No. 19-618

IN THE SUPREME COURT OF
THE UNITED STATES

JON ERIC SHAFFER,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether the private search doctrine, which was not raised by petitioner in the state trial court, the state intermediate appellate court, or his principal brief to the state supreme court, allowed police to view the same material on petitioner's laptop that a private party viewed before police obtained a search warrant where petitioner authorized the private party to repair the laptop and thus relinquished any reasonable expectation of privacy in the laptop?

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COUNTER-STATEMENT OF THE CASE

Petitioner Shaffer seeks review of an issue that was not developed in state court. Shaffer gave his laptop to a computer repair shop. Shaffer authorized the shop to conduct specific repairs/services on his laptop after multiple communications with the shop. An employee discovered suspected child pornography on the laptop. The shop called the police. Police reviewed the same material that the shop reviewed and then obtained a search warrant to look through the laptop. After Shaffer was charged with multiple crimes, he sought to suppress the evidence found on his laptop. Shaffer and the Commonwealth did not raise the private search doctrine. The state trial court denied Shaffer's motion, the intermediate appellate court affirmed, and the state supreme court granted review on an issue unrelated to the private search doctrine. The private search doctrine was first mentioned as a fallback argument in the Commonwealth's brief for appellee before the state supreme court. The state supreme court affirmed based on the private search doctrine. Three of seven state supreme court justices opined that the record was not developed to address the private search doctrine. Shaffer now requests that this Court review the private search doctrine.

A thorough review of the background follows. Shaffer delivered his laptop computer to CompuGig, a computer repair shop. Shaffer completed CompuGig's intake form and marked the boxes "Spyware/virus" and "Can't get to Internet." Petitioner's Appendix at 2a. He also gave CompuGig his computer login password. Shaffer informed a CompuGig employee that his "son

downloaded some things and now there are a lot of pop-ups. Internet has stopped working." *Id.* at 2a-3a.

CompuGig technician Justin Eidenmiller believed that Shaffer's laptop had a failing hard drive. An employee contacted Shaffer and Shaffer consented to the replacement of his hard drive. *Id.* at 3a. CompuGig then was unable to place an image of the laptop's hard drive on another hard drive. CompuGig contacted Shaffer again. Shaffer consented to CompuGig manually copying files on the laptop's hard drive and transferring them to a new hard drive. *Id.* at 3a-4a, 3a n.2-3, 66a-68a. Eidenmiller then observed small images reflecting the identity of a computer file's contents, revealing what he believed to be sexually explicit photos of children. Eidenmiller had not been searching for that kind of information and had never been asked by law enforcement to look for evidence of child pornography. Eidenmiller informed his boss of the images he discovered, and a CompuGig employee contacted the police. *Id.* at 3a-4a.

Officer Christopher Maloney of the Cranberry Township Police Department arrived at CompuGig. He asked to see the images that Eidenmiller had found. Eidenmiller showed Officer Maloney the child pornography images he had discovered, using the same route he originally took to find the images. Officer Maloney directed Eidenmiller to "shut down the file" and seized the laptop, external hard drive copy, and power cord. *Id.* at 4a.

Detective Matthew Irvin of the Cranberry Township Police Department went to Shaffer's home and questioned him. Shaffer admitted to having some

images on his computer depicting children as young as eight years old in sexually explicit positions and identified the folders where the digital images were stored. Detective Irvin thereafter obtained a search warrant for the laptop and accompanying hardware. *Id.* at 4a-5a.

Detective Irvin met with Shaffer a second time and obtained a written, incriminating statement regarding the illegal images. Police charged Shaffer with sexual abuse of children (possession of child pornography), 18 Pa.C.S. § 6312(d), for possessing 72 digital images, which depicted a child under 18 years of age engaging in a prohibited sexual act or in the simulation of such act. The complaint also charged Shaffer with criminal use of a communication facility (laptop computer), 18 Pa.C.S. § 7512(a), for utilizing the internet to commit, cause or facilitate the commission of the felony of sexual abuse of children. Petitioner's Appendix at 5a.

Shaffer filed a pretrial motion to suppress the images discovered on the hard drive of his laptop. Shaffer asserted that an illegal search occurred at the moment Officer Maloney directed the CompuGig employee to open the computer files and display the display the images that Eidenmiller had discovered. *Id.* at 5a-6a.

Shaffer contended in his suppression motion that this police conduct constituted a warrantless search of his laptop in violation of his reasonable expectation of privacy, as well as a trespass upon his property in violation of Article I, Section 8 of the Pennsylvania Constitution and the Fourth and Fourteenth Amendments to the United States Constitution.

Shaffer argued that he did not abandon his expectation of privacy in the files stored on his laptop when he took the computer to CompuGig for repair. *Id.* at 6a-7a.

The Commonwealth did not invoke the private search doctrine. The Commonwealth argued that once Shaffer gave his laptop to CompuGig for repairs, he abandoned his expectation of privacy in the files stored on the laptop. The Commonwealth relied on *Commonwealth v. Sodomsky*, 939 A.2d 363 (Pa. Super. 2007). Petitioner's Appendix at 7a.

Sodomsky concluded that the defendant had no reasonable expectation of privacy in his illegal computer files because Sodomsky requested that a Circuit City store install a DVD drive, that employees informed him that the drive's operability would be tested, and that the defendant did not inquire as to the manner of testing or restrict the employees' access to his computer files. *Sodomsky*, 939 A.2d at 368.

At the suppression hearing, Eidenmiller and Officer Maloney testified to the aforementioned facts. The parties' arguments focused exclusively on the applicability of *Sodomsky*. The trial court denied Shaffer's motion, finding that the instant facts were similar enough to render *Sodomsky* controlling. The trial court held that Shaffer abandoned his expectation of privacy when he requested repairs on his computer related to complaints of a virus and an inability to use the Internet and consented to the replacement of his hard drive. Petitioner's Appendix at 10a-11a.

The trial court further rejected Shaffer's challenge to the search and seizure of his laptop based on a trespass analysis, concluding that Eidenmiller was

engaged in conduct permitted by Shaffer when the files were discovered; thus, he was not trespassing on Shaffer's effects. The trial court emphasized that Officer Maloney never expanded upon Eidenmiller's actions, but merely viewed the images that Eidenmiller presented to him. *Id.* at 11a-12a.

The trial court found Shaffer guilty. Shaffer appealed to the state intermediate appellate court, raising the single issue of whether the trial court erred in failing to suppress evidence from the warrantless search and seizure of his laptop. The Commonwealth again contended that *Sodomsky* controlled, while Shaffer maintained that *Sodomsky* was distinguishable or, in the alternative, should be overturned. *Id.* at 12a.

The state intermediate appellate court affirmed. *Commonwealth v. Shaffer*, 177 A.3d 241 (Pa. Super. 2017). The court concluded that Shaffer abandoned his expectation of privacy in the contents of his laptop computer files. Petitioner's Appendix at 82a-84a.

Shaffer sought allowance of appeal before the state supreme court to address the reasonable expectation of privacy issue. The court granted allowance of appeal to address this issue: "Does an individual give up his expectation of privacy in the closed private files stored on his computer, merely by taking his computer to a commercial establishment for service or repair, where the service or repair requested does not render the viewing of the citizen[']s closed private files as foreseeable to either the customer or the computer technician?" *Commonwealth v. Shaffer*, 188 A.3d 1111 (Pa. 2018).

The state supreme court decided the case based on the private search doctrine even though it did not grant review on that basis. Petitioner's Appendix at 1a. Shaffer did not address the private search doctrine in his principal brief before the state supreme court. The Commonwealth mentioned the private search doctrine as a fallback argument in its brief for appellee. *Id.* at 45a. The majority concluded that the private search doctrine was met because the police did not exceed the search of CompuGig (and police obtained a search warrant to further search the laptop). *Id.* at 37a-38a.

State Supreme Court Justice Wecht noted in his concurring and dissenting opinion: "I concur only in the result .... The Majority chooses to invoke our discretionary authority to affirm an order upon any basis, and does so on the basis of the 'private search' doctrine. [footnote omitted] I would address instead the question of abandonment of privacy, which is the issue upon which this Court granted *allocatur*." *Id.* at 41a. Justice Wecht further stated that the state supreme court did not grant *allocatur* to address the private search doctrine, did not order briefing on the doctrine, and the private search doctrine was first raised as part of a fallback argument in the Commonwealth's brief as appellee before the state supreme court. *Id.* at 44a-45a. Justice Wecht explained: "[t]he sole inquiry from the outset of this case up to and through our grant of *allocatur* was whether Shaffer had an expectation of privacy in the laptop computer that he dropped off for repairs at CompuGig. That inquiry differs significantly from one assessing the private search doctrine." *Id.* at 49a. Justice Wecht stated that there "is not a record containing any meaningful evidentiary development of the facts necessary for evaluation of the private search

doctrine in the context of this case." *Id.* at 51a-52a. Chief Justice Saylor, joined by Justice Donahue, also expressed that "the record has not been appropriately developed to allow for consideration of the application of the [private search doctrine] doctrine in this case." *Id.* at 71a, 71a at n.1.

Shaffer now seeks review of the private search doctrine issue although three of the seven state supreme court justices explained that the record was not developed to address the private search doctrine.

REASONS WHY THIS COURT SHOULD DENY THE PETITION

I. This Court should deny review because (A) there is no specific circuit split; (B) the private search doctrine was not raised in the state trial court and the state intermediate appellate court, and the state supreme court did not grant review to address the private search doctrine; (C) the record was not developed to address the private search doctrine; (D) Shaffer abandoned an expectation of privacy in his laptop; and (E) the private search doctrine was easily met as evidenced by the police not exceeding the review by the private actor before obtaining a search warrant.

A. A specific circuit split does not exist.

Shaffer mentions a few circuit court opinions, as well as some state court decisions. Shaffer, however, has not established that that multiple circuits interpret *United States v. Jacobsen*, 466 U.S. 109 (1984) one specific way concerning its application to situations where an individual voluntarily provides his digital device to a private party to review, and that multiple circuits interpret *Jacobsen* another specific way concerning its application to situations where an individual voluntarily provides his digital device to a private party to review.

For example, one of the cases that Shaffer references throughout his petition, *United States v. Chapman-Sexton*, 758 F. App'x 437 (6th Cir. 2018), concerns a factual and legal background distinct from

the instant case. *Chapman-Sexton* concerned a flash drive and a PlayStation gaming device that was stolen from Chapman-Sexton. One of the thieves told police that the flash drive and the PlayStation contained child pornography. Police conducted a limited search of the flash drive and discovered suspected child pornography. Chapman-Sexton went to the police station and told police that he owned the flash drive and PlayStation. Chapman-Sexton was charged with various federal crimes and sought to suppress the discovered evidence. The case concerned the independent source doctrine as a basis to uncover the evidence, but the Sixth Circuit affirmed the denial of Chapman-Sexton's suppression motion based on the principle of inevitable discovery. *Id.* at 441-42. The majority opinion did not mention the private search doctrine.

Judge Bush, in a concurring opinion, discussed the private search doctrine as another basis to uphold the lawfulness of the search. Judge Bush's discussion of the private search doctrine was further diluted because he ultimately concluded that police had a good faith basis to believe the private search doctrine applied. *Id.* at 454 (Bush, J., concurring). The good faith exception was not addressed in the state court proceedings here.

Next, Shaffer's references to *Carpenter v. United States*, 138 S. Ct 2206 (2018) (government obtained suspects' cell phone records) and *United States v. Jones*, 565 U.S. 400 (2012) (government placed global positioning system tracking device on car) throughout his petition are unpersuasive because as the state supreme court noted: "they involve government

searches and not searches conducted by a private individual." Petitioner's Appendix at 38a n.14.

The amicus brief of the DKT Liberty Project, *et al.*, does not establish that a specific circuit split exists.

In Professor McJunkin's amicus brief, he initially focuses on this case being an opportunity to clarify what *Jacobsen* means, not that this case can clarify a specific circuit split. Professor McJunkin Brief at 5-13. Next, he asserts that a circuit split exists on cases markedly different than the instant case. The cases he references concern individuals finding suspected contraband on digital devices without the owners of the devices' knowledge. *Id.* at 14-19 (citing multiple cases). The individuals then give the devices to law enforcement. *Id.* Here, Shaffer specifically turned over his laptop to CompuGig and, after multiple follow-up communications with CompuGig, authorized repairs to certain portions of his laptop. No circuit split exists in this regard. Shaffer also cites one significantly different case where a cell phone was mistakenly left at a Walmart and employees looked through the phone and found suspected child pornography. *Id.* at 16 (citing *United States v. Sparks*, 806 F.3d 1323 (11th Cir. 2015)). Concerning the application of the private search doctrine to digital devices, Professor McJunkin references one state supreme court decision and three lower state court decisions. *Id.* at 16-17 (citing multiple cases). In sum, there is not a significant, easily defined circuit split worthy of review.

The second purported circuit split that Professor McJunkin posits is less persuasive because it concerns the private search doctrine's application to residences,

which clearly does not apply to the facts here. *Id.* at 19-21. This Court should deny review.

The third purported circuit split that Professor McJunkin posits is also unpersuasive as it focuses on the single-purpose container exception; none of the cases cited concern digital devices and all the cases are dated, the most recent being issued in 2012. *Id.* at 21-22 (citing *United States v. Gust*, 405 F.3d 797 (9th Cir. 2005) (search of gun case); *United States v. Donnes*, 947 F.2d 1430 (10th Cir. 1991) (search of camera lens case); *United States v. Villareal*, 963 F.2d 770 (5th Cir. 1992) (search of gallon drums); *United States v. Davis*, 690 F.3d 226 (4th Cir. 2012) (search of clothing); *United States v. Cardona-Rivera*, 904 F.2d 1149 (7th Cir. 1990) (search of packages)). This Court should deny review.

A specific circuit split does not exist. And it is important to remember that the issue of evidence uncovered in private searches is not new, as evidenced by this Court positively referencing an almost 100 year-old decision of this Court: "It has . . . been settled since *Burdeau v. McDowell*, 256 U.S. 465 [1921] . . . that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." *Walter v. United States*, 447 U.S. 649, 656 (1980); *see also* Petitioner's Appendix A at 36a-37a n.13 (Supreme Court of Pennsylvania explained that federal circuits have consistently applied *Jacobsen* to cases involving digital material). Shaffer and the supporting amicus briefs are attempting to shoehorn tangentially related cases and

holdings into the case and issue here. There is not a circuit split on factual and legal circumstances specific to the instant case. If this Court is inclined to review the private search doctrine in the context of the facts and law applicable in this case, this Court should wait for the circuits to review and develop case law in this area, namely where individuals voluntarily relinquish their digital device to a third party to review. This Court should deny review.

B. The private search doctrine was not raised in the state trial court, the state intermediate appellate court, and state supreme court did not grant review to address the private search doctrine.

Contrary to Shaffer's assertion, Petition at 13, Shaffer's petition has multiple, significant vehicle problems. The state trial court and the state intermediate appellate court did not address, let alone decide, the private search doctrine. Those courts concluded that Shaffer abandoned his expectation of privacy by giving his laptop to CompuGig to repair. Those courts focused on a state court decision, *Sodomsky*, which concerned whether an individual relinquished his expectation of privacy by giving his computer to Circuit City for repairs/product installation and employees there discovered suspected child pornography on the computer. The state supreme court granted *allocatur* to decide: "Does an individual give up his expectation of privacy in the closed private files stored on his computer, merely by taking his computer to a commercial establishment for service or repair, where the service or repair requested does not render the viewing of the citizen[']s closed private files

as foreseeable to either the customer or the computer technician?" *Shaffer*, 188 A.3d at 1111.

The state supreme court admitted that it decided the case on a different basis than the state intermediate court. Petitioner's Appendix at 1a. Justice Wecht noted in his concurring and dissenting opinion: "I concur only in the result .... The Majority chooses to invoke our discretionary authority to affirm an order upon any basis, and does so on the basis of the 'private search' doctrine.[footnote omitted] I would address instead the question of abandonment of privacy, which is the issue upon which this Court granted *allocatur*." *Id.* at 41a. Justice Wecht further stated that the state supreme court did not grant *allocatur* to address the private search doctrine, did not order briefing on the doctrine, and the private search doctrine was first raised as part of a fallback argument in the Commonwealth's brief as appellee before the state supreme court. *Id.* at 44a-45a. Ironically, Shaffer relies on Justice Wecht's thoughts on the private search doctrine throughout his petition. Petition at 15-19. Clearly, the weight given to Justice Wecht's thoughts in that regard is minimal because Justice Wecht himself opined that the state supreme court should not have addressed the private search doctrine. Justice Wecht explained: "[t]he sole inquiry from the outset of this case up to and through our grant of *allocatur* was whether Shaffer had an expectation of privacy in the laptop computer that he dropped off for repairs at CompuGig. That inquiry differs significantly from one assessing the private search doctrine." Petitioner's Appendix at 49a. The private search doctrine was not raised by the parties before the trial court and intermediate appellate court. The state

supreme court did not grant review on an issue concerning the private search doctrine. The instant case is replete with vehicle problems. This Court should deny review.

C. The record was not developed to address the private search doctrine.

In addition to the vehicle problems described above, three state supreme court justices also described that the record was not developed to address the private search doctrine. Justice Wecht explained that the lack of the development of the record before the state trial court concerning the private search doctrine hurt *Shaffer*: "Shaffer had no reason to anticipate or rebut any argument ... [the] warrantless inquiry into the files on his computer was permissible as an extension of CompuGig's private search. More importantly, Shaffer had no opportunity to create a record to defend against such an argument." *Id.* at 43a. The presentation of testimony at the suppression hearing was not designed to elicit evidence that would relate to the private search doctrine. *Id.* at 44a. Justice Wecht explained that "a brief two question/and two answer exchange between Shaffer's counsel and Officer Maloney that touched inadvertently upon matters that sometime later might be deemed pertinent to the private search doctrine is a far cry from the examination that would be necessary to build a record adequate to evaluate the private actor versus state actor dilemma." *Id.* at 50a. Justice Wecht further emphasized: "[t]hat counsel, by happenstance or coincidence, stumbled upon one or two questions relevant to the new issue upon which this Court now chooses to focus does not mean that the record suffices

for purposes of our discretionary application of the right-for-any-reason doctrine." *Id.* at 51a. Justice Wecht stated that there "is not a record containing any meaningful evidentiary development of the facts necessary for evaluation of the private search doctrine in the context of this case." *Id.* at 51a-52a. Chief Justice Saylor, joined by Justice Donahue, also expressed that "the record has not been appropriately developed to allow for consideration of the application of the [private search doctrine] doctrine in this case." *Id.* at 71a, 71a n.1. Because the record below was not developed to address the private search doctrine, the instant case has additional vehicle problems. If this Court wants to review the private search doctrine, it should be in a case with a much better record specifically developed to address the private search doctrine. This Court should deny review.

D. Shaffer abandoned an expectation of privacy in his laptop.

Another reason to deny review is that Pennsylvania can likely prevail on a legal ground other than the private search doctrine: Shaffer did not have an expectation of privacy in the laptop. Petitioner's Appendix at 66a-69a. Shaffer took his laptop to CompuGig and listed specific problems with the laptop on an intake form. *Id.* at 66a-67a. Shaffer gave CompuGig his laptop password and requested restorative services. CompuGig contacted Shaffer and explained what their initial work found. Shaffer then asked to have his laptop replaced and did not limit CompuGig to any folder or files. CompuGig then was unable to place an image of the laptop's hard drive on another hard drive. CompuGig then contacted Shaffer

again; Shaffer consented to CompuGig manually copying files on the laptop's hard drive and transferring them to a new hard drive. Shaffer had atleast three opportunities to limit or restrict CompuGig's access to his laptop. On each occasion, he gave CompuGig access to his laptop and its contents with no apparent restrictions. The quantity and precision of Shaffer's acquiescence to CompuGig's repairs reveals that Shaffer abandoned an expectation of privacy in his laptop. *Id.* at 66a-69a. Because it is likely that Shaffer did not have a reasonable expectation of privacy in the laptop that he gave to CompuGig and authorized repairs on multiple times, with no restrictions, it is unlikely this Court can even reach the private search doctrine. *Id.* at 65a n.11; *Carpenter*, 138 S. Ct at 2213-14 (search for Fourth Amendment purposes requires reasonable expectation of privacy be present); *Chapman-Sexton*, 758 F. App'x 437 (other exceptions to the warrant requirement, such as those discussed in *Chapman-Sexton*, may be a basis to support the lawfulness of the search here). This Court should deny review.

E. The private search doctrine was met.

The facts related to police conduct in the instant case also provide a basis for denying review. When the police were alerted by CompuGig employees of the suspected child pornography, they observed the material at CompuGig and then obtained a search warrant before reviewing the material further. Petitioner's Appendix at 8a. The state supreme court concluded that police did not exceed the review conducted by CompuGig. *Id.* at 37a. The police engaged in lawful, after the fact confirmation of

evidence and then presented evidence to a neutral magistrate in order to obtain a warrant to search the laptop. And, as discussed above, many of the cases that Shaffer and the supporting amicus briefs cite concern an individual accessing someone's digital device without the owner of the digital device's consent or even knowledge. Petition at 19; Professor McJunkin Brief at 14-19.

In sum, this Court should deny review for any, or all, of the following reasons: (1) there are not multiple circuits conflicted on the private search doctrine concerning a situation where an individual voluntarily gives his digital device to a private party to review and repair; (2) the private search doctrine was not raised and litigated in this case in the state trial court and the state intermediate appellate court, and the state supreme court did not grant allowance of appeal to address the private search doctrine; (3) consequently, as three of seven state supreme court justices opined, the record in this case was not developed in the lower courts in order to create arguments based on the private search doctrine; (4) Shaffer likely does not have a reasonable expectation of privacy in the contents of his laptop because he gave CompuGig permission to work on his laptop multiple times; and (5) the private search here was minimal and police subsequently obtained a search warrant to look through the laptop. This Court should deny review.

CONCLUSION

In sum, this Court should deny Shaffer's petition.

Respectfully submitted,

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