No. _____

SUPREME COURT OF THE UNITED STATES

OSCAR HENRY STEINMETZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Philip G. Scanlon
Counsel for Petitioner
Taaffe & Associates, LLC
1015 Locust St., Ste. 725
St. Louis, Missouri 63101
(314) 241-3700 (office phone)
(314) 241-3710 (office fax)
phil@taaffeandassociates.com

I. QUESTIONS PRESENTED

1. Does the law regarding searches, seizures, and consent need clarification for proper guidance and application?

2. Should a law enforcement officer be required to notify a suspect of his or her rights under the Fourth Amendment before requesting the suspect's consent to search?

II. TABLE OF CONTENTS

III. TABLE OF AUTHORITIES

Cases

IV. PETITION FOR WRIT OF CERTIORARI

Oscar Henry Steinmetz, an inmate currently incarcerated at the United States Medical Center for Federal Prisoners located in Springfield, Missouri, by and through Counsel, Philip G. Scanlon, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eight Circuit.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as United States v. Oscar Steinmetz (8th Cir. 2018) (App. A-L). The Eighth Circuit's opinion was entered on August 15, 2018 (App. A-L).

VI. JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). Mr. Steinmetz timely filed this petition for a writ of certiorari within ninety days of the judgment of the Eight Circuit Court of Appeals.

VII. CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution states as follows:

> 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. U.S. Const. Amend IV.

The Fifth Amendment to the United States Constitution states as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

> offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, with our without just compensation. U.S. Const. Amend V.

The Sixth Amendment to the United States Constitution states as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. U.S. Const. Amend VI.

VIII. STATEMENT OF THE CASE

Steinmetz was accused of sexual assault and taking nude photographs of a minor. Police suspected that evidence of child pornography were present in computers or hard drives within Steinmetz' residence. Investigation led to a station house interrogation lasting over seven hours and involving two detectives.

During Steinmetz' interrogation, there were multiple discussions concerning Steinmetz' consent to search his residence. Approximately one hour and fourteen minutes into the interrogation, the detective at that time made the first attempt to obtain Steinmetz' consent. Upon the detective's request, Steinmetz asks if he would be released if he did so. The detective responds that she cannot make that decision. Shortly after, the detective makes a second attempt to obtain Steinmetz' consent. The detective presented Steinmetz with a Consent to Search form. Said form did not detail the items to be searched and generally lists his entire house as the object of the search. Said form included the clause, "I understand that I have the right to refuse to consent to the search described above[.]" After review but prior to Steinmetz signing the form, he asked if he could be present during the search. The detective responded, "Okay" but later testified that she had no intention of Steinmetz being present.

Approximately four hours into the interrogation, Steinmetz is confronted with a second interrogating detective. Steinmetz is informed that this detective would be conducting the search which led Steinmetz to repeat his desire to be present during the search. Steinmetz is told that his presence would delay the

process, that the detective would supervise the search, and that the search would be "minimal" and "unlike a search warrant".

Steinmetz is asked for his consent to search a third time and is presented with a second form. The detective explained the form pertained to Steinmetz' computer and password and made no reference to hard drives, thumb drives, or other computer equipment being searched. Steinmetz asked the detective about the details and procedure of the search, but the detective does not respond. Steinmetz then signed the form. Soon thereafter, the detective informed Steinmetz that the search was completed and Steinmetz became visibly upset, impliedly, because he realized he was not present during the search.

Steinmetz was indicted on the charge of Production of Child Pornography. Steinmetz moved to suppress the evidence on the grounds that the search was in violation of the Fourth Amendment. His motion was denied.

After a jury trial, Steinmetz was convicted of the charge and sentenced to 240 months incarceration, a $10,000.00 fine, and restitution in the amount of $69,284.00.

Steinmetz timely filed a Notice of Appeal. Oral Argument was heard by the Eighth Circuit Court of Appeals on April 12, 2018. As part of Steinmetz argument, he proposed the implementation of prophylactic warnings that notify custodial suspects of their rights concerning searches and seizures. The Eighth Circuit denied Steinmetz' appeal and issued its opinion on August 15, 2018 (App. A-L).

IX. REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case to further clarify the rights pursuant to the Fourth Amendment, and, additionally, implement prophylactic warnings to those in custodial interrogations when asked for consent to search. This is an important question of law that needs to be settled by this Court.

Our Constitution is rooted in personal freedoms and instituted by persons who fought for their existence. Our system of law is predicated on the supreme importance of individual protection from excess governmental power. This Court's decision in *Miranda* details the sanctity of rights under the Fifth and Sixth Amendment but does not extend to Fourth Amendment rights. Debate regarding Fourth Amendment rights has continued since *Miranda.* This Court needs to clarify the questions surrounding this issue and guide our system of law.

This Court's review of this issue would provide much needed clarification and guidance for individuals, law enforcement, and legal practitioners. By implementing said prophylactic warnings, this Court would: (1) strengthen investigative procedures and the admission of evidence, (2) restore the historical purpose and importance of the Fourth Amendment, (3) strengthen individual liberties, (4) increase transparency in the investigative process, and (5) promote trust between the people and law enforcement.

I. This Court needs to clarify the importance and scope of the Fourth Amendment, in context with the Fifth and Sixth Amendments, to resolve consistent and perplexing ambiguities pertaining to consensual searches.

A. The law pertaining to suspects' rights in custodial interrogations creates an imbalance between Fifth and Sixth Amendment protections and Fourth Amendment Protections.

The Fifth Amendment gives individuals the right to be free from self-incrimination. U.S. Const. Amend V. The Sixth Amendment gives individuals the right to be assisted by counsel in defense of criminal prosecutions. U.S. Const. Amend VI.

In *Miranda*, this Court clarified the tantamount importance of an individual's Fifth and Sixth Amendment rights. *Miranda v. Arizona*, 384 U.S. 436, 439 (1966) (stating that the right against self-incrimination goes "to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime.") The *Miranda* Court held that clear and unequivocal warnings must be given to an accused prior to being asked questions in a custodial interrogation. *See id*. at 467-74. The *Miranda* decision furthered individual liberties and was an extension of prior cases increasing Constitutional protections. *See Gideon v. Wainwright*, 412 U.S. 218 (1963) (holding an accused has an absolute right to counsel thereby overturning *Betts v. Brady*, 316 U.S. 455 (1942)). The *Miranda* Court noted that if there are not proper limitations on a custodial interrogation, there is no assurance that rights under the Fifth and Sixth Amendments are protected. *Id*. at 447. The *Miranda* Court did not explicitly state how or if its decision impacted Fourth

Amendment protections. *See generally id*. (in entirety); (*See also Schmerber v. California*, 384 U.S. 757, 764 (1966) (stating that *Miranda* does not extend to a suspect being the source of real or physical evidence)).

The Fourth Amendment gives individuals the right to be free from warrantless searches and seizures. U.S. Const. Amend IV. The Fourth Amendment detracts from excess police power and instills that our Constitution does not tolerate the tactics of a police state. *See Davis v. United States*, 328 U.S. 582, 597 (1946). The fundamental right to be secure in one's person, home, and property is not new to modern society but rooted in ancient philosophy. *See* Nelson B. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 13 (1970). It is unquestioned that Fourth Amendment rights are stitched into the very fabric of American society, essential to democratic values, and intertwined with the protection against self-incrimination. *Boyd v. United States*, 116 U.S. 616, 630 (1886) (stating, "*any forcible and compulsory extortion of a man's own testimony, of his private papers to be used as evidence to convict him of a crime…In this regard, the fourth and fifth amendments run almost into each other*." (emphasis added)).

Unlike custodial statements that are self-incriminating or made without counsel, a warrantless search is reviewed based only on its objective "reasonableness" under the totality of the circumstances. *Katz v. United States*, 389 U.S. 347, 361 (1967). Practically speaking, the reasonableness of a search is determined using the rational basis standard—the same test used to decide equal

protection and due process challenges to social and economic legislation. *See Collins v. City of Harker Heights*, 112 S.Ct. 1061, 1070 (1992) (holding that a City's failure to train and warn employees of risks of harm was not a due process violation as governmental programs are presumed valid and rationally based and weighed against competing social, political, and economic interests); *See also Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1987) (finding that a statute survives equal protection attack if the challenged legislation is rationally related to legitimate governmental purposes).

The problem with the reasonableness criterion is that it leads to balancing the government's interest in effective law enforcement against individual interests in personal security and privacy—which almost always results in a subjective decision against personal liberty. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich. L. Rev. 1468, 1472 (1985) (stating, "The Court purports to set forth clear rules while actually adjusting them constantly to accommodate each new fact situation."). The reasonableness criterion also applies Fourth Amendment protections to those in the criminal milieu. *See United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (stating in Justice Black's dissent "[i]t is a fair summary of history to say the safeguards of liberty have frequently been forged in controversies involving not very nice people.") This approach lacks context and results in deferential determinations on the side of police intrusion. *Id*. at 83 (stating in Justice Black's dissent, "To say that the search must be reasonable is to require

some criterion of reason. It is no guide…to say that an 'unreasonable search' is forbidden—that the search must be reasonable.").

The law's problematic treatment of the Fourth Amendment was substantially furthered in *Schneckloth*. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In *Schneckloth*, this Court found that the prosecution need only show that a suspect voluntarily consented to a search when given in a non-custodial atmosphere. *Id*. at 248. This Court defined "voluntary" consent as consent that is objectively reasonable based on the totality of circumstances. *Id*. at 225-26. The determination of "reasonableness" weighs the societal interest in effective law enforcement against personal liberties under the Fourth Amendment. *See id*. This Court declined to follow the Ninth Circuit in requiring that the consenting suspect be made aware of his or her rights. *Id*. at 229. This Court noted the impracticality of warning a suspect of his Fourth Amendment rights in the context of a non-custodial atmosphere. *Id*. at 231. Warnings elucidated in *Miranda* were distinguished from Fourth Amendment rights by finding rights under the Fifth and Sixth Amendment protect trial fairness whereas the Fourth Amendment does not. *Id*. at 235-37. Specifically, the *Schneckloth* Court found that the Fourth Amendment in a non-custodial context is not an adjunct for truth. *Id*. at 242. As such, the Court stated, "The considerations that formed the court's holding in Miranda are simply inapplicable to the present case." *Id*. at 246. Inevitably, the holding in *Schneckloth* was extended to custodial interrogations in *Watson*. *United States v. Watson*, 423 U.S. 411, 424 (1976).

The reasonableness standard is inherently biased against Fourth Amendment rights and minimizes the protections of the Fourth Amendment. Examples of the ambiguities of the reasonableness standard and the inherent bias toward law enforcement has been illustrated in every circuit. Such is exemplified in the majority opinion in *Jimeno* wherein Fourth Amendment protections were minimized in finding that general consent to search a vehicle reasonably extended to the search of containers inside the vehicle. *Florida v. Jimeno*, 500 U.S. 248 (1991). However, in a detailed and emphatic dissenting opinion, Justice Marshall pointed out the inherent and recurring problem in using such an ambiguous standard. *Id*. at 254. Marshall's opinion highlights that law enforcement efficacy cannot detract from the protections of the Fourth Amendment. *See id*. In the context of a search, Justice Marshall promoted the requirement of an officer to transparently and unequivocally notify the suspect of the scope and object of the search to obtain valid consent. *Id*. The dissent demonstrates that the reasonableness standard easily allows an officer to exploit the ignorance of an individual to circumvent the individual's security—effectually finding law enforcement effectiveness more important than individual rights. *Id*. at 255-56. Justice Marshall ends his opinion emphasizing the ongoing problem with the practical value of a person's Fourth Amendment rights by quoting his opinion in *Schneckloth*:

> [I]t would be "practical" for the police to ignore the commands of the Fourth Amendment, if by practicality we mean that more criminals will be apprehended, even though the constitutional rights of innocent people go by the board. But such a practical advantage is achieved only at the cost of

permitting the police to disregard the limitations that the Constitution places on their behavior, a cost that a constitutional democracy cannot long absorb. *Id*. at 256 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 288 (1973).

B. The imbalance between Fourth, Fifth, and Sixth Amendment protections and the decreasing value of personal security is evident in every circuit thereby increasing the need for judicial clarification and precedential revision.

The continued validation of the reasonableness standard and legitimization of varying law enforcement practices inevitably leads to the question of whether consent in a custodial atmosphere is ever unreasonable.

In *Robinette*, this Court affirmed the rejection of bright-line rules defining reasonableness due to the limitless variations of facts and circumstances where searches occur and consent is given. *Ohio v. Robinette*, 519 U.S. 33, 38-39 (1996) (citing *Florida v. Royer*, 46 U.S. 491 (1983); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Florida v. Bostick*, 501 U.S. 429 (1991). However, Justice Stevens' dissenting opinion notes that there is no federal law precluding admonishing suspects of their rights under the Fourth Amendment. *Id*. at 52. Nevertheless, Justice Stevens notes that although warnings would benefit law enforcement, the courts, and the public at large, it is not a question for the United States Supreme Court to decide. *Id*. at 52-53.

The Fifth Circuit minimized Fourth Amendment protections by finding reasonable consent despite flagrant Miranda violations and officers demanding a suspect's decision. *United States v. Gonzalez-Garcia*, 708 F.3d 684, 684-688 (5th Cir. 2013). The Fifth Circuit found that Miranda does not attach to physical evidence seized as a result of a consensual search. *Id*. at 687. The Court deferred to

the case-by-case analysis of consent and searches thereto and furthered the disapproval of bright-line rules. *Id.* at 688 (following *Schneckloth* and *Watson*).

The Sixth Circuit in *Lucas* minimized Fourth Amendment protections regarding reasonableness and consent. *United States v. Lucas*, 640 F.3d 168 (6th Cir. 2011). In *Lucas*, a suspect believed to be manufacturing marijuana was asked to sign a consent to search form in the presence of five officers. *Id.* at 170. Upon the suspect's hesitancy, officers warned of the inevitability of a search warrant leading the suspect to sign the form which included notice of his right to refuse and withdraw consent and authorization for officers to search for drug related evidence. *Id*. at 170-71. The search of the suspect's residence led to the search of his computer, hard drive, and thumb drive and the seizure of child pornography. *Id*. at 171-72. The Court found that consent was reasonable and that the search's scope extended to the computer, hard drive, and thumb drive due to the form's contents. *Id*. at 174-79.

The Eighth Circuit in *Whisenton* minimized Fourth Amendment protections by finding illegal entry of multiple, armed officers into an individual's home led to reasonable consent due to "intervening circumstances". *United States v. Whisenton*, 765 F.3d 938, 940 (8th Cir. 2014). After police entry, the suspect was effectually in custody and non-responsive to the officers' request for consent. *Id*. Officers then notified the suspect of the inevitability of a search warrant if no consent was given. *Id*. The suspect was given the opportunity to smoke a cigarette and understand the scope of the search before signing a form that included notice of the suspect's right

to refuse. *Id.* The Eighth Circuit found that a fifteen minute lapse between the illegal entry and consent, the suspect's affirmation of his right to refuse, and the absence of his withdrawal of consent was enough for the search to be valid and the illegal entry to be overcome. *Id.*

The Eleventh Circuit in *Hidalgo* found valid consent by a Spanish speaking suspect despite (1) invoking his right to silence prior to consent, and (2) being woken up to the commands of gun wielding officers, ordered to the floor, and presented with a consent form in English. *United States v. Hidalgo*, 7 F.3d 1566, 1567-71 (11th Cir. 1993). In regards to the relationship between invoking Miranda and consent to search, the 11th Circuit noted that every federal circuit ruled Miranda warnings irrelevant to the issue of consent to search. *Id.* at 1568 (citing *Smith v. Wainwright*, 581 F.2d 1149, 1152 (5th Cir. 1978); *United States v. Lemon*, 550 F.2d 467, 472 (9th Cir. 1977); *United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1568 (10th Cir. 1993); *United States v. Lewis*, 921 F.2d 1294, 1303 (D.C. Cir. 1990); *United States v. Glenna*, 878 F.2d 867, 971 (7th Cir. 1989); *Cody v. Solem*, 785 F.2d 1323, 1330 (8th Cir. 1985); *United States v. Faruolo*, 506 F.2d 490, 495 (2d Cir. 1974). In regards to the reasonableness of the consent in light of the circumstances, the 11th Circuit found that because the individual had the form explained to him, his consent was valid and the search was reasonable. *Id.* at 1570-71.

The preceding examples, albeit a snapshot of those available, illustrate the need for further guidance from the Court in regards to when a search pursuant to consent is unreasonable. The cases, *supra*, are examples of what Justice Marshall

warned of in *Schneckloth* and *Jimeno*. All preceding cases illustrate the lack of direction the law provides and the continual trend of using the reasonableness standard as a rubberstamp for police procedure and against individual liberty. We cannot use the same standard in judging the legitimacy of economic legislation that we do in judging the infringements upon individual protections of person, property, and possessions. Such is contrary to the importance that the Framers intended when granting the rights espoused in the Fourth Amendment.

II. This Court needs to decide the issue regarding prophylactic warnings in situations where custodial suspects are asked for consent to search, and, in turn, make such warnings a requirement.

Boyd was decided 132 years ago. That decision made explicit the Court's understanding of the importance of the Fourth Amendment, what fighting for the Fourth Amendment cost the Framers in allowing it to be protected in this Country, and the sanctity of its application. Today, the importance of the Fourth Amendment and its practical protection is diluted. Its present state is the result of an ambiguous standard that rationalizes broad police powers. The current state of the Fourth Amendment is precisely what Justice Marshall feared.

The Fourth Amendment is not afforded the same protections as the Fifth and Sixth Amendments because the opinion that it is not inherently connected to trial and reliable determination of truth. However, the purpose of a search is to get closer to truth by finding evidence of a suspect's guilt. The reason courts repeatedly review this issue is because a person that consented was found guilty at the very trial the law says the Fourth Amendment is not connected to. A suspect's assertion

of consent, especially in custodial interrogations, is a statement that often extorts the relinquishment of a person's fundamental right and the deciding factor in proving guilt.

Regardless of the Fourth Amendment's connection to trial and its historical importance, warrantless searches are measured using a standard that is too benign. The reasonableness standard is the same standard used to determine the legality of limits on bakers' work hours[1], activities of opticians[2], and the sale of contraceptives[3]. Such a test has resulted in the decay of Fourth Amendment protections to the benefit of investigative practices. The increased power of law enforcement is part of the ever-increasing divide between the community and law enforcement. Similarly, Miranda was decided in a time of unrest between American citizens and law enforcement. Its decision was a check on police power that promoted transparency and fairness between the accused and police.

This Court has repeatedly refused to implement bright-line rules clarifying reasonableness citing the varying circumstances in which it is reviewed. This Court continues to avoid deciding upon whether to require prophylactic warnings regarding a person's Fourth Amendment rights and defers to state courts. However, the problem is circular as state courts are left with the ambiguous standard that perpetuates the same issues. More guidance on the issue is

[1] *Lochner v. New York*, 198 U.S. 45 (1905)

[2] *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1985)

[3] *Griswold v. Connecticut*, 381 U.S. 479 (1965)

necessary whether it results in the implementation of prophylactic warnings or not. However, this Court's implementation of prophylactic warnings of a custodial suspect's Fourth Amendment rights would provide multiple practical and systemic benefits. It would: (1) clarify the reasonableness determination by starting the analysis with the threshold question of whether rights were read; (2) increase the admissibility of evidence by further legitimizing investigatory procedures; (3) increase the use of search warrants as impliedly preferred under the plain language of the Fourth Amendment; (4) instill and substantiate the importance of Fourth Amendment protection; and, (5) increase trust between the populace and law enforcement by furthering transparency and decreasing manipulative police tactics.

Steinmetz proposes the implementation of required warnings, their retroactive application to his case, and the finding that their absence in his interrogation invalidates the admission of evidence seized pursuant to his consent. Such warnings should be required when law enforcement requests a custodial suspect to consent to a search. Either oral or written, warnings should notify a suspect of the following: (1) the right to refuse consent, (2) the possibility of law enforcement obtaining a search warrant in light of refusal, (3) the right to condition consent, and, (4) if consent is given, the right of officers to search for evidence and the use of evidence seized against the suspect.

This Court has an opportunity to further guide law enforcement, the courts, practitioners, and all individuals in our society in its review.

X. CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully Submitted,

/s/ Philip G. Scanlon
Philip G. Scanlon
Counsel for Petitioner
Taaffe & Associates, LLC
1015 Locust St., Ste. 725
St. Louis, Missouri 63101
(314) 241-3700 (office phone)
(314) 241-3710 (office fax)
phil@taaffeandassociates.com

XI. APPENDIX

United States of America, Plaintiff - Appellee,
v.
Oscar Henry Steinmetz, Defendant - Appellant.

No. 17-3061

United States Court of Appeals For the Eighth Circuit

Submitted: April 12, 2018
August 15, 2018

Appeal from United States District Court for the Eastern District of Missouri - St. Louis

Before COLLOTON, ARNOLD, and SHEPHERD, Circuit Judges.

COLLOTON, Circuit Judge.

Oscar Henry Steinmetz was convicted of producing child pornography, in violation of 18 U.S.C. § 2251(a). At trial, the government introduced evidence that law enforcement officers had seized from Steinmetz's home during a warrantless

Page 2

search. Steinmetz contends that the district court1 erred in denying his motion to suppress this evidence because he did not voluntarily consent to the search. Alternatively, he asserts that even if his consent was voluntary, the search exceeded the scope of his consent. Steinmetz also argues that the district court erred by overruling his objections to certain prejudicial testimony and by restricting his right to cross examine his accuser. We conclude that there was no reversible error, and therefore affirm.

I.

The child pornography investigation began in April 2015 when a woman in her late twenties, identified as E.S., made a complaint to the Maryland Heights Police Department in Missouri. E.S. alleged that Steinmetz, her stepfather, had abused her when she was between the ages of thirteen and sixteen. Some of the abuse occurred while E.S. and Steinmetz were watching pornographic Japanese anime films, a type of animated production. E.S. also reported that Steinmetz had photographed some of the abuse.2

Detective Kendra House decided to contact Steinmetz and ask for consent to search his residence and computers. On May 1, 2015, she and another detective approached Steinmetz at his workplace, and he agreed to accompany them to the police station. The government maintains that Steinmetz, during an interview,

consented to a search of his residence and computers. Investigators then searched the house and found incriminating evidence. A grand jury charged Steinmetz with production of child pornography.

Steinmetz moved to suppress all evidence that investigators seized during the search. After a hearing, a magistrate judge recommended denying the motion, and the district court adopted the recommendation. The court found that Steinmetz voluntarily consented to the search of his residence, computers, and other media, and that investigators did not exceed the scope of his consent. The record on the motion included testimony from Detective House, a videorecording of the Steinmetz

interview, consent forms and waiver forms that Steinmetz signed, and photographs taken during the search.

Steinmetz also moved *in limine* to exclude certain evidence as unfairly prejudicial. The disputed evidence included (1) testimony that Steinmetz sexually abused E.S. when she was between the ages of thirteen and sixteen; (2) pornography from Steinmetz's computer that depicted child victims other than E.S.; (3) pornographic anime that investigators seized from Steinmetz's residence; and (4) images of E.S.'s mother wearing a bondage costume that E.S. was wearing in other images. The court ruled that the evidence of sexual abuse and pornographic anime was admissible as inextricably intertwined with the child pornography charge. The court concluded that the pornographic images of other children were admissible under Federal Rule of Evidence 404(b) to show identity and under Rule 414 as evidence of similar crimes in a child molestation case. The court reserved ruling on the images of E.S.'s mother wearing the bondage costume, but ultimately allowed the prosecution to present one such image.

Page 4

A jury found Steinmetz guilty of production of child pornography. The district court sentenced him to 240 months' imprisonment.

II.

Steinmetz first argues that the district court erred in denying his motion to suppress evidence that investigators seized during the search of his residence. The Fourth Amendment generally permits investigators to conduct a warrantless search

of a home if they obtain a resident's voluntary consent. *Fernandez v. California*, 571 U.S. 292, 298-301 (2014). Whether a person voluntarily consented to a search is a factual determination that we review for clear error. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *United States v. Quintero*, 648 F.3d 660, 665 (8th Cir. 2011).

Steinmetz argues that he did not voluntarily consent to the search of his residence because his consent was the product of coercive police authority. We consider the "totality of all the circumstances" to evaluate whether consent was "voluntary or was the product of duress or coercion, express or implied." *United States v. Mendenhall*, 446 U.S. 544, 557 (1980).

On careful review of the record, we conclude that the district court did not clearly err in finding that Steinmetz voluntarily consented to the search. The district court found with adequate support that Steinmetz "appeared to be an articulate, intelligent, man in his early sixties," that he "appeared to be relatively at ease" throughout his interview with officers, and that "with one or two brief exceptions, neither Steinmetz nor any of the officers raised their voices." Before the interview, Detective House advised Steinmetz of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and Steinmetz signed a waiver form, acknowledging that he understood his rights and was willing to answer questions.

The district court found, without clear error, that after about seventy-five minutes, Steinmetz said it would be "okay" for Detective House to look at his

computer, hard drives, and thumb drives to verify that he did not have naked pictures of E.S. Steinmetz also agreed that it would be "okay" for the detective to send his computer, computer media, and cameras to a "forensic group" for examination. Shortly thereafter, Steinmetz signed a "Consent to Search" form that authorized police to search his house. The form plainly notified him of "the right to refuse to consent to the search described above and to refuse to sign this form."

Steinmetz argues nonetheless that the interview environment rendered his consent involuntary. He emphasizes that he was unexpectedly confronted by multiple armed officers at his place of work, and questioned for hours in a small, locked, windowless room. The district court found, however, that the officers made "no show of force" when they approached Steinmetz at his workplace. At the police station, Detective House and her supervisor, Sergeant Richard White, questioned Steinmetz individually; the interview room—which measured ten feet by seven feet—was never crowded. The record supports the district court's finding that Steinmetz appeared "relatively at ease and calm" for the duration of the interview. Even assuming that Steinmetz was not free to leave, he gave consent after receiving Miranda warnings, and custodial status does not preclude voluntary consent. *United States v. Beasley*, 688 F.3d 523, 531 (8th Cir. 2012).

Steinmetz objects that the detectives interviewed him for approximately six hours, but the district court made no error in finding that the length of the interrogation did not render Steinmetz's consent involuntary. Steinmetz orally consented to the search and signed a "Consent to Search" form within the first

ninety minutes of the interview. That the meeting carried on for several more hours is irrelevant to whether Steinmetz's earlier expression of consent was voluntary.

Page 6

Steinmetz next contends that his consent was involuntary because the officers misled him about the purpose and execution of the search. He complains that the consent forms were not specific as to the items that the officers intended to search. The detective, however, already had obtained oral consent to search computers and other media, and a reasonable person would have understood that consent to search the house encompassed those items.

Steinmetz also objects that Sergeant White gave assurances that he would supervise the search himself, but then ended up remaining at the police station. The record does not show whether White intentionally misrepresented his plan or whether changed circumstances led him to forego traveling to the scene of the search, but the identity of the supervising officer was not so material that misinformation on that point requires a finding of involuntariness under the totality of the circumstances. The district court found, without clear error, that Detective House informed Steinmetz that the purpose of the search was to look for nude pictures of E.S., and that the search would extend to Steinmetz's computers, hard drives, thumb drives, cameras, and computer media. Sergeant White did not promise to limit the scope of the search, and a reasonable person would have understood that investigators could search the same areas and objects regardless of the supervisor's identity.

Under the totality of the circumstances, the district court did not clearly err in finding that Steinmetz voluntarily consented to a search.

B.

Alternatively, Steinmetz contends that investigators exceeded the scope of his consent. Steinmetz asks us to conclude that his consent was predicated on his presence during the search, and that the officers therefore exceeded the scope of his consent when they searched his residence while he was at the police station.

Page 7

"A suspect may of course delimit as he chooses the scope of the search to which he consents." *Florida v. Jimeno*, 500 U.S. 248, 252 (1991). The scope of a suspect's consent depends on what "the typical reasonable person" would have understood by the exchange between the officer and the suspect. *Id.* at 251. "Where a suspect provides general consent to search, only an act clearly inconsistent with the search, an unambiguous statement, or a combination of both will limit the consent." *United States v. Beckmann*, 786 F.3d 672, 679 (8th Cir. 2015).

The district court found that Steinmetz "gave a general consent (both verbally and in writing) to a search of his residence and specifically consented to a search of his computers, external hard drives and other storage media." The court also determined that while Steinmetz stated that he would "prefer" to be present during the search, he did not "condition" his consent on his presence. These findings are not clearly erroneous. Although Steinmetz stated that he would "rather be there if

he could," a "typical reasonable person" would not have understood that Steinmetz was limiting his consent by merely expressing a preference.

After Steinmetz expressed his desire to be present for the search, Sergeant White explained that the search was going to take place while Steinmetz remained at the station. The district court found that "[d]uring that discussion, it was clear that Steinmetz understood that officers were going to remove computers and related items from his home," and that "Steinmetz was not going to be allowed to accompany police to his house or to be present during the search." The videorecording substantiates this finding. Despite knowing the scope of the plan, Steinmetz did not insist on accompanying the officers, withdraw his consent, or otherwise make clear that his consent was conditioned on his presence during the search. To the contrary, even after learning that he would not be present for the search, Steinmetz told Detective House which key she could use to open the residence. Steinmetz's words and actions consistently communicated general consent to a search of his residence.

Page 8

We thus conclude that the officers did not exceed the scope of Steinmetz's consent. The district court properly denied Steinmetz's motion to suppress.

III.

Steinmetz also appeals several of the district court's rulings at trial on the ground that certain evidence was irrelevant or unfairly prejudicial. We review the

rulings for abuse of discretion. *United States v. Emmert*, 825 F.3d 906, 909 (8th Cir. 2016).

The district court admitted evidence that Steinmetz had sexually abused and molested the victim. Steinmetz objected under Federal Rule of Evidence 403 on the ground that the danger of unfair prejudice substantially outweighed the probative value of the evidence. He also objected that the evidence was improper character evidence under Rule 404. The court ruled, however, that the evidence was "inextricably intertwined" with the charged offense of producing child pornography, because the molestation of E.S. was part and parcel of the "grooming process" that led to the offense. The court acknowledged that the evidence was prejudicial, but concluded that the evidence was sufficiently probative to be admitted under Rule 403. Over the same objections, the court also admitted pornographic anime that was discovered at Steinmetz's home as "inextricably intertwined" with the charged offense.

We agree with the district court that the evidence of molestation and the pornographic anime are relevant to the charged offense, because they show the context in which Steinmetz took nude photographs of E.S. When Steinmetz first molested E.S., he showed her the pornographic anime at issue. He began to take nude photographs of the victim in the midst of ongoing sexual abuse. The challenged evidence thus showed the grooming process that enabled Steinmetz to photograph the victim. The evidence was relevant to showing how Steinmetz came to produce child

pornography, and the district court did not abuse its discretion by concluding that any unfair prejudice did not substantially outweigh the probative value.

Steinmetz also contends that the district court erred in admitting "miscellaneous" child pornography that investigators discovered in his possession, because these images did not involve E.S. But we agree with the district court that this evidence was admissible under Rule 414: "In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation." Fed. R. Evid. 414(a). "Child molestation" includes acts relating to child pornography. *Id.* 414(d)(2)(B); see also *Emmert*, 825 F.3d at 909.

The miscellaneous child pornography depicted nude female children, and was therefore similar in kind to the pornographic images of E.S. that Steinmetz was charged with producing. The evidence tended to show that Steinmetz had an interest in lascivious photographs involving minor females. Rule 414(a) permits evidence that shows the defendant's character or propensity to commit certain acts in a child molestation case, so prejudice to Steinmetz from this evidence was not "unfair" within the meaning of Rule 403. *United States v. Gabe*, 237 F.3d 954, 960 (8th Cir. 2001). The district court did not abuse its discretion on this point.

Steinmetz next urges that the district court erred under Rule 403 by admitting a pornographic image depicting his ex-wife in a bondage outfit. The challenged image showed the ex-wife wearing a harness that was identical to one that E.S. was

wearing in another photograph. Both photographs were found in the Steinmetz residence and appeared to be taken in the same location. The similarities of the photographs, along with the relationship of the parties involved, tended to prove that Steinmetz produced both images, so the evidence was relevant to whether Steinmetz produced child pornography depicting E.S. It was not an abuse of discretion to conclude that the balancing test under Rule 403 allowed admission of the photograph.

Page 10

IV.

In his last argument, Steinmetz contends that the district court violated his right under the Sixth Amendment to confront his accuser by limiting his ability to cross examine E.S. about her depression and counseling. The district court retains wide latitude to impose reasonable limits on cross-examination, *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986), and whether mental health evidence is sufficiently probative to warrant examination is a fact-intensive determination. *See United States v. Love*, 329 F.3d 981, 984 (8th Cir. 2003); *United States v. Jimenez*, 256 F.3d 330, 343-44 (5th Cir. 2001). In this case, Steinmetz made no offer of proof to show how the proposed cross-examination might have been relevant to E.S.'s credibility or bias. Without such an offer, we cannot ascertain what evidence was excluded or whether any excluded evidence would have significantly affected the jury's impression of E.S.'s credibility. Steinmetz therefore has failed to establish an

error in limiting cross-examination. *United States v. Leisure*, 844 F.2d 1347, 1360 (8th Cir. 1988); *United States v. Lavallie*, 666 F.2d 1217, 1220 (8th Cir. 1981).

* * *

The judgment of the district court is affirmed.

Footnotes:

1. The Honorable Rodney W. Sippel, Chief Judge, United States District Court for the Eastern District of Missouri, adopting the report and recommendation of the Honorable Shirley Padmore Mensah, United States Magistrate Judge for the Eastern District of Missouri.

2. A witness testified that the victim was "transitioning to the male gender" when she made her complaint to the police, and the victim later adopted the initials "F.M." Like the district court, we use the victim's initials at the time of the offense conduct.

CERTIFICATE OF COMPLIANCE

I, the undersigned, hereby certify that this "Petition for a Writ of Certiorari" complies with the all requirements set forth in the United States Supreme Court Rules. Specifically, this "Petition for a Writ of Certiorari" complies with the word limitations required under United States Supreme Court Rule 33(h) as it contains 7,249 words.

Respectfully Submitted,

/s/ Philip G. Scanlon
Philip G. Scanlon
Counsel for Petitioner
Taaffe & Associates, LLC
1015 Locust St., Ste. 725
St. Louis, Missouri 63101
(314) 241-3700 (office phone)
(314) 241-3710 (office fax)
phil@taaffeandassociates.com

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 13th day of November, 2018,

1. Forty (40) physical copies of the foregoing "Petition for a Writ of Certiorari", booklet-format, and one (1), unbound copy on 8.5 x 11 inch paper were sent to the Clerk of the United States Supreme Court through express mail;

2. Three (3) physical copies of the foregoing "Petition for a Writ of Certiorari", booklet-format, were sent through express mail to Respondent, the United States;

3. One (1) copy of the appropriate documents composing my "Application for Admission to the Bar of the United States Supreme Court" was sent by way of express mail at the above-cited, requisite addresses to both the Clerk of the United States Supreme Court and Respondent, the United States; and,

I, the undersigned, hereby certify that on the 12th day of December, 2018, after technical issues with my Application for Admission were corrected, was allowed to electronically file the foregoing "Petition for a Writ of Certiorari" and electronically filed the same.

Respectfully Submitted,

/s/ Philip G. Scanlon

Philip G. Scanlon
Counsel for Petitioner
Taaffe & Associates, LLC
1015 Locust St., Ste. 725
St. Louis, Missouri 63101
(314) 241-3700 (office phone)
(314) 241-3710 (office fax)
phil@taaffeandassociates.com