

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

BRUCE NICHOLSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a violation of a time-limit prescribed in a search warrant render a search unreasonable under the Fourth Amendment?

PARTIES TO THE PROCEEDINGS

Both parties are identified in the case caption. Because neither party is a corporation, a corporate disclosure statement is not required.

STATEMENT OF RELATED PROCEEDINGS

- *United States v. Nicholson*, Northern District of Alabama, 2:15-cr-00418
- *United States v. Nicholson*, Eleventh Circuit Court of Appeals, No. No. 19-11669 (published at 24 F.4th 1341 (11th Cir. 2022))

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OPINIONS BELOW

The Eleventh Circuit's opinion affirming Mr. Nicholson's convictions is attached as App. A.

STATEMENT OF JURISDICTION

The Eleventh Circuit affirmed Mr. Nicholson's convictions via published opinion on January 24, 2022, in *United States v. Nicholson*, 24 F.4th 1341 (11th Cir. 2022). This Court has jurisdiction to consider this petition under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL PROVISIONS

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.

U.S. Const., amend IV.

STATEMENT OF THE CASE

On December 28, 2015, a grand jury in the Northern District of Alabama indicted Mr. Nicholson in a six-count indictment. Doc. 1.

In Counts 1 and 2, the grand jury charged Mr. Nicholson with knowingly transporting K.M. and J.F., who were under the age of 18, in interstate commerce with the intent to engage in sexual activity for which a person can be charged with a criminal offense, a violation of 18 U.S.C. § 2423(a). In Count 3, the grand jury charged Mr. Nicholson with traveling in interstate commerce for the purpose of engaging in illicit sexual contact with J.F, a violation of 18 U.S.C. § 2423(b). In Count 4, the grand jury charged Mr. Nicholson using means of interstate commerce to transport child pornography using an Acer laptop computer and a Polaroid camera, a violation of 18 U.S.C. § 2252A(a)(1). In Count 5, the grand jury charged Mr. Nicholson with knowingly possessing child pornography on the Acer laptop, but not including the child pornography described in Count 4 or 6, a violation of 18 U.S.C. § 2252A(a)(5)(B). In Count 6, the grand jury charged Mr. Nicholson with using, persuading, inducing, enticing or coercing K.M., who was under 18 years old, to engage in sexually explicit conduct for the purposes of producing a visual depiction of the

conduct and that depiction was transported in interstate commerce, a violation of 18 U.S.C. § 2251(a) and (e).

After a four-day trial, a jury convicted Mr. Nicholson of all six counts. Doc. 114-119; Doc. 168 at 565. On April 19, 2019, the district court sentenced Mr. Nicholson to terms of life imprisonment for his convictions for Counts 1 and 2, 360 months for Counts 3, 120 months for Count 4, 120 months for Count 5 and 360 months for Count 6. Doc. 170 at 35; Doc. 139. Mr. Nicholson filed a timely notice of appeal on April 30, 2019. Doc. 141.

At the heart of this case lies allegations that Mr. Nicholson left Birmingham, Alabama, with his daughter, J.F., and K.M, the daughter of his long-term girlfriend, Rebecca Baker, in the summer of 2012. According to these women, Mr. Nicholson had sexually abused them for years.

Mr. Nicholson and Baker were involved in a relationship for eleven years. Doc. 165 at 94. Baker had a daughter, K.M. (born October 21, 1995), from a previous relation and Mr. Nicholson served as a father figure to her. *Id.* at 97-98; Doc. 167 at 382. Mr. Nicholson later father J.F. by Baker on July 31, 1998. Doc. 166 at 257.

In April 2008, K.M. and J.F. were removed from the Mr. Nicholson and Baker's household due to abuse allegations involving Baker. Doc. 165 at

99-100. At the time, K.M. was 12 years old and J.F. was 9 years old. *Id.* at 99. After being removed from the house, the girls lived with Janet Baker and her husband, who was Rebecca Baker's uncle. *Id.* at 94, 100. While both girls lived with Janet, they had overnight weekend visits with Mr. Nicholson. *Id.* at 102. J.F. eventually went back to live with Mr. Nicholson; K.M. continued to live with Janet. *Id.* 101. Although Janet had custody of K.M., she visited Mr. Nicholson and J.F. overnight on weekends after J.F. moved back in with Mr. Nicholson. *Id.* at 101-02. At the time, K.M. saw Mr. Nicholson every other weekend. *Id.* at 102.

The events leading to the present prosecution began to unfold in June 2012. At the time, K.M. was 16 and J.F. was 13. *Id.* at 103. According to Janet Baker, K.M. had volleyball practice twice a day with the first practice beginning at 6 a.m. before coming home around 10 or 11 a.m. *Id.* at 104-5. On June 12, 2012, however, K.M. did not come home after practice and her car was later found at the Summit shopping center. *Id.* at 105. Janet reported K.M. missing and involved law enforcement. *Id.* On July 16, 2012, K.M. and J.F. were located with Mr. Nicholson in Kentucky. *Id.* at 106. Janet traveled to Kentucky to pick up K.M. *Id.* at 107. On the way back to Alabama, K.M. informed Janet that she was pregnant. *Id.*

At trial, J.F. and K.M. testified against Mr. Nicholson. The two alleged that Mr. Nicholson had been sexually abusing them for some time. K.M. testified that Mr. Nicholson began sexually abusing her when she was young – back when she was 6 or 7. Doc. 167 at 382. According to K.M. this abuse occurred when she and J.F. lived with their mother and Mr. Nicholson. *Id.* Occasionally, Mr. Nicholson would take K.M. out on the road with him for work, where the sexual abuse would continue. *Id.* at 388. The contact continued after K.M. and J.F. were removed from Mr. Nicholson and Rebecca’s house when K.M. would visit with J.F. *Id.* at 397. When she K.M. was 14 or 15, Mr. Nicholson began having intercourse with her. *Id.* at 397-98. K.M. became pregnant at the age of 16 by Mr. Nicholson in 2012. *Id.* at 398. According to K.M., her pregnancy prompted Mr. Nicholson to leave Alabama with her and J.F. *Id.* at 399. J.F. testified that Mr. Nicholson began sexually abusing her when she was seven years old. Doc. 166 at 263. J.F. alleged that the abuse continued until right before the three left Birmingham. *Id.* at 273. As with K.M., J.F. explained that they left town because of K.M.’s pregnancy. *Id.* at 272.

J.F. and K.M. testified that during this period, both saw Mr. Nicholson watch child pornography. *Id.* at 270; Doc. 167 at 388-89. J.F. identified an Acer laptop computer that Mr. Nicholson had. Doc. 166 at 270-271. K.M. testified that Mr. Nicholson would show her child porn and believed that he did so to teach her what to do to him. Doc. 167 at 389. Mr. Nicholson also took pictures and video of both girls naked and in specially bought lingerie. *Id.* at 390-91. J.F. identified a green Polaroid camera as the camera Mr. Nicholson used to photograph her and K.M. Doc. 166 at 264-267. Mr. Nicholson called it a fashion show when he took pictures of the girls. *Id.*; Doc. 167 at 391. During one fashion show, Mr. Nicholson performed oral sex on both girls. *Id.* at 392. When K.M. lived with Janet, Mr. Nicholson was in stored her cell phone as “Nick Brady” to hide his identity. *Id.* at 395. Mr. Nicholson would ask her to send him “something pretty,” which she interpreted as naked pictures of her body including her genitals. *Id.* at 395-97. She would do so. *Id.* at 395-397, 414. K.M. identified Exhibit 15 as a picture of her vagina that she sent to Mr. Nicholson after he asked her for a picture. *Id.* at 396.

On June 12, 2012, the three left Birmingham in Mr. Nicholson’s Ford F-150 truck. They traveled to Florida and then up the east coast ending

in Syracuse, New York. Doc. 166-167. There, Mr. Nicholson took a job driving a tractor-trailer rig for J.B. Hunt. *Id.* at 275; Doc. 167 at 402. Mr. Nicholson left his F-150 in Syracuse. *Id.* Authorities eventually located Mr. Nicholson, J.F., and K.M. in Kentucky on July 16, 2012.

In December 2012 and January 2013, search warrants were executed on Mr. Nicholson's truck in Syracuse as well boxes of the contents removed from the cab of the J.B. Hunt truck Mr. Nicholson was driving in Kentucky at the time of the arrest. The searches from Kentucky and New York yielded a green Polaroid digital camera and an Acer laptop computer. Doc. 166 at 136, 138, 193, 211. A forensic examiner with the FBI found multiple images of child pornography on the camera's memory card and on the hard drive removed from the Acer laptop. Doc. 166 at 312, 318.

REASONS FOR GRANTING THE PETITION

This Court should consider the question of whether a violation of a time-limit prescribed for a search warrant renders a search unreasonable.

Mr. Nicholson suffered a violation of his Fourth Amendment rights when authorities searched his laptop computer well outside the time limitation imposed by the search warrant.

The United States conceded that law enforcement failed to search the hard drive of Mr. Nicholson's Acer computer within the time limits prescribed by the New York search warrant but argued that suppression of evidence from the hard drive was not warranted despite clear violations of the warrant's provisions. Doc. 92 at 6-9; Doc. 102 at 10-11. Over Mr. Nicholson's objection, the district court allowed evidence discovered on the Acer laptop at trial. Doc. 166 at 310, 318. The district court should have suppressed this evidence.

Law enforcement in New York obtained a search warrant for Mr. Nicholson's truck and personal belongings in Syracuse, New York on December 18, 2012. Doc. 101-1. The warrant contained an addendum that provided "[t]he computer or electronic media search authorized by this warrant shall be completed within sixty (60) days of the date of this

warrant. This period may be extended by the court upon a showing of good cause.” Doc. 92-2 at 6. The warrant was executed the next day. *Id.* According to Joy Speakman, an evidence control tech, the Birmingham FBI office received the Acer laptop from the New York FBI on January 31, 2013.

According to Wendy Davis, a digital forensic examiner with the Computer Analysis Response Team at the FBI in Birmingham, the Birmingham FBI office assigned the Acer laptop to a forensic examiner on March 1, 2013. Doc. 92-2. The laptop was then assigned to her verbally on June 16, 2013, and formally on June 17, 2013. *Id.* Davis would later testify made a forensic copy of the hard drive and began her review on June 17, 2013. Doc. 164 at 89. She was not aware of the 60-day addendum to the warrant. *Id.* at 90. A total of 180 days passed between the seizure of the Acer laptop and the forensic search of its hard drive and 135 days passed from law enforcement in Birmingham receiving the laptop from New York authorities. The United States never applied for an extension to the warrant’s time limits.

The Court below rejected the contention that fruits of the search were due to be suppressed. The Court believed the violation was equivalent to

a violation of the temporal limits of Rule 41, Fed. R. Crim. P. *See Nicholson*, 24 F.4th at 1351-52. Because it believed Mr. Nicholson had not proven that (1) he suffered prejudice from the tardy search, or (2) there was evidence of intentional and deliberate disregard for the time limit, then he wasn't entitled to any relief for this violation. *Id.* at 1352.

Another circuit has rejected the Rule 41 comparison and found a constitutional violation where the time limitations of the search warrant are violated. The United States Court of Appeals for the Armed Forces reached the opposite conclusion of the Eleventh Circuit in *United States v. Cote*, 72 M.J. 41 (C.A.A.F. 2013). There, investigators finally searched the hard drive of a computer well over one year after the computer was seized pursuant to a warrant. *Id.* at 43. Like Mr. Nicholson's warrant, Cote's warrant contained a 90-day time limit for searching the hard drive. *Id.* at 42. That Court recognized "that the Fourth Amendment harm being protected against by the ninety-day provision in this case is from a seizure of unreasonable duration and the resulting interference with Cote's possessory interest in noncriminal materials." *Id.* at 45. The Court ultimately upheld the suppression of the evidence on the grounds that the warrant violation was not a de minimis violation and because the

United States “did not show any fact which would support the argument that its violation of the warrant's terms was reasonable under the circumstances.” *Id.* at 46.

Cote and the decision below create a tension as to how courts should address searches conducted after the temporal limitation for a warrant expires. While the Court below couched its focus on a “staleness” concern, *see Nicholson*, 24 F.4th at 1351, the Court of Appeals for the Armed Forces looked to Mr. Cote’s possessory interest and how the delay interfered with his right to possess his computer. Thus, the question exists as to the tension between the staleness/prejudice focus applied by the Eleventh Circuit here or the possessory interest concern discussed by the Court of Appeals for the Armed Forces.

Because the circuits are split on this issue, this Court should grant a writ of certiorari to further explore this emerging area of digital evidence and the Fourth Amendment.

CONCLUSION

For these reasons, this Court should grant Mr. Nicholson's petition for a writ of certiorari.

Respectfully submitted,

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