No. 05-30177

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-vs-

JEFFREY BRIAN ZIEGLER,

Defendant-Appellant.

DEFENDANT-APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION
DISTRICT COURT CASE NO. CR-03-08-BU-RFC

HONORABLE RICHARD F. CEBULL
UNITED STATES DISTRICT JUDGE, PRESIDING

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SUBMITTED: September 1, 2006

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I. INTRODUCTION

Defendant-Appellant, Jeffrey Brian Ziegler, petitions for rehearing and suggests rehearing *en banc* of the panel's decision holding that he had no objectively reasonable expectation of privacy in his workplace computer and thus no standing to assert a claim that his Fourth Amendment rights were violated. A copy of the August 8, 2006 opinion of the Court is attached hereto as exhibit B.

II. STATEMENT OF COUNSEL

I express belief, based on a reasoned and studied professional judgment, that the panel decision, entered on August 8, 2006, in the above captioned case conflicts with the authoritative decisions of the United States Supreme Court, the Ninth Circuit and other United States Courts of Appeals that have considered the issues addressed in this Petition. Most prominently, the panel's holding that a company's policy of monitoring employee internet use renders a private employee's expectation of privacy in his workplace computer objectively unreasonable conflicts with the Supreme Court's decision in Mancusi v. DeForte, 392 U.S. 364 (1968). For this reason, as well as others described below, the Defendant-Appellant, Jeffrey Brian Ziegler, petitions for rehearing and suggests rehearing *en banc* of the panel's decision.

III. STATEMENT OF PROCEEDINGS

A. Statement of the Facts as Found by the District Court

The facts of this case as found by the district court are as follows. In January of 2001, Special Agent James Kennedy, Jr., of the Federal Bureau of Investigation received a report that an employee of Front Line Processing had viewed child pornography via the internet from his company computer. Acting on the tip, Agent Kennedy spoke with John Softich and William Schneider, who both worked in Frontline's Internet Technology ("IT") Department. Both confirmed that they had

been alerted by Frontline's "firewall' that one of the company's computers had accessed a prohibited site in late 2000. Upon further investigation, Softich and Schneider determined that the computer that had accessed the website was located in Appellant Jeffrey Ziegler's office.

In response to this information, Agent Kennedy contacted Softich and Schneider "and directed them to make a back up of [Ziegler's] computer files." Acting on his direction, they obtained a key to Ziegler's office from Frontline's Chief Financial Officer. Late that night, after business hours, Softich and Schneider used the key to enter Ziegler's office. They made two copies of his hard drive, which they delivered to Agent Kennedy.

A copy of the district court's order denying Ziegler's suppression motion is attached hereto as Exhibit A.

B. District Court Proceedings

In the trial court, Ziegler argued that the search and seizure of his computer hard drive violated the Fourth Amendment. Specifically, he argued that the search was conducted at the behest of Agent Kennedy's direction, without a warrant and unjustified by any exception to the warrant requirement. In response, the Government argued that the search was conducted by a private citizen and with Frontline's consent. Essentially sidestepping these arguments, the district court ruled that Ziegler

did not have a legitimate expectation of privacy in his workplace computer. Therefore, it did not reach the issues of whether the search was private or conducted pursuant to valid consent.

C. The Circuit Court Proceedings

On appeal, the panel upheld the district court. Relying on O'Connor v. Ortega, 480 U.S. 709 (1987) and United States v. Simons, 206 F.3d 392 (4th Cir. 2000), it held that Ziegler did not have an "objectively reasonable expectation of privacy in his workplace computer and thus no standing to invoke Fourth Amendment protection." United States v. Ziegler, 456 F.3d 1138 ___ (9th Cir. 2006). His claim to a reasonable expectation of privacy was defeated, in the panel's view, because the computer was company-owned and was subject to routine monitoring and access by Frontline staff. The panel was untroubled by the fact that the computer files were seized from Ziegler's private office. Although it acknowledged "that an employee may have a legitimate expectation of privacy in his office," the panel did not believe that an "actual[] search" took place. "Frontline employees entered the office merely to gain access to the computer's hard drive." And, therefore "they did not violate a privacy expectation in the office generally, such as through 'their conduct of a general search' or video surveillance." Ziegler, 456 F.3d at ___, n.9(citations omitted).

D. Bail Status of Defendant-Appellant

Mr. Ziegler is currently incarcerated at FCI Coleman. His full address is reproduced in the Certificate of Service.

IV. ARGUMENT

A. The Panel Opinion Conflicts with the Supreme Court's Decision in Mancusi v. DeForte.

In holding that Ziegler did not have a legitimate expectation of privacy in his office computer files, the panel relied upon two decisions that arose out the public employment context. Unlike the case at bar, Ortega and Simons involved government employees. The defendant in Simons worked for the Central Intelligence Agency; the plaintiff/respondent in O'Connor was a physician employed at a state hospital. There is a clear distinction between the Fourth Amendment protection accorded government employees and that accorded those who work in the private sector. See, generally, U.S. Dep't. Of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations (July, 2002). The panel failed to recognize this distinction and, as a result, did not properly analyze Ziegler's Fourth Amendment claim. Its failure in this regard resulted in an opinion at odds with the Supreme Court's decision in Mancusi v. DeForte, 392 U.S. 364 (1968).

In Mancusi, state officials searched and seized records belonging to a labor union from an office the defendant, Frank DeForte, shared with other union officials.

The search was conducted without a warrant and over DeForte's protests. Arguing that his Fourth Amendment rights were violated, DeForte objected to use of the seized material during his trial. Overruling his objection, the trial court ruled that the search did not infringe upon his legitimate privacy interests and therefore he had no standing to contest the search. On certiorari, the Supreme Court characterized the issue as whether DeForte's office space was an "area . . . in which there was a reasonable expectation of freedom from governmental intrusion." Mancusi, 392 U.S. at 368. Answering this question in the affirmative, the Court held that DeForte had "Fourth Amendment standing to object to the admission of the papers at his trial." Id. at 369. In coming to its conclusion, the Court observed that it had "long been settled that one has standing to object to a search of his office, as well as of his home." The fact that DeForte shared the office with other employees did not defeat his legitimate expectation of privacy because he "still could reasonably have expected that only those persons and their personal or business guests would enter that office, and that the records would not be touched except with their permission or that of union higher-ups. This expectation was inevitably defeated by the entrance of state officials, their conduct of a general search, and their removal of records which were in DeForte's custody." Id. at 369.

In O'Connor v. Ortega, the Supreme Court confronted a distinctly different set of circumstances. In Ortega, the Court developed an analytic framework for evaluating searches of government workplaces. Initially confronting the question of whether a public employee has any expectation of privacy in the workplace, the Court held that an individual does not lose "Fourth Amendment rights merely because he works for the government instead of a private employer." Ortega, 380 U.S. at 717. Therefore, a government employee can enjoy a reasonable expectation of privacy in his or her workplace unless it is "so open to fellow employees or to the public that no expectation of privacy is reasonable." Id. at 718.

A public employee's expectation of privacy may be overidden, however, by the operational realities of the work place "when an intrusion is by a supervisor rather than a law enforcement official." A public employee's expectation of privacy in his "office, desk and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation . . ." Id. at 717. A governmental employer may, for example, intrude upon an employee's privacy and conduct a warrantless search of his office if the search is justified for work related, non-investigatory reasons – such as entering an employee's office to retrieve a file or to investigate work-related misconduct – and is reasonable under "all the circumstances".

The expectation of privacy enjoyed by a private employee differs significantly from his counterpart in the public sector. Private sector employees enjoy a reasonable expectation of privacy in their workplace unless the space is open to the public at large. Government employees, on the other hand, have a reasonable expectation of privacy in the workplace only if a case-by-case analysis of "the actual office practices and procedures" establishes that the employee can reasonably expect that others will not enter his space.

In the case of a private sector employee, like Ziegler, "one's personal office is constitutionally protected against warrantless intrusions by the police, even though employer and co-workers are not excluded." Ortega, 480 U.S. at 730 (Scalia, concurring). The private employer's internal regulations have no effect on the assessment of whether the employee enjoys a legitimate expectation of privacy. As both this Court and the Ortega Court have recognized, "even 'private' business offices are often subject to visits of co-workers, supervisors, and the public, without defeating the expectation of privacy unless the office is 'so open to fellow employees or the public that no expectation of privacy is reasonable.'" Taketa, 923 F.2d at 672. "One may freely admit guests of one's choosing – or be legally obligated to admit specific persons – without sacrificing one's right to expect that a space will remain secure against all others." United States v. Lyons, 706 F.2d 321, 325 (D.C. Cir. 1983).

Therefore, the fact that a private employee has no reason to expect that the privacy of his workspace is secure from intrusions of his boss and co-workers says nothing about his expectations vis-a-vis the government.

In the public employment context, however, the government is the employer. Having the same interest in securing operational efficiency of the workplace as a private employer, the government in this context can enter and search an employee's workspace for "legitimate work related reasons." Boiled down to its essentials, all the Ortega decision did was give the government the same ability as that held by private employers to ensure the orderly operation of its workplace. Its holding has little – if any relevance – to the Fourth Amendment privacy interests of private sector employees.

Applying the analytical framework of Mancusi and Ortega to Ziegler's case, it is clear that the panel erred in concluding that a private employee forfeits his reasonable expectation of privacy by simple virtue of the fact that his employer and co-workers enjoy access to his workspace and computer. "Constitutional protection against unreasonable searches by the government does not disappear merely because the. . .[employer]. . .has the right to make reasonable intrusions" into the employee's workspace. (Ortega, 480 U.S. at 717, citing, Scalia, concurring, post at 731). Under

the Supreme Court's holding in Mancusi, Ziegler could legitimately expect that the privacy of his workspace was secure from government intrusion.

Contrary to the panel decision, a private employee does, in fact, enjoy an objectively reasonable expectation that his desk, file cabinets and computer will not be searched or seized by the government without a warrant or valid consent.[1] Further, this expectation is not defeated by simple virtue of the fact that his employer has reserved the right to conduct such searches for its legitimate work-related reasons. The panel's decision to the contrary is, with all due respect, simply wrong. Because it directly conflicts the Supreme Court's decision in Mancusi and misapplies the holding of Ortega, consideration by the full Court is necessary to "secure and maintain uniformity of this Court's decisions." See, Rule 35(b) F.R.App.P.

B. The Panel's conclusion that the late night intrusion into Ziegler's locked private office was not a "search" conflicts with relevant authority of the Supreme Court, Ninth Circuit and other Courts of Appeals.

The panel's conclusion that physical entry into Ziegler's office did not constitute a "search" within the meaning of the Fourth Amendment contradicts both

[1]This is not to imply that other exceptions to the warrant requirement can never apply in this context. There may be instances, for example, where search and seizure of a computer is justified by exigent circumstances.

the traditional meaning attached to the term and relevant precedent from the Supreme Court, the Ninth Circuit and other Courts of Appeals.

"When the Fourth Amendment was adopted, as now, to 'search' meant '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as to search a house for a book; to search the wood for a thief." Kyllo v. United States, 533 U.S. 27, 33 n.1 (2001) (quoting N. Webster, *an American Dictionary of the English Language* 66 (1828)(reprint 6th ed. 1989)). The late night intrusion into Ziegler's office "easily meets this definition" because Softich and Schneider surreptitiously entered his office for the specific purpose of seizing evidence to be used in a criminal prosecution. See, United States v. Simons, 206 F.3d 392, 399 (4th Cir. 2000); Doe v. Beck, 327 F.3d 492, 510 (7th Cir. 2003); see also, 1 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* Section 2.1(a) at 429429 (2004)(noting that "[u]nder the traditional approach, the term 'search' is said to imply some exploratory investigation, or an invasion and quest, a looking for and seeking out. The quest may be secret, intrusive or accomplished by force . . .").

Ziegler undoubtedly had a legitimate expectation of privacy in the confines of his office. United States v. Driver, 776 F.2d 807, 809 (9th Cir. 1985); United States v. Taketa, 923 F.2d at 672; Schowengerdt v. General Dynamics Corp., 823 F.2d 1328

(9th Cir. 1987); United States v. Simons, 206 F.3d at 399-400 (finding that the defendant had a reasonable expectation in the privacy of his office).[2] He had a private office that was not shared with other co-workers. He kept his door locked and there was no evidence that he allowed any of his co-workers – let alone the public at large – enter and roam through his office. United States v. Taketa, 923 F.2d at 672-673. Even under standard of Ortega (which as stated above does not apply to private employees) it is clear that Ziegler retained an objectively reasonable expectation that government agents would not intrude into the confines of his office in the middle of the night to search for and seize evidence for use in a criminal prosecution.

"A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." Kyllo v. United States, 533 U.S. at 33. Even if one accepts the notion that Ziegler did not enjoy an expectation of privacy with respect to his computer, the government could not constitutionally enter his office without a warrant to search or seize its contents. See, Horton v. California, 496 U.S. 128 (1990). The relevant privacy interest concerns the area that is searched, not the contraband that is found. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980). [A]n essential predicate to any valid warrantless seizure of

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[2]Schowengerdt, Taketa and Simons all arise out of the public employment context. They are cited only to support the proposition that a person has a legitimate expectation of privacy in his office space.

incriminating evidence [is] that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." Horton, 496 U.S. at 136.

The panel's conclusion that the late night intrusion into Ziegler's office did not constitute a "search" is incorrect. Irregardless of his privacy interest in the computer itself, the government could not, consistent with the Fourth Amendment, invade Ziegler's private office to seize its contents. The Panel's conclusion to the contrary is inconsistent with relevant Supreme Court authority and the decisions of both this Court and other Courts of Appeals.

CONCLUSION

The Panel's decision is, with all due respect, disturbing. Taken to its logical end, it authorizes the government to invade a private office, without a warrant, probable cause, or valid consent, and rifle through a citizen's desktop computer. Up until this decision, it has generally been understood that the government would need to secure a warrant or consent of the employer prior to conducting such a search. But if private sector employees forfeit all legitimate claims to privacy in their computers simply because their employer has a computer access policy, then the government can break into a private office and take any computers it wants. After all, the intrusion

into the physical confines of the office is not a "search" and the individual employee has no standing to contest the search and seizure of his office computer.

This Panel's opinion has strong implications for the Fourth Amendment rights of all employees who are subject to computer monitoring policies. Moreover, it conflicts with long-standing Supreme Court precedent. Given the importance of the issue involved and its contradiction of other relevant binding authority, the full Court should reconsider the Panel's opinion.

DATED this 1st day of September, 2006.

JEFFREY BRIAN ZIEGLER

By _____

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 40-1, I certify that the Petition for Rehearing and Suggestion for Rehearing *En Banc*'s line spacing is double spaced, with exception of quotations and footnotes. The body of the argument has a Times New Roman typeface, 14-point size and contains less than 4,200 words at an average of 280 words (or less) per page, including footnotes and quotations. (Total number of words: 2,886, excluding tables and certificates).

DATED this 1st day of September, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2006, copies of the foregoing Petition for Rehearing and Suggestion for Rehearing *En Banc* were sent, postage paid, by first class mail, to:

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