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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

UNITED STATES OF AMERICA,	**No. CR 10-475-KI**
Plaintiff,	**MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS THE PRODUCTS OF NON-FISA INTERROGATIONS, SEARCHES, AND SEIZURES**
v.	
MOHAMED OSMAN MOHAMUD,	
Defendant.	

Introduction

This case involves unique applications of standard law regarding the scope and voluntariness of consent to searches and seizures of Mr. Mohamud's electronic stored information, as well as the voluntariness of statements made on November 2, 2009. Prior to that time, the government surveilled Mr. Mohamud, apparently pursuant to the Foreign Intelligence Surveillance Act (FISA),

so in the chronology and causation necessary to Fourth and Fifth Amendment analyses, this motion is inextricably intertwined with the separately filed FISA motions. Another unique aspect of the intrusions on privacy in this case is the parallel involvement of the federal government, which surreptitiously participated in the interrogations, searches, and seizures conducted by state and local authorities. Essentially, the non-federal actors contacted Mr. Mohamud regarding an investigation into a potential crime, of which Mr. Mohamud was completely innocent. Instead of simply investigating the allegations and exonerating him, the non-federal actors contacted federal agents who, unbeknownst to Mr. Mohamud, became involved in the interrogation and took possession of and searched Mr. Mohamud's computer and cell phone, which had been handed over solely to establish his innocence of the state offense. Under the circumstances of this case, the government cannot establish that the interrogations, searches, and seizures were within the scope of any valid consent or otherwise lawful. This Court should therefore order the suppression of all fruits of the constitutional violations.

Relevant Facts From Discovery Regarding Interrogations And Warrantless Searches And Seizures Of Mr. Mohamud's Laptop Computer And Cell Phone.

Based in part on FISA electronic surveillance, the government began non-FISA visual surveillance of Mr. Mohamud on the campus of Oregon State University from at least October 4, 2009. On November 1, 2009, the campus station of the Oregon State Police received information that resulted in an investigation regarding a sexual encounter the previous night. After a Halloween party, Mr. Mohamud became intimate with a fellow student: the pair were seen together dancing, flirting, and talking; they were both drinking but not to apparent incapacitation; and he walked her home afterwards. However, the next day she reported being concerned that she had been given drugs

in a beer handed to her by a stranger, not Mr. Mohamud, and not remembering the sexual encounter. The police tested her for drugs and, eventually, received negative results for any date rape drugs. The investigation corroborated Mr. Mohamud's account of a consensual encounter, resulting in notification to Mr. Mohamud on January 14, 2010, that the investigation cleared him.

The non-FISA investigation regarding the drug issue would not be controversial except for the federal involvement: Mr. Mohamud met with state officers and told them fully and truthfully that he had not given her any drugs and that the sex was completely consensual. However, the police reports, incomplete as they appear to be, indicate that the federal agents used the state officers to mask the separate and undisclosed federal investigation.

On the evening of November 1, 2010, Oregon State Police officers called Mr. Mohamud and asked him to meet with them. Shortly thereafter, Mr. Mohamud met the officers at his dorm room. The officers asked him to accompany them in a police car to the campus police station, which he did. After reading *Miranda* rights, the officers asked Mr. Mohamud whether he had drugged his companion and to tell them what occurred from Saturday night to Sunday morning. Mr. Mohamud explained that he did no such thing and described his activities during the relevant time, also providing a written statement explaining his activities and that he only engaged in consensual sex.

The next day, the state officer called Mr. Mohamud and again set up a time for him to come to the station. At around 1:00 p.m. on November 2, 2010, Mr. Mohamud appeared at the campus office of the Oregon State Police. This time, federal agents were present and monitored the questioning from a concealed location. Mr. Mohamud, after being reminded of *Miranda* rights, submitted to a polygraph examination in which he repeatedly denied providing any drugs or being aware of any drugs being provided to the woman. The federal "agents were permitted to observe the

[state officer's] polygraph interview/examination from an adjacent room." Although not described in the state officer's report, the federal report establishes that this interview expanded substantially beyond the subjects covered in the first interview. From the interview, the federal officers obtained information about Mr. Mohamud's personal background, including his educational plans, family constellation, and attitude toward Somalia. The federal officers also noted Mr. Mohamud's admitted use of drugs and alcohol and that "Mohamud is very concerned that his parents will freak out if they find out about the investigation or his use of drugs and alcohol."

The state officer questioned Mr. Mohamud regarding his computer, asking if it would reflect searches for date rape drugs. The officer's report states that Mr. Mohamud "offered for me to look at his computer *to make sure he was not researching date rape drugs*" (emphasis added). Both the context and the explicit words only anticipated a limited search to determine whether sites had been accessed relative to certain drugs. Mr. Mohamud provided a hand-written "permission" for "the Oregon State Police" to seize and to search his laptop computer and his cell phone; he also provided his password (Exhibit A). The state officers seized the computer and then, unbeknownst to Mr. Mohamud, provided the laptop and cell phone to the Federal Bureau of Investigation. The federal agents then gave the computer to the Eugene Police Department Computer Crimes unit, which made a mirror image of the hard drive at about 5:13 p.m. on November 2, 2009.

The federal and state accounts of the relevant events regarding the seizure and search of electronic stored data vary because the contemporaneous state reports omit federal involvement. The state reports do not reflect the personal information adduced at the second interview that was irrelevant to the state investigation. Further, the reports are inconsistent regarding federal involvement in the seizure and search. For example, the state officer asserts, "I seized the computer

and had the hard drive imaged by the Eugene Police Department Computer Crimes unit." In contrast, the Eugene police department computer specialist stated, "A computer under this case was originally submitted to me on November 2, 2009, by FBI Analyst Bill Tanton and Special Agent Chris Luh." The computer specialist also stated, "I was asked to make a forensic image of this computer and wait for further instructions."

From the reports, there is no indication that the computer was ever searched to determine whether date rape drugs were researched, nor does the computer specialist indicate he was even asked to do so. The state computer expert imaged the computer and copied four folders and their contents onto a disk, which he then provided to a federal agent. The federal agents also copied out three pages of information from Mr. Mohamud's cell phone.

The discovery does not clearly set out all subsequent searches of material from the computer. Although the state investigation was closed, the federal agents obtained further images at other times and conducted general searches of the electronically stored information unrelated to whether Mr. Mohamud accessed information regarding date rape drugs. For example, the state computer specialist stated, "I was later requested to copy some specific information from the computer on 12/29/09 which I provided to [FBI Analyst] Tanton." The discovery does not indicate that the Oregon State Police, the only entity authorized to search, ever performed any task other than handing it over to the federal agents.

Within seven days of the federal agents' search and seizures, the Bill Smith emails from a federal agent to Mr. Mohamud began, encouraging him to do violence in the United States. The government knew from the second interview that Mr. Mohamud planned to complete his studies at Oregon State University and could base its communications on information obtained regarding his

personal life. The distribution and use of the products of the searches and seizures of electronic information have not been provided in discovery.

A. The Federal Government's Searches And Seizures Of Mr. Mohamud's Computer And Cell Phone Exceeded The Scope Of Any Consent And Were Unlawful.

The warrantless searches and seizures in this case are per se unreasonable, subject only "to a few specifically established and well delineated exceptions." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971). The exception to the warrant requirement for consent must be "jealously and carefully drawn." *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (citing *Jones v. United States*, 357 U.S. 493 (1958)); *see Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1018 (9th Cir. 2008) (noting the "narrow scope" of the consent exception). While consensual searches are permissible without a warrant, the government must establish that the search and seizure is within the scope of the consent given by the defendant, which "is generally defined by its expressed object." *Florida v. Jimeno*, 500 U.S. 248, 251 (1991) (citing *United States v. Ross*, 456 U.S. 78 (1982)). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.*

Under *Jimeno*'s objective standard, this is an easy case. The exchange at the state police office between the state officer and the student described the consent in unmistakably clear and limited terms: the officer could "look" at the computer "to make sure [Mr. Mohamud] was not researching date rape drugs." Given the context in which the state officers obtained the purported consent, no reasonable person would consider it permission to authorize either 1) imaging and repeated imaging of the computer, 2) providing computer images to federal authorities (especially

where the written permission specified "the Oregon State Police"), or 3) rummaging through the stored data a) that had nothing to do with whether the computer was used to research date rape drugs and b) that occurred at times far attenuated from the initial contact. Because the search exceeded the scope of any consent, the products of such searches and seizures must be suppressed. *Randolph*, 547 U.S. at 123; *United States v. Washington*, 739 F.Supp. 546, 550-51 (D.Or.1990). Further, the officers' deception forecloses a finding of a voluntary consent to the search and seizure of the electronic information. *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990)

1. The General Search And Seizure Of Electronic Storage Devices Far Exceeded The Reasonable Scope Of Any Consent, Especially Given The Privacy Protections Recognized For Personal Computers And Other Electronic Communication Storage Devices.

Courts have directly applied *Jimeno* to require suppression of the products of computer searches that are beyond the stated purpose of the request for consent. For example, in *United States v. Richardson*, 583 F.Supp. 2d. 694 (W.D. Pa. 2008), several federal customs agents represented that they were investigating identity thieves who were purportedly targeting the defendant. For this purpose, the defendant gave oral and written consent for a search of his computer. In reality, the federal agents were investigating the defendant regarding child pornography. The court suppressed the products of the search as beyond the scope of the consent, stating: "Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search." *Id*. at 715 (quoting *United States v. Dichiarinte*, 445 F.2d 126, 129 (7th Cir.1971)). The court specifically noted that the general written consent did not expand the scope of the search beyond the oral reason for the search. *Id*. at 718-19.

Similarly, in *People v. Prinzing*, 389 Ill.App.3d 923, 907 N.E. 2d 87 (2009), the Illinois Supreme Court held that the police exceeded the scope of a computer search by going beyond its articulated purpose. The police requested access to the computer in order to determine whether the defendant's system had been compromised, resulting in fraudulent use of his credit card number by others. Agreeing with *Richardson*, the court held that the consent only applied to the search for viruses, not the search for images that occurred. *Prinzing*, 907 N.E.2d at 99-100. Even though – unlike the present case – the defendant was present during the search, the court held that the products of the search that were beyond the scope of consent had to be suppressed. *Accord State v. Bailey*, 898 A.2d 716 (Me. 2010) (search of video files suppressed because beyond the scope of consent to search computer to determine whether he was accessing his neighbor's wireless router without permission); *United States v. Parsons*, 599 F.Supp.2d 592, 609-10 (W.D. Pa. 2009) (where police claimed they were investigating whether defendant was the victim of identity theft, search of computer for pornography exceeded the scope of the consent given).

Upholding the limited scope of a consent is especially important in light of judicial recognition of the substantial privacy interest in electronically stored data. In the context of *warranted* searches of electronic storage devices, the Ninth Circuit en banc has noted the central role of computers as repositories for material within core zones of privacy, requiring careful limitations to avoid unlawful general searches. *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1177 (9th Cir. 2010) (en banc). Where there is no neutral magistrate interposed between the citizen and the government, the need to enforce the *Jimeno* limitation regarding the scope of consent for a computer search is especially important given the highly personal data maintained on computers. *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) ("For most people, their

computers are their most private spaces."); *see generally* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 569 (2005) ("[C]omputers are playing an ever greater role in daily life and are recording a growing proportion of it . . . . [T]hey are postal services, playgrounds, jukeboxes, dating services, movie theaters, daily planners, shopping malls, personal secretaries, virtual diaries, and more.").

The holding of *Jimeno* has been directly applied to computer searches under circumstances indistinguishable from the present case. The repeated seizures of the computer and its images, as well as the searches of the electronic data, far exceeded the articulated purpose of looking to see if there was research of date rape drugs. The Court should find a violation of the Fourth Amendment, requiring suppression of the products of the searches and seizures.

2. The Searches And Seizures Were Also Unlawful Because The Government Cannot Establish That The Officers Obtained A Voluntary Consent.

The officers' ruse to obtain and to search Mr. Mohamud's electronic data also forecloses the government from carrying its burden of proving a free and voluntary consent. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968); *see United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990) ("[A]ccess gained by a government agent, known to be such by the person with whom the agent is dealing, violates the fourth amendment's bar against unreasonable searches and seizures if such entry was acquired by affirmative or deliberate misrepresentation of the nature of the government's investigation.") (quoting *United States v. Little*, 753 F.2d 1420, 1438 (9th Cir. 1984)). "Where consent is obtained through a misrepresentation by the government . . . such consent is not voluntary." *United States v. Rothman*, 492 F.2d 1260, 1265 (9th Cir. 1973) (citations omitted); *see also United States v. Garcia*, 997 F.2d 1273, 1280 (9th Cir. 1993) ("Nor can a government agent

obtain entry 'by misrepresenting the scope, nature, or purpose of the investigation.'") (quoting *Bosse*, 898 F.2d at 115). Although "not all deceit and trickery" by government agents is improper, "when the police misrepresentation of purpose is so extreme that it deprives the individual of the ability to make a fair assessment of the need to surrender his privacy . . . the consent should not be considered valid." *United States v. Harrison*, 639 F.3d 1273, 1280 (10th Cir. 2011) (quoting 2 Wayne R. LeFave et al., CRIMINAL PROCEDURE, § 3.10(c) (3d ed. 2007)).

The Ninth Circuit provided the basic rules on ruse consents in *Bosse*. In that case, a gun dealer consented to a search by state officers who purported to be conducting a state firearms regulatory inspection. Unbeknownst to the gun dealer, an agent of the federal Bureau of Alcohol, Tobacco, and Firearms accompanied the state officers, intent upon investigating the gun dealer's alleged violation of federal weapons laws. A state officer said the BATF agent "is with me," pursuant to which the gun dealer allowed the federal agent access to the premises. "In these circumstances, [the federal agent's] silence amounted to a deliberate representation that his purpose was that announced by [the state officer], and a deliberate misrepresentation of his true purpose." *Bosse*, 898 F.2d at 115. Therefore, the surreptitious entry was illegal. *Id.*; *accord Commonwealth v. Slaton*, 530 Pa. 207, 217, 608 A.2d 5, 10 (1992) (undisclosed shift in purpose of investigation rendered consent constitutionally invalid).

The present case is indistinguishable: the federal agents silently and surreptitiously permitted the state officers' explanation of their purpose to disguise the true purpose of the federal intrusion of the protected zone of privacy. As held in *Bosse*, the federal activity "must be limited to the purposes contemplated by the suspect." 898 F.2d at 115. "A ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which

the agent seeks entry cannot be justified by consent." *Id*. (citing *United States v. Phillips*, 497 F.2d 1131, 1134-35 (9th Cir. 1974)).

While government investigators need not disclose their every purpose and motivation, the gap between the state officers' declared purpose of establishing no research of drugs and the federal government's undisclosed purpose of learning every private fact about Mr. Mohamud's personal life rendered any consent involuntary. Mr. Mohamud agreed to give his computer to the "Oregon State Police" to "look" at it for the purpose of "mak[ing] sure he was not researching date rape drugs." The officers immediately turned over the computer to federal agents, who proceeded to have the hard drive imaged within a few hours. Federal law enforcement continued to image and to access the imaged computer on subsequent occasions for purposes unrelated to the state investigation.

The rationale for the *Bosse* rule fully applies to the present case: When the government seeks a citizen's cooperation based on governmental authority, the citizen should be able to rely on the officers' representations. "We think it clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust." *Id*. (quoting *SEC v. ESM Government Securities, Inc.*, 645 F.2d 310, 316 (5th Cir. 1981)). "If people can't trust the representations of government officials, the phrase 'I'm from the government and I'm here to help' will become even more terrifying." *United States v. Alverez-Tejeda*, 491 F.3d 1013, 1017 (9th Cir. 2007). This concern reaches its zenith "when government officials lie in order to gain access to places and things they would otherwise have no legal authority to reach." *Id*. As in *Bosse*, the federal officer's silence "amounted to a deliberate representation that his purpose was that announced [by the state officer], and a deliberate misrepresentation of his true purpose." 898 F.2d at 115. The "widely shared social expectations,"

Randolph, 547 U.S. at 111, that provide the touchstone for reasonableness include that the government will not deceive its citizens into surrendering privacy rights. *See also* David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L. J. 1, 40 (2006) ("If legal or illegal immigrants in these communities fear the police, whether for good reasons or bad, they will avoid the police in every way possible, going out of their way to steer clear of officers.").

3. Because The Statements On November 2 Were Obtained Based On Material Omissions And False Pretenses, The Government Cannot Carry Its Burden Of Proving They Were Made Knowingly, Intelligently, And Voluntarily.

The police interrogation on November 2, which apparently led to the electronic data seizure and search, suffers the same type of invalidity as the purported consent. *See Doody v. Ryan*, 2011 WL 1663551, *18 (9th Cir. May 4, 2011) (en banc) (citing *Schneckloth* for the proposition that a suspect's statement must be suppressed as involuntary because, "if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."). The government bears the burden of proving, at least by a preponderance of the evidence, the voluntariness of any *Miranda* waiver and the voluntariness of the statement itself. *Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004); *Lego v. Twomey*, 404 U.S. 477, 489 (1972). While some police misdirection is tolerated, an important factor is whether the statement was "obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence." *See Brady v. United States*, 397 U.S. 742, 753 (1970) (quoting *Bram v. United States*, 168 U.S. 532, 542-543 (1897)).

Based on the reasoning of *Bosse*, the degree of deception in the present case forecloses a finding of a knowing, intelligent, and voluntary waiver of Fifth Amendment rights. *See Pollard v.*

Galaza, 290 F.3d 1030, 1035 (9th Cir. 2002) (finding statement voluntary in part because the officer "did not misrepresent the nature or purpose of the interview."); *United States v. McCrary*, 643 F.2d 323, 328 (5th Cir. 1981) ("It is difficult to discern how a waiver of these rights could be knowing, intelligent and voluntary where the suspect is totally unaware of the offense upon which the questioning is based."); *United States v. Schenk*, 293 F.Supp. 26, 29 (D.Mont. 1968) ("Certainly it stands to reason that a suspect cannot intelligently make the decision as to whether he wants counsel if knowledge of the crime suspected is withheld from him."). In determining whether the government carries its burden of establishing voluntariness, the Court should also consider Mr. Mohamud's known vulnerabilities because, for example, the federal agents knew he had just turned 18 the previous August and was considered immature for his age. *Compare Colorado v. Connelly*, 479 U.S. 157, 165-67 (1986) (because police were unaware of suspect's mental illness, psychological vulnerability did not render statement involuntary), *with Blackburn v. Alabama*, 361 U.S. 199, 207-08 (1960) (exploitation of known psychological vulnerability led to suppression of statement and its fruits). Because the government cannot carry its burden given the deception of a teenager, the statements beyond the scope of the state investigation should be suppressed, as well as any fruit of those statements including the purported consent.

B. The Court Should Order The Suppression Of All Evidence And Investigative Actions That The Government Cannot Prove Were Not The Products Of Unlawful Interrogations, Seizures, And Searches.

To serve the exclusionary rule's function of deterring unlawful police conduct, the "fruit of the poisonous tree doctrine" expands the exclusionary rule to the use of evidence derived indirectly from illegal conduct. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963). In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), the Supreme Court stated: "The essence of

a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be used at all*" (emphasis added). The exclusionary rule should put the prosecution in the same position as it would have been in if the illegality had never transpired, neither better nor worse. *Nix v. Williams*, 467 U.S. 431, 443 (1984) ("[T]he prosecution is not to be put in a better position than it would have been if no illegality had transpired.").

This principle that the prosecution should not benefit, and the defendant should not suffer, from constitutional violations applies to official actions taken in reliance on the products of illegal conduct. *Murray v. United States*, 487 U.S. 533, 542 (1988). In *Murray*, the Court held that the decision to seek a warrant must be free from the taint of prior unlawful conduct. *Id*. In that case, government agents conducted an unlawful search during which they saw bales of marijuana. *Id*. at 535. They then obtained a warrant to search the area where they had discovered the drugs, without mentioning the prior search or observations made during the search. *Id*. at 536. The Court held that, on remand, the district court must inquire whether the government would have acted as it did absent the illegal search. *Id*. at 542. If not, then the evidence must be suppressed. *Id*.

Justice Scalia made clear that the exclusionary rule applied to the decision to seek a warrant and that the government bore the burden of establishing the independent basis for its action:

> The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry . . . .

Id. In a footnote, the Court emphasized that the critical question was how to assure that the government did not obtain an advantage from its illegal conduct:

> To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred . . . . [W]hat counts is whether the actual illegal search had any effect in producing the warrant . . . Only that much is needed to assure that what comes before the court is not the product of illegality.

Id. at 543 n.3. To the same extent, this Court must determine whether the unlawfully obtained statements, seizures, and searches "had any effect in producing" the direct contacts by federal agents with Mr. Mohamud, in which the government encouraged him to engage in violence against his country.

In this case, state and federal officials violated Mr. Mohamud's Fourth and Fifth Amendment rights to be free from unreasonable searches and seizures and from encroachments on the privilege against self-incrimination. They then exploited the violation of Mr. Mohamud's constitutional rights by using the information as part of the formulation of a sting operation against Mr. Mohamud. The causation is remarkably apparent: within seven days of the intrusions, government agent Bill Smith initiated his communication with Mr. Mohamud. The communication utilized information about Mr. Mohamud's personal life, which was later refined by the second team of agents with direct contact

with Mr. Mohamud. Under *Wong Sun* and *Murray*, the Court should enter an order suppressing all evidentiary and investigative products of the unlawful interrogations, seizures, and searches.

Dated this 22nd day of June, 2011.

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