

Case Summaries: Fourth Circuit Court of Appeals (Sept. 8, 2022)

(1) Defendant was not in custody for purposes of *Miranda* and trial court correctly denied the motion to suppress; (2) Admission of lay opinion interpreting machine-generated data categorizing images as child pornography violated the Confrontation Clause but was harmless error on the facts of the case

[U.S. v. Arce](#), 49 F.4th 382 (Sept. 8, 2022). A detective was monitoring peer-to-peer filesharing networks for child pornography. He noticed an IP address sharing child pornography and connected it to a residence in the Eastern District of Virginia. Officers eventually obtained a search warrant for the home. Officers armed with guns and wearing bulletproof vests encountered the defendant at the house, which belonged to the defendant's sister. A friend of the defendant was also present, and the pair were asked to sit at the kitchen table while officers conducted the search. An officer remained in the kitchen with the pair during the search. According to the defendant, they were ordered to sit in the kitchen, although the officers claimed that the two were told that they were free to leave. Officers eventually asked the defendant to speak with them in a patrol car. In the car, the officer told the defendant that he was free to leave and did not have to answer questions. The defendant first admitted to using peer-to-peer filesharing networks and ultimately admitted to viewing child pornography. The officer then read the defendant a *Miranda* warning, after which the defendant again acknowledged downloading and viewing the images on his phone. The defendant claimed that he was handcuffed and threatened by the officer and that no *Miranda* warning was given. The defendant later consented to a search of his home and directed officers to a phone containing the contraband images. The defendant was not arrested or taken into custody at the time but was later indicted on child pornography offenses. He moved to suppress, arguing that his statements were obtained by police in violation of his protections against self-incrimination. The trial court credited the officers' version of events, finding serious credibility issues with the defendant's version of events. It determined that the defendant was not in custody at the time of questioning and that he voluntarily consented to answer questions.

At trial, a law enforcement officer testified as a lay witness about his examination of the defendant's phone. One software program, Cellebrite, was used to copy the phone's data. Another program, Griffeye, was then used to match images on the phone to known child pornography images through the "hash values," or digital footprints, of the images. The officer compiled a report identifying images from the phone and classifying them as child pornography. The defendant was convicted after a bench trial and was sentenced to 130 months. On appeal, a unanimous panel of the Fourth Circuit affirmed.

(1) The district court did not clearly err in denying the motion to suppress for alleged *Miranda* violations. The defendant was not physically restrained and was told that he was free to leave. While armed officers were present and kept the defendant under watch during the search, officers never threatened the defendant or drew their guns and otherwise exhibited calm demeanors. The defendant's inculpatory statements were made while sitting in the front seat of the police car over the course of less than one hour. The defendant was also ultimately released and allowed to turn himself in when an arrest warrant issued. Keeping the defendant under surveillance during the search of his sister's home did not amount to a formal arrest, and the district court therefore correctly denied the motion to suppress.

(2) The defendant challenged the admission of the cell phone report as a violation of his Confrontation Clause rights. While most of the evidence recovered from the defendant's phone was non-testimonial and did not implicate confrontation rights, a part of the report characterized the images on the phone as probable child pornography, which was testimonial. Machine generated data is generally not testimonial, but the interpretation of such data can be. When the officer here matched hash values from the images on the phone to those of known images of child pornography to determine what was likely child pornography, he necessarily relied on the judgment of unknown law enforcement officers that certain images in the known images database were child pornography. Thus, the conclusions of the officer in his report that the phone contained child pornography based on this comparison was testimonial and was admitted in violation of the defendant's Confrontation Clause rights. However, in light of the overwhelming evidence of the defendant's guilt at trial, this error was harmless. "It is thus clear beyond a reasonable doubt that the judge would have found [the defendant] guilty without the report's statement that a given image was Child Exploitation Material or Child Abuse Material." *Arce Slip op.* at 394.

Other challenges were likewise rejected, although the defendant prevailed on a challenge to a lifetime ban on computer and internet activity as a condition of supervised release. The judgment of the district court was therefore reversed in part, affirmed in part, and remanded for a new determination of the terms of supervised release.