

No. 20-

IN THE
Supreme Court of the United States

BRUCE HAROLD HENDLER ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX VOLUME

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

September 11, 2020

Lyle W. Cayce
Clerk

No. 18-41023
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

BRUCE HAROLD HENDLER,

Defendant—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 2:17-CR-388-1

Before HIGGINBOTHAM, JONES, and COSTA, *Circuit Judges*.

PER CURIAM:*

Bruce Harold Hendler pleaded guilty to possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B), reserving his right to appeal the district court's denial of his motion to suppress. Hendler was arrested after a search of his van by two police officers revealed electronic

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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devices that contained images of child pornography that Hendler ultimately admitted he had downloaded.

We review the denial of a suppression motion “in the light most favorable to the prevailing party.” *United States v. Hernandez*, 670 F.3d 616, 620 (5th Cir. 2012). The district court’s legal conclusions, including whether the officers had reasonable suspicion to conduct a *Terry* stop, are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Its factual findings are reviewed for clear error. *United States v. Pawlak*, 935 F.3d 337, 346 (5th Cir. 2019).

Hendler first argues that the district court erred in concluding that the arresting officers had reasonable suspicion to detain and question him. Officers may briefly detain an individual on the street for questioning “if they have a reasonable suspicion that criminal activity is afoot.” *United States v. Michelleletti*, 13 F.3d 838, 840 (5th Cir. 1994) (en banc) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). Such a detention is lawful if the officer “can point to specific and articulable facts” supporting a reasonable belief “that a particular person has committed, is committing, or is about to commit a crime.” *United States v. Monsivais*, 848 F.3d 353, 357 (5th Cir. 2017) (quotation omitted).

In this case, one of the arresting officers testified at the suppression hearing that his suspicions regarding Hendler arose after he was provided with information from a credible witness that Hendler possessed child pornography, he observed Hendler interact with a young girl at a church, he learned of Hendler’s email address which he believed was suggestive of pedophilia, and he drew on his experience investigating pedophilia-related offenses. Because the officer was able to point to specific and articulable facts to support his reasonable belief that Hendler possessed child pornography, *see Monsivais*, 848 F.3d at 357, the officer was entitled to detain Hendler to confirm or dispel those suspicions, *see United States v. Brigham*, 382 F.3d 500,

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511 (5th Cir. 2004) (en banc). Accordingly, Hendler fails to show any error in this regard.

Hendler next contends that the district court erred in determining that the plain-view exception to the warrant requirement applied to various electronic devices that were laying on a lounge chair at the outset of the officers' questioning of Hendler. We need not reach this question, however, as the images of child pornography at issue were discovered on an electronic device seized during a search of Hendler's van. There is nothing in the record to indicate that the other devices on the lounge chair contained incriminating evidence or that the officers' seizure of those devices led to, or resulted in, the discovery of any evidence under the "fruit of the poisonous tree" doctrine. *See Segura v. United States*, 468 U.S. 796, 804 (1984).

The officers did recover incriminating evidence from Hendler's van, however. So we must address his argument that he never voluntarily consented to its search. A warrantless search is presumptively unreasonable, subject to certain exceptions, such as voluntary consent. *See United States v. Santiago*, 410 F.3d 193, 198 (5th Cir. 2005). In evaluating the voluntariness of consent, we consider:

- (1) the voluntariness of the defendant's custodial status;
- (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police;
- (4) the defendant's awareness of his right to refuse to consent;
- (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

Id. (quotation omitted).

Here, the balance of the factors supports the district court's finding that Hendler voluntarily consented to the search of his van. Hendler arguably did not feel free to terminate the encounter because the officers retained possession of his electronic devices. But they did not employ coercive police procedures to induce Hendler's consent, Hendler was extremely

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cooperative, and the officers told Hendler on several occasions that he was entitled to withhold his consent. Given that, the district court did not clearly err in determining that his consent was voluntary.

Finally, Hendler contends that he was subjected to a custodial interrogation and, because the arresting officer failed to administer a *Miranda* warning, any incriminating statements should have been suppressed. The Supreme Court has defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). “A suspect is . . . in ‘custody’ for *Mirada* purposes when placed under formal arrest or when a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.” *United States v. Wright*, 777 F.3d 769, 774 (5th Cir. 2015) (quotation omitted).

Hendler was not isolated, physically restrained, or coercively questioned—the hallmarks of a custodial interrogation. To the contrary, Hendler was questioned outside in a public area of a trailer park by officers who spoke to him calmly and professionally, and who never told him that he was under arrest or that he was not permitted to leave. Hendler thus fails to show that he was subject to a custodial interrogation.

The district court’s suppression ruling has ample record support. *Pawlak*, 935 F.3d at 346 (“We uphold a district court’s denial of a suppression motion if there is any reasonable view of the evidence to support it.”). We therefore AFFIRM.

APPENDIX B

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in Corpus Christi

ENTERED

October 19, 2018

David J. Bradley, Clerk

UNITED STATES OF AMERICA
V.
BRUCE HAROLD HENDLER

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 2:17CR00388-001

USM NUMBER: 26556-479

Stephen Christopher McMains

Defendant's Attorney

☐ See Additional Aliases.**THE DEFENDANT:**☒ pleaded guilty to count(s) 3 on July 19, 2018.☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. §§ 2252(a)(4)(B) and 2252(b)(2)	Possession of Child Pornography	5/7/2017	3

☐ See Additional Counts of Conviction.

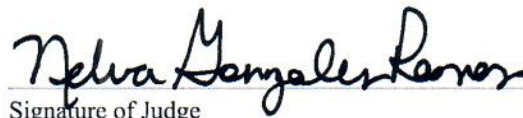
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____☒ Count(s) 1, 2, and 4 ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

October 17, 2018

Date of Imposition of Judgment



Signature of Judge

NELVA GONZALES RAMOS**UNITED STATES DISTRICT JUDGE**

Name and Title of Judge

October 19, 2018

Date

DEFENDANT: **BRUCE HAROLD HENDLER**
CASE NUMBER: **2:17CR00388-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 70 months.

☐ See Additional Imprisonment Terms.

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant participate in the Residential Drug Abuse Program (RDAP) while incarcerated.
That the defendant be placed in a facility that can address his mental health issues.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **BRUCE HAROLD HENDLER**
CASE NUMBER: **2:17CR00388-001**

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 10 years.

☐ See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☒ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

☒ See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **BRUCE HAROLD HENDLER**
CASE NUMBER: **2:17CR00388-001**

SPECIAL CONDITIONS OF SUPERVISION

SUBSTANCE ABUSE TREATMENT AND TESTING:

You must participate in an outpatient substance-abuse treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the costs of the program, if financially able.

You may not possess any controlled substances without a valid prescription. If you do have a valid prescription, you must follow the instructions on the prescription.

You must submit to substance-abuse testing to determine if you have used a prohibited substance, and you must pay the costs of the testing if financially able. You may not attempt to obstruct or tamper with the testing methods.

You may not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances, including synthetic marijuana or bath salts, that impair a person's physical or mental functioning, whether or not intended for human consumption, except as with the prior approval of the probation officer.

SEX OFFENDER CHILDREN PROHIBITION:

The defendant shall not reside, work, access, or loiter within 1,000 feet of school yards, parks, playgrounds, arcades, or other places primarily used by children under the age of 18, or where children may frequently congregate, unless approved in advance in writing by the United States Probation Officer. Additionally, the defendant shall not have contact with any minor child without being supervised by an adult family member of the child, unless granted permission to do so by the U.S. Probation Office. This would include athletic, religious, volunteer, civic, or cultural activities designed for minors under the age of 18.

SEX OFFENDER CHILDREN PROHIBITION:

The defendant shall not date or cohabit with anyone who has children under the age of 18, unless approved in advance in writing by the United States Probation Officer, after full disclosure to the family.

SEX OFFENDER COUNSELING:

The defendant shall participate in a sex offender treatment program provided by a Registered Sex Offender Treatment Provider, as approved by the United States Probation Officer, which may include but not be limited to group and/or individual counseling sessions, Abel Screen, polygraph testing and/or psycho-physiological testing to assist in treatment and case monitoring administered by the sex offender contractor or their designee. Further, the defendant shall participate as instructed and shall abide by all policies and procedures of the sex offender program, until such time as the defendant is released from the program as approved by the United States Probation Officer. The defendant will incur costs associated with such sex offender treatment program and testing, based on ability to pay as determined by the United States Probation Officer. The defendant shall waive his right of confidentiality in any records for mental health treatment imposed as a consequence of this judgment to allow the supervising United States Probation Officer to review the defendant's course of treatment and progress with the treatment provider. The Court authorizes the release of pertinent information from the presentence investigation report that will assist with the mental health treatment of the offender, and available mental health evaluations to the mental health provider, as approved by the probation officer.

SEX OFFENDER REGISTRATION:

The defendant shall register with the sex offender registration agency in any state where the defendant resides, is employed, carries on a vocation, or is a student, as directed by the probation officer. The probation officer will provide the state officials with any and all information required by the state sex offender registration agency and may direct the defendant to report to that agency personally for additional processing, such as photographing and fingerprinting.

DEFENDANT: **BRUCE HAROLD HENDLER**
CASE NUMBER: **2:17CR00388-001**

ADDITIONAL SPECIAL CONDITIONS OF SUPERVISION

MENTAL HEALTH TREATMENT:

You must participate in a mental-health treatment program and follow the rules and regulations of that program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program, including the provider, location, modality, duration, and intensity. You must pay the cost of the program, if financially able.

You must take all mental-health medications that are prescribed by your treating physician. You must pay the costs of the medication, if financially able.

DEFENDANT: **BRUCE HAROLD HENDLER**
CASE NUMBER: **2:17CR00388-001**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00		

The court found that the \$5,000 special assessment, listed under 18 U.S.C. § 3014, was not applicable based on the finding of indigency.

- ☐ See Additional Terms for Criminal Monetary Penalties.
- ☐ The determination of restitution is deferred until _____. *An Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.
- ☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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- ☐ See Additional Restitution Payees.

TOTALS	\$0.00	\$0.00	
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- ☐ Restitution amount ordered pursuant to plea agreement \$ _____
- ☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
- ☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:
- ☐ Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **BRUCE HAROLD HENDLER**
CASE NUMBER: **2:17CR00388-001**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☐ Lump sum payment of _____ due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or
- C ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or
- D ☐ Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court
 Attn: Finance
 1133 N Shoreline Blvd., Ste 208
 Corpus Christi, TX 78401

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Case Number

Defendant and Co-Defendant Names
(including defendant number)

Total Amount

Joint and Several
Amount

Corresponding Payee,
if appropriate

- ☐ See Additional Defendants and Co-Defendants Held Joint and Several.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
- ☐ See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

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