No._____

IN THE SUPREME COURT OF THE UNITED STATES

_____

CHRISTOPHER KEGLER,

Petitioner,

v.

UNITED STATES,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED FOR REVIEW

Should this Court reconsider and reverse *Schneckloth v. Bustamente*, 412 U.S. 218, 222 (1973) on the ground that that it is inconsistent with the reasoning of *Miranda v. Arizona*, 384 U.S. 436 (1966), *Dickerson v. United States*, 120 S.Ct. 2326, 2334, 530 U.S. 428, 440 (2000), and the New Jersey Supreme Court's decision in *State v. Johnson*, 346 A.2d 66, 68, 68 N.J. 349, 354 (N.J. 1975)?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, CHRISTOPHER KEGLER, petitions this Court to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *United States v. Christopher Kegler, No.* 17-10177 (9th Cir. 2018*)*.

OPINIIONS BELOW

The unpublished decision of the Ninth Circuit Court of Appeals is reproduced in the Appendix at page A-1.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The decision of the Ninth Circuit Court of Appeals was filed on September 24, 2018. (App. page A-1)

CONSITTUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV of the United States Constitution provides in pertinent part that "(T)he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."

New Jersey Constitution of 1947, Art. I, par. 7, provides that "(T)he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . ."

STATEMENT OF THE CASE

1. The Underlying Facts

In the evening of December 16, 2014 at 6:00 p.m., a team of six to eight U.S. Marshals and task force agents used battering ram to force entry into Mr. Kegler's hotel room to execute the arrest warrant. ER 74 CR 38 at 23-25, 51. All of the team members were armed, but not all had rifles. ER 53 CR 38 at 9, 29. Less than a minute after the barricaded door had been broken open, Mr. Kegler was already cuffed with his hands behind his back. ER 71 CR 38 at 47. The U.S. Marshals asked Mr. Kegler for his name, but Mr. Kegler refused to give it. ER 34-36 CR 38. Mr. Kegler was immediately arrested on the warrant, and shortly thereafter he asked the U.S. Marshals to get his sweatshirt in case the jail was cold. ER 36-37, 43 CR 38. The Deputy U.S. Marshal was unable to find the sweatshirt and he asked Mr. Kegler what he wanted done with all his property. ER 37-38 CR 38. The deputy told Mr. Kegler that he could bring all the property to the jail, but it would need to be searched. ER 37-39 CR 38. Mr. Kegler then said "go ahead and search everything." ER 40 CR 38 at 16. While searching everything, police found a full bag of methamphetamine and a pistol.

2. District Court Criminal Proceedings

Mr. Kegler was charged with possession of methamphetamine with intent to distribute under 21 U.S.C. §841 and possession of a firearm by a felon under 18 U.S.C. §922(g). Mr. Kegler moved to suppress the drugs and firearm. In its written opposition to the motion to suppress, the United States conceded that all of the factors which courts usually look to in evaluating consent searches weigh against a finding of consent, but the United States argued that under the totality of the circumstances there was valid consent. After an evidentiary hearing the district judge denied the motion to suppress finding the consent was valid. ER 9-10, CR 38 at 82-84.

On October 21, 2016, Mr. Kegler pled guilty to both counts by conditional plea which preserved his right to appeal the denial of the motion to suppress. ER 12-14, CR 41-44. On April 20, Mr. Kegler was sentenced to 75 months prison to run consecutively to the 135-months prison sentence which he is still serving. ER 1, CR 56.

3. Appeal

Mr. KEGLER filed a timely notice of appeal. ER 11, CR 57-58. The Ninth Circuit Court of Appeals denied the appeal in *United States v. Christopher Kegler*, 17-10177 (9th Cir. 2018). (App. page A-1) In its opinion, the Ninth Circuit held

that there was valid consent, because it was Kegler himself who initiated and broadened the search. Appendix at p. 3. The Ninth Circuit's opinion conceded that the multi-factor balancing test in its previous authority did not weigh in favor of a finding of consent:

> Here the *Cormier-Patayan Soriano* factors di not readily inform the voluntariness inquiry, because it was Kegler himself who initiated and broadened the search that resulted in the discovery of the methamphetamine and the gun.

(Appendix page A-3) In denying Mr. Forte's appeal, the Ninth Circuit relied directly on *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) which held that voluntariness of a search is determined "from the totality of the circumstances."

REASON FOR GRANTING THE WRIT

Certiorari review is needed to address the conflict between circuit court decisions which evaluate consent to search by using multi-factor balancing tests and U.S. Supreme Court's vague totality of the circumstance test which provides no prospective guidance to law enforcement officers and thereby fails to protect the Fourth Amendment.

For a consent search to be valid under the Fourth Amendment, the government must prove "the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1958). The Ninth Circuit has

"identified five primary factors to be considered in determining the voluntariness of consent to search:

> (1) whether defendant was in custody;
> (2) whether the arresting officers had their guns drawn;
> (3) whether *Miranda* warnings were given;
> (4) whether the defendant was notified that she had a right not to consent;
> (5) whether the defendant had been told a search warrant could be obtained.

United States v. Patayan Soriano, 361 F.3d 494, 502 (9th Cir. 2004); *see also United States v. Cormier*, 220 F.3d 1103, 1112 (9th Cir. 2000). In *Patayan Soriano*, this Court noted that this list of factors is not exclusive and no one factor is determinative, but many of the court's decisions upholding consent are supported by "at least several of the (five) factors." *Id.*

Unlike the Ninth Circuit's clear multi-factor balancing test, the *Schneckloth v. Bustamonte* "totality of the circumstances" test encourages police to guess at whether they have a valid consent to search. Legal commentators believe that truly voluntary consent to search is uncommon, but invalid consent searches are generally approved under the current voluntariness test. *LaFave, W., & Baum, D., 4 Search & Seizure: A Treatise on the Fourth Amendment* § 8.2 (5th ed. 2017). According to *LaFave*, *supra*, using an elusive voluntariness test to prevent involuntary searches is likely to be as ineffective and unworkable as the same voluntary test was before it was superseded by the clear rules in *Miranda v.*

Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). As Chief Justice Rehnquist explained in *Dickerson v. United States*, the *Miranda* warnings are constitutionally required due to the compelling pressures which are inherent in custodial police interrogation. *Dickerson v. United States*, 120 S.Ct. 2326, 2334, 530 U.S. 428, 440 (2000). Chief Justice Rehnquist pointed out that the totality of the circumstance test created an unacceptably high risk that involuntary confessions would be allowed into evidence in a criminal case unless strict rules were implemented:

> In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, 384 U.S., at 457, 86 S.Ct. 1602, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something moreh than the totality test was necessary.

Id., 120 S.Ct. at 2335-2336, 530 U.S. at 441.

According to *LaFave, supra*, the use of a vague voluntariness test to protect the Fourth Amendment rights will have the same problems as the use of the same test to protect the Fifth Amendment in identical circumstances. If the *Scneckloth v. Bustamonte* test is not protecting the people from unreasonable searches, the scope of the constitutional problem is immense. *See Florida v. Bostick*, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)(evaluating the legality of suspicion-less searches of bus passengers which enable police to engage in a tremendously high

volume of searches which are justified by apparent consent).

Professor Strauss has suggested that consent searches should be eliminated, because the process encourages distortion and police perjury. *Strauss, M., Reconstructing Consent*, 92 J.Crim.L. & Criminology 211, 212 (2002). Professor Thomas suggests that the widespread use of consent searches encourages racial profiling. *Thomas, George C. Terrorism, Race and a New Approach to Consent Searches*, 73 Miss.L.J. 525, 551–52 (2003).

The New Jersey Supreme Court refused to follow *Schneckloth v. Bustamonte* in interpreting its identically-worded state constitutional protection against unreasonable searches, and held that a consent search is invalid unless the state proves the person was fully aware of his right to refuse to consent. *State v. Johnson*, 346 A.2d 66, 68, 68 N.J. 349, 354 (N.J. 1975).

Mr. Kegler asks this Court to accept certiorari in this case to evaluate whether *Schneckloth v. Bustamonte* should be reconsidered and replaced by a clear rule that will protect the people from unreasonable searches.

CONCLUSION

For the foregoing reasons, Mr. KEGLER respectfully requests that this Court grant his Petition for Certiorari.

Dated: December 26, 2018

Respectfully submitted,

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