

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : Criminal No. 1:07-CR-00211
 :
 v. : (Chief Judge Kane)
 :
 ROBERT ELLSWORTH CRIST, III : (Electronically Filed)

BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE

AND NOW, comes the defendant, Robert E. Crist, III, by his attorney, Frederick W. Ulrich, of the Federal Public Defender's Office, and files the following brief in support of his Motion to Suppress Evidence.

I. Procedural History

On May 23, 2007, a grand jury returned a two-count indictment charging Robert E. Crist, III, in Count I, with receiving digital images and video files containing child pornography that had been mailed, shipped, and transported in interstate commerce by means of the internet, in violation of 18 U.S.C. §2252A(a)(2)(A), (b); and, in Count II, with unlawfully possessing digital images and video files located in the hard drive of his personal computer and other material that contained child pornography that had been mailed, shipped, and

transported in interstate and foreign commerce by means of the internet and that were produced using materials that had been mailed, shipped, and transported in interstate and foreign commerce, in violation of 18 U.S.C. § 2252A(a)(5)(B), (b).

On May 29, 2007, Mr. Crist was arrested, appeared before the Honorable J. Andrew Smyser, entered a plea of not guilty to the indictment and, following a detention hearing, was ordered detained. On July 24, 2007, Your Honorable Court reviewed the initial detention order and ordered Mr. Crist released on conditions. Trial in this matter is currently scheduled to commence with the drawing of a jury on Tuesday, September 4, 2007, with pretrial motions due on or before August 15, 2007.

II. Factual Background

During the early part of the summer of 2005, Mr. Crist was renting a home at 401 Erford Road, Camp Hill, Pennsylvania. *See* (Exhibit “A” lease agreement); (Exhibit “B” Supplemental Police Rep’t). Although a formal eviction process was not initiated, on August 10, 2005, individuals were retained by the landlord to clean the Erford Road property and ready it for a new tenant. *See* (Exhibit “B”); (Exhibit “C” East Pennsboro Twp. Police Rep’t). During the course of cleaning the property, certain of Mr. Crist’s personal effects were moved to the curb outside the residence. *See* (Exhibit “D” Supplemental Police Rep’t).

Upon learning that his property was being moved outside, Mr. Crist contacted an agent of the landlord, requesting that such action be stopped and advising that he would have his personal property moved out by the following day. Despite assurances from the landlord's agent, Mr. Crist's computer was taken. *See* (Exhibit "E" Supplemental Police Rep't). Mr. Crist reported the theft to the East Pennsboro Township Police Department. *See* (Exhibit "B"); (Exhibit "F" Theft Rep't).

On August 13, 2005, the individuals who had taken Mr. Crist's computer, advised the East Pennsboro Township Police Department that they had accessed the machine, observed child pornography, and then deleted the files. *See* (Exhibit "C"). Mr. Crist's computer was delivered into the custody of the police and, thereafter, subjected to searches and a forensic examination by the Office of the Attorney General. *See* (Exhibit "C"); (Exhibit "F" Supplemental Police Rep't). The various searches of the computer were conduct without prior judicial authorization and revealed suspected child pornography.

Approximately a year and one half after the computer was stolen, Mr. Crist was interrogated at his residence by agents of the Federal Bureau of Investigation and a detective with the East Pennsboro Township Police Department. *See* (Exhibit "H" F.B.I. Rep't). Mr. Crist was not advised of his constitutional rights

prior to or during the course of this interview. *See* (Exhibit “H”). Nevertheless, Mr. Crist requested, on at least two occasions, the opportunity to consult with an attorney. The interrogation continued despite Mr. Crist’s requests for counsel.

III. Issues

1. Whether the warrantless searches of Mr. Crist’s personal computer violated the Fourth Amendment to the United States Constitution, thus requiring suppression of the evidence?
2. Whether Mr. Crist’s statement should be suppressed, as it was involuntary and elicited in violation of his constitutional rights and public policy?

IV. Argument

- 1. The Warrantless Searches of Mr. Crist’s Personal Computer Violated the Fourth Amendment to the United States Constitution, Thus Requiring Suppression of the Evidence.**

The Fourth Amendment to the United States Constitution protects the “right of the people to be secure in their persons, houses, *papers, and effects*, against unreasonable searches and seizures.” U.S. CONST. amend. IV (emphasis added). This right is protected by the requirement that searches and seizures be conducted with prior judicial approval. *See Katz v. United States*, 389 U.S.347, 359 (1967) (emphasizing that, the procedure of antecedent justification is central to the Fourth Amendment). In this same vein, it is not the form of the interest at stake, but

whether the individual had an actual expectation of privacy that society would recognize as reasonable. *See id.* at 361 (Harlan, J., concurring).¹

Here, Mr. Crist reported that his personal computer had been stolen, the police received the machine with knowledge of its owner identity, *see* (Exhibit “C”), and there was no exigency that would have excused the failure to obtain a search warrant. *Cf. United States v. Peterson*, 294 F. Supp. 2d 797, 800 (D. S.C. 2003) (involving information respecting child pornography received via a report from a computer technician, which the police used to secure a search warrant). Although a computer presents a different circumstance for purposes of Fourth Amendment analysis, the fact that personal-private information is stored in electronic or computerized form does not, alone, take it outside the purview of such Amendment. *See generally* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, §2.6(f) (4th ed. 2004) (referencing the *Katz* test and the irrelevance of physical under the Fourth Amendment). More important, computerized information stored on a machine in the home is, in certain respects, akin to personal papers in a filing cabinet, albeit an extremely large one. *See United States v. Adjani*, 452 F.3d 1140, 1152 (9th Cir. 2006).

¹ Justice Harlan’s “reasonable expectation of privacy” test was adopted by a majority of the Court in *Smith v. Maryland*, 442 U.S. 735, 740-41 (1979).

Indeed, in other contexts under the Fourth Amendment, courts have observed that the search and seizure of a computer requires careful scrutiny of the particularity requirement, because of the storage capacity of the device and the likelihood of discovering intermingled documents. *See generally United States v. Carey*, 172 F.3d 1268, 1275 n.7 (10th Cir. 1999). In this regard, while it may be impractical in some cases to conduct an onsite search of the computer and its files, a warrant and its application, to satisfy the particularity requirement, should set forth the standard that the Government proposes to use to specify what types of files will be sought during the search. *See, e.g., In re Search of 3817 W. End*, 60621, 321 F. Supp. 2d, 953, 960 (N.D. Ill. 2004); *United States v. Hunter*, 13 F. Supp. 2d 574, 584 (D. Vt. 1998) (observing that, “there is no justification for favoring those who are capable of storing their records on computer over those who keep hard copies of their records...”). Indeed, the Department of Justice’s own manual respecting computer searches and seizures recommends the inclusion of a search strategy in the probable cause affidavit. *See United States v. Maali*, 346 F. Supp. 2d 1226, 1246 (M.D. Fla. 2004).

In the above instances, the concern was with the scope of the search warrant, whereas here no effort was made to obtain a warrant. Courts have recognized the necessity of obtaining a warrant to retrieve electronic data. *See*,

e.g., *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, *1 (N.D. Cal. May 23, 2007) (concluding that, the police should have obtained a warrant before searching a cellular telephone, which the Court noted contained highly personal information); *see also United States v. Lynch*, 908 F. Supp. 284, 287 (D. V.I. 1995) (finding that, a reasonable expectation of privacy existed in a pager). The rationale for such authorization applies with greater force in the context of a computer, which may contain vast amounts of personal information in the form of letters, financial records, diaries, etc. *See United States v. Arnold*, 454 F. Supp. 2d 999, 1003, 1004 (C.D. Cal. 2006); *United States v. Barth*, 26 F. Supp. 2d 929, 936-37 (W.D. Tex. 1998) (holding that, a reasonable expectation of privacy existed in the contents of a computer hard drive sufficient to require protection of the warrant requirement).² Absent prior judicial approval or any exigent circumstance, the search of Mr. Crist's personal computer violated the Fourth Amendment and the evidence seized/recovered as a result of this search must be suppressed. *See id.*

² *Accord United States v. Costin*, No. 3:05-CR-38 JCH, 2007 WL 2522377, *7 n.7 (D. Conn. July 31, 2007) (collecting cases).

2. Whether Mr. Crist's Statement Should be Suppressed, as it was Involuntary and Elicited in Violation of his Constitutional Rights and Public Policy.

In this case, the police interrogated Mr. Crist without advising him of his constitutional rights, and such questioning continued after he had requested the opportunity to consult with an attorney. In general, where law enforcement officials conduct a custodial interrogation, statements made by the suspect must be suppressed, unless he was advised of his constitutional rights prior to the interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 479 (1966). Custody, for purposes of *Miranda* warnings, is based upon whether the individual has been deprived of his freedom of action in a significant way. *See Oregon v. Mathiason*, 429 U.S. 492, 494 (1977) (*per curiam*). Interrogation occurs when law enforcement words or actions are likely to elicit an incriminating response. *See Rhode Island v. Innis*, 446 U.S. 291, 300 (1980).

Presently, because the interrogation occurred at Mr. Crist's home and because he was not restrained and was not arrested until some months later, he was not in custody. *See Mathiason*, 429 U.S. at 495. Consequently, the Fifth Amendment protections afforded under *Miranda* would not apply. *See id.* Similarly, the Sixth Amendment right to counsel is not applicable, where, as here, adversarial proceedings have not yet commenced. *See McNeil v. Wisconsin*, 501 U.S.171, 175 (1991).

Although the precise issue advanced by Mr Crist has not been directly addressed by the United States Supreme Court, in *dicta*, the Court has indicated that the *Miranda* protections cannot be anticipatorily invoked. *See McNeil*, 501 U.S. at 182 n.3.³ That said, as a matter of public policy and consistent with due process principles, a request for counsel should be honored and the failure to do so should warrant suppression. Nevertheless, while the prophylactic protections of the Fifth and Sixth Amendments would not, in this circumstance, create a presumption of coerciveness, *see, e.g., Commonwealth v. Morgan*, 610 A.2d 1013, 1018 (Pa. Super. 1992), the absence of counsel may also inform the voluntariness surrounding a statement. In this regard, a confession or admission must be the product of a rational intellect and free will. *See Blackburn v. Alabama*, 361 U.S. 199, 208 (1960). The test for voluntariness is based upon the totality of the circumstances. *See Arizona v. Fulminante*, 499 U.S. 279, 285-86 (1991).

In the present case, Mr. Crist was confronted by three law enforcement officers, accused of a crime, and advised that he should confess. He requested an opportunity to consult with counsel and this request was ignored. Under these circumstances, his statements were involuntary and, accordingly, should be suppressed.

³ *See also State v. Relford*, 623 N.W.2d 343, 348 (Neb. App. 2001) (collecting cases).

V. Conclusion

WHEREFORE, the Defendant, Robert E. Crist, III, respectfully requests that Your Honorable Court order a hearing on his motions to suppress and, thereafter, suppress the evidence seized from his computer and any statements he made to governmental agents.

Respectfully submitted,

Date: August 15, 2007

/s/ Frederick W. Ulrich

FREDERICK W. ULRICH, ESQUIRE

Attorney ID # PA44855

Federal Public Defender's Office

100 Chestnut Street, Suite 306

Harrisburg, PA 17101

Tel. No. (717) 782-2237

Fax No. (717) 782-3881

<*fritz_ulrich@fd.org*>

Attorney for Robert Ellsworth Crist, III

CERTIFICATE OF SERVICE

I, Frederick W. Ulrich, of the Federal Public Defender's Office, do hereby certify that I served a copy of the **BRIEF IN SUPPORT OF MOTION TO SUPPRESS EVIDENCE**, via Electronic Case Filing, or by placing a copy in the United States Mail, first class in Harrisburg, Pennsylvania, addressed to the following:

CHRISTY H. FAWCETT, ESQUIRE
United States Attorney's Office

[REDACTED]
[REDACTED]
[REDACTED]

ROBERT ELLSWORTH CRIST, III

[REDACTED]
[REDACTED]

Date: August 15, 2007

/s/ Frederick W. Ulrich

FREDERICK W. ULRICH, ESQUIRE

Attorney ID # PA44855

Federal Public Defender's Office

100 Chestnut Street, Suite 306

Harrisburg, PA 17101

Tel. No. (717) 782-2237

Fax No. (717) 782-3881

<fritz_ulrich@fd.org>

Attorney for Robert Ellsworth Crist, III