

No. 06-50581

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA	)	(NO. CR 05-772-DDP)
Plaintiff-Appellant,	)	
v.	)	
MICHAEL TIMOTHY ARNOLD,	)	
Defendant-Appellee.	)	

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Appellee Arnold's Motion to De-Publish Opinion;  
Declaration of Bednarski and Exhibits 1 and 2

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Appeal from The United States District Court  
For the Central District of California

Honorable Dean D. Pregerson  
United States District Judge

MARILYN E. BEDNARSKI  
KEVIN LAHUE  
KAYE, McLANE, & BEDNARSKI, LLP.  
128 North Fair Oaks Avenue  
Pasadena, California 91103  
Telephone: (626) 844-7660  
Facsimile: (626) 844-7670

Attorneys for Deceased Appellee  
Michael Timothy Arnold

## MOTION TO DE-PUBLISH OPINION

The Appellee Michael Timothy Arnold, through counsel, hereby files his motion to de-publish the Opinion of this Court issued July 10, 2008 and published at 533 F. 3d 1003 (9<sup>th</sup> Cir. 2008).

This motion is based upon the attached Declaration of Marilyn E. Bednarski, Exhibits 1 and 2 and the files and records in this case and is made pursuant to Fed. R. App. P. 27.

March 3, 2009

Respectfully submitted,

By            /S/  
Marilyn E. Bednarski  
KAYE, McLANE, & BEDNARSKI, LLP

Attorney for Deceased Appellee  
MICHAEL TIMOTHY ARNOLD

## MEMORANDUM OF POINTS AND AUTHORITIES

### I.

#### SUMMARY OF MOTION

The undersigned counsel is appointed to represent the appellee Michael Arnold on appeal. This Motion requests that the Opinion of a panel of this Circuit reversing the district court's suppression order, found at 533 F. 3d 1003 (9<sup>th</sup> Cir. 2008), be de-published. This motion is made because Mr. Arnold is deceased, the case against him is over, and the charges against him will by necessity be dismissed. There was never a plea or judgment of conviction. The Opinion arose from the government's interlocutory appeal, and there is no judgment below.

### II.

#### RELEVANT FACTUAL AND PROCEDURAL HISTORY

Mr. Arnold was arrested in July 2005, and later charged in an Indictment with certain federal offenses arising out of the discovery of pictures alleged to be child pornography on his laptop, and electronic media (hard drive, flash drive, and compact discs) searched without any articulable reason at the Los Angeles airport. He was reentering the United States from a vacation trip to the Philippines.

Michael Arnold, through the undersigned counsel, filed a suppression motion in the district court, moving to suppress all evidence discovered as a result of the search of the laptop and electronic storage devices. CR 33. The government opposed the motion to suppress (CR 36) and filed a First Superseding Indictment (CR 37). The district court held an evidentiary hearing on and took the matter under submission. CR 52.

On October 2, 2006, the district court issued its Order granting Michael Arnold's motion to suppress. CR 53, October 2, 2006. The government decided

that it could not proceed to trial without this critical evidence and thereafter took an interlocutory appeal from the district court's suppression order. Declaration of Bednarski at ¶2.

A panel of this Circuit reversed the suppression order in a written opinion filed April 21, 2008, amended July 10, 2008 and published at 533 F. 3d 1003 (9<sup>th</sup> Cir. 2008). The Appellee's Petition for rehearing *en banc* and panel rehearing was denied July 10, 2008. *Id.* This Court stayed the mandate pending the filing and decision on the petition for writ of certiorari in the U. S. Supreme Court. CR 89.

Subsequently Appellee Michael Arnold petitioned the Supreme Court for a writ of certiorari. The government filed a written opposition to that petition and emphasized that the appeal was interlocutory and the issue raised not ripe for review. The government wrote:

“Finally, as to petitioner Arnold, any review of the court of appeals’ decision would be premature because that decision is interlocutory. Petitioner has not yet been tried on the underlying criminal charges in this case. If petitioner is ultimately acquitted following a trial on the merits, the claim that he raises in his petition will be moot. On the other hand, if petitioner is convicted, he will be able to raise the instant claim— together with any other claims he might have— in a petition for writ of certiorari seeking review of the final judgment against him. Accordingly, petitioner Arnold’s case is not ripe for review at this time.”

Exhibit 2, Excerpt of Government’s Opposition cover page, and pp. 14-15.

Michael Arnold’s Petition for Writ of Certiorari was recently denied. By letter dated February 23, 2009, the Supreme Court formally notified the undersigned of that denial. Exhibit 1, Letter from U.S. Supreme Court. The undersigned then informed Mr. Arnold. Two days later Mr. Arnold took his own



DECLARATION OF MARILYN E. BEDNARSKI

I, Marilyn E. Bednarski, declare and state as follows:

1. I am an attorney in the Central District of California. I am a member of the Criminal Justice Act Panel in the Western District of California. I represented Michael Arnold in the District Court on underlying motion to suppress, in this Court, and in the United States Supreme Court throughout the litigation.

2. Since November 1, 2006 Mr. Arnold has been out of custody on bond, and on home detention, living in Arizona. CR 66. After the evidence was suppressed in the District Court, the government took the interlocutory appeal which generated the opinion at issue in this Motion. CR 54, Notice of Interlocutory Appeal filed October 13, 2006 .

There was never a plea or judgment against Mr. Arnold. Had he been successful in this Court and the suppression order been affirmed, the case would have been dismissed. Acting United States Attorney George Cardona declared in his Certification attached to the Government's Notice of Interlocutory Appeal: "the evidence suppressed or excluded is a substantial proof of a fact material in the proceeding." CR 54. It is also clear from the opinion that the underlying facts are that all of the electronic media outside and inside the laptop were suppressed.

3. Kevin LaHue, an associate in this office advised me on Monday February 23, 2009 that he had spoken earlier that day with a Clerk in the United States Supreme Court and was advised that the Court, which had conferenced this and other cases the previous Friday, had denied the petition.

That same day, I advised Mr. Arnold of that decision. Two days later, on February 25, 2009, he ended his life. This was verified for me by Phoenix pretrial services officer Tom Moreno who informed me by telephone that he was at Mr.



**EXHIBIT 1**

Supreme Court of the United States

Office of the Clerk

Washington, DC 20543-0001

William K. Suter  
Clerk of the Court  
(202) 479-3011

February 23, 2009

Ms. Marilyn E. Bednarski  
Kaye, McLane, & Bednarski, LLP  
128 North Fair Oaks Avenue  
Pasadena, CA 91103

Re: Michael Timothy Arnold  
v. United States  
No. 08-6708

Dear Ms. Bednarski:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

**EXHIBIT 2**

Nos. 08-6708 and 08-6892

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL TIMOTHY ARNOLD, PETITIONER

v.

UNITED STATES OF AMERICA

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MATTHEW JOHN HILLIARD, PETITIONER

v.

UNITED STATES OF AMERICA

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ON PETITIONS FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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GREGORY G. GARRE  
Solicitor General  
Counsel of Record

MATTHEW W. FRIEDRICH  
Acting Assistant Attorney General

DEBORAH WATSON  
Attorney

Department of Justice  
Washington, D.C. 20530-0001  
(202) 514-2217

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officials had reasonable suspicion for the search of petitioner's computer files. Petitioner was nervous during his encounter with Customs, and he tried to avoid inspection by stating that he had an immediate connecting flight. In fact, his connecting flight was not scheduled to depart for a few hours. When an inspection of petitioner's suitcase revealed a package of approximately 25 photographs that appeared to be of minor females, some of whom were naked, petitioner tried to wrest the pictures from the inspector, stating that the pictures were of his girlfriends, who had assured him they were at least 18 years of age. Gov't C.A. 5-11. Those facts raised a reasonable suspicion that petitioner's computer might contain illegal photographs of minors, such that petitioner would not prevail even under his own legal position.

4. Finally, as to petitioner Arnold, any review of the court of appeals' decision would be premature because that decision is interlocutory. Petitioner has not yet been tried on the underlying criminal charges in this case. If petitioner is ultimately acquitted following a trial on the merits, the claim that he raises in his petition will be moot. On the other hand, if petitioner is convicted, he will be able to raise the instant claim -- together with any other claims he might have -- in a petition for a writ of certiorari seeking review of the final judgment against him. Accordingly, petitioner Arnold's case is not ripe for review at this time.

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CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

GREGORY G. GARRE  
Solicitor General

MATTHEW W. FRIEDRICH  
Acting Assistant Attorney General

DEBORAH WATSON  
Attorney

JANUARY 2009

