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No. \_\_\_\_\_

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**IN THE SUPREME COURT OF THE UNITED STATES**

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UNITED STATES OF AMERICA,  
RESPONDANT,

V.

ROBERT ENGLAND,  
PETITIONER.

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

**A. THE DISTRICT COURT ERRED WHEN IT DENIED MR. ENGLAND'S MOTION TO SUPPRESS THE SEARCH OF HIS COMPUTER**

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## **I. OPINIONS BELOW**

The reported opinion of the Court of Appeals for the Sixth Circuit and the judgment of conviction in the United States District Court for the Eastern District of Kentucky are attached to this petition as the Appendix.

## **II. JURISDICTION**

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 6<sup>th</sup>, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), the petitioner having asserted below and asserting in this petition the deprivation of rights secured by the United States Constitution.

## **III. STATUTORY PROVISIONS INVOLVED**

This matter involves violations of the United States Code, specifically, 18 U.S.C. § 2252A(a)(2) & (4).

## **IV. STATEMENT OF THE CASE**

### **A. Procedural Background**

The matter was briefed for the Sixth Circuit Court of Appeals and, after considering the matter on the briefs and oral argument, the Court issued an Opinion, with a concurring Opinion from Judge Murphy, dated February 6<sup>th</sup>, 2023, denying all relief, which has been appended to this Petition below. Mr. England now makes this timely application.

## **B. Statement of Facts**

Mr. England has confined his application to the issue of the denial of his motion to suppress the search of his laptop computer provided to him by his place of employment, the Middlesboro, Kentucky, Fire Department. He has restricted the statement of facts to the proof presented as to that issue. Both the Government and the defense presented substantially more proof at trial that is not summarized below but has been summarized in the Sixth Circuit's Opinion that is appended below.

### **i. Robert Steven England<sup>1</sup>**

Chief Robert Steven England testified at an evidentiary hearing held in the District Court and conducted by the Court's appointed Magistrate. Chief England testified that, when issuing laptop computers that were owned by the Fire Department to each of his three lieutenants, one of which was Mr. England, the Chief placed the stickers with the names of his lieutenants on each laptop. (R. 97, Motion to Suppress, Vol. II, PageID#763) Chief England agreed that there was no policy in place at the time he issued the laptops that noticed employees that there was no expectation of privacy on the department laptops, nor were employees told that routine searches of the laptops were permitted. (R. 97, Motion to Suppress, Vol. II, PageID#769-770) He was aware of the allegation related to the Walmart incident<sup>2</sup>

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<sup>1</sup> Chief England was Mr. Robert Christopher England's superior at work as well as his father. He is referred to as Chief England for clarity.

<sup>2</sup> At the time of the seizure the laptop, and the event that provided impetus to an investigation by local law enforcement, it had been alleged that Mr. England had exposed his penis to a minor in the bathroom of a local Walmart

and advised Mr. England not to give a statement without counsel and then saw him, visibly upset, once he returned to their mutual residence after Mr. England had already left work and returned to the residence.<sup>3</sup> (R. 97, Motion to Suppress, Vol. II, PageID#770-771) Once home, Mr. England did not access the laptop. (R. 97, Motion to Suppress, Vol. II, PageID#772)

The allegation about Walmart did not lead to the accusation of any violation of existing fire department policy. (R. 97, Motion to Suppress, Vol. II, PageID#774-775) Law enforcement did not inform Chief England about the allegation that was provided to them by another member of the Fire Department that perceived Mr. England to be deleting items while at work from the laptop when law enforcement asked Chief England to provide them the laptop and the Chief believed he had the authority to consent to the search. (R. 97, Motion to Suppress, Vol. II, PageID#777-778) Chief England stated that in his opinion when he assigned a laptop to a lieutenant, the lieutenant was then "in charge of that computer." (R. 97, Motion to Suppress, Vol. II, PageID#786:17) He also stated that Lieutenant Rick Evans would also take his laptop home to his residence on a nightly basis. (R. 97, Motion to Suppress, Vol. II, PageID#790) Since the lieutenants made the laptops available for the use of other personnel, they were not exclusive and it was also known around the Fire Department that the laptops were to be used for training purposes. (R. 97, Motion to Suppress, Vol. II, PageID#796-797) Once law enforcement asked Chief

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<sup>3</sup> Chief England and Mr. England, in addition to working together, also lived at the same residence at the time of the seizure of the laptop.

England to provide them with the computer, he informed Mr. England where he was taking the laptop and who had requested it. (R. 97, Motion to Suppress, Vol. II, PageID#803) The Chief explained that misconduct by a fireman only leads to the possibility that there may be discipline from the fire department, but there is no require that he/she be disciplined. (R. 97, Motion to Suppress, Vol. II, PageID#806) In the Chief's opinion, an allegation of employee misconduct would not give the department the right to conduct a search of the employee's property. (R. 97, Motion to Suppress, Vol. II, PageID#808)

The Chief believed that the mayor of Middlesboro could order him to seize fire department property and Chief England, additionally, could require employees to turn property in. (R. 97, Motion to Suppress, Vol. II, PageID#811-812) After signing the consent for the laptop, he had second thoughts about his authority to have done so and the mayor believed he should have been the one to consent. (R. 97, Motion to Suppress, Vol. II, PageID#815-816)

## **V. STANDARDS OF REVIEW**

When a defendant seeks appellate review of the District Court's denial of a motion to suppress evidence, the Sixth Circuit "review[s] the district court's findings of fact under the clear-error standard and its conclusions of law de novo." *United States v. Quinney*, 583 F.3d 891, 893 (6<sup>th</sup> Cir. 2009). "A factual finding is clearly erroneous when, although there may be evidence to support it, the reviewing court, utilizing the entire evidence, is left with the definite and firm conviction that a mistake has been committed." *United States v. Sanford*, 476 F.3d 391, 394 (6<sup>th</sup> Cir. 2007)

## **VII. SUMMARY OF ARGUMENT**

The District Court erred when it determined that the search and seizure of Mr. England's computer was lawful based on the Apparent and/or Actual Authority of his work superior, Chief Robert Steven England. The Sixth Circuit erred when it affirmed this decision.

## **VIII. ARGUMENT**

### **A. THE DISTRICT COURT ERRED WHEN IT DENIED MR. ENGLAND'S MOTION TO SUPPRESS THE SEARCH OF HIS COMPUTER**

Mr. England motioned the District Court to suppress all evidence obtained from the seized laptop as it was seized, and later searched, without a warrant, without his consent and without a permissible exception to the warrant requirement.



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.

“The Fourth Amendment generally requires police officers to obtain a warrant before searching or seizing persons, houses, papers, and effects.” *United States v. Allen*, 106 F.3d 695, 698 (6th Cir.1997). Absent a specific, permissible reason for a warrantless search, the fruits of such a warrantless search are inadmissible as evidence against the defendant. “The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.” *Rakas v. Illinois*, 439 U.S. 128, 132 n. 1, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

**i. Actual Authority to Consent of Chief England and Mayor Kelley**

The district court correctly determined that Mr. England had a legitimate expectation of privacy in the seized laptop.<sup>4</sup> Further, while, “some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable”, the district court correctly concluded that this was not the case with the seized laptop. *O'Connor v. Ortega*, 480 U.S. 709, 718, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987); see also *James v. Hampton*, 592 F. App'x 449, (6th Cir. 2015). The district court erred in determining Chief England's consent permitted the search.

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<sup>4</sup> Mayor William Kelley, at the behest of law enforcement, signed a consent to search form for the laptop, but the District Court deemed that he did not have the authority to do so. (R. 99, Motion to Suppress, Vol. III, PageID#836-862)

Consent is a recognized exception to the general warrant requirement. Searches may be valid if law enforcement is able to “show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the ... effects sought to be inspected.” *United States v. Matlock*, 415 U.S. 164, 171-72, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Common authority does not arise as a property right based on ownership, but rather because of the “mutual use” of the property by employees or other workers that have common access or control over the property. *Id.* at N. 7. “[T]he government bears the burden of establishing the effectiveness of a third party’s consent.” *United States v. Waller*, 426 F.3d 838, 845 (6<sup>th</sup> Cir. 2005).

The District Court correctly determined that Mayor Kelley’s consent, even if he had the actual authority to consent, came subsequent to the search of the seized laptop making it an invalid basis to permit the search and the only basis on which the District Court validated the search was the consent supplied by Chief England. (R. 106, Recommended Disposition for Motion to Suppress, PageID#1015)

Though District Court’s ruling notes that the search was not permissible merely because the MFD owned the seized laptop, the District Court only noted generalities that created “mutual use” when deeming Chief England to have actual authority. (R. 106, Recommended Disposition for Motion to Suppress, PageID#1020-1021) The District Court ruled the seized laptop was for common usage and attempted to rest its rulings on the “customs, culture, and policies of the fire department” and “an unwritten (but nevertheless *understood*) right” to accessing the

laptop that established the common authority and/or sufficient relationship necessary under *Matlock*. (R. 106, Recommended Disposition for Motion to Suppress, PageID#1021& R. 121, Memorandum Opinion and Order Denying Motion to Suppress, PageID#1128) Despite this explanation, the District Court cited no times Chief England himself used the computer and was able to cite very few instances when other employees of the fire department used the computer. This was juxtaposed against voluminous information that the District Court simply ignored. The common practice in relation to the seized laptop, as attested to by numerous Government witnesses, was that Mr. England almost exclusively used the seized laptop, he took it home at night with him, often locked it in the lieutenant's office when he was not present and the laptop was password protected by Mr. England. These facts undermine the assertion that Chief England, by the "customs, culture, and policies of the fire department", had common authority over or sufficient relationship with the laptop to permit third party consent to support the District Court's ruling. The District Court, later in its Order, tries to hedge on its justification for the consent by stating the ownership of the laptop by the Fire Department did, in fact, matter and the policies of the department created authority to consent, rather than the customs or culture or informal understanding, citing Chief England's testimony that he controlled the equipment of the department.<sup>5</sup> (R. 121, Memorandum Opinion and

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<sup>5</sup> The Magistrate revealed, through its questioning of Chief England, that it believed ownership to be central to actual authority. When questioning Chief England *sua sponte*, the Magistrate asked:

THE COURT: If the mayor instructed you to obtain one of the fire department's pieces of property, would you be obligated to do it?

THE WITNESS: I would assume I would. I would do it, yes.....

THE COURT: Do you think you had the ability, as chief, to instruct fire department employees to provide you with fire department property that might be in their possession?

Order Denying Motion to Suppress, PageID#1131-1133) However, Chief England was as much in control of the firemen's individual lockers, or bunks, as the seized laptop, however, though a search of those areas would fall outside *Matlock*. Further, the District Court's additional explanation that the "expectation" that the laptop was communal does not make that expectation part of the custom or culture of the department, nor does it appear, from the totality of the testimony, that that expectation was met. (R. 121, Memorandum Opinion and Order Denying Motion to Suppress, PageID#1133)

Chief England likened the request for the laptop to procuring a nozzle for a firehose from an employee with the nature of the information stored on a laptop and the misperception demonstrates the difference in actual authority necessary to effectuate proper third-party consent. (R. 97, Motion to Suppress, Vol. II, PageID#812) A more apt comparison would be filing cabinet that was kept in an employee's office and contained both work related and private files. The District Court, siding with the Government's arguments, believed that, following this analogy, a third party who had proper work-related business associated with the files in other employee's office met the criterion of *Matlock*, and there was mutual use, access, or control over the cabinet itself. Due to this perceived authority, the third party, if law enforcement asked them to do so, could then consent to the search of any and all files in the other employee's personal filing cabinet because some of the

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THE WITNESS: I would have thought I did, yes. If somebody had a nozzle at home and I told them to bring it home -- or back, yes. If they had a computer, bring it back, yes. (R. 97, Motion to Suppress, Vol. II, PageID#812:1-14)

contents pertained to work notwithstanding the fact that that employee had never had personal access to the filing cabinet. This is clearly an erroneous interpretation of *Matlock* based on the facts in Mr. England's case and the District Court abused its discretion in denying his motion.

**ii. Apparent Authority to Consent of Chief England**

As an additional basis for the validity of the search, even absent actual authority of Chief England, the District Court stated that he had apparent authority that, even if erroneous, was reasonably relied upon by law enforcement when seizing and searching the laptop without a warrant.

"The apparent-authority doctrine excuses otherwise impermissible searches where the officers conducting the search 'reasonably (though erroneously) believe that the person who has consented' to the search had the authority to do so." *United States v. Taylor*, 600 F.3d 678, 681 (6th Cir.2010); quoting *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

In an effort to explain the apparent-authority doctrine, the Sixth Circuit has stated:

When one person consents to a search of property owned by another, the consent is valid if the facts available to the officer at the moment ... warrant a man of reasonable caution to believe that the consenting party had authority over the premises. Whether the facts presented at the time of the search would warrant a man of reasonable caution to believe the third party has common authority over the property depends upon all of the surrounding circumstances. The government cannot establish that its agents reasonably relied upon a third party's apparent authority if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to mutual use by the person giving consent, then

warrantless entry is unlawful without further inquiry. Where the circumstances presented would cause a person of reasonable caution to question whether the third party has mutual use of the property, warrantless entry without further inquiry is unlawful.

*Waller*, 426 F.3d at 846.

The District Court abused its discretion when it deemed that Chief England had apparent authority to consent that law enforcement could rely on. When Chief England was asked to produce the laptop to law enforcement, he was not on duty, he was in his residence and he was asked to submit a piece of department property for inspection that belonged to a resident at his home that was also his subordinate at work. At the time of the seizure, the information in law enforcement's possession was Mr. England was assigned the laptop and maintained exclusive control over it. See R. 97, Motion to Suppress, Vol. II, PageID#628. Even though Chief England was the head of the fire department, it should have been apparent to the law enforcement seizing the laptop that Chief England did not have the authority to permit a search of what law enforcement believed at that time to be Mr. England's exclusive laptop. They did not clarify, or follow up on the control of the laptop even though they knew, at the time of the seizure, that Mr. England used the laptop almost exclusively.

*Waller* not only places an emphasis on what officers knew at the time the search or seizure was requested, it states that a search will be invalid if law enforcement is presented with an "ambiguous situation" as to the propriety of the authority to consent. *Waller*, 426 F.3d at 846. The search or seizure will likewise be invalid if the officer did not attempt to clarify the authority of the consent and if "the circumstances presented would cause a person of reasonable caution to question

whether the third party has mutual use of the property”. *Id.* Given these facts, law enforcement should have known that Chief England lacked authority to allow the search of his son’s laptop simply because the department owned it and, at the very least, they should have clarified whether there was mutual use, access, or control of the laptop by other members of the department.

This lack of good faith was further demonstrated by later seeking approval from Mayor Kelley well after the seizure of the laptop.<sup>6</sup> Had law enforcement believed that Chief England had apparent, or actual, authority to consent to the search, there would have been no need to get Mayor Kelley’s consent days later which the District Court ultimately determined could not validate the search. Law enforcement did nothing to clarify what they knew to be an “ambiguous situation” with Chief England’s consent and, pursuant to *Waller*, they cannot benefit from a good faith exception under *Rodriguez* and the apparent authority doctrine.

The lack of “good faith” is further demonstrated by the background in which the laptop was seized by law enforcement. Rather than seeking Chief England’s, or Mayor Kelley’s, consent at all, law enforcement eschewed multiple other methods that could have led to a permissible search of the laptop. Law enforcement

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<sup>6</sup> It is of further note that Mayor Kelley testified he thought his own consent, rather than that of Chief England, was required for the seizure and Chief England, after consenting to the search and turning over the laptop, had doubts about his own authority after a conversation with Mayor Kelley. (R. 97, Motion to Suppress, Vol. II&III, PageID#815-816&892) Additionally, Mayor Kelley stated that he was relying on the representation of the Middlesboro Police Department that the consent being given would be sufficient to permit the search. (R. 99, Motion to Suppress, Vol. III, PageID#861:16-21)

intentionally avoided these methods and, due to this intentional act, they should not enjoy the protection afforded by “good faith” in *Rodriguez*.

At the time of the seizure, the only information in law enforcement’s possession was based on the accusation by Mr. Farmer that Mr. England was attempting to delete items from his laptop. This was insufficient probable cause to support a warrant for the seizure of the laptop, but law enforcement did nothing to attempt to further develop probable cause that could have led to a constitutionally permissible search. Further, a more direct, simple and constitutionally sound method would have been to ask Mr. England for consent to search the laptop thereby curing any possible questions about the propriety of the subsequent search. Law enforcement willfully ignored this route despite the testimony of Sergeant Patterson which declared that, at the time of the seizure, he was only investigating the Walmart incident and he did not believe there were exigent circumstances at the time of seizure, or that Mr. England was attempting to destroy evidence. (R. 97, Motion to Suppress, Vol. II, PageID#748) *Rodriguez* should not allow the apparent authority doctrine to be applied to the seizure of the laptop when the entire course of conduct of law enforcement demonstrated that they intentionally sought to obtain third party consent that they should have known was insufficient with minimal diligence rather than seeking actual consent, or a warrant.

The District Court abused its discretion and created substantial prejudice to Mr. England when it determined that Chief England had both actual authority and apparent authority to consent to a search of the seized laptop. For the



aforementioned reasons, Mr. England is entitled to a suppression of the evidence and, as the exclusion of the evidence would make prosecution impossible, a dismissal of the indictment.

### **CONCLUSION**

For the aforementioned reasons, Mr. England prays that this Honorable Court will grant his request for a writ of certiorari in order to review the question presented relating the erroneous and prejudicial evidentiary and legal rulings by the District Court, affirmed by the Circuit Court, that created reversible error. This issue is one that presents an important issue that this Court grant review.

Respectfully submitted,

/s/ Manuel B. Russ  
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### **CERTIFICATE OF SERVICE**

I certify that the foregoing writ of certiorari and the accompanying appendix has been served via electronic mail upon counsel for the Respondent, Assistant United States Attorney Ms. Jenna Reed, United States Attorney's Office for the Northern District of Ohio at Toledo, Ste. 308, Four SeaGate, Toledo, OH 43604-2624, and Ms. Elizabeth Prelogar, Acting Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington D.C. 20530-0001, this 29<sup>th</sup> day of April, 2023.

/s/ Manuel B. Russ  
Manuel B. Russ