

No. 20-5601

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

Eric Wayne Grinder,
Petitioner,

v.

United States of America,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

ORIGINAL

Question Presented

Does the conflict of the particularity required in

computer searches between the Fourth and Tenth circuits

diminish Fourth Amendment rights?

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Petition for a Writ of Certiorari

The petitioner, Eric Wayne Grinder respectfully petitions for a writ of certiorari under supreme court rule 10(a) for a review of conflicts between the Fourth circuit and the Tenth circuit.

Opinions Below

The Fourth circuit entered an unpublished judgement on United States v. Grinder, (1:17-cr-00226-CCB-1, 2018 WL 2943235) affirming the District court's decision denying a motion to suppress evidence, attached as Appendix A.

Jurisdiction

The Fourth circuit issued an unpublished decision on April 6, 2020 (Appendix A). The jurisdiction of this court is invoked under 28 U.S.C. § 1254 (1).

Constitutional and Statutory Provisions Involved

The Fourth Amendment of the United States

Constitution provides in part:

"nonconsensual search of a home by law enforcement officers ordinarily requires a warrant. Upon probable cause, supported by oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized."

Statement of case

On November 27, 2016 the petitioner's wife (Alisha) alleges that the couple's ten year old daughter (Jane Doe) told Alisha that the petitioner "had been sexually abusing her." (Opening Brief 'OB' p.3). The affidavit for the state warrant reported Alisha told law enforcement that the petitioner orders Clonazepam, a "Benzodiazepine class drug and that he orders it "via the internet and has it sent to the house." (OB-4). Alisha also states she tasted Robitussin in Jane Doe's room and it tasted like Clonazepam, the next morning Alisha administered a home drug test and it "indicated [Jane Doe] tested positive for Benzodiazepines." (OB-4).

On November 29, 2016 a Maryland state judge signed a warrant to search the couple's home on 261 Montpelier court

in Westminster, Maryland in relation to five sex crimes. The items

the state warrant authorized to be seized are:

"evidence to the crimes of Sex Abuse of a Minor, 2nd Degree Sexual Offense, 3rd Degree Sexual Offense, Rape 2nd Degree, Sex Abuse of a Minor - Continuing Course of Conduct, to include but not limited to crime scene processing; to include photographs, drawings/measurements, DNA/Biological evidence collection; bedding, prescription and non prescription medication to include but not limited to Clonazepam and U-4771, home drug testing kits, invoices/receipts for mail order medications, cell phones, computers, hard drives, media storage devices, etc." (OB-5).

The search warrant also authorized officers to:

"seize and have forensically analyzed by a qualified person or persons any cellular telephones seized."

seize and have forensically analyzed by a qualified person or persons any computers, hard drives, [and] media storage devices." (OB 5-6).

On December 19, 2016 Maryland state police gave the

petitioner's cell phone and laptop to Homeland Security Investigations (HSI).

On February 7, 2017 HSI began the search of the laptop.

On February 16, 2017 while searching the laptop HSI

discovered images of Jane Doe performing fellatio on an adult male and touching an adult male's penis. They also discovered two

"known images of child pornography" which the analyst recognized from

previous cases. The analyst stopped his search to obtain a federal

search warrant.

March 17, 2017 a federal magistrate signed a warrant to

give permission to search the petitioner's cell phone and laptop

for evidence of production, receipt, and possession of child pornography.

April 26, 2017 the grand jury returned an indictment charging

the petitioner with three counts of producing child pornography in

violation of 18 U.S.C. § 2251(a). The petitioner filed a

motion to suppress all of the evidence found on the laptop, cell phone, and SD card. The state warrant was argued to be overbroad allowing a full blown forensic examination of the electronic devices. The contention was the forensic examination HSI performed for nine days was beyond the scope of the warrant. As a result the evidence found during the follow up searches should be inadmissible as fruit of the poisonous tree. The District court denied the motion to suppress.

The District court held law enforcement did not exceed the scope of the warrant. The court stated "a forensic search of a laptop, authorized by a warrant, includes 'the authority to open and cursorily view each file.'" (OB-11). *United States v. Williams* 592 F.3d 511 at 523 (4th Cir 2010).

January 23, 2019 the grand jury handed up a third

superseeding indictment. This was the charging indictment that held five counts of production of child pornography, one count of attempted production of child pornography, 18 U.S.C. § 2251 (a), two counts of possession of child pornography 18 U.S.C. § 2252 (a)(4)(B), and one count of witness tampering 18 U.S.C. § 1512 (b)(1).

February 19, 2019 the petitioner requested a motion to reconsider the suppression of evidence; it was denied. A three day trial followed; the petitioner was found guilty of all charges.

May 24, 2019 the petitioner was sentenced to 360 months in prison, followed by lifetime supervised release.

Summary of Argument

1. The Fourth circuit allows indiscriminate searching of computers, while the Tenth circuit requires particularity.

In the Fourth circuit law enforcement may "open and view

all [a computer's] files, at least cursorily, to determine whether any

one falls within the terms of the warrant." Williams 592 F.3d at 521.

This allows law enforcement executing the warrant to search a computer

in its entirety without having to show that where they searched was

likely to contain evidence described in the warrant.

The Tenth circuit held that a search warrant for a computer

that simply states to search "electronic and magnetic media stored

within such devices" was overbroad and lack the required particularity.

United States v Riccardi 405 F.3d 852 at 858. The Tenth circuit

has a proven track record for having well tailored search warrants

being a requirement for computer searches. The two circuits conflict on particularity and probable cause on searches and seizures on computers.

Argument

1. The generality and overbreadth of Williams

Williams was a case of electronic internet crimes where threatening emails were sent, law enforcement traced them back to the user. The warrant authorized the search and seizure of:

"Any and all computer systems and digital media, videotapes, videotape recorders, documents, photographs, and instrumentalities indicative of the offense of harassment by computer and threats of death or bodily injury to a person or member of his family; threats to commit seriously bodily harm to a person on school property, etc." Williams 592 F.3d at 515, 516.

The District court denied a motion to suppress citing:

"The fact that a person who's already under suspicion for threatening to do bodily harm to minors would have imagery within his computer or within his home showing significant mistreatment of minors in my view is sufficiently within the ambit of those concerns to permit the agents to search for that [under the warrant]. The court concluded that the child pornography was evidence and instrumentalities of criminal activity." Williams 592 F.3d at 516, 517.

The Fourth Circuit affirmed the District court's decision to deny the motion to suppress saying:

"because the scope of the search authorized by the warrant included the authority to open and cursorily view each file the observation of child pornography within several of these files did not involve an intrusion on Williams' protected privacy interests etc." Williams 592 F.3d at 523.

Allowing law enforcement the ability to open and view every file, at least "cursorily" on a computer is an ambiguous statement.

In a lenient view of this ruling it should be construed that

law enforcement could simply power up a computer and give the files a casual glimpse without forensic software. The generality of this ruling cannot give officers executing a warrant direction where "nothing is to be left to the discretion of the officer executing the warrant." Marron v. United States 275 U.S. 192 at 196 (1927).

2. The controversial application of Williams to the petitioner's case.

The Williams case shares few similarities to the petitioner's case as stated by the government "Indeed, Defendant's argument cannot be squared with the court's decision in Williams." (Reply Brief 'RB', p. 36). The only computer allegations in the petitioner's case were "his purchase of drugs over the internet, text

messages between defendant and Alisha Grinder concerning the [sexual] abuse and drugs." (RB-17). The Fourth circuit concluded that evidence of "the sexual abuse of the victim could have been anywhere in the laptop." (Appendix A, p. 5). There isn't probable cause in this case to believe any evidence of sexual abuse (a physical crime not electronic) would be found on the laptop, the Fourth circuit has held "evidence of child molestation alone does not support probable cause to search for child pornography."

United States v. Doyle 650 F.3d 460 at 472 (4th Cir. 2011). In the petitioner's case the Fourth circuit held that Doyle was "misplaced", there are some similarities. The warrant here doesn't initially charge with child pornography, however the forensic examiner makes it clear that is what he was looking for during the trial.

He says "once my software has finished, it parses out the images and videos into separate names... I've gotten very quick at detecting flesh-colored tones and that kind of stuff." (Trial 'Tr' transcripts 'trans' Day 2, p. 72). He also testified to using forensic tool "Griffeye Analyze" to specifically search for "images and videos." (Tr. trans. Day 2, p. 31). He was clearly knowingly exceeding the scope of the warrant looking for text messages and drug purchases. There is also no reason to believe that text messages regarding drug purchases or any discussion of sexual abuse would be found on the laptop, it is not common practice to sync a cell phone to a laptop nor should it be assumed, it was also not supported in the affidavit. Searching everywhere on a computer is "a general, exploratory rummaging in a person's belongings" a

search warrant should specifically "describe the place to be searched, and the persons or things to be seized." United States v. Kimble 855 F.3d 604 at 610 (4th Cir. 2017).

The particularity requirement was also violated in the petitioner's case turning the state search warrant into a general warrant, "a warrant must describe the place to be searched." (emphasis added). United States v. Galpin 720 F.3d 436 at 446 (2nd Cir. 2013). The state warrant did not describe the place to be searched in the laptop. Another requirement of particularity is the warrant "must specify the items to be seized by their relation to the designated crimes." Galpin 720 F.3d at 446. The warrant here gave nothing specific to be seized from the computer, instead it gave police the authority to forensically analyze all electronics

without any specifics as to what to seize. "General searches are prevented by other Fourth Amendment requirement that the place to be searched be particularly described." 2 W. LaFare, Search and Seizure § 4.6(a) (5th ed. 2012). The state warrant in this case was not "narrowly tailored to uncover only those things described" in the warrant (United States v Mann 592 F.3d 779 at 786 (7th Cir. 2010)), nor was it "limiting the authorization to search the specific areas for which there is probable cause to search." Horton v California, 496 U.S. 128 footnote 10 (1990).

If the particularity requirement is met law enforcement still exceeded the scope of the warrant, from the perspective of Williams police could only "cursorily" view each file. Search warrants should be read in a "commonsense and realistic manner, avoid hyper technical reading

of their terms." Williams 592 F.3d at 519. A "commonsense" definition of cursorily is, superficial or on the surface. In this case Maryland state police seized the laptop, then handed it to HSI so they could forensically examine it using software to recover fragments, postmortem, and deleted files. The examiner testified to examining the "unallocated space" (deleted files) on the laptop. (Tr. trans. Day 2, p. 32). HSI never cursorily viewed the laptop files they spent nine days doing a forensic examination. The examiner failed to search where he was "directed at uncovering the evidence specified in the search warrant." United States v. Loera 923 F.3d 907 at 917 (10th Cir 2019).

The application of Williams to the petitioner's case is misplaced there weren't initial charges related to computers just one allegation from his wife that he purchased drugs online in the affidavit. The

overbreadth of the state warrant to forensically analyze all electronics top to bottom gave police authority to search everywhere.

"It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment."

Payton v. New York 455 U.S. 573 at 583 (1980).

3. The Tenth circuit's carefully tailored particularity requirements for computer search warrants while providing protection to one's Fourth Amendment rights.

United States v Carey 172 F.3d 1268 (10th Cir. 1999) set the stage for the Tenth circuit's evolution of the particularity requirement when searching computers. In this case the Tenth circuit granted suppression of evidence on child pornography charges

because the evidence was not "inadvertently discovered" during a

search for drug transactions. On En Banc the court found "inadvertance is a characteristic of most legitimate 'plain view' seizures." Carey 172 F.3d

at 1277, citing Horton 496 U.S. at 130. The warrant gave specifics of what to search for in the computer, however the court found that "they were in closed files and thus not in plain view." Carey 172 F.3d at 1273.

It has also been established that "an essential predicate of the plain view doctrine is that the initial intrusion not violate the Fourth Amendment." United States v. George 975 F.2d 72 at 78 (2nd Cir. 1992).

Law enforcement has many tools at their disposal after they seize a computer and have "computers and data in their custody, law enforcement can generally employ several methods to avoid searching files of the type not identified in the warrant." Carey 172 F.3d at 1276. Allowing law enforcement to view every file on a computer, even "cursorily" would

negate any inadvertance. This would essentially place every file on the computer in "plain view".

More circuits should follow the Tenth circuit as they are the trailblazer for computer searches, as their "case law therefore suggests that warrants for computer searches must affirmatively limit the search of evidence to specific federal crimes or specific types of material." (emphasis added) United States v. Riccardi 405 F.3d 852 at 862 (10th Cir. 2005). Six years later even Riccardi relies on Carey, "the underlying premise in Carey is that officers conducting searches (and the magistrates issuing warrants for those searches) cannot simply conduct a sweeping, comprehensive search of a computer's hard drive." Riccardi 405 F.3d at 862. Computers cannot be searched with a general search warrant because they "store and intermingle a huge array of one's personal papers

in a single place [which] increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the particularity requirement that much more important." United States v Otero 563 F.3d 1127 at 1133 (10th Cir. 2009). Nearly everyone has a computer or cell phone, with the amount of information on them we desperately need the protection of the Fourth Amendment to protect our privacy because "If a warrant is read to allow a search of all computer records without description or limitation it would not meet the Fourth Amendment's particularity requirement." United States v. Burgess 576 F.3d 1078 at 1093 (10th Cir 2009).

4. The effect the particularity requirement for computer searches in the Tenth circuit should have had on the petitioner's case.

The state search warrant in the petitioner's case did not give anything specific police were to seize in the laptop and "a warrant

is overbroad if it does not contain sufficiently particularized language

that creates a nexus between the suspected crime and the items to be

seized." *Mink v. Knox* 613 F.3d 995 at 1010 (10th Cir. 2015). The state

warrant in this case gave police authority to search the petitioner's

home and seize his computer, that same warrant gave not one thing to

seize within the computer just authorizing a general search. The warrant

in regards to the computer was overbroad and a warrant without specifics

where to search and what to seize is a general warrant. A "warrant

authorizing a general search of a computer [is] invalid as it permitted

officers to search anything, 'from child pornography to tax returns to private

correspondence." *Riccardi* 405 F.3d at 863. The lack of particularity in

the warrant should have caused it to be suppressed, "In today's

world, if any place or thing is especially vulnerable to a worrisome

exploratory rummaging by the government, it may be our personal computers."

United States v. Christie 717 F.3d 1156 at 1164 (10th Cir. 2013).

The search of the petitioner's laptop was without a doubt wide-ranging. The Fourth circuit has shown its position by allowing law enforcement to search anywhere (within a computer) for evidence that fell "within the terms of the warrant." Williams 592 F.3d at 521. The Tenth circuit goes directly against Williams, "The most practical reading authorized a wide-ranging search of the defendant's computer. The warrant as it pertained to the computer search was therefore invalid."

Otero 563 F.3d at 1133. Search warrants need particularity and consistency, especially into computers we cannot allow police to go on fishing expeditions with the amount of private information they hold.

The state warrant in the petitioner's case lacked substance and another

warrant should have been obtained to search the laptop to "provide justifications to search the seized computers." United States v Wong

334 F.3d 831 at 834 (9th Cir. 2002). The HSI analyst knew this warrant was overbroad but still searched the laptop, when law enforcement "must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant." United States v. Walser 275 F.3d 981 at 986 (10th Cir. 2001).

The search warrants in Riccardi have striking similarities to the petitioner's case with totally different results. The first warrant in Riccardi law enforcement "noted that Mr. Riccardi had a personal computer."

Riccardi 405 F.3d at 858. In the petitioner's case his wife told law enforcement he ordered drugs online so it was safe to assume he had a computer. The second warrant in Riccardi allowed law enforcement

to seize his personal computer and search all "electronic and magnetic media stored within such devices." Riccardi 405 F.3d at 858. The state warrant in the petitioner's case stated to have the electronics "forensically analyzed". In Riccardi law enforcement questioned the particularity of the second warrant to prosecution but was told to proceed, in the petitioner's case HSI went straight to work looking for "flesh colored tones" in picture and video files. The Tenth circuit held the second warrant in Riccardi "failed to satisfy the Fourth Amendment's particularity requirement." Riccardi 405 F.3d at 861. In the petitioner's case the Fourth circuit "found that law enforcement officers are permitted 'to open and view [a computer's] files, at least cursorily, to determine whether any one falls within the terms of the warrant.'" (Appendix A, p.5). While the search in Riccardi was deemed to be

unconstitutional, because law enforcement asked the prosecution about the breadth of the warrant the good faith exception applied to the case.

Here HSI did not question the lack of particularity, instead he exceeded any scope and searched for pornography. Searching for "flesh colored tones" in video and image files in a sex crimes case involving a minor could have no other interpretation other than the HSI analyst took advantage of a warrant he knew to have no particularities of where to search in the laptop or what to seize, and searched for child pornography.

5. The good faith rule does not apply

In the petitioner's case HSI agent Gibson was sworn in at trial as an expert in computer forensics. (Tr. trans. Day 2, p. 21).

As an expert in his field it is implied he would at least have reasonable knowledge of what the law prohibits. Mr. Gibson should have been able

to tell the state warrant was "so facially deficient - i.e., in failing to particularize the place to be searched [in the computer] or the things to be seized [in the computer]." United States v. Leon 468 U.S. 897 at 923 (1984). The state warrant in this case did not give one specific item to be searched for or seized within the computer, therefore the executing officers cannot reasonably presume it to be valid." Leon 468 U.S. at 923.

Mr. Gibson testified to searching image and video files seeking "flesh colored tones" in the laptop, exceeding the scope of the warrant where "It is well settled in this circuit that the Leon good faith exception does not apply to an improperly executed warrant." United

States v. Rowland 145 F.3d 1194 at 1212 (10th Cir. 1998). The state warrant in this case gave police limitless searching abilities in the

electronics, the evidence from the laptop should be suppressed if

"exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect [it] must alter the behavior of individual law enforcement officers or the policies of their departments."

Leon 468 U.S. at 918. As an expert in the field of computer forensics

for HSI, Mr. Gibson had to know that this state warrant allowing him to search and seize anything on the laptop was overbroad.

The lack of particularity in the state warrant is ultimately

what led to the probable cause for the federal warrant. The government

has made no argument that the federal warrant was "genuinely independent"

of the state warrant. The evidence found in the state warrant should be

suppressed because of the general warrant as well as the evidence from

the federal warrant, since it would be 'fruit of the poisonous tree.'

Reasons For Granting The Writ

1. There cannot be justice with the divide of the Fourth circuit and the Tenth circuit in particularity requirements of search warrants.

Under Rule 10(a) the Supreme Court of the United States can

grant a writ of certiorari for compelling reasons when "a United

States court of Appeals has entered a decision in conflict with the

decision of another United States court of Appeals on the same important

matter." Our Fourth Amendment rights are being stretched between two

circuit courts, the Fourth and Tenth are moving in opposite directions.

The Fourth is becoming more liberal declaring that when searching a

computer the officers can just search the whole computer to see if any files

"falls within the terms of the warrant", there's no requirement for

particularity in computer searches in the Fourth circuit, as seen in the

petitioner's case. Williams 592 F.3d at 521. The Tenth circuit has

went in the opposite direction sticking to and improving their two decade long requirement of particularity when searching computers that began with Carey. This issue demands this court's attention, justice can't be obtained while these two courts are on opposite sides of the spectrum. If the state search warrant in the petitioner's case was issued in the Tenth circuit it would have been suppressed, same as in Riccardi.

The application of Williams to this case could potentially haunt the courts, it makes general search warrants of computers legal, crippling the Fourth Amendment. This case could allow law enforcement to seize any electronic device and "cursorily" search the entire thing with no specifics and it would be legal. The petitioner implores this court to abate Williams as it could be detrimental

to the protection of the Fourth Amendment.

All of the cases cited in this petition from the Tenth circuit that did not suppress the computer evidence listed very specific items to search for within the computer, from Carey (1999) to Loera (2019).

The most recent case's warrant (in regards to the computer) authorized

the seizure of "configuration files... documents, browsing history...

photographs, and correspondence..." Loera 923 F.3d at 912. It is

not impartial or reasonable of the courts to have two very different

opinions in two very similar search warrants (Riccardi and petitioner's

case) where jurisdiction is the biggest difference. In a federal

court the area one lives should not be the deciding factor on

the protection of Fourth Amendment rights.

2. Use this case as a vehicle to resolve these conflicts between two circuit courts.

Almost a century ago the supreme court decided "The requirement that warrants shall particularly describe things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another." Marron 275 U.S. at 196. From this ruling in 1927, to 2020 where the Fourth circuit determined it was sufficient for a search warrant that simply stated "seize and have forensically analyzed by a qualified person or persons any computers, hard drives, [and] media storage devices," (OBS-6) determining particularities are no longer needed. This is a critical issue that should not be taken lightly as Justice Alito has said "granting review in this case sets a precedent that, if followed in other cases, will very

substantially alter the court's practice." Tolan v Cotton 572 U.S. 650 at 661 (2014).

Even the government's prosecutors stated that the petitioner's case "cannot be squared with the court's decision in Williams."

(RB-36). The Fourth circuit chose to ignore the prosecution and defense instead relying on the liberal views of Williams.

The petitioner requests this court to imagine his case in the Tenth circuit with the state search warrant police used to seize and search his computer. The similarities to the warrant in Riccardi are evident.

The two search warrants are too similar to ignore. Only this court can bring the Tenth circuit and the Fourth circuit closer together and insure the Fourth Amendment rights of the people stay protected.

Conclusion

For the foregoing reasons, the petition should be granted

Respectfully submitted,

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