

SEP 24 2004

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

UNITED STATES OF AMERICA,)
)
Plaintiff)
)
v.)
)
CRISPIN A. TAITANO,)
)
Defendant)
_____)

Criminal No. 04-00017

ORDER DENYING PRE-TRIAL
MOTIONS, EXCEPT AS
SPECIFIED

THIS MATTER came before the court on Thursday, September 23, 2004,
for hearing of defendant's motions to dismiss the superseding indictment or, in
the alternative, for a bill of particulars, for a transcript of the grand jury
proceedings, to suppress physical evidence and statements, to dismiss counts II
and VIII as multiplicitous, to strike surplusage, and for discovery. Plaintiff
appeared by and through Assistant U.S. Attorney Jamie D. Bowers; defendant

1 appeared personally and by and through his attorney, G. Anthony Long.

2 THE COURT, having fully considered the written and oral arguments of
3 counsel, as well as the testimony presented regarding defendant's motion to
4 suppress physical evidence and statements, rules as follows.
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6 Defendant's motions to dismiss the superseding indictment for failure to
7 plead an essential element of the crime or, in the alternative, for a bill of
8 particulars, are denied. As stated in the court's order of June 17, 2004:
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11 Defendant argues that the indictment is fatally defective
12 because it does not allege that the child pornography he allegedly
13 purchased and had in his possession depicts real human children
14 engaged in explicit sexual activity with each other and with adults,
rather than computer-generated simulacra.

15 An indictment must contain the elements of the offense
16 intended to be charged, and sufficiently apprise the defendant of
17 what he must be prepared to meet. Russell v. United States, 369
18 U.S. 749, 763, 82 S.Ct. 1038 (1962); United States v. Lane, 765 F.2d
19 1376, 1380 (1985) (the indictment must allege the elements of the
offense charged and the facts which inform the defendant of the
specific offense with which he is charged).

20 Here, defendant's arguments are based on pre-PROTECT
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1 Act statutes and case law.¹ Under the PROTECT Act² it has been
2 illegal since April 30, 2003, (1) to show minor children engaged in
3 sexually explicit conduct, or (2) to show digital or computer-
4 generated images of minor children that are indistinguishable from
5 minor children engaged in sexually explicit conduct, or (3) to show
6 a visual depiction that has been created, adapted, or modified to
7 resemble an identifiable minor child engaging in sexually explicit
8 conduct. 18 U.S.C. § 2256(8). The indictment under which
9 defendant is charged contains all the elements of the offense with
10 which he was charged and is sufficient to apprise him of what he
11 must be prepared to meet. Russell, Lane, supra.

12 If it has not already been waived for failure to be asserted,
13 defendant may raise as an affirmative defense that no real minor
14 children are shown in the child pornography he is alleged to have
15 purchased and possessed. 18 U.S.C. § 2252A.

16 Defendant's alternative motion for a bill of particulars is
17 denied. The court may direct plaintiff to submit a bill of particulars
18 to protect a defendant from double jeopardy, to enable adequate

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20 Defendant's references to Ashcroft v. Free Speech
21 Coalition, 535 U.S. 234, 122 S.Ct. 1389 (2002), and
22 United States v. Hilton, 363 F.3d 58 (1st Cir. 2004), are
23 not helpful because they both pre-PROTECT Act
24 defendants. Additionally, Hilton is not binding
25 because it is from a different circuit and is currently the
26 subject of a petition for *en banc* review.

[Since the above footnote appeared in the court's original order, the
judgment of the First Circuit has been vacated and the matter has been returned
to the original panel for rehearing of the United States' petition. Order, United
States v. Hilton, Appellate Docket No. 03-1741 (1st Cir. Sept. 20, 2004).]

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Which repealed and amended various portions of Title
18, U.S. Code.

1 preparation of a defense, and to avoid surprise at trial. United
2 States v. Giese, 597 F.2d 1170, 1180 (9th Cir. 1979). Here, the
3 indictment, together with the extensive discovery already given to
4 defendant, are sufficiently specific to put defendant on notice of the
5 charges against him and to allow him to prepare his defense without
6 fear of unfair surprise at trial. *See e.g.* Wong Tai v. United States,
7 273 U.S. 77, 82, 47 S.Ct. 300 (1927). This is particularly so since
8 defendant's averred main concern is that he seeks confirmation that
9 the child pornography which he allegedly purchased depicts real
10 human children engaged in sexual acts, as opposed to simulated or
11 computer-generated human forms engaged in sexual acts. With the
12 copies of the videos and CD-ROMs recently provided to him by the
13 U.S. Attorney's Office, defendant can either reach his own
14 conclusions about whether or not minor children are shown
15 engaging in explicit sexual conduct or submit the materials to an
16 expert for such a determination.

17 Similarly, defendant's renewed motion for a transcript of the grand jury
18 proceedings is also denied, except to the extent agreed to by plaintiff in its
19 opposition, again for the reasons set out in the court's order of June 17, 2004:

20 Federal Rule of Criminal Procedure 6 generally prohibits
21 disclosure of such material. However, Fed.R.Crim.P. 6 and 16
22 outline instances where such materials may be obtained by a
23 defendant, and the U.S. Supreme Court identified another instance
24 in Brady v. Maryland, 373 U.S. 83 (1963). Rule 16(a)(1)(A) applies
25 only when a defendant has testified before the grand jury. Here,
26 defendant did not testify. Rule 6(e)(3)(E)(ii) provides for disclosure
of grand jury transcripts where there exists grounds for dismissing
an indictment due to matters occurring before the grand jury.
Defendant has made no showing that such grounds exist. The
government has already agreed to supply any Brady material to
defendant in sufficient time for him to make effective use of it.
Brady did not create a right of access to grand jury transcripts.

1 Gollaher v. United States, 419 F.2d 520, 527 (9th Cir.), *cert. denied*,
2 396 U.S. 960 (1969).

3 Defendant's motion to suppress physical evidence and statements he made
4 on April 22, 2004, is denied. The court's analysis is in two parts: first, the
5 validity of the officers' warrantless entry into defendant's premises and, second,
6 the validity of defendant's subsequent consent to search further and seize items.
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9 As to the first part of the analysis, a warrantless search is *per se*
10 unreasonable unless there is probable cause and exigent circumstances are
11 present. *See e.g. United States v. Brooks*, 367 F.3d 1128 (9th Cir. 2004).
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13 Probable cause exists where there is "a fair probability or substantial chance of
14 criminal activity." *Id.* at 1134, *citing United States v. Alaimalo*, 313 F.3d 1188,
15 1193 (9th Cir. 2002). One of the exigent circumstances permitting a warrantless
16 search is the need to prevent the imminent destruction of evidence. *Id.* at 1133.
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19 Defendant contends that the warrantless search was improper and the
20 statements he made to law enforcement officers on April 22, 2004, were not the
21 product of a knowing, voluntary, and intelligent waiver of his rights and must
22 be suppressed. In rebuttal, plaintiff presented the testimony of three of the four
23 law enforcement officers who were present on April 22, 2004, as well as the
24 testimony of a former co-worker of defendant's at the Rota Customs office.
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1 The co-worker testified that defendant was his superior for the entire
2 sixteen years that the witness worked for Commonwealth Customs' Rota office.
3 He testified there is a large component of law enforcement in a Customs'
4 officer's normal duties and that Customs officers routinely seek consent to
5 search inbound traffic and baggage. The witness testified that defendant was the
6 head of the Rota office during all or part of his thirty-year career. From this
7 witness' testimony the court concludes that defendant had many years of quasi-
8 law enforcement experience and was more familiar than most people with the
9 requirements to obtain a valid consent to search.
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11 Plaintiff's three law enforcement witnesses were consistent in their
12 testimony of the events of April 22, 2004. Four officers were involved: Hales
13 and Cassidy from the U.S. Postal Service, Manalili from the Joint CNMI/FBI
14 Task Force, and Special Agent Auther of the FBI. All four were present on the
15 island of Rota when defendant retrieved the package with the alleged child
16 pornography video and CDs from the Rota post office. Inspectors Hales and
17 Cassidy followed defendant in one car and Manalili and Auther were in a second
18 car as defendant left the post office. Once they ascertained that he had stopped
19 at Cue Time---defendant's combination bar, pool hall, children's game arcade,
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1 and living quarters---they monitored their tracking equipment until they
2 received a signal from a transmitter in the package that the package had been
3 opened.³ At that point Hales and Cassidy went to the living quarters portion of
4 the building, while the other two secured the side and rear of the building to
5 make sure no one left or entered. Hales and Cassidy knocked on defendant's
6 door loudly and repeatedly, and identified themselves several times as police
7 officers. After two or three minutes defendant answered the door. Hales and
8 Cassidy again identified themselves as police officers, and entered the premises
9 with guns drawn to do a protective sweep. (Hales knew of Taitano's previous
10 career as a Customs officer and thought he might have a weapon available.)
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17 Inspector Hales testified that he and his fellow officers had discussed
18 getting an anticipatory search warrant but opted against it. They were not
19 certain they could show probable cause at every location (defendant's business,
20 home, or ranch) where the defendant might finally open the package containing
21 the videos and CDs. (The Ninth Circuit requires that the package be on a "sure
22 and irreversible course" to its destination. See e.g. United States v. Ruddell, 71
23 F.3d 331 (9th Cir. 1995) (to obtain anticipatory search warrant, affiant must be
24 able to assert that the package was irrevocably en route to defendant's house).
25 Because the island of Rota does not have home delivery of mail, the officers
26 could not be certain where the package might be opened.) The officers
concluded that their best bet was that defendant would cooperate with them
once he was confronted by law enforcement officers. Officer Manalili testified
that if defendant denied consent, they would have secured the premises and
obtained a search warrant.

1 Manalili and Auther followed, once they knew defendant had opened the door,
2 also with guns drawn. Once inside, the four officers conducted a pat-down
3 search of defendant and a protective sweep to insure no one else was inside and
4 that any evidence could not be destroyed. There was no search. After they had
5 secured the premises and holstered their weapons, the officers told defendant
6 they were there as part of an investigation into child pornography. The officers
7 testified they were present with defendant for three or four hours.

11 Hales, Manalili, and Auther all testified that defendant was cooperative,
12 although he appeared nervous and uncomfortable. Defendant asked Officer
13 Manalili in Chamorro to be allowed to close the door, so no one outside could
14 see in. Officer Manalili did so and defendant then turned on an air conditioner
15 and some lights. Otherwise, defendant communicated easily in English.
18 Defendant was told he was not under arrest, but the officers read the Miranda
19 rights to him anyway. Defendant initialed the seven individual rights he had
20 been apprised of (including the right to remain silent) and signed and dated the
21 advice of rights form, indicating that he was willing to answer questions without
22 a lawyer present. Plaintiff's Hearing Exhibit 1.

25 Defendant then completed, initialed, and signed a consent to search form,
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1 indicating in his own handwriting that the officers were authorized by him to
2 search his business and residence in the village of Sinapalo and seize any
3 evidence found relating to pornography. Defendant initialed the sentences
4 advising him that he could refuse to consent and that he was giving his
5 permission voluntarily. Plaintiff's Hearing Exhibit 2.
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8 Finally, after agreeing to give a statement, defendant repeatedly initialed
9 and then signed a three-page, single-spaced confession, typed for him by
10 Inspector Cassidy, and after he had reviewed it line-for-line with Inspector
11 Hales. Defendant also assisted the officers by helping them print out the
12 confession on his own printer. Defendant was not arrested until after an
13 indictment had been returned.
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17 As to the initial entry into defendant's premises, the court finds that the
18 officers had probable to conclude that there was criminal activity because they
19 knew what the package contained and they knew when it had been opened.
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21 There were exigent circumstances because Inspector Hales testified that he was
22 concerned that the evidence could be destroyed before they entered if defendant
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1 discovered the transmitting device in the package.⁴ The warrantless entry was
2 valid and the officers did no more than a protective search before talking to
3 defendant.
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5 As to the second part of the analysis, the parties agree that the question of
6 valid consent to search is one of fact, depending upon the totality of
7 circumstances. See *e.g.* United States v. Enslin, 327 F.3d 788, 792 (9th Cir. 2003).
8 The parties also agree that there are five factors tending to show a lack of
9 voluntariness: (1) the person was in custody, (2) the officer had a weapon drawn,
10 (3) the officer failed to give the Miranda warnings, (4) the officer did not inform
11 the person that he or she had a right to refuse to consent, and (5) the person was
12 told a search warrant could be obtained. See United States v. Chan-Jimenez, 125
13 F.3d 1324, 1327 (9th Cir. 1997). Plaintiff bears a heavy burden in showing that
14 consent was freely and voluntarily given. Schneckloth v. Bustamonte, 412 U.S.
15 218, 222, 93 S.Ct. 2041, 2045 (1973).
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25 Inspector Hales testified to his belief that the information on a CD would
26 be irretrievably lost if defendant simply broke it before it could be secured from
harm by the officers.

1 As noted above, the documents provided in opposition to defendant's
2 motion do not give any indication that they were signed under duress or
3 otherwise were not the product of a knowing, voluntary, intelligent waiver of
4 rights by the defendant. Defendant initialed each sentence in the advice of
5 rights form given to him, and signed the waiver section, which stated: "I have
6 read this statement of my rights and I understand what my rights are. At this
7 time, I am willing to answer questions without a lawyer present." Plaintiff's
8 Hearing Exhibit 1. Also, defendant initialed and signed a consent to search
9 form, indicating that he agreed to allow agents to search his "business and
10 residence," that agents could take with them any items which they believed
11 might be related to their investigation, that he had been told he could refuse to
12 consent, and that his consent was given voluntarily. Plaintiff's Hearing Exhibit
13 2. Finally, he initialed both at the beginning and end of each paragraph a three-
14 page single-spaced declaration that Special Agent Cassidy apparently typed, and
15 signed under oath that he had read it and been given an opportunity to make
16 corrections to it. Defendant affirmed under oath that "All facts contained
17 herein are true to the best of my knowledge and belief." Plaintiff's Hearing
18 Exhibit 3. Opposed to these documents is only defendant's repeated, bare,
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1 mechanical assertion that he consented because he did not believe he could
2 refuse. "Declaration of Crispin Taitano Supporting Suppression Motion" (Aug.
3 25, 2004).

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5 Looking at the totality of the circumstances, the court concludes that
6 defendant's statements and consent to search were made knowingly, voluntarily,
7 and intelligently, after he was apprised orally and in writing of his right to say
8 nothing and his right to refuse consent to the search. Defendant had thirty
9 years of experience as a Customs officer and should have known of his right to
10 refuse consent to search. Defendant's actions in cooperating with the officers
11 (even to the extent of giving them a briefcase with additional child pornography
12 which was not in the mailed package and assisting them in operating his printer
13 to print out his statement) indicate that he was not overcome by the situation
14 he found himself in and was not acting under any duress or coercion. Although
15 all four officers stayed in defendant's living area while he was being questioned,
16 their weapons were by that time holstered and only Hales and Cassidy
17 questioned defendant, as they sat around a ping-pong table. In conclusion, the
18 court found the officers' testimony clear, uniform, and extremely persuasive.
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20 Their version of the events of April 22, 2004, is accepted. Finally, given
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1 defendant's age, intelligence, and facility in speaking English, the fact that he
2 was advised orally and in writing that he could refuse consent to the search, his
3 cooperation with the officers, his voluntary handing over to them of the
4 briefcase with additional contraband, and the non-coercive setting and actions of
5 the police officers, all persuade the court by a preponderance of the evidence
6 that his consent was voluntarily given. *See generally* Schneckloth v. Bustamonte,
7 412 U.S. 218, 93 S.Ct. 2041 (1973).
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11 Defendant's motion to dismiss counts II and VIII as multiplicitous is
12 denied. Multiplicity is the charging of a single offense in more than one count.
13 Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1982); United States v.
14 McKittrick, 142 F.3d 1170, 1176 (9th Cir. 1998). The test is whether each
15 separately violated statutory provision "requires proof of an additional fact
16 which the other does not." Blockburger v. United States, 284 U.S. at 304, 52
17 S.Ct. at 182. Here, the computer disks identified in count VIII were allegedly
18 child pornography downloaded by defendant to his computer, while the
19 computer disks in count II were allegedly purchased through the U.S. Mail.
20 Because the items at issue in count I and II are separate from those listed in
21 count VIII, and because they will require proof of additional facts, the
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1 indictment is not multiplicitous.

2 Defendant's motion to strike as surplusage the "additional factors" listed
3 in count VIII is denied. As conceded by plaintiff, the "additional factors"
4 included in count VIII are a direct response to the United States Supreme
5 Court's decision in Blakely v. Washington, 2004 WL 1402697 (June 24, 2004).
6 There, the Court held that factors which could previously be used to increase a
7 convicted defendant's incarceration time must be found by the jury beyond a
8 reasonable doubt. The United States Court of Appeals for the Ninth Circuit
9 has held that the rule announced in Blakely applies to sentences in federal court
10 which are imposed pursuant to the Sentencing Guidelines. United States v.
11 Ameline, 376 F.3d 967 (9th Cir. 2004). Accordingly, the court denies the
12 motion and finds that plaintiff's inclusion of these factors is warranted in light
13 of Ameline. The court will determine how best to present these additional
14 factors to the jury after first consulting with counsel.
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21 Defendant's motion for discovery is denied, based upon plaintiff's
22 counsel's representation as an officer of the court that defendant has been given
23 all discovery to which he is entitled, that plaintiff is aware of its continuing
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1 discovery obligation and will honor it, and will provide additional discovery as
2 and when it is due. Accordingly,
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4 FOR THE REASONS STATED ABOVE, defendant's motions are
5 denied.
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7 DATED this 24th day of September, 2004.
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11 ALEX R. MUNSON
12 Judge
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