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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. CR 05-00772 (A) DDP
)
Plaintiff,) ORDER GRANTING DEFENDANT'S MOTION
) TO SUPPRESS EVIDENCE
v.)
)
MICHAEL TIMOTHY ARNOLD) [Motion filed on June 1, 2006]
)
Defendant.)

This matter comes before the Court on defendant Michael Arnold's motion to suppress evidence. On July 17, 2005, Customs and Border Patrol ("CBP") Officers at Los Angeles International Airport ("LAX") searched Arnold's laptop, hard drive, compact discs ("CDs"), and memory stick. Following the search, Arnold was indicted for transportation of child pornography and possession of a computer hard drive and CDs containing images of child pornography. Arnold contends that the warrantless search of his computer equipment violated his Fourth Amendment rights.

In response to Arnold's motion, the government contends that the border search of information stored in a computer hard drive is not subject to Fourth Amendment protection. The government also

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1 argues that, even if the minimal Fourth Amendment standard of
2 reasonable suspicion applies to such searches, its search of
3 Arnold's laptop, hard drive, CDs and memory stick comported with
4 that standard. SCANNED

5 The question presented is whether the government can conduct a
6 border search of the private and personal information stored on a
7 traveler's computer hard drive or electronic storage devices
8 without Fourth Amendment review. This is an issue of first
9 impression in this Circuit. It is also an issue ripe for
10 determination because technological advances permit individuals and
11 businesses to store vast amounts of private, personal and valuable
12 information within a myriad of portable electronic storage devices
13 including laptop computers, personal organizers, CDs, and cellular
14 telephones.

15 The Court concludes that Fourth Amendment protection extends
16 to the search of this type of personal and private information at
17 the border. While not physically intrusive as in the case of a
18 strip or body cavity search, the search of one's private and
19 valuable personal information stored on a hard drive or other
20 electronic storage device can be just as much, if not more, of an
21 intrusion into the dignity and privacy interests of a person. This
22 is because electronic storage devices function as an extension of
23 our own memory. They are capable of storing our thoughts, ranging
24 from the most whimsical to the most profound. Therefore,
25 government intrusions into the mind - specifically those that would
26 cause fear or apprehension in a reasonable person - are no less
27 deserving of Fourth Amendment scrutiny than intrusions that are
28 physical in nature.

1 The Court further concludes that the correct standard requires
2 that any border search of the information stored on a person's
3 electronic storage device be based, at a minimum, on a reasonable
4 suspicion. To proceed with its search in this case, the government
5 needed a reasonable suspicion that the confidential information
6 stored on Arnold's computer equipment contained evidence of a
7 crime. Based on the testimony presented at the hearing, the Court
8 is not satisfied that the Government had a reasonable suspicion
9 supported by objective, articulable facts to search Arnold's
10 laptop, hard drive, and storage devices. Accordingly, the Court
11 grants the motion to suppress.

12
13 **I. BACKGROUND**

14 The following facts are not in dispute:

15 On July 17, 2005, forty-three year-old Michael Arnold arrived
16 at LAX after a nearly twenty-hour flight from the Philippines. He
17 had flown coach and was tired from the flight. He was dressed in
18 casual clothes, which were not ragged or worn. His hair was short,
19 and he had a goatee.

20 After retrieving his luggage from the baggage claim, Arnold
21 proceeded to customs. CBP Officer Laura Peng first saw Arnold
22 while he was in line waiting to go through the customs checkpoint.

23 After Arnold went through the checkpoint, Peng selected him
24 for secondary questioning. She asked Arnold where he had traveled,
25 the purpose of his travel, and the length of his trip. Arnold
26 stated that he had been on vacation for three weeks visiting
27 friends in the Philippines.

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1 Peng then inspected Arnold's luggage, which contained his
2 laptop computer, a separate hard drive, a computer memory stick
3 (also called a flash drive or USB drive), and six CDs. Peng
4 instructed Arnold to turn on the computer so she could see if it
5 was functioning. While the computer was booting up, Peng turned it
6 over to her colleague, CBP Officer Roberts, and continued to
7 inspect Arnold's luggage.

8 When the computer had booted up, its desktop displayed
9 numerous icons and folders. Two folders were entitled "Kodak
10 Pictures" and one was entitled "Kodak Memories." The CBP Officers
11 clicked on the Kodak folders, opened the files, and viewed the
12 photos on Arnold's computer.

13 During the search, Peng and Roberts viewed a photo that
14 depicted two nude women.¹ Roberts called in supervisors, who in
15 turn called in special agents with the United States Department of
16 Homeland Security, Immigration and Customs Enforcement ("ICE").
17 The ICE agents questioned Arnold about the contents of his computer
18 and detained him for several hours. They examined the computer
19 equipment and found numerous images depicting what they believed to
20 be child pornography.

21 The officers seized the computer and storage devices and
22 released Arnold. Two weeks later, federal agents received a
23 warrant to search the computer and storage devices. The images
24 found in their search, along with the images found in the initial
25 airport search, are the subject of this motion.

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28 ¹ The government has not presented evidence that the photo depicted minors.

1 II. DISCUSSION

2 A. The Fourth Amendment Requires the Government to Possess a
3 Reasonable Suspicion to Perform a Search That Implicates
4 the Privacy and Dignity Interests of a Person

5 The Fourth Amendment protects the right of the people to be
6 secure in their persons, houses, papers, and effects against
7 unreasonable searches and seizures. U.S. Const. amend IV. With
8 few exceptions, warrantless searches are per se unreasonable. Katz
9 v. United States, 389 U.S. 347, 357 (1967). One of the exceptions
10 is at the nation's border. United States v. Montoya de Hernandez,
11 473 U.S. 531, 538 (1985); United States v. Ramsey, 431 U.S. 606,
12 617, 619 (1977).

13 A border search is made in the enforcement of customs laws, as
14 distinct from general law enforcement, and for the purposes of
15 regulating the collection of duties and preventing the introduction
16 of contraband into the United States. Montoya de Hernandez, 473
17 U.S. at 537. The reasonableness of a border search is determined
18 by balancing the need for a particular search against the invasion
19 that the search entails. United States v. Guadalupe-Garza, 421
20 F.2d 876, 878 (9th Cir. 1970). Some searches are so intrusive that
21 they require particularized suspicion to be reasonable. Id. at 879
22 (holding that border officials must have real suspicion directed
23 specifically at that person to justify a strip search).

24 The balance is struck more favorably toward the government
25 because of the lessened expectation of privacy and the need to
26 protect the nation's borders. United States v. Flores-Montano, 541
27 U.S. 149, 152 (2004) (reasoning that "[t]he Government's interest
28 in preventing the entry of unwanted persons and effects is at its
zenith at the international border."). As a result of the

1 heightened need of the government, the examination of items such as
2 luggage, purses, wallets, and pockets is considered "routine" and
3 requires no suspicion. Montoya de Hernandez, 473 U.S. at 538.
4 United States v. Vance, 62 F.3d 1152, 1156 (9th Cir. 1995). Yet,
5 the oft-quoted phrase "searches made at the border . . . are
6 reasonable simply by virtue of the fact that they occur at the
7 border" belies the fact that highly intrusive searches are not
8 reasonable merely because they take place at the border. Flores-
9 Montano, 541 U.S. at 152-53 (quoting Ramsey, 431 U.S. at 616).

10 Although neither a warrant nor probable cause is needed for
11 ordinary searches of persons and things crossing the border, cause
12 is required for more intrusive border searches. Certain border
13 searches are highly intrusive because they implicate the "dignity
14 and privacy interests of the persons being searched." Flores-
15 Montano, 541 U.S. at 152. As a search becomes more intrusive, it
16 must be justified by a correspondingly higher level of suspicion of
17 wrongdoing. United States v. Aman, 624 F.2d 911, 912-13 (9th Cir.
18 1980) (holding that to conduct a strip search, the authorities must
19 have a "real suspicion" that the person is smuggling contraband and
20 that "real suspicion" is "subjective suspicion supported by
21 objective, articulable facts" (quoting United States v. Rodriguez,
22 592 F.2d 553, 556 (9th Cir. 1979))).

23 Courts have found that certain "non-routine" or intrusive
24 border searches require a heightened level of suspicion to be
25 reasonable. Guadalupe-Garza, 421 F.2d at 879 (holding that border
26 officials must have subjective suspicion supported by objective,
27 articulable facts to justify a strip search); Henderson v. United
28 States, 390 F.2d 805, 808 (1967) (holding that a body cavity search

1 without a heightened level of suspicion is considered
2 unreasonable). In addition, an invasive search must be limited in
3 scope. United States v. Price, 472 F.2d 573, 574-75 (9th Cir.
4 1973) (holding that after officers strip searched the defendant and
5 dispelled their initial suspicion with respect to the bulge in
6 defendant's waist, they were not justified to continue searching).

7 A search is reasonable in scope only if it is no more
8 intrusive than necessary to obtain the truth respecting the
9 suspicious circumstances. United States v. Palmer, 575 F.2d 721,
10 723 (9th Cir. 1978). The objective facts must bear some reasonable
11 relationship to the degree of suspicion. Price, 472 F.2d at 547.
12 For example, to conduct a body cavity search, which is considered a
13 "serious invasion of personal privacy and dignity," a "clear
14 indication" of possession of narcotics must exist. Henderson, 390
15 F.2d at 808 (citing Rivas v. United States, 368 F.2d 703, 710 (9th
16 Cir. 1996)).

17 Reiterating this principle in United States v. Vance, 62 F.3d
18 1152 (9th Cir. 1995), the Ninth Circuit held that as the
19 intrusiveness of a search increases, so does the need for
20 suspicion. Id. at 1156. In Vance, the customs inspector conducted
21 a pat-down search of Vance after noticing that his eyes were
22 glassy, he looked like he was on drugs, and his trip was too short
23 to make sense. Id. at 1155. The Court noted that a pat-down
24 required Vance to spread-eagle against a wall and have a strangers'
25 hands touch his body. Id. at 1156. It held that "minimal
26 suspicion" was required to conduct a pat-down and what the customs
27 officers knew before they patted Vance down sufficed to establish
28 "minimal suspicion." Id.

1 Hence, an invasive border search must be limited in scope, and
2 the scope must meet the reasonableness standard of the Fourth
3 Amendment. Price, 472 F.2d at 574. In the Ninth Circuit, such
4 non-routine searches require at least reasonable suspicion. United
5 States v. Ramos-Saenz, 36 F.3d 59, 61 (9th Cir. 1994); see also
6 United States v. Ek, 676 F.2d 379, 382 (9th Cir. 1982) (holding
7 that there must be a "clear indication" or "plain suggestion" that
8 the person is carrying contraband in his or her body to conduct a
9 body cavity search). In the case of non-routine, invasive searches
10 that implicate personal privacy and dignity, customs agents must
11 possess a reasonable suspicion.

12 **B. The Search of a Computer Hard Drive and Similar**
13 **Electronic Storage Devices Implicates Privacy and Dignity**
14 **Interests of a Person**

15 The Supreme Court recognized in Flores-Montano that highly
16 intrusive searches of persons implicate dignity and privacy
17 interests. Flores-Montano, 541 U.S. at 152. Likewise, opening and
18 viewing confidential computer files implicates dignity and privacy
19 interests. Indeed, some may value the sanctity of private thoughts
20 memorialized on a data storage device above physical privacy. See
21 United States v. Molina-Tarazon, 279 F.3d 709, 716 (9th Cir. 2002)
22 (recognizing that "government intrusions into the mind –
23 specifically those that would cause fear or apprehension in a
24 reasonable person – are no less deserving of Fourth Amendment
25 scrutiny than intrusions that are physical in nature"), rev'd on
other grounds, Flores-Montano, 541 U.S. 149.

26 The government argues that the officers searched Arnold's
27 tangible property, not his person, and therefore the search was
28 routine and did not require reasonable suspicion. However, as the

1 Court recognized during the evidentiary hearing, the information
2 contained in a laptop and in electronic storage devices renders a
3 search of their contents substantially more intrusive than a search
4 of the contents of a lunchbox or other tangible object.

5 A laptop and its storage devices have the potential to contain
6 vast amounts of information. People keep all types of personal
7 information on computers, including diaries, personal letters,
8 medical information, photos and financial records. Attorneys'
9 computers may contain confidential client information. Reporters'
10 computers may contain information about confidential sources or
11 story leads. Inventors' and corporate executives' computers may
12 contain trade secrets. In this case, Arnold kept child pornography
13 on his laptop and in his storage devices; however, "[i]t is a fair
14 summary of history to say that the safeguards of liberty have
15 frequently been forged in controversies involving not very nice
16 people." Montoya de Hernandez, 473 U.S. at 548 (Brennan, J.,
17 dissenting) (quoting United States v. Rabinowitz, 339 U.S. 56, 69
18 (1950) (Frankfurter, J., dissenting)).

19 **C. The Government's Search in This Case Was Not Based on a**
20 **Reasonable Suspicion**

21 On August 25, 2006, the Court conducted an evidentiary hearing
22 on Arnold's motion to suppress. During the hearing, the Court
23 listened to testimony from Peng and Arnold about the circumstances
24 giving rise to the search. Based on this testimony and the
25 evidence introduced by the parties, the Court concludes that the
26 government's search of Arnold was not based on an articulable,
27 reasonable suspicion.

28 ///

1 First, the government has not provided the Court with any
2 record of the search that was completed at or near the time of the
3 incident. The only writing that contemporaneously memorialized the
4 search is a standard customs report that Peng and various officers
5 filled out after the search occurred. The government did not
6 introduce this customs report into evidence. Peng testified that
7 she did not write her reasons for searching Arnold in her portion
8 of the customs report.

9 Although the customs report was not introduced into evidence,
10 and Peng had not written the complete report herself, Peng relied
11 on the report when preparing a memorandum regarding the search.
12 This memorandum, written nearly a year after the search, is Peng's
13 only memorialized account of the incident. The memorandum is
14 slightly longer than one page, and was prepared by Peng at the
15 government's request. The government relied on Peng's memorandum
16 when preparing her declaration. Peng's declaration and testimony
17 are the sole factual basis for the government's opposition to this
18 motion.

19 Given these facts, the Court is not satisfied with the
20 government's broken chain of documentation in this case. To
21 determine whether the government had an objectively reasonable
22 basis for searching Arnold, the Court must rely on accounts of the
23 circumstances surrounding the search. Here, the Court has no means
24 of reviewing the government's initial account of the search.
25 Instead, the Court must rely on a memorandum written a significant
26 period of time after the search occurred and based in part on the
27 recollections of other people. Moreover, although Peng testified
28 that she relied on the customs report to prepare her account of the

1 search, Peng also stated that she had never written her reasons for
2 searching Arnold in the customs report. Because Peng's
3 recollection of the search was based largely on a document that
4 Peng herself had not written and which, by Peng's own admission,
5 did not explain her rationale for searching Arnold, the Court must
6 view skeptically the government's claim that Peng's search was
7 based on an articulable reasonable suspicion.

8 Furthermore, the Court has serious concerns about Peng's
9 ability to recall the search accurately. During her testimony,
10 Peng appeared to have only a vague memory of the circumstances of
11 the search. For example, Peng could not recall how long Arnold had
12 been waiting in line before the search, or how long she observed
13 Arnold before she searched him. Moreover, although Peng testified
14 about Arnold's physical appearance and demeanor, she could not
15 remember what Arnold was wearing, the length of his hair, or if he
16 had a goatee. Similarly, Peng could not say whether Arnold was
17 looking at his laptop when she took it out of his suitcase, or if
18 he was looking at his dirty clothes on the table. Peng's inability
19 to remember the details of the search damages her credibility as a
20 witness.

21 Moreover, when Peng did provide testimony about the search, it
22 was often imprecise and internally inconsistent. For example, one
23 of Peng's stated justifications for searching Arnold was his age.
24 At the beginning of her testimony, Peng stated that on the evening
25 of the search, she was targeting single men traveling from Asia who
26 were in their "30s to 50s." Later, Peng stated that Arnold fit her
27 profile as a man in his "20s to 30s." Putting Peng's two
28 statements together, it appears that Peng was profiling men aged

1 20-59. Because this age range is so broad as to be meaningless,
2 Peng's stated reliance on Arnold's age is insufficient to justify
3 the government's search. Furthermore, in giving two different
4 answers to the same question, Peng contradicted herself. Given
5 that the government's key witness could not consistently identify
6 one of her primary reasons for searching the defendant, the Court
7 has serious concerns about relying on her testimony.

8 The Court is also concerned about the lack of consistency
9 among Peng's memorandum, her declaration, and her testimony. For
10 example, Peng's memorandum did not contain any description of
11 Arnold's purported demeanor. In her declaration and testimony,
12 however, Peng stated that Arnold appeared nervous, shifted his
13 weight, and listened to the conversations between the passengers in
14 front of him and the CBP officers. Moreover, in her declaration,
15 Peng stated that she moved Arnold's laptop some distance away from
16 his luggage as she went through his belongings. However, at the
17 hearing, she stated that she moved the laptop a foot or "maybe a
18 little less" from his suitcase.

19 Finally, in her declaration, Peng described Arnold as
20 "disheveled." When asked what "disheveled" meant, Peng stated that
21 "disheveled" meant "out of it." She then testified that disheveled
22 was not her word; it came from the government's counsel.

23 When taken together, these inconsistencies significantly
24 undermine the credibility and trustworthiness of Peng's testimony.
25 Because Peng's testimony formed the basis of the government's
26 opposition to this motion, the serious problems with her testimony
27 are fatal to the government's case.

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1 Peng's testimony not only contradicted itself; it frequently
2 ran counter to common experience. Peng testified that one reason
3 she searched Arnold was that he did not become agitated when she
4 pulled him aside for secondary questioning. When asked to clarify
5 her response, Peng stated that U.S. citizens who are selected for
6 secondary questioning typically become agitated and mad. Peng
7 explained that "normal" behavior for U.S. citizens selected for
8 secondary questioning consisted of "yelling and screaming." While
9 the Court can certainly accept that some citizens may become upset
10 when asked additional questions by a customs agent, describing such
11 behavior as the norm belies common experience.

12 Peng's testimony about Arnold's answers to her questions is
13 similarly illogical. Peng characterized Arnold's statements about
14 whom he had visited and his previous employment as "evasive," and
15 she cited his vagueness as a justification for her search.² Later
16 in her testimony, however, Peng admitted that she did not ask
17 Arnold questions that would require specific answers, and she did
18 not "push him" to clarify his answers. In light of this admission,
19 the Court cannot conclude that Arnold's answers to Peng's questions
20 were evasive or suspicious.

21 The Court does not believe that Peng's intent was to misstate
22 the circumstances of the search. However, she did not memorialize
23 her own account of the search when it occurred, and did not

24

25 ² Peng testified that she asked Arnold questions about his
26 employment before she opened files on his laptop. By contrast,
27 Arnold testified that she did not ask him additional questions
28 until she had viewed his files. If the Court takes Arnold's
testimony as true, then Arnold's purported "evasiveness" about his
employment could not have given rise to a reasonable suspicion
necessary to justify the computer search.

1 understand vocabulary in her own declaration. Given Peng's failure
2 to contemporaneously record her account of the search, her
3 inability to describe the events with specificity or precision, and
4 her inconsistent testimony, the Court is not able to resolve any
5 factual disputes in the government's favor.

6 When determining whether a Fourth Amendment violation has
7 occurred, it is the government that bears the burden of
8 demonstrating that its search was reasonable. Here, the government
9 has presented no credible evidence that Arnold was behaving in a
10 way that would justify an invasive search. When Peng approached
11 Arnold, he had just completed a twenty-hour flight from the
12 Philippines. During this flight, he had passed through many time
13 zones. He had been waiting in a long customs line with 200 to 300
14 other travelers. As Peng testified, there is no one way that
15 someone behaves while waiting in the customs line after arriving in
16 the United States on a long, international flight. Even if Arnold
17 was moving around in the customs line, listening to others'
18 conversations, and looking at his laptop when Peng went through his
19 luggage, such behavior is not inconsistent with that of an innocent
20 traveler, waiting in a customs line after a 20-hour flight, who is
21 approached by an officer for secondary questioning and whose
22 personal belongings are being inspected.

23 Furthermore, even presuming that Peng thought Arnold looked
24 nervous, nervousness is likely a common reaction to questioning by
25 government officials. Moreover, nervousness alone does not warrant
26 reasonable suspicion. See Guadalupe-Garza, 421 F.2d at 879-80
27 (holding that the fact that the appellant "tilted his head," "shied
28 away," and appeared nervous did not warrant the suspicion required

1 for a strip search). A search based on such highly subjective,
2 generalized criteria as "nervousness" cannot withstand
3 constitutional scrutiny.

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4 In every Fourth Amendment case, the Court must consider the
5 circumstances of the search without the benefit of hindsight. The
6 fact that the officers' search uncovered what they believe to be
7 child pornography does not transform what was at best a hunch into
8 the reasonable suspicion necessary for an invasive search. "[A]
9 search is not to be made legal by what it turns up. In law it is
10 good or bad when it starts and does not change character from its
11 success." United States v. Di Re, 332 U.S. 581, 595 (1948). Thus,
12 to justify its intrusive search, the government must show that the
13 search was based on an articulable reasonable suspicion that Arnold
14 was carrying contraband in his laptop computer. For the foregoing
15 reasons, the government has not met its burden in this case.
16 Accordingly, the Court holds that the government's search of
17 Arnold's computer and electronic storage devices violated the
18 Fourth Amendment. Therefore, all evidence obtained as a result of
19 this illegal search must be suppressed.

20

21 III. CONCLUSION

22 In balancing the Fourth Amendment interests here, on one side
23 is the desire to prevent the clear evil of smuggling through
24 laptops and other storage devices child pornography and other
25 informational contraband, such as the plans for a bomb or a list of
26 possible terrorist suspects. In our information age, such
27 contraband can flow with the click of a mouse through the Internet.
28 On the other side of the scale is the liberty interest in one's

1 ability to travel with vast amounts of private information. This
 2 information can be highly personal, privileged, and valuable. To
 3 conduct a search of this type without reasonable suspicion goes
 4 well beyond the goals of the customs statutes and the
 5 reasonableness standard articulated in the Fourth Amendment.
 6 Therefore, while it is appropriate to turn on or x-ray a laptop or
 7 other device to ensure that it functions and does not physically
 8 contain drugs or other dangerous substances, a search of the
 9 information contained therein requires a reasonable suspicion.

10 The airport search of Arnold's laptop, CDs, hard drive and
 11 memory stick was not supported by reasonable suspicion. The
 12 government must sustain the burden of establishing the
 13 constitutionality of the search and seizure of the laptop and
 14 storage devices. Because it has not done so, the Court grants the
 15 motion to suppress.

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 17 IT IS SO ORDERED.

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 20 Dated: October 2, 2006



DEAN D. PREGERSON
 United States District Judge

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