

NO. \_\_\_\_\_  
October Term, 2018

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHAEL SCOTT MORRIS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

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**PETITION FOR A WRIT OF CERTIORARI**

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(a) **The Question Presented for Review Expressed in the Terms and Circumstances of the Case.**

Is consent to search a home freely and voluntarily given when police threaten arrest and jail if they are required to obtain a search warrant?

(b) List of all Parties to the Proceeding

The caption of the case accurately reflects all parties to the proceeding before this Court.

(c) Table of Contents and Table of Authorities

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The order and judgment of the United States Court of Appeals for the Tenth Circuit is unpublished. *United States v. Morris*, No.17-6223, \_\_\_ Fed.Appx.\_\_\_, 2018 WL 5278915 (10th Cir. October 23, 2018) (unpublished).

(e) **Concise Statement of Grounds on which the Jurisdiction of the Court is Invoked.**

(i) Date of judgment sought to be reviewed.

The unpublished Order and Judgment of the Tenth Circuit of which review is sought was filed October 23, 2018;

(ii) Date of any order respecting rehearing.

Not applicable;

(iii) Cross Petition.

Not applicable;

(iv) Statutory Provision Believed to Confer Jurisdiction.

Pursuant Title 28, United States Code, Section 1254(1), any party to a criminal case may seek review by petitioning for a writ of certiorari after rendition of judgment by a court of appeals.

(v) The provisions of Supreme Court Rule 29.4(b) and (c) are inapposite in this case. The United States is

a party to this action and service is being effected in accordance with Supreme Court Rule 29.4(a).

**The Constitutional Provisions, Statutes and Rules which the Case Involves.**

(1) Constitutional Provisions:

U.S. Constitution, amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(2) Statutes Involved:

None.

(3) Rules Involved:

Federal Rule of Criminal Procedure Rule 12.

(4) Other:       None.

(g) **Concise Statement of the Case.**

*Basis of Jurisdiction in Court of First Instance*

This Petition seeks review of an order entered by a United States Court of Appeals, affirming the denial of relief from a motion to suppress evidence discovered during a warrantless search. The jurisdiction of the District Court was invoked pursuant Title 18, United States Code, Section 3231. Review in the Court of Appeals was sought under Title 28, United States Code, Section 1291. The Court of Appeals

denied Mr. Morris' appeal on October 23, 2018. Review in this Court is sought under Title 28, United States Code, Section 1254. This petition is timely filed pursuant to Supreme Court Rule 13.1.

### **Facts Material to Consideration of Question Presented**

#### *Procedural Posture*

On November 15, 2016, Mr. Morris was charged by indictment with two counts: Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1) and Possession of a Homemade Silencer in violation of 26 U.S.C. § 5861(d). Mr. Morris filed a motion to suppress, challenging the warrantless search of his home. The district court denied Mr. Morris' motion after hearing evidence and argument.

Mr. Morris subsequently pled guilty to Count 1 after entering into a plea agreement reserving the right to appeal the denial of his motion to suppress. The district court sentenced Mr. Morris to sixty (60) months incarceration. Mr. Morris appealed to the United States Court of Appeals for the Tenth Circuit. After hearing oral argument, the Tenth Circuit Court of Appeals affirmed the sentence in an unpublished order and judgment.

#### *Facts*

The relevant facts focus on the events of June 24, 2016 in Chickasha, Oklahoma. The district court heard testimony from two officers and Mr. Morris'

mother, Deborah Morris. In addition, the district court was provided video recordings taken from the body worn cameras of both police officers. Mr. Morris also provided the district court with a transcript of the videos.

Dustin Igo and Kayla Johnson reported to Chickasha Police that Mr. Morris was involved in a shooting. Though the shooting allegedly occurred around 12:30 a.m., Mr. Igo and Ms. Johnson did not call police until shortly before 1:30 a.m. Officer Clayton Hobbs arrived on scene at 1:26 a.m. He testified he was responding to a report that a subject armed with a firearm and suppressors was at the residence and had just shot at someone from his porch. When Officer Hobbs arrived at the scene of the alleged shooting, he set up a perimeter around the house. Shortly thereafter, Officer Peck arrived and assisted. The subsequent events are captured on the body worn cameras of both officers, and the tape was admitted into evidence. In addition to the portions played in open court, the district court made note that it reviewed the video prior to the hearing.

Officers surrounded the home of Mr. Morris and trained multiple weapons on the house. Deborah Morris exited the residence, at which point she was ordered to come to the patrol cars. The testimony at the hearing revealed that Ms. Morris was employed at McDonald's for 17 years. She suffered from rheumatoid arthritis, degenerative arthritis, psoriatic arthritis, high blood pressure, and dense blood.

Officer Hobbs noticed she had difficulty moving as she exited the house and came closer to the officers. Her pain and limited mobility were clear from the video recordings. Officer Hobbs attempted to let her sit in one of the patrol cars, but the doors were locked. She told the officers she had taken some pills to alleviate general pain she was suffering and to help her sleep. At the end of the encounter, Ms. Morris was exhausted, tired, groggy, and just wanted some place comfortable to sit.

As documented in the transcript of the videos admitted into evidence, Officer Hobbs proceeded to speak with Ms. Morris in an attempt to secure consent to search the residence.<sup>1</sup> The relevant portion is reproduced here with relevant parts emphasized:

Officer Peck:	Where's Michael at?
Debra Morris:	[Inaudible] went somewhere.
Officer Hobbs:	Come over here and talk to me. Are you ok?
Debra Morris:	Yeah, I just have arthritis, ok?
Officer Hobbs:	Alright.
Debra Morris:	Took pills, tried to get rid of it. Just real groggy.

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<sup>1</sup>The District Court commented on the use of the transcript in its review of the evidence:

[A]nd for the benefit of all parties, including a reviewing court, I'll certainly say that the transcript is at least generally, and I think in virtually every respect, if not every respect, accurate, but that all concerned should understand that the best evidence is the video itself, and I'm going to rely on the video with the transcript simply as a guide to what's happening when. (*Tr.* at 27).

*See also Tr.* at 123 (“[T]his is also a bit counterintuitive, but at least to me the conversation looks noticeably more coercive, oddly enough, in the transcript, than it was in real life as recorded by the body camera.”).

...

Officer Hobbs: He's not in your house?

Debra Morris: No, just me and Bella.

Officer Hobbs: Is it alright if we go in there and take a look?

Debra Morris: [Stutters] The dog will not let you in that house.

Officer Hobbs: What kind of dog is it?

Debra Morris: She's a pit.

Officer Hobbs: Ok.

Officer Hobbs: How...what's the best way that I can restrain that dog?

Debra Morris: She is extraordinarily protective of me and she's not going to let anybody in that house.

Officer Hobbs: Ok, we're going to have to get in that house. So, what do you suggest?

Debra Morris: He is not here! He went with a damn friend! I don't know where or who he went with because I don't even know where his friends live.

Officer Hobbs: Ok. Uh...we got to question him about a couple things. We're going to need to talk to him.

Debra Morris: I will get a hold of him as soon as I can. I will go in there and text him and start calling him and tell him to get a hold of you people.

Officer Hobbs: Well, this is the deal, you're not gonna go back in that house, ok? Uh, as a matter...you're not going back in the house until we talk to him and find out where he's at and we're gonna have to clear the house and make sure he's not in there.

Debra Morris: You are not hurting my dog.

Officer Hobbs: Well, we don't want to hurt your dog.

Debra Morris: Well then you cannot...

...

Officer Hobbs: Ok. Well, I'm going to explain what, why we're here, alright? We're here because...

Debra Morris: And I took pills and laid down...

Officer Hobbs: So, you don't...did you go to sleep?

Debra Morris: No, I was just fixin' to start dozin' off when I realized I heard somethin'.

...

Officer Hobbs: Ok. This is...this is what...this is what we're here. Somebody watched him come out and fire a round off the front porch and it struck a car that was drivin' by. We're..we're here to see if he's here...

Debra Morris: Here?

Officer Hobbs: Yes.

Officer Hobbs: He had a silencer on his gun, a homemade silencer on a .22 pistol. Have you ever saw him...

Debra Morris: No!

Officer Hobbs: ..with a gun?

Debra Morris: No!

Officer Hobbs: Never saw him own a gun or anything like that?

Debra Morris: No!

Officer Hobbs: Alright. And, you know for a fact he's not in the house?

Debra Morris: No...the reason that I was...I...he went with a friend.

Officer Hobbs: 'Bout how long...how long have you been asleep?

Debra Morris: Maybe 10, 15 minutes I was just started to doze off.

Other Officer: Do you know what time it is, ma'm?

Debra Morris: No, I don't.

Other Officer: Guess what time it is without looking at your watch, ok?

Debra Morris: Umm...one?

Other Officer: About what time...

Debra Morris: It..it has to be after one because I stayed up and watched Big Brother on my computer at midnight.

Officer Hobbs: Ok. Uh, nobody's supposed to be in the house...

Debra Morris: No, there's not supposed to be anyone in the house!

Officer Hobbs: ...at all right now? Ok.

Debra Morris: [inaudible]...to let anybody in the house.

Officer Hobbs: I understand. Um. Well, we're gonna have to clear your house. **Are you givin' us consent to go in and clear your house?**

Debra Morris: No.

Officer Hobbs: **Ok, then we'll get a warrant.**

Debra Morris: **It's not my house!**

Officer Hobbs: Let's go, let's walk this way. **We'll get a...file for a warrant. If he's in there, then I'm takin' you to jail too.** So, let's go this way.

Debra Morris: [Inaudible]

Officer Hobbs: If he's in there and you're not tellin' me, I'm takin' you to jail.

Debra Morris: As far as I know, he's not in there! He left with a friend!

Officer Hobbs: Ok. We're gonna have to get a warrant, Lt. So you don't want...you're not givin' us consent to go in the house?

Debra Morris: It's...

Officer Hobbs: All ya gotta do is say, 'yes' or 'no'.

Debra Morris: If I could talk to him and tell him...if they'll let me...I don't.

Officer Hobbs: He's in the house, isn't he?

Debra Morris: No, I don't think he's in the house!

Officer Hobbs: Ok, first off...

Debra Morris: Because he left!

Officer Hobbs: ...don't yell at me. Somebody watched somebody shoot at them from your front porch. Alright? That's why we're here. We just don't show up because we're just bored. Alright?

Debra Morris: I understand...

Officer Hobbs: And, we're askin' you if he's here and you said 'no'.

Debra Morris: No...[inaudible]..he's not here.

Officer Hobbs: But now, you're not givin' us consent to go in the house, so, at this point we can get a search warrant and then we'll...

Debra Morris: Ok, ok, ok...I just.

Officer Hobbs: We won't hurt your dog to the best of our ability.

Debra Morris: It's...it's not my house...

Officer Hobbs: You...it doesn't matter whose house it is. You live here?

Debra Morris: I live with him, yeah.

Officer Hobbs: Ok, so you occupy the house, right?

Debra Morris: Yeah, I stay...I live at the house.

Officer Hobbs: So, you pay rent and all that stuff?

Debra Morris: I help him out, yeah, cuz.

Officer Hobbs: Ok.

Debra Morris: ...he's been having trouble here lately.

Officer Hobbs: Alright.

Debra Morris: He's helped me for freakin' years.

Officer Hobbs: **Alright. She says that she's giving us consent now to go in the house...**

Debra Morris: **He's not in there, no!**

Officer Hobbs: ...that he's not in there according to her.

Debra Morris: Last time I saw him, he walked out the door, I was in my room, on the computer, it was before the Big Brother episode went off. Said he was goin' out for awhile and he'd be back later and I told him, 'ok'.

Other Officer: Ok.

Other Officer: **And you're tellin' us that you're...**

Debra Morris: And, I...

Other Officer: **...you're tellin' us that you'll give us consent to search that house for Michael?**

Debra Morris: **Yeah.**

Other Officer: **Ok.**

Other Officer: **That's of your...**

Debra Morris: **Finished watching that program...**

Other Officer: **That's of your own free will...**

Debra Morris: **...took 2 Tylenols.**

Other Officer: **Is that of your own free will?**

Debra Morris: **Yeah.**

As evident on the video, Officer Hobbs became stern with Ms. Morris. His tone changed. At this point, Officer Hobbs began discussing the possibility of taking Ms. Morris to jail. Ms. Morris testified she took Officer Hobbs comments about jail as a threat. She testified that she felt threatened and coerced into giving officers consent to search the home.

After Ms. Morris gave permission to search for Mr. Morris in the home, officers waited over an hour before entering the residence. Once inside, officers located and detained Mr. Morris. Officer Peck read Mr. Morris warnings under *Miranda* and Mr.

Morris answered questions and engaged in conversation. Officers advised they were looking for guns and Mr. Morris said “all right” when asked whether police could search a bedroom for guns. Eventually, officers found guns and silencers which formed the basis for the instant criminal charge.

*Ruling of the district court*

The district court made factual findings from the bench. For the district court, the conversation between Officer Hobbs and Ms. Morris took a “significant turn” when Ms. Morris explicitly denied consent. The district then discussed the subsequent conversation, but noticeably omitted any consideration of the threat of jail made to Ms. Morris.

The district court concluded the officers reasonably perceived her to have authority to consent.<sup>2</sup> In addition, the district court found her consent was not given as a result of coercion or intimidation, and that it was freely and voluntarily given.

As an alternative basis, the district court concluded entry into the home was justified by the exigent circumstances exception.

*Ruling of the Court of Appeals*

The Tenth Circuit reviewed the district court findings for clear error. Based upon evidence most favorable to the lower court’s decision, the Circuit ruled the

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<sup>2</sup>Ms. Morris’ authority to consent was not at issue.

district court had applied the correct legal standard for determining the voluntariness of Ms. Morris' consent after considering the totality of the circumstances. It further concurred with the district court findings that, after viewing the body camera footage and seeing Ms. Morris testify at the suppression hearing, that Ms. Morris' consent was voluntary and not coerced. It did not rule on the exigency circumstances question.

(h) **Direct and Concise Arguments Amplifying the Reasons Relied on for the Allowance of the Writ.**

This case presents an egregious example of police tactics designed to wither away at an individual's ability to decline consent to search. This Court should grant review because a threat to take a person to jail if police are required to get a warrant renders any resulting consent invalid. Petitioner's case presents a compelling example of law enforcement coercion.

I. The Tenth Circuit's decision conflicts with *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)

The Tenth Circuit determined Ms. Morris was not coerced into providing consent to search, even though the officers threatened to get a warrant and take her to jail. This conclusion is contrary to the principles in *Schneckloth*.

In *Schneckloth*, the Court set forth a totality of the circumstances inquiry to determine whether an individual's consent to search was voluntarily given, or if it was the product of duress or coercion. 412 U.S. at 227. Such consent cannot "be coerced,

by explicit or implicit means, by implied threat or covert force.” *Id.* at 228. If consent were permitted after coercion, such “‘consent’ would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.” *Id.* In the totality of the circumstances inquiry, a court must take account of “the possibly vulnerable subjective state of the person who consents.” *Id.* at 229.

Simply put, “[w]here there is coercion there cannot be consent.” *Bumpton v. N. Carolina*, 391 U.S. 543, 500 (1968). Coercion is barred “no matter how subtly [it is applied].” *Schneckloth*, 412 U.S. at 228. For consent to be valid, it must be “the product of an essentially free and constrained choice by its maker.” *Id.* at 225. Indeed, this Court recently struck down a statute that required a business owner to submit to a warrantless search or risk “being arrested on the spot.” *City of Los Angeles v. Patel*, 135 S.Ct. 2243, 2452 (2015). An individual cannot “reasonably be put to this kind of choice.” *Id.*

Both the district court and the Tenth Circuit’s decision failed to properly apply the totality of the circumstances analysis. *See Schneckloth*, 412 U.S. at 227-29 (consent inquiry is governed by totality of the circumstances). The question below was analyzed by taking each fact separately and rebutting them. In contrast, the totality of the circumstances analysis does not review each fact “in isolation;” instead

a court must consider “the whole picture.” *District of Columbia v. Wesby*, 138 S.Ct. 577, 588 (2018).

The Tenth Circuit affirmed the district court’s conclusions. Review of the facts and law demonstrate this was error. The undisputed testimony in the record is that Ms. Morris was an older woman replete with health conditions. When officers encountered her, she was drifting off into a medicine induced sleep. She was disoriented and physically ailing. Officers then proceeded to seek her consent to search the home. The objective evidence in the record establishes that she persisted in denying officers permission to enter the home. The district court characterized Ms. Morris as “mentally alert [and] reasonably intelligent.” Importantly, the district court did not find Ms. Morris lacked credibility. The district court’s factual findings suggest Ms. Morris continuously denied consent to enter the home throughout the encounter. For example, when analyzing Ms. Morris’ concern that she lacked authority to consent, the district court considered Ms. Morris to want the officers “to be on their way.” It was an attempt at “deflect[ion].”

The district court also reasoned that Ms. Morris’ 17 year employment record at McDonald’s weighed against a finding that her consent was involuntary or the product of coercion: “if you are, as she was and is, a long-time and apparently successful shift manager at McDonald’s, you’re certainly not likely to be a person

who can easily be flustered or intimidated.” (*Tr.* at 130). Yet the district court wholly failed to factor in Ms. Morris’ current physical state at the time of the police encounter. She had been roused from sleep after working a full and busy shift. She had taken Tylenol PMs, which include a sleep additive. She had made this known to the police on multiple occasions during the conversation. She was in a compromised mental state which bears on the ultimate decision of whether her consent was voluntary or coerced.

In addition to her ongoing medical conditions and immediate mental state at the time of the police interaction, Ms. Morris was threatened with arrest and jail once she explicitly declined to consent. Ms. Morris testified this threat was a reason for her “consent.” Indeed, Ms. Morris’ consent was what saved her from going to jail. Recall the officer told her that if he needed to get a warrant and Mr. Morris was inside the residence, she was going to jail. The courts below considered the threat of jail to be conditioned on Ms. Morris lying, and not on refusal of consent. However, she maintained that her son was not inside the house, but he was. So, this was a lie. Yet she was not arrested because she gave consent to search. This is the exact type of coercion that renders consent invalid.

This Court should make clear the consent exception to the Fourth Amendment’s warrant requirement cannot be secured through threats of incarceration.

Other lower courts have considered threats of jail particularly significant when determining whether consent was freely and voluntarily provided. *See, e.g., United States v. Ivy*, 165 F.3d 397, 402-04 (6th Cir. 1998) (government failed to meet its burden that consent to search home was freely and voluntarily given where defendant eventually signed consent form after threats of jail). *Cf. Griffin v. Strong*, 983 F.2d 1540 (10th Cir. 1993) (in Section 1983 proceeding, threats of jail and inability to see daughter held to be sufficiently coercive under the Fifth and Fourteenth Amendments such that statement was coerced). *United States v. DiGiacomo*, 579 F.2d 1211, 1216 (10th Cir. 1978) (consent to search invalid where officers told defendant he was suspected of a serious crime, gave incorrect recitation of constitutional rights, told him he could go to jail, and required him to surrender all counterfeit money he had).

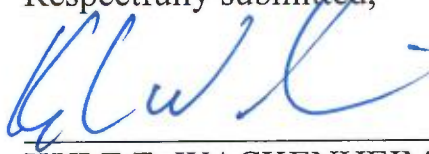
These principles are evidence from prior cases from this court. For example, consent cannot be lawfully secured if police “convey a message that compliance” is required. *Florida v. Bostick*, 501 U.S. 429, 435 (1991). *See also United States v. Drayton*, 536 U.S. 194, 206 (2002) (consent was valid because “[n]othing [the] Officer . . . said indicated a command to consent to the search.”).

The Court should take the opportunity to make clear threats of arrest for failing to consent weighs heavily against a conclusion that such consent was freely and voluntarily provided.

*Conclusion*

The petition should be granted.

Respectfully submitted,



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(i) **Appendix.**

- (i) Opinion delivered upon the rendering of judgment by the court where decision is sought to be reviewed:

*United States v. Morris*, No.17-6223, \_\_\_\_ Fed.Appx.\_\_\_\_, 2018 WL 5278915 (10th Cir. October 23, 2018) (unpublished).

- (ii) Any other opinions rendered in the case necessary to ascertain the grounds of judgment:

None;

- (iii) Any order on rehearing:

None;

- (iv) Judgment sought to be reviewed entered on date other than opinion referenced in (i):

None;

- (v) Material required by Rule 14.1(f) or 14.1(g)(i):

None;

- (vi) Other appended materials:

*Selected Transcript in United States v. Morris*, CR-16-220-F, Doc. 57, filed Dec. 3, 2017.