NO. _____

In the Supreme Court of the United States

CRISTOFER JOSE GALLEGOS-ESPINAL
Petitoner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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PETITION FOR WRIT OF CERTIORARI

RICHARD KUNIANSKY
LAW OFFICES OF RICHARD KUNIANSKY
440 LOUISIANA STREET, SUITE 1440
HOUSTON, TEXAS 77002
(713) 622-8333
RKUNIANSKY@GMAIL.COM
COURT-APPOINTED ATTORNEY FOR PETITIONER CRISTOPHER JOSE GALLEGOS-ESPINAL

QUESTION PRESENTED

Whether verbal consent to "look through" a cell phone, followed by written consent on an outmoded pre-*Riley* consent form, permits the government to perform a forensic search of the cell phone and maintain the data in perpetuity, after the cell phone has been returned to its owner?

LIST OF PARTIES

1. Cristofer Jose Gallegos-Espinal, represented by Richard Kuniansky.

2. United States of America, represented by the Solicitor General of the United States

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cristofer Jose Gallegos-Espinal respectfully submits this petition for a writ of certiorari.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *United States v. Gallegos-Espinal*, 970 F.3d 586 (5th Cir. 2020) and is also attached at Appendix B.

STATEMENT OF JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231. The Government filed an interlocutory appeal from the District Court's granting of a motion to suppress. 18 U.S.C. § 3231. This appeal is from the United States Court of Appeals for the Fifth Circuit's reversal of the District Court's decision. The Fifth Circuit decision was filed on August 17, 2020 and this petition is within 90 days of the decision of the Fifth Circuit. Supreme Court Rule 13.

CONSTITUTIONAL PROVISION INVOLVED

The Appendix reproduces the Fourth Amendment of the United States Constitution at Appendix H.

STATEMENT OF THE CASE

The Department of Homeland Security (DHS) was conducting an alien smuggling investigation against Aleida Ruedo-Espinal (Aleida), the mother of

Cristofer Jose Gallegos-Espinal (Gallegos). They were conducting a search pursuant to a search warrant at the home of Aleida. Present at the search were the minor children of Alieda. The Agents asked Alieda who they could call to take custody of the minor children. She provided them with the name and telephone number of her adult son Gallegos. An Agent telephoned Gallegos, identified himself and told him to come to his Mother's home right away. When Gallegos arrived, approximately 20 Federal agents/police officers were there to greet him. Gallegos walked up to the house carrying his gray Samsung phone. Agent Newman approached Gallegos and inquired whether he was willing to take custody of his younger brother. ROA.272. He responded that he was. Agent Newman, in order to induce consent for the search of Gallegos' gray Samsung phone and his car, used a double ruse. He did not want to tell Gallegos that he wanted to search his phone to gather evidence against him and his mother for alien smuggling because he was concerned he may not get consent. As a result, he came up with the most absurd ruse he could think of: "So I asked him if I could search through his phone, but in order to avoid alerting him to exactly what I was looking for on his phone, I decided to use an absurd example of why I wanted to use his phone. So I said 'Hey, I just want to *look through your phone* to make sure you don't have any child pornography on it'."(Emphasis added). ROA.140. This was a double ruse because the agent said he wanted consent to merely "look through" his phone, and that the purpose was to look for child pornography. The agents then got

a good laugh out of the ruse. Agent Newman used a similar tactic to gain consent to search the car. That is, we want to make sure that when you take custody of your younger brother, there are no weapons or other items in your car that could cause harm to him. Gallegos initially gave oral consent. He was subsequently presented with a old generic outmoded consent form that pre-dated *Riley v. California*, 573 U.S. 373 (2014). This consent form is quoted verbatim in the Fifth Circuit's decision. See *Gallegos-Espinal* at pg. 5, fn 5, and Appendix E. Gallegos signed the written consent form. ROA.529.

The initial search of the car was a cursory one, limited to a search for weapons. Although there was a white iPhone in the car, it was not located in the initial search. When the agents performed a more thorough second search of Gallegos' car, they located the white iPhone. The agents requested the passcode to this phone and Gallegos provided it. There is a factual dispute whether Gallegos wrote the passcode on the consent form or whether the Agent added it. In any event, Gallegos did not object when the white iPhone was added to the previous consent form.[1] ROA.529. In fact, he said nothing.

An agent had a Cellebrite machine on site and attached the gray Samsung phone to it. A Cellebrite machine is a forensic tool that allows law enforcement to download

[1] As noted during the hearing, the agents failed to change the consent form from "phone" in the singular to "phones" in the plural. ROA.361.

the complete contents of a cell phone, including information that had been deleted. Gallegos observed his gray Samsung phone hooked up to a "techy" devise. Gallegos did not object. In fact, once again, he simply said nothing. The agents did not explain to Gallegos prior to gaining consent to search his phone that they would be hooking up his phone to a Cellebrite machine, which would perform both a logical extraction (explaining to him what that was) and a physical extraction (explaining to him what that was), and they would then keep the data *ad infinitum*. Agent Newman was candid as to why he did not advise Gallegos of the Cellebrite search: "Well, I don't like to be specific because that can unnerve some people. And so, sometimes what will happen is the –the person consenting will – will object to using a Cellebrite or do a computer forensic; and they will say – or they'll say, 'hey, I don't want you to take the phone out of my presence'. And so at that point, I would simply thumb through the phone in front of them. But I like to be vague so that I can use the Cellebrite and then, if they object, I'll stop and go through it physically." ROA.160. Put another way, Agent Newman conceded that if he truthfully advises a person of the *scope* of the consent he is seeking, it will frequently "unnerve" them and they will limit their consent. Therefore, he intentionally misleads them as to the scope of his intended search.[2]

The agents decided to go the DHS headquarters to complete the extraction of the gray Samsung phone, to begin and complete the extract of the white iPhone and

[2] Judge Miller referred to this as "troubling". ROA.94 at Fn 11.

to interview Gallegos. They asked Gallegos to follow them to DHS headquarters. He was still under the mistaken belief that the purpose was for him to pick up his minor brother. Once at DHS headquarters, Gallegos was interviewed by agents about his knowledge of alien smuggling. While that interview was taking place, the physical extraction of the gray Samsung phone and the logical and physical extraction of the white iPhone were taking place in a separate area outside his view.

Three days after the data from the white iPhone was extracted, an agent discovered child pornography in the extracted data. ROA.65. This resulted in an indictment being returned against Gallegos for child pornography charges.

Gallegos filed a motion to suppress the child pornography images located in a forensic search of his cell phone conducted several days after he provided consent to search. He alleged that his consent was involuntary, and further, even assuming *arguendo* there was voluntary consent, that the extraction of data, the retention of that data and the subsequent forensic analysis of that data several days later, exceeded the scope of consent. After a two day suppression hearing, Judge Miller granted the motion to suppress. Appendix A. The government appealed. On August 17, 2020, the Fifth Circuit reversed Judge Miller's order in a split decision. *United States v. Gallegos-Espinal, supra*. On August 27, 2020, the Fifth Circuit denied Gallegos' Motion for Rehearing *En Banc*. Appendix D. On October 19, 2020, Judge Miller stayed the criminal case pending the filing of a writ of certiorari to the United States

Supreme Court. Appendix G.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the decision of the Fifth Circuit Court of Appeals conflicts with this Court's decision in *Riley v. California* and because it raises exceptionally important issues of constitutional law. Specifically, whether verbal consent to "look through" a cell phone, followed by written consent on an outmoded pre-Riley consent form, permits the government to perform a forensic search of the cell phone and maintain the data in perpetuity, after the cell phone has been returned to its owner?

The Fourth Amendment to the United States Constitution states:

> 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.

In the landmark case of *Riley v. California, supra*, this Court had the opportunity to decide whether the search of a cell phone fell within the search incident to arrest exception to the search warrant requirement. This Court has not yet had the opportunity to decide how other exceptions to the search warrant requirement apply to the search of a cell phone. Almost all of the cases decided by lower courts involve the border exception to the search warrant requirement.[3] This case presents the ideal vehicle to decide how the consent exception to the search warrant requirement interplays with holding in *Riley v. California* and the forensic

[3] See e.g., *United States v. Cotterman*, 709 F.3d 952 (9th Cir. 2013) (*en banc*); *United States v. Cano*, 934 F.3d 1002 (9th Cir. 2019); *United States v. Aigbekaen*, 943 F.3d 713 (4th Cir. 2019); *United States v. Kolsuz*, 890 F.3d 133 (4th Cir. 2018).

the search of a cell phone.

Four Federal Judges in this case have ruled on this issue. Two said *Riley* was not violated[4] and two said *Riley* was violated. Specifically, a United States District Judge and a Fifth Circuit Court of Appeals Judge have already found that the forensic search of a cell phone based on an outdated non-electronic consent form, after the phone had been returned to its owner, violated *Riley v. California*. United States District Judge Gray Miller, in granting Defendant's motion to suppress, stated in pertinent part:

> The Court finds Newman's testimony that a more specific consent form would "unnerve" the person signing and that he expects individuals to just withdraw consent when they see their phones being hooked up to the Cellebrite machine troubling ... The court finds that this is a call that must be resolved in favor of upholding the privacy rights secured by the Founding Fathers. The court thus holds, in light of the *Riley* Court's finding that there is an increased privacy right in smart cell phones and in consideration of the totality of the circumstances of this particular case, the continuing search after the iPhone was returned to Gallegos and the purpose of the search that was relayed tohim - to make sure there were no issues with his taking custody of the children - was no longer at issues, exceeded the scope of Gallegos's consent. It was reasonable to believe that the Government was finished perusing through Gallegos's data at that time, and the general consent form was insufficient to alert Gallegos that the Government was going to keep the data and go through it at its leisure. Allowing the Government to keep the intimate data available on modern cell phones indefinitely and search through it at any time without obtaining voluntary consent for such an extensive dive into a person's "privacies of life" runs contrary to the Fourth Amendment's guarantee that a person has to [sic] right to be secure in his or her "person[], house[], papers, and effects." U.S. Const. amend IV.

Similarly, Fifth Circuit Judge James E. Graves, Jr. in his dissent in

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[4] Fifth Circuit Court of Appeals Judges E. Grady Jolly and Stuart Kyle Duncan held that *Riley* was not violated.

United States v. Gallegos-Espinal, supra, stated in pertinent part as follows:

> As Justice Scalia wrote, "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States,* 533 U.S. 27, 33-34, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001); *see also Riley v. California*, 573 U.S. 373, 407, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (Alito, J., concurring in part and concurring in the judgment) ("Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.").

970 F.3d at 594.

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> Here, the generic consent form only specified that agents can "take any letters, papers, materials, or other property which they may desire to examine." Today's decision requires the average person to make the inferential leap that "property" refers to your digital content, including text messages, photos, Google Maps locations, bank account statements, and even your highest score on Candy Crush.

Id.

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> In my view, Gallegos-Espinal's inability to see the Cellebrite extraction performed on his iPhone (as he previously saw on his Samsung phone) deprived him of having information necessary to make an expressed or implied limitation on the initial broad consent to search. We can only speculate as to whether Gallegos-Espinal would have limited the scope of the search had he witnessed his iPhone being plugged into the Cellebrite machine for data extraction. The general consent form was insufficient to alert Gallegos-Espinal that the government was going to extract and retain the iPhone data for later examination, especially when Gallegos-Espinal was told the phone searches were only needed to

> determine if he could take custody of his younger siblings. For these reasons, I would affirm the district court's suppression order.

Id. at 595.

In the pre-*Riley* case of *United States v. Cotterman, supra*, a warrantless forensic border search was performed on a laptop computer. Although a border search was a well recognized exception to the warrant requirement, the Ninth Circuit nevertheless required reasonable suspicion for the forensic search of a laptop computer. The Court observed the forensic search was "akin to reading a diary line by line, looking at everything the writer may have erased." 709 F.3d at 963-64.

The Court concluded:

> International travelers certainly expect that their property will be searched at the border. What they do not expect is that, absent some particularized suspicion, agents will mine every last piece of data on their devices or deprive them of their most personal property for days (or perhaps weeks or even months, depending on how long the search takes). (Cites omitted.) Such a thorough and detailed search of the most intimate details of one's life is a substantial intrusion upon personal privacy and dignity. We therefore hold that the forensic examination of Cotterman's computer required a showing of reasonable suspicion, a modest requirement in light of the Fourth Amendment.[5]

Id. at 964-968.

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[5] See also *Alasaad v. Nielson*, 2019 WL 5899371 (D.Mass.) that "[t]he potential level of intrusion from a search of a person's electronic devices simply has no easy comparison to non digital searches. *See Cotterman*, 709 F.3d at 966 (describing forensic search of digital device as 'essentially a computer strip search')".

In a post-*Riley* case, the Ninth Circuit applied similar reasoning to that utilized in *Cotterman* to suppress the fruits of a forensic search of a cell phone at the border. *United States v. Cano, supra*. Although the court held that a manual search of a cell phone was subject to search at the border, citing *Riley*, the court held reasonable suspicion is required for the forensic search of a cell phone. The Court stated:

> We think that *Cotterman*'s reasoning applies equally to cell phones. In large measure, we anticipated the Supreme Court's reasoning in *Riley*, 573 U.S. at 393–97, 134 S.Ct. 2473, when we recognized in *Cotterman* that digital devices "contain the most intimate details of our lives" and "the uniquely sensitive nature of data on electronic devices carries with it a significant expectation of privacy," *Cotterman*, 709 F.3d at 965–66; *see Riley*, 573 U.S. at 385, 393, 134 S.Ct. 2473 (describing cell phones as "a pervasive and insistent part of daily life" that, "as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse"). The Court's view of cell phones in *Riley* so closely resembles our own analysis of laptop computers in *Cotterman* that we find no basis to distinguish a forensic cell phone search from a forensic laptop search.
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> xxxxx
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> Accordingly, we hold that manual searches of cell phones at the border are reasonable without individualized suspicion, whereas the forensic examination of a cell phone requires a showing of reasonable suspicion. *See Cotterman*, 709 F.3d at 968.

Even before *Riley*, the Department of Justice modified their consent forms to comport with the digital age.[6] However, DHS, and presumably other agencies,

[6] ROA.644, attached at Appendix F.

continue to use outdated generic consent forms to misinform individuals of their rights in the digital age. Not only did the DHS agents use outdated forms, but each agent that was questioned about *Riley v. California* had either never heard of the case or only remembered it in passing. The most knowledgeable was Agent Newman, who was "somewhat familiar" with the case, but hadn't read it in a long time. ROA.169. Agent Sandoval testified he had not been trained in cell phone searches after *Riley v. California*. ROA.262. Agent Cardenas testified he had not been briefed on *Riley v. California*. ROA.360. Agent Mirino was not familiar with *Riley v. California*. ROA.419.

This case is particularly egregious because the purported basis for the search no longer existed since Gallegos was not permitted to leave with his young brother and his cell phone was returned to him. In *Escamilla v. United States*, 852 F.3d 474 (5th Cir. 2017), Escamilla consented to a search of his cell phone. The agent manually searched his phone and handed the phone back to Escamilla. Agents later took all of Escamilla's property from him, including his cell phone. A forensic search was then performed based on his prior consent. The Fifth Circuit held that a reasonable person would believe that when his phone was handed back to him, it ended the search. The forensic search was a distinct second search requiring a warrant, consent, or some other exception to the warrant requirement.

"As a general rule, the scope of a warrant exception should be defined by its

justifications. See *Riley*, 134 S.Ct. at 2487-88 (asking whether 'application of the search incident to arrest doctrine to this particular category of effects would untether the rule from all justifications underlying the [search incident to arrest] exception')." See *Kolsuz, supra* at 143.

Here, the justification for the basis of obtaining consent no longer existed, since Gallegos was not permitted to leave with his minor younger brother, and his cell phone was returned to him.

If the *Gallegos-Espinal* decision is allowed to stand, the government may maintain cell phone data forever, and conduct "consent" searches years or even decades later, notwithstanding the fact the cell phone owner has no reason to suspect that he or she should revoke consent. This is an issue that is likely to occur with regularity, and involves important privacy rights that must be protected.

This case is of exceptional importance because, without guidance from this Court, Federal agencies will continue to use outmoded generic consent forms, that ignore *Riley*, to justify forensic searches of cell phones based on uninformed consent. There is simply no valid reason why the government cannot use modern consent forms that properly inform individuals of the nature of the search they intend to conduct. In fact, the government already has such forms. They simply choose not to use them, and will continue to do so as long as the Court permits.

Just as courts should not revert to stagecoach law to decide automobile

search law, courts should not revert to the law of seizure of "papers" to decide digital search law.

Additionally, this case presents an important opportunity to extend the exclusionary rule to the modern age of digital devices and communications. The exclusionary rule was created by the Court to deter and prevent the government from using most evidence gathered in violation of the United States Constitution. The decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) established that the exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment. The purpose of the rule is to deter law enforcement officers from conducting searches or seizures in violation of the Fourth Amendment and to provide remedies to defendants whose rights have been infringed. This case involves a search by a large law enforcement agency, DHS, which intentionally ignored teaching its agents of the rule announced in *Riley v. California* as to searching smart phones. All agents testified as such. It also involves the use of a consent form that is, at best, outmoded, if not intentionally used to get around compliance with this Court's rule in *Riley*. These intentional acts of avoidance of this Court's precedent by one of its essential and largest investigative agencies is a proper reason for the invocation of the exclusionary rule to extend to illegal searches of modern electronic devices.

CONCLUSION

This Court should grant certiorari to resolve the conflict between this Court's opinion in *Riley v. California* and the Fifth Circuit's opinion in *Gallegos-Espinal*, and to decide an issue of exceptional importance .

Respectfully submitted,

/s/ Richard Kuniansky
Richard Kuniansky
Law Offices of Richard Kuniansky
440 Louisiana; Suite 1440
Houston, Texas 77002
(713) 622-8333
rkuniansky@gmail.com
Attorney For Petitioner
Cristofer Jose Gallegos-Espinal