914)..... 10

Wong Sun v. United States,
371 U.S. 471 (1963)..... 10, 11

STATUTORY AND OTHER AUTHORITY:

18 U.S.C. § 2252(a)(4)(B) 1

18 U.S.C. § 2252(b)(2) 3

18 U.S.C. § 3231 1

18 U.S.C. § 3742 1

28 U.S.C. § 1291 1

Federal Rule of Criminal Procedure 11(a)(2) 2

STATEMENT OF JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. The Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States. This appeal was timely filed on May 7, 2010 from the final judgment and commitment order entered on May 7, 2010, that disposes of all claims between the parties to this cause.

STATEMENT OF THE ISSUES

Issue # 1: Whether a law enforcement officer exceeded the scope of a consent to search a particular computer program where the officer opened a program different than the program he was directed to open by the owner of the computer.

Issue # 2: Whether the possessory interest in the computer and a delay in searching the computer required that the search of the computer be suppressed.

STATEMENT OF THE CASE

The appellant was the defendant in the district court and will be referred to by name or as the defendant. The appellee will be referred to as the government. The record will be noted by docket number. The appellant is incarcerated.

Course of Proceedings and Disposition in the District Court

On April 16, 2009, Mr. Whaley was indicted in the Southern District of Florida for possessing child pornography on June 26, 2008, in violation of 18 U.S.C. § 2252(a)(4)(B). DE 3. The indictment also sought forfeiture, upon conviction, of Mr. Whaley's laptop computer. *Id*.

Mr. Whaley filed a Motion to Suppress Statements and Physical Evidence. DE 24. That motion was referred to a Magistrate Judge. DE 25. The government filed a response to the motion. DE 40. An evidentiary hearing was held on November 13, 2009. DE 41. During the hearing, the government called Detective Ivette Dominguez, Sergeant Howard Bennett, Sergeant Mark Schoenfeld, Officer Jorge Allesandri, and Officer Timothy Aucoin. DE 56.

On November 24, 2009, the Magistrate Judge issued a report and recommendation recommending that the motion to suppress be denied. DE 46. On December 7, 2009, Mr. Whaley objected to the magistrate judge's report and recommendation. DE 50. The government filed a response to Mr. Whaley's objections. DE 59. Mr. Whaley filed a reply to the government's response on February 23, 2010. DE 60. The district denied the motion to suppress. DE 61.

Pursuant to Federal Rule of Criminal Procedure 11(a)(2), Mr. Whaley entered a conditional guilty plea, reserving the right to challenge the denial of his motion to suppress on appeal. DE 63, 64, 80. The government and district court consented to the conditional plea. *Id.* A factual proffer was signed by Mr. Whaley, which stipulated to certain facts. DE 64.

Pursuant to 18 U.S.C. § 2252(b)(2), the government filed a notice of seeking an enhanced mandatory minimum sentence of imprisonment of ten years based on a qualifying prior conviction. DE 30. Mr. Whaley was sentenced on May 6, 2010 to 120 months imprisonment, supervised release for life, and a $100 special assessment. DE 70, 81.

Statement of Relevant Facts

An evidentiary hearing was held on November 13, 2009 pursuant to Mr. Whaley's motion to suppress. DE 56. During the hearing, various law enforcement personnel testified as to the following:

Mr. Whaley first came in contact with law enforcement in this matter when Sergeant Howard Bennett encountered him standing near the scene of an apartment fire and questioned him about it. DE, 56, p. 48. Mr. Whaley was not arrested at the scene despite giving a false name, providing a false identification, and giving a false address to Sgt. Bennett. *Id*. at pp. 48-53. Mr. Whaley was instead called to

the police station on a different day and arrested by Sgt. Bennett for providing a false name. *Id*. at 53-6.

After being arrested by Sgt. Bennett, Mr. Whaley was transferred to Detective Ivette Dominguez to be arrested for failing to register as a sex offender. While he was being booked by Det. Dominguez, Sgt. Schoenfeld testified that Mr. Whaley spontaneously asked him to get his laptop from his truck even though Sgt. Schoenfeld was not involved in Mr. Whaley's investigation, questioning, or arrest. *Id*. at 88-9. Mr. Whaley requested that law enforcement retrieve his laptop, which was in his truck parked outside the police station. Sgt. Bennett would not retrieve the computer because he did not want to be responsible for it. *Id*. at 57, 58-9.

Sergeant Schoenfeld volunteered to get Mr. Whaley's laptop from his car, *Id*. at 58, because he was allegedly interested in a flight simulator video game on the computer. *Id*. at 71. The Magistrate Judge had concerns with respect to Sgt. Schoenfeld's credibility. *Id*. at 173. Sgt. Schoenfeld also testified that "it would be a great idea" to search the computers of all previous sex offenders without regard for the Fourth Amendment. *Id*. at 91-92.

Sgt. Schoenfeld did not retrieve the computer alone. Three law enforcement officers, Agent Timothy Devine, Sgt. Schoenfeld, and Sgt. Jorge Allessandri, all of who investigate sexual crimes against children, went to retrieve Mr. Whaley's laptop from his car. *Id*. at 35-6, 66-7, 73, 90-91, 107-112, 118, 141. Rather than

simply retrieve the laptop, the three searched his entire car allegedly looking for the computer's power cord. *Id*. at 73, 97, 143.

Mr. Whaley's computer was seized on June 26, 2008. *Id*. at 107. It was searched without a warrant. The government produced no reliable evidence as to when the computer was actually searched. *Id*. at 155-6. However, the case agent speculated that the search could have been completed sometime 5 or 6 months later. *Id*. The government blamed the delay on the fact that it was a campaign year. *Id*.

In addition, Mr. Whaley and the government stipulated to the following factual proffer.

> Barry Whaley is a convicted sex offender. In 1993, he was convicted in Alaska for sexual abuse of a minor. In 2008, Whaley was living in Miami Beach, Florida. Because of this conviction, when he got his Florida's driver's license in 2008, his address was registered with the Florida Department of Law Enforcement's sex offender registry. On June 26, 2008, Detective Ivette Dominguez and Sergeant Mark Schoenfeld from the Miami Beach Police Department, attempted to verify Whaley's address. They went to the address that appeared on the registry: 622 15th Street, Apartment 4. Once there, they discovered that the apartment had been through a fire and was condemned.
>
> When Dominguez returned to the station, she spoke with Sergeant Edward Bennett – an arson investigator with the Miami Beach Police Department. Bennett confirmed that 622 15th Street, Apartment 4 had been through a fire and was condemned. Bennett said that the fire happened on June 17, 2008. Section 943.0435 of the Florida Statutes requires sex offenders to update their registrations within 48 hours of changing residences. Whaley did not update his address after the fire at his registered apartment. Detective

Dominguez showed Bennett a picture of Barry Whaley. Bennett said that he had spoken with the person in the picture at the scene of the apartment fire on June 17, 2008, but that the person had given him a different name. On June 26, 2008, Sergeant Bennett called Whaley and asked to see him. Whaley drove himself to the Miami Beach police station that day. Once there, Whaley admitted to Sergeant Bennett that he had given him a false name at the fire scene. Sergeant Bennett arrested him for giving false information during an arson investigation and for disguising his identity. In addition, since Whaley had failed to register a new or temporary address within 48 hours of changing residences, as Florida law requires, Detective Dominguez also arrested Whaley for failing to update his sexual offender registration.

While going through booking procedures at the Miami Beach police station, Whaley repeatedly asked officers at the station to retrieve his laptop computer from his car. Whaley had parked his car on the street, outside the Miami Beach police station. Whaley expressed concern that someone might break into the car and steal his laptop, which he said was worth about $4,000.00. In particular, Whaley asked Sergeant Bennett to get his laptop from the car. Sergeant Bennett declined. Whaley also asked Sergeant Mark Schoenfeld to retrieve the laptop. Whaley told Schoenfeld that he had an amazing flight simulator program on his computer; the same program that professional pilots used for training. Schoenfeld, who had flown planes in the past, was interested in the program. Whaley offered to show Schoenfeld the program and Schoenfeld agreed to obtain the laptop from Whaley's car. Whaley described his car to Schoenfeld, told him where it was parked, and gave him the car keys.

Sergeant Schoenfeld went to Whaley's car to retrieve the laptop. Two other law enforcement officers accompanied him. Schoenfeld brought the laptop to Whaley, who was inside the police station. Whaley's handcuffs were removed and Whaley entered his password on the computer. He and Sergeant Schoenfeld were sitting next to each other, facing the laptop, looking for the flight simulator program. Sergeant Schoenfeld pressed the tab button and clicked an icon titled, "auto racing 13." A video began to play on the laptop screen showing two young females who appeared to be under 12-years-old, partially nude, engaged in activity of a sexual nature,

including lewd and lascivious posing. After the video played for a while, Whaley reached over and pressed the power button on the laptop, sending it into hibernation. Sergeant Schoenfeld recognized the video as child pornography, told Whaley that he had seen the video, and asked Whaley to reenter his password on the computer. Whaley agreed. Once the laptop was back on, since it was hibernating and not completely off, the child pornography video automatically popped back up on the screen.

Schoenfeld showed the video to other officers at the police station. Whaley was given read his Miranda rights. He waived them verbally and in writing. He also gave verbal and written consent for law enforcement officers to examine his laptop. In a post-Miranda, audio-recorded statement, Whaley said that: the laptop was his, he bought it on Ebay, the laptop had been in his custody since he received it, he did not share it with anyone, and he was the laptop's exclusive user. Whaley also made statements demonstrating a working knowledge of peer-to-peer (P2P) file sharing over the internet and admitted to using Bearshare, a popular P2P software program, to download images of children engaging in sexual activity.

That day, Whaley was arrested only on the state charges, not on the federal child pornography charges. After he posted bond on his state charges, Whaley called Miami Beach police officers several times and left voicemail messages. In his messages, he identified himself as Whaley, said that the calls were voluntary and that he understood that the information he left in the messages could be used against him. In the messages, Whaley acknowledged downloading illegal material using a peer-to-peer file sharing program.

A forensic examination of Whaley's laptop computer revealed both images and movies of child pornography including the following: an image of two nude girls who appear to be between the ages of 10 and 14, displaying their genitals; a movie almost 10 minutes long of a young girl believed to be under the age of 14, displaying her genitals and inserting an inanimate object into her vagina; a movie over 6 minutes long of two young girls believed to be under the age of 12 displaying their genitals and performing sex acts with inanimate objects; a movie almost five minutes long of three young girls believed to be under the age of 14, displaying their

> genitals; and a movie clip 32 minutes long of a young girl, believed to be under the age of 12, displaying her genitals and performing sex acts on an adult male. As Whaley admitted when he spoke with police officers, he downloaded these and similar images from the internet, so they traveled through interstate or foreign commerce.
>
> Whaley was charged federally with possession of child pornography.

DE 64.

STANDARD OF REVIEW

This Court applies a mixed standard of review to the denial of a suppression motion, reviewing the district court's findings of fact for clear error and its application of the law to those facts *de novo*. *United States v. Glover*, 431 F.3d 744, 747 (11th Cir. 2005) (per curiam) (motion to suppress statement); *United States v. Magluta*, 418 F.3d 1166, 1182 (11th Cir. 2005) (motion to suppress results of search). The voluntariness of a defendant's statement is a question of law. *United States v. Barbour*, 70 F.3d 580, 584 (11th Cir. 1995).

SUMMARY OF THE ARGUMENTS

Issue #1: The district court erred when it denied Mr. Whaley's motion to suppress the results of a search of his laptop computer. Mr. Whaley gave a limited consent to search his computer for a particular computer program. A law enforcement officer proceeded to open a different program, revealing child pornography. With the "cat out of the bag" Mr. Whaley did not feel free to refuse a subsequent search of the computer. Therefore, any subsequent consent to search

the computer was not given freely and voluntarily. As a result, the images found during the searches of Mr. Whaley's computer should be suppressed as they violated his Fourth Amendment rights.

Issue #2: The district court erred when it denied Mr. Whaley's motion to suppress the results of a search of his laptop computer. The United States government seized Mr. Whaley's computer on June 26, 2008. The government did not perform a search of Mr. Whaley's computer until at least five or six months later. Consequently, Mr. Whaley's possessory interest in the computer was violated and therefore the forensic search of the computer was improper.

ARGUMENT AND CITATIONS OF AUTHORITY

Issue # 1

The district court should have suppressed the results of the search of Mr. Whaley's computer because the initial search by law enforcement exceeded the scope of consent.

"'Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically delineated exceptions.'" *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (*quoting Katz v. United States*, 389 U.S. 347, 357 (1967).

Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v.*

Ohio, 367 U.S. 643 (1961). Furthermore, the exclusionary rule mandates the exclusion of derivative evidence, both tangible and testimonial, that is the product of unlawfully seized evidence or is acquired as an indirect result of that conduct. *Wong Sun v. United States*, 371 U.S. 471 (1963). This expansion of the exclusionary rule is known as the "fruit of the poisonous tree" doctrine. When applying the exclusionary rule to derivative evidence, a court must determine whether the evidence is tainted by the illegality. The Supreme Court addressed the issues of later discovered evidence by placing the focus on how the evidence was obtained: "[w]hether, granting establishment of the primary illegality, the evidence to which [the] instant objection is made has come by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id*. at 487-88. Mr. Whaley's consent to search his laptop and the subsequent forensic search conducted by the Secret Service would be fruits of the poisonous tree under *Wong Sun*, 371 U.S. at 487.

One of the exceptions to the requirements of both a warrant and probable cause is a search conducted pursuant to consent to search. *Florida v. Bostick*, 501 U.S. 429, 439 (1991). To be considered voluntary, a consent to search must be the product of an essentially free and unconstrained choice. *United States v. Garcia*, 890 F.2d 355, 360 (11th Cir. 1989). Whether consent was in fact voluntary or a product of express or implied duress or coercion is to be determined by the totality

of the circumstances. *United States v. Mendenhall*, 446 U.S. 544 (1980); *see also United States v. Walton*, No. 07-CR-10785, 2008 WL 313916, at *4 (S.D. Fla. Feb. 4, 2008).

When viewing the totality of the circumstances to determine whether consent was freely given, "courts should attempt to strike a balance between a suspect's right to be free from coercive conduct and the legitimate need of the government to conduct lawful searches." *United States v. Brown*, No. 405-Cr-280, 2006 WL 1835006, at *3 (S.D. Ga. July 3, 2006) (*citing United States v. Chemaly*, 741 F.2d 1346, 1352 (11th Cir. 1984)). In determining voluntariness, relevant factors include (but none of which is dispositive):

> (1) the voluntariness of the defendant's custodial status, (2) the presence of coercive police procedures, (3) the extent and level of the defendant's cooperation with police, (4) the defendant's awareness of his right to refuse to consent to the search, (5) the defendant's education and intelligence, and (6) the defendant's belief that no incriminating evidence will be found."

Id. A seventh factor to consider is the defendant's intoxication. The mere fact that someone is intoxicated does not render consent involuntary; rather, in each case, "the question is one of mental awareness so that the act of consent was the consensual act of one who knew what he was doing and had a reasonable appreciation of the nature and significance of his actions." *United States v. Elrod*, 441 F.2d 353, 355 (5th Cir. 1971).

Here, Mr. Whaley consented to the limited search of his flight simulator computer program. He did not give unlimited consent to search his entire computer. *See United States v. Gordon*, 294 Fed.Appx. 579, 583 (11th Cir. 2008). He did not consent to searching the computer icon titled "auto racing 13."

Further, law enforcement's actions should be viewed with skepticism because the search of Mr. Whaley's computer was pretextual. Law enforcement knew Mr. Whaley was a registered sex offender. DE 56, pp. 58, 109. Detective Dominguez and Sgt. Schoenfeld, respectively, stated that previous sexual offenders against children often have child pornography on their computers and that all sexual offenders should have their computers searched. *Id*. at 35, 91-2. One of the law enforcement officers who searched Mr. Whaley's car, Agent Timothy Devine, specializes in computer crimes against minors. *Id.* at 33, 35-6, 45, 90-1. Sgt. Schoenfeld testified that Mr. Whaley spontaneously asked him to get his laptop from his truck even though Sgt. Schoenfeld was not involved in Mr. Whaley's investigation, questioning, or arrest. *Id*. at 88-9. Sergeant Schoenfeld volunteered to get Mr. Whaley's laptop from his car, *Id*. at 58, because he was allegedly interested in a flight simulator video game on the computer. *Id*. at 71. However, Sgt. Schoenfeld, who's credibility was questioned by the Magistrate Judge, did not retrieve the computer alone. *Three* law enforcement officers, Agent Devine, Sgt. Schoenfeld, and Sgt. Jorge Allessandri, all of who investigate sexual crimes

against children, went to retrieve Mr. Whaley's laptop from his car. *Id*. at 35-6, 66-7, 73, 107-112, 118, 141. Rather than simply retrieve the laptop, the three searched his entire car allegedly looking for the computer's power cord. *Id*. at 73, 97, 143. Obviously, the only use for the power cord was to view the content of the computer.

When the computer was brought into the Miami Beach Police Station, Mr. Whaley was handcuffed. It is routine policy to handcuff an individual under arrest (prior to being placed in a holding cell) for security reasons. Yet, strangely, he was uncuffed so that Sgt. Schoenfeld could play a video game with him. *Id*. at 17, 30-32, 65, 71, 85-6, 98-9. Sgt. Schoenfeld ignored routine police procedure, risking his own safety, the safety of his fellow officers, and Mr. Whaley's safety, so that, on duty, he could play a video game with Mr. Whaley. *Id*. at 94-5. This testimony is wholly unbelievable.

Mr. Whaley was uncuffed to enter his password, yet it was Detective Schoenfeld who then began to search the computer. *Id*. at 74-76, 99. If the goal of law enforcement were to find a flight simulator, common sense would dictate that Mr. Whaley would be the person who could find it. Moreover, if Mr. Whaley's alleged consent is to be believed at all, his consent was limited to one specific computer program. *Id*. at 100. Mr. Whaley offered to show the officers where the flight simulator was *himself*. *Id*. at 74. However, it was Sgt. Schoenfeld who

searched the computer, avoiding the icon stating "Microsoft Flight SI" and choosing "Auto Racing 13." *Id*. at 77, 100-101. When the government asked him why he clicked on the Auto Racing icon, he answered, "I really don't remember." *Id*. at 77.

Additionally, Sgt. Schoenfeld's testimony differed from police reports prepared regarding Mr. Whaley's arrest. Police reports of the incident state that the laptop simply starting playing when opened. *Id*. at 102. However, at the suppression hearing, Sgt. Schoenfeld, realizing that story to be ridiculous, stated that he in fact caused the program to be played. *Id*.

After the "cat was out of the bag," Mr. Whaley reached over and closed the laptop. *Id*. at 78. Any alleged subsequent consent to search by Mr. Whaley was tainted by the initial impermissible search. Mr. Whaley's later alleged consent to search his computer was invalid because the earlier impermissible search of his computer tainted it. *United States v. Tovar-Rico*, 61 F.3d 1529, 1536 (11th Cir. 1995) (where defendant observed officers explore every room in the apartment during a protective sweep and officers told her she could refuse to consent to search but they would come back with a warrant defendant could not reasonably have known that she could still refuse a search and her consent to search was involuntary); *United States v. Butler*, 102 F.3d 1191, 1197 (11th Cir. 1997) (one consideration whether "the police conduct would have communicated to a

reasonable person that the person was not free to decline" the officer's request to search the house). Both Mr. Whaley and law enforcement had seen child pornography on his computer. DE 56, pp. 105-06. A reasonable person would not think he was free to refuse consent after an impermissible search had already revealed contraband.

Moreover, Mr. Whaley had taken Xanax and Lithium that morning. Xanax significantly alters one's ability to think clearly, making that individual groggy and disoriented. *Id*. at 38-9. Lithium is a drug for mental illness. *Id*. at 39. Yet, law enforcement did not follow up with any questions regarding the effects on Mr. Whaley. *Id*. at 38, 40. Law enforcement did not ask about his mental illness history. *Id*. at 40-1. These drugs contributed to the involuntariness of any subsequent consent given by Mr. Whaley after Sgt. Schoenfeld searched the wrong computer program.

Issue # 2

The district court should have suppressed the results of the search of Mr. Whaley's computer because the search was untimely and in violation of his possessory interest in the computer.

Mr. Whaley's computer was seized on June 26, 2008. It was searched without a warrant. The government produced no reliable evidence as to when the computer was actually searched. *Id*. at 155-6. However, the case agent speculated that the search could have been completed sometime 5 or 6 months later. *Id*. The

government blamed the delay on the fact that it was a campaign year. *Id*. Mr. Whaley has a possessory interest in his computer, which is still in the government's possession despite the fact that it has yet to be forfeited. *See United States v. Mitchell*, 565 F.3d 1347, 1350 (11th Cir. 2009). "[A] seizure, lawful at its inception, can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on unreasonable searches." *Id*. (*quoting United States v. Jacobsen*, 466 U.S. 109, 124 (1984)).

CONCLUSION

Based upon the foregoing argument and citations of authority, the Court should vacate Mr. Whaley's conviction and order the search of his computer to be suppressed.

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