No. 21-6899

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

JOHN ALBERTS,
Petitioner,

v.

GRADY PERRY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

John Alberts, Petitioner, *pro se*
TDOC # 282544
South Central Correctional Facility
555 Forrest Ave.
Clifton, Tennessee 38425

QUESTION(S) PRESENTED

Whether Trial Counsel was Ineffective for Failing to Move to Suppress Computer Evidence on the Ground that a Search Pursuant to the Automobile Exception does not Encompass a Laptop Computer as a "Container" within a Vehicle Parked, and Unoccupied on the Owner's Private Residential Property.

LIST OF THE PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Alberts v. Perry, No. 3:20-cv-00408, U.S. District Court for the Middle District of Tennessee. Judgment entered December 10, 2020.

Alberts v. Perry, No. 21-5151, U.S. Court of Appeals for the Sixth Circuit. Judgment entered October 5, 2021.

Alberts v. State, No. M2018-00994-CCA-R3-PC, 2019 WL4415189 (Tenn. Crim. App. Sept. 16, 2019).

State v. Alberts, No. M2015-00248-CCA-R3-CD, 2016 WL 349913 (Tenn. Crim. App. Jan. 28, 2016).

State v. Alberts, 354 S.W.3d 320 (Tenn. Crim. App. 2011).

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix ___A___ to the petition and is

[X] reported at _____No. 21-5151_____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix ___B___ to the petition and is

[X] reported at _____No. 3:20-cv-00408_____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was October 5, 2021.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest court decided my case was _____.
A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____(date) on _____(date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 4 Unreasonable searches and seizures.

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.

Amendment 6 Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14 Due Process Clause.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 10, 2008, a Williamson County, Tennessee grand jury returned an indictment charging Petitioner with eight counts of rape of a child, one count of solicitation of a minor to commit rape of a child, and one count of solicitation of sexual exploitation of a minor. *See Appendix D; State v. Alberts*, M2015-00248-CCA-R3-CD, 2016 WL 349913 (Tenn. Crim. App. Jan. 28, 2016) ("*Alberts II*"). The trial court subsequently severed the count into four separate cases. *See id.* This § 2254 petition arises from one of those four cases-counts 1 through 4, Rape of a Child. *See id.*

Prior to trial, Petitioner filed a motion to suppress evidence seized during a search of his car, asserting that such evidence, which included a laptop computer and a camera, was "fruit[] [of] a poisonous tree to an illegal and invalid search warrant." He argued that the affidavit supporting the search warrant failed to "state probable cause that [he] had done some illegal act" and failed to "state a nexus connecting the criminal activity to the place to be searched." The trial court granted the motion, and the State filed an interlocutory appeal. The Tennessee Court of Criminal Appeals remanded the matter to the trial court for further proceedings as to whether an exception to the warrant requirement applied. *Appendix E; State v. Alberts*, 354 S.W.3d 320, 324 (Tenn. Crim. App. 2011) ("*Alberts I*"). On remand, the trial court found that the automobile exception to the warrant requirement applied and therefore denied the motion to suppress. *Appendix D; Alberts II*, 2016 WL 349913, at *4.

On June 5, 2013, the case proceeded to trial, where "the bulk of the direct evidence against [Petitioner] consisted of images retrieved from the laptop computer" seized from his car. *Appendix D; Alberts II*, 2016 WL 349913, at *4. The jury ultimately convicted Petitioner of all four charges, and the trial court sentenced him to four consecutive terms of twenty-five years' imprisonment to be served at 100%.

Petitioner filed a motion for a new trial, challenging, among other things, the denial of his motion to suppress. He argued that the trial court erred by ruling that the automobile exception applied to the search of his car and contended further that the exception did not extend to the search of his laptop and camera. The trial court denied the motion, concluding that the automobile exception was properly applied and that the search of the laptop and camera contained within the vehicle was justified by the probable cause that existed to search the car. The court further found that Petitioner waived the issue concerning the search of the laptop and camera, noting that the motion to suppress challenged the search of the vehicle and "touched on the laptop and the camera only as fruits of the poisonous tree," that the court's order on the motion to suppress following remand stated that the "sole inquiry" was

whether probable cause existed to search the vehicle, and that Petitioner never moved to suppress the results from the search of the laptop or camera and did not raise a contemporaneous objection to the admission of the incriminating images found on the laptop. The Tennessee Court of Criminal Appeals affirmed the judgment, and the Tennessee Supreme Court denied Petitioner's application for permission to appeal. *Appendix D; Alberts II*, 2016 WL 349913, at *8, *perm. app. denied* (Tenn. June 23, 2016).

On May 3, 2017, Petitioner filed a pro se state petition for post-conviction relief. The post-conviction court appointed counsel, who filed an amended petition raising a claim that trial counsel was ineffective for "failing to file a separate motion to suppress the search and examination of his laptop computer containing the images directly linking him to the sexual assaults alleged in the indictment." Petitioner argued that the automobile exception to the warrant requirement did not justify the search and forensic examination of the laptop. Acknowledging that the automobile exception permits the search of containers found within a vehicle that are capable of concealing the object of a search, Petitioner argued that pursuant to *Riley v. California*, 573 U.S. 373 (2014) and *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014)-both decided after Petitioner's trial-a laptop computer found in a vehicle does not constitute a container that is subject to search. After conducting an evidentiary hearing, the court denied the petition. The court found that defense counsel's performance was not deficient, explaining that counsel's motion to suppress was sufficient to preserve any challenge to the search of the laptop and that Petitioner's claim of ineffectiveness was based on a change in the law surrounding computer and cell phone searches that developed years after trial counsel originally sought suppression of the evidence. The Tennessee Court of Criminal Appeals affirmed, and the Tennessee Supreme Court denied discretionary review. *Appendix C; Alberts v. State*, No. M2018-00994-CCA-R3-PC, 2019 WL 4415189, at *6 (Tenn. Crim. App. Sept. 16, 2019) ("*Alberts III*"), *perm. app. denied* (Tenn. Jan. 15, 2020).

In May 2020, Petitioner filed his pro se § 2254 petition in the district court. His sole claim is that trial counsel was ineffective for failing "to file a motion to suppress the search of a laptop computer seized from a vehicle, where the vehicle [wa]s found parked and locked on the owner[']s private residential driveway, within a few feet of the home." *Citing Florida v. Jardines*, 569 U.S. 1 (2013), Petitioner argued that the automobile exception does not apply to a warrantless search of a vehicle parked within the curtilage of a home.

The district court found that Petitioner failed to present his habeas claim to the state courts, explaining the distinction between the claim Petitioner raised in his state petition for post-conviction

relief-that counsel was ineffective for failing to file a motion to suppress the computer evidence on the ground that the automobile exception did not allow for a search of the laptop as a "container" within the car-and the claim he asserted in his § 2254 petition-that counsel was ineffective for failing to argue that the automobile exception did not apply at all because the car was parked within the protected curtilage of the home. The court determined that the claim was procedurally defaulted because there was no longer an available state remedy that would allow Petitioner to exhaust the claim. But rather than consider whether Petitioner had established cause and prejudice to excuse the procedural default, the court analyzed the merits of the claim and concluded that Petitioner was not entitled to habeas relief. The court declined to issue a COA. *Appendix B; Alberts v. Perry*, No. 3:20-cv-00408, 2020 U.S. Dist. LEXIS 232333 (M.D. Tenn. Dec. 10, 2020).

Petitioner filed an application for a certificate of appealability ("COA") and a motion for the appointment of counsel in the United States Court of Appeals for the Sixth Circuit. On October 5, 2021, the Court denied his application. *Appendix A; Alberts v. Perry*, No. 21-5151 (6th Cir. October 5, 2021).

REASONS FOR GRANTING THE PETITION

In a case with substantially similar facts, *Coolidge v. New Hampshire*, the Supreme Court confronted a vehicle parked at home, in a private driveway. 403 U.S. at 447. It held that the warrantless search of that vehicle was unreasonable.

After arresting a murder suspect inside his home, police impounded his car and later searched it. *Id.* New Hampshire argued that the automobile exception permitted the car search. See *id.* at 458-64 (plurality opinion). The Court rejected that argument and excluded the evidence. Justice Stewart wrote the plurality opinion, and Justice Harlan joined part II-D of that opinion to form a majority. *Id.* at 491. That part of *Coolidge* "is a binding precedent." *Horton v. California*, 496 U.S. 128, 136 (1990).

The *Coolidge* dissent argued that the automobile exception fully applied to a vehicle parked "in the driveway of a person's house." 403 U.S. at 525 (White, J., dissenting in part).

The majority rejected that view. Instead, it held that "a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable." *Id.* at 474. That is, the warrant requirement remains in effect for vehicles on residential property: "If the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard." *Id.* at 480. The majority worried that allowing *any* vehicle search on probable cause alone "would simply . . . read the Fourth Amendment out of the Constitution." *Id.*

The plurality opinion reaffirmed that the automobile exception has limited scope: "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* at 461 (Section II-B). *Where* the automobile sat was critical: "it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." *Id.* at 463 n.20. Because the defendant was in police custody, there was no "justified initial intrusion" onto the driveway where the car sat. *Id.* The automobile exception was "simply irrelevant." *Id.* At 462. Here, like in *Coolidge*, the automobile exception to the warrant requirement would not have legally justified the search of Petitioner's car and its contents.

Even if the automobile exception to the warrant requirement applied to the search of Petitioner's car, the warrantless forensic analysis of his laptop computer seizure during the search of his car was unreasonable. *See U.S. Const. amend IV.* In *United States v. Camou*, 773 F.3d 932 (9th Cir. 2014), the

Court found that cell phones are not containers for purposes of the vehicle exception as cell phones are not capable of physically holding other objects, and, the search of which, would expose to the government far more information than an exhaustive search of a house. The same logic in *Camou* should apply to computers, which are capable of holding even more information or data than a cell phone. In *Riley v. California*, 573 U.S. 373, 384-86 (2014), the Supreme Court found that police may not search the contents of a cell phone incident to arrest, and that, generally, officers must secure a warrant before conducting such a search.

In *Camou*, the Ninth Circuit logically extended *Riley* to searches of a cell phone seized during a search pursuant to the vehicle exception. Other courts have observed, "the information contained in a laptop and in electronic storage devices renders a search of their contents substantially more intrusive than a search of the contents of a lunchbox or other tangible object. A laptop and its storage devices have the potential to contain vast amounts of information. People keep all types of personal information on computers, including diaries, personal letters, medical information, photos and financial records." *United States v. Arnold*, 454 F. Supp. 2d 999, 1004 (C.D. Cal. 2006).

The Sixth Circuit has declared that "analogizing computers to other physical objects when applying Fourth Amendment law is not an exact fit because computers hold so much personal and sensitive information touching on many private aspects of life. There is a far greater potential for intermingling of documents and a consequent invasion of privacy when police execute a search for evidence on a computer." *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011)(internal alterations and quotation marks removed); *see also Riley v. California*, 573 U.S. 373 (2014) (distinguishing the justifications for searching "physical objects" and "digital content on cell phones").

The term "container" does not unambiguously encompass a laptop computer and the information contained therein. The purposes and uses of a laptop computer are broader than items or containers traditionally subject to an automobile exception search, such as closed or open glove compartments, consoles, or other receptacles. *New York v. Belton*, 453 U.S. 454 (1981). It is likewise not comparable to luggage, boxes, bags, clothing, and the like, given that a search of the digital data contained in a laptop could reveal private information such as emails, notes, photographs, videos, appointments, passwords, financial records, website preferences, calendars, associations, and contacts, and other private information.

When the authorities conducted the search of Petitioner's car pursuant to the invalid search warrant, (1) the car was parked and unoccupied on his private residential driveway; (2) the police had

developed probable cause well in advance of the warrantless search; (3) the Petitioner had already had ample opportunity to destroy any incriminating evidence; (4) the Petitioner was in police custody; (5) police had secured the vehicle from relocation or tampering; (6) police officers searched the vehicle pursuant to a warrant that the Court later found to be invalid and; (7) The forensic analysis of the laptop computer seized from Petitioner's car occurred months later at the TBI headquarters.

The police should have obtained a warrant before searching Petitioner's laptop computer. *United States v. Jacobsen*, 466 U.S. at 114; *see also Ross*, 456 U.S. 812 n.16 (noting that there is "significant difference between the seizure of a sealed package and a subsequent search of its contents," with the latter constituting a "far greater intrusion into Fourth Amendment values . . . ."). The failure to obtain such a warrant constituted a violation of search and seizure law. *U.S. Const. amend. IV.*

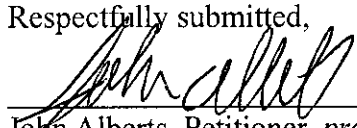
Had trial counsel filed a motion to suppress directly challenging the search of Petitioner's laptop computer the State would have been unable to prove that any exception to the warrant requirement applied. The law at the time Petitioner's case proceeded to trial allowed police to seize the laptop to protect it from loss or destruction. *Jacobsen*, 466 U.S. at 114. The automobile exception does not provide law enforcement with carte blanch authority to seize an item from a vehicle parked, and unoccupied on a private residential driveway and subject it to a warrantless search and examination months later. *Coolidge v. New Hampshire*, 403 U.S. 443, 453-54, 472 (1971) (reversing the denial of a motion to suppress evidence found during a seizure and search pursuant to an invalid warrant); *See United States v. Jacobsen*, 466 U.S. 109, 114 (1984)("Even when government agents may lawfully seize such a package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining the contents of such a package."). Trial counsel's failure to file a motion to suppress the search of Petitioner's computer constituted deficient performance that prejudiced Petitioner's defense. *See U.S. Const. amend. VI and XIV*; *Strickland v. Washington*, 466 U.S. 668 (1984); *Kimmelman v. Morrison*, 477 U.S. 365, 383 (1986).

Had trial counsel filed a motion to suppress the search of Petitioner's laptop computer, there is a reasonable probability that the motion to suppress would have bee granted. Thus, the evidence uncovered from the computer would have been inadmissible. Without the evidence from the computer, there is a substantial probability that Petitioner would not have been convicted. *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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December 28, 2021