

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

DONALD LEE HATHORN
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 18-60380

PETITION FOR WRIT OF CERTIORARI

Omodare B. Jupiter (MB #102054)
Federal Public Defender
N. and S. Districts of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Michael L. Scott (MB # 101320)
Assistant Federal Public Defender

Attorney for Defendant-Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fifth Circuit erred by affirming the district court's requirement for Mr. Hathorn to submit his computer, cellular telephone and all other electronic devices to warrantless searches as a special condition of supervised release.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

This appeal involves a supervised release revocation proceeding. The underlying conviction was for possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). The United States District Court for the Southern District of Mississippi filed the Judgment in the underlying case on April 1, 2010. This supervised release revocation proceeding arises out of that conviction.

During the period of supervised release, the prosecution alleged that Mr. Hathorn violated conditions of supervised release by using a controlled substance on two occasions. Mr. Hathorn took responsibility for his actions by admitting that he used drugs. Because of his honest admission, the district court entered a Revocation Judgment on May 17, 2018. A copy of the Revocation Judgment is attached hereto as Appendix 1.

The court sentenced Mr. Hathorn to serve six months in prison, followed by 42 months of supervised release. The prison sentence and the term of supervised release ordered by the district court are not at issue on appeal. At issue is the special condition of supervised release requiring Mr. Hathorn to submit his computer, cellular telephone and all other electronic devices to warrantless searches by the probation officer.

Mr. Hathorn appealed this special condition of supervision to the United States Court of Appeals for the Fifth Circuit, and the Fifth Circuit affirmed the lower court's rulings. The Fifth Circuit filed both its Judgment and its Opinion on April 11, 2019. The Judgment and Opinion are attached hereto as composite Appendix 2. The Fifth Circuit's Opinion is published at 920 F.3d 982. A copy of the reported rendition of the Opinion is attached hereto as Appendix 3.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Judgment and its Order in this case on April 11, 2019. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISION INVOLVED

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.

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a supervised release revocation proceeding initiated against Mr. Hathorn. The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges and conviction for which Mr. Hathorn was serving a period of supervised release arose from the laws of the United States of America.

B Statement of material facts.

Mr. Hathorn's underlying conviction that this revocation is based on occurred *over eleven years ago*, on February 6, 2008. The conviction was for distribution of cocaine. Mr. Hathorn fully accepted responsibility for his actions by pleading guilty to this charge.

The case is now before the Court on a revocation proceeding. Mr. Hathorn again accepted responsibility for his wrongdoings by admitting to the two supervised release violations asserted by the prosecution, both of which were nonviolent violations pertaining to use of illegal drugs. After admitting guilt, he stated "I just want to apologize, and I'm sorry for falling off the right track, relapse, and I needed help."

The court ordered a revocation sentence of six months in prison, followed by 42 months of supervised release. The terms of imprisonment and supervised release are within the advisory Sentencing Guidelines range. They are not at issue on appeal.

At issue is a portion of supervised release special condition number two, which states: “The defendant shall submit his person, residence, computers, cellular telephones, all other electronic devices and vehicles to searches by the United States Probation Officers, at any time, to be conducted in a reasonable manner, under reasonable suspicion of contraband or illegal activity.” (Emphasis added). The objectionable portion of this special condition of supervision is the search of Mr. Hathorn’s computers, cellular telephones and other electronic devices. At the revocation hearing, the defense objected to imposing this special condition of supervision, and the court overruled the objection. On appeal, the Fifth Circuit affirmed the district court’s rulings. This appeal followed.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons.”

The issue in this case provides a “compelling reason” to grant certiorari. The warrantless search of cellular telephones and computers seriously infringes on a supervisee’s Fourth Amendment right to be free from unreasonable searches. As this Court ruled in *Riley v. California*, 134 S.Ct. 2473, 2496 (2014), these types of devices contain a wealth of personal information that reveals many or most aspects of a person’s private life. *Riley* is further discussed below.

In summary, this Court should grant certiorari to review whether a defendant on supervised should be required to submit his or her cellular telephones, computers and other electronic devices to warrantless searches by a probation officer. While some fact scenarios may warrant this type of intrusion, it has become an all too commonplace special condition of supervision. In other words, this has become more of a “standard” condition of supervised release, as opposed to a “special” condition, which it was originally intended to be. The Court should grant certiorari to correct this incursion on defendants’ Fourth Amendment right to privacy.

B. The district court abused its discretion by requiring Mr. Hathorn to submit his computer, cellular telephone and all other electronic devices to searches as a condition of supervised release.

A district court's discretion to impose special conditions of supervised release is restricted in at least two ways. *United States v. Scott*, 821 F.3d 562, 569 (5th Cir. 2016) (citation omitted).¹

First, under 18 U.S.C. § 3583(d)² the condition of supervision must be reasonably related to one of the following four factors found in 18 U.S.C. § 3553(a):

- (1) the nature and characteristics of the offense and the history and characteristics of the defendant,
- (2) the deterrence of criminal conduct,
- (3) the protection of the public from further crimes of the defendant, and

¹ In *Scott*, the Fifth Circuit vacated the district court's imposition of two special conditions of supervision – a lifetime ban on accessing any computer with internet access and a ban on having unsupervised contact with minors. 821 F.3d at 572. The court reached this conclusion under a plain error standard of review. *Id.* at 570.

² In relation to a court's authority to order special conditions of supervision, § 3583(d) states: The court may order, as a further condition of supervised release, to the extent that such condition--

- (1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);
- (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and
- (3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate[.]

(4) the provision of needed educational or vocational training, medical care, or other correctional treatment to the defendant.

Scott, 821 F.3d at 570 (citation omitted). If any one of the factors is satisfied, then this initial test for reasonableness is met. *United States v. Salazar*, 743 F.3d 445, 451 (5th Cir. 2014) (citation omitted).³

Second, “the condition must be narrowly tailored such that it does not involve a ‘greater deprivation of liberty than is reasonably necessary’” to achieve the above stated goals. *Scott*, 821 F.3d at 570 (emphasis added; citation omitted).

When applicable, a third factor applies – “the condition must be consistent with the policy statements issued by the Sentencing Commission.” *United States v. Weatherton*, 567 F.3d 149, 153 (5th Cir. 2009) (citing 18 U.S.C. § 3583(d)(3)).

The above tests are consistent with the provisions of 18 U.S.C. §§ 3553(a) and 3583(d). Also, the restrictions on imposing special conditions of supervision set forth in U.S.S.G. § 5D1.3(b) are similar to the above stated tests. Section 5D1.3(b) states:

The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant

³ In *Salazar*, the Fifth Circuit vacated the district court’s imposition of a special condition of supervision that required the defendant to “refrain from purchasing, possession, or using any sexually stimulating or sexually oriented materials[.]” 743 F.3d at 448, 453.

with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

See also United States v Caravayo, 809 F.3d 269, 272 and 274 (5th Cir. 2015)

(citation omitted) (applying the above tests and vacating a special condition of supervision that barred the defendant from dating anyone with minor children).

We now move to the crux of this issue – whether application of these tests indicates that the district court abused its discretion when it ordered the special condition of supervision requiring Mr. Hathorn to “submit his person, residence, computers, cellular telephones, all other electronic devices and vehicles to searches by the United States Probation Officers, at any time, to be conducted in a reasonable manner, under reasonable suspicion of contraband or illegal activity.”

First considered are the three sub-tests under § 3553(a). Section 3553(a)(1) requires us to consider whether requiring Mr. Hathorn to submit all of his electronic devices to searches is reasonably related to either “the nature and circumstances of the offense” or “the history and characteristics of the defendant[.]”

The district court stated that it was ordering this special condition of supervision “because he has a conviction for drug dealing. He has shown that he has a drug addiction – apparently a drug addiction, or certainly a drug abuse

problem, and one of the best ways to discover using illegal drugs is to look at somebody's cell phone or communication device." About this justification by the court, we must realize that the "conviction for drug dealing" was over eleven years ago. There is no indication or implication of any kind that he is still a drug dealer. Further, the court stated no basis for its conclusion that searching electronic devices provides a better method of uncovering drug use than other less intrusive techniques, such as random drug testing, which Mr. Hathorn will be required to do while on supervised release. Under these facts, both of the legal tests stated in § 3553(a)(1) favor the defense's argument.

The next consideration is § 3553(a)(2)(B), which questions whether ordering the subject special condition of supervision is reasonably related "to afford[ing] adequate deterrence to criminal conduct[.]" For the same reasons stated in the previous paragraph, this factor does not support imposing the subject special condition of supervision.

Next considered is § 3553(a)(2)(C), which requires the special condition of supervision to be reasonably related "to protect[ing] the public from further crimes of the defendant[.]" The defense sees no reason that subjecting Mr. Hathorn to searches of his electronic devices protects the public.

Finally, under § 3553(a)(2)(D), the instant special condition of supervision must be reasonably related "to provid[ing] the defendant with needed educational

or vocational training, medical care, or other correctional treatment in the most effective manner[.]” The special condition of supervision at issue is not related to this factor at all.

Requiring Mr. Hathorn to subject all of his electronic devices to searches is not supported by the § 3553(a) factors analyzed above. If this Court agrees, then it must vacate this special condition of supervision without the need to analyze the remaining tests for reasonableness relating to this condition. *See Salazar*, 743 F.3d at 451-53 (vacating a special condition of supervision because the district court failed to demonstrate “that it was reasonably related to the statutory factors” set forth in § 3553(a)). Nevertheless, Mr. Hathorn will analyze the remaining tests that must be met for a court to legally impose a special condition of supervision.

Under the next test, we must consider whether “the condition [is] narrowly tailored such that it does not involve a ‘greater deprivation of liberty than is reasonably necessary’” to achieve the goals stated in § 3553(a). *Scott*, 821 F.3d at 570 (emphasis added; citation omitted). Even under the district court’s explanation that a search of Mr. Hathorn’s telephone could conceivably reveal evidence of drug use, that does not explain why each and every one of his electronic devices should be subject to searches.

An example of why this special condition is overly broad is because it allows a probation officer to access all aspects of Mr. Hathorn’s life, which will

reveal a wealth of private information that has nothing to do with drug use. For this point, we look to this Court’s holdings in *Riley v. California*, 134 S.Ct. 2473, 2496 (2014), a case in which the Court found that a warrant is typically required to search a cellular telephone incident to arrest. In *Riley*, the Court recognized the wealth of highly private information contained on a modern cellular phone. The Court held “[w]ith all they contain and all they may reveal, they hold for many Americans ‘the privacies of life[.]’” *Id.* at 2494-95 (citation omitted). Stated another way, “[t]he sum of an individual’s private life can be reconstructed” through a cell phone search. *Id.* at 2489. For these reasons, imposition of the subject special condition of supervision must be vacated because it is not narrowly tailored to achieve the goals of § 3553(a).

The third test is that “the condition must be consistent with the policy statements issued by the Sentencing Commission.” *Weatherton*, 567 F.3d at 153 (citing 18 U.S.C. § 3583(d)(3)). Mr. Hathorn’s underlying crime of conviction is drug dealing, and the subject supervised release violations involve drug use. The only Policy Statement under the Sentencing Guidelines that relates to these issues is found at U.S.S.G. § 5D1.3(d)(4), titled “Substance Abuse.” This Policy Statement calls for drug treatment, drug testing and abstinence from alcohol. *Id.* It has nothing to do with the subject special condition. Therefore, the Policy

Statements do not support requiring Mr. Hathorn to subject his electronic devices to searches.

VI. CONCLUSION

District courts are overstepping boundaries regarding Fourth Amendment rights of defendants that have served their debt to society by spending time in prison, and are now on supervised release. This Court should grant certiorari and address the allowable parameters of requiring a supervisee to submit cellular telephones, computers and other electronic devices to warrantless searches by probation officers.

/s/Michael L. Scott

Michael L. Scott (MB # 101320)
Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of Mississippi
200 South Lamar Street, Suite 200-N
Jackson, Mississippi 39201
Telephone: 601/948-4284
Facsimile: 601/948-5510

Attorney for Defendant-Petitioner