

No._____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES THOMAS BUTLER II,
Petitioner / Appellant,

v.

UNITED STATES OF AMERICA,
Respondent / Appellees.

On Petition for a Writ of Certiorari to the
Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Under the Fourth Amendment, does consent to “take a look” at a suspect’s smartphone outside of his residence at a table twenty feet away extend to a full forensic logical and physical off-site extraction of the contents of the phone almost five months later at an FBI field office?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Eleventh Circuit Court of Appeals include the Respondent, UNITED STATES OF AMERICA, and Petitioner, JAMES THOMAS BUTLER II. There are no parties to the proceedings other than those named in the petition.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JAMES THOMAS BUTLER II, respectfully petitions this Court for a writ of certiorari to review the *Opinion* rendered by the Eleventh Circuit Court of Appeals on MAY 30, 2023. See Appendix A.

OPINIONS BELOW

The *Opinion* rendered by the Eleventh Circuit Court of Appeal is attached as Appendix A. The *Order* of the district court denying the motion to suppress is attached as Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment guarantees the right “to be secure, in their persons, houses, papers, and effects, against unreasonable searches and seizures...”

JURISDICTION

The order of the Eleventh Circuit Court of Appeal was rendered on May 30, 2023. (App.A) This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2023).

STATEMENT OF THE CASE

In the direct appeal of judgment and sentence below, the Eleventh Circuit Court of Appeals found that consent for law enforcement to search a suspect's smartphone (which was given at his residence to "take a look" at the contents of the smartphone) extended to a full forensic logical and physical off-site extraction of the contents of the smartphone almost five months later at an FBI field office.

Previously, Petitioner, JAMES THOMAS BUTLER II, was convicted following a jury trial of two counts of criminal conduct and sentenced to a total of 420-months imprisonment followed by 25 years of supervised release:

- COUNT ONE: sexual exploitation of a minor for purpose of producing child pornography (18 U.S.C. § 2251(a) (2018)); and
- COUNT TWO: possessing visual depictions involving the sexual exploitation of a minor (18 U.S.C. § 2252(a)(4)(B) (2018)).

The entirety of the evidence forming the basis of these convictions were videos and still photographs which the FBI obtained from a smartphone seized during the execution of a search warrant at a multiple-person residence. Mr. Butler was not the target or subject of the search warrant.

Mr. Butler moved to suppress the contents of the smartphone on the basis that his consent to "take a look" at the smartphone at his residence did not extend to a full logical and physical off-site extraction of the contents of the smartphone five months later at an FBI field office.

Residence Search - May 2, 2018

At his residence on May 2, 2018, state and federal law enforcement agents executed a search warrant concerning another resident in the same home for soliciting child pornography. Although all of the residents were registered sex offenders, this search had nothing to do with Mr. Butler. (*Opinion* p.3).

One of the law enforcement agents informed Mr. Butler that they were looking for electronic devices and vehicles in connection with the search warrant. The agent asked Mr. Butler if he possessed any smartphones or electronic devices. Mr. Butler produced two smartphone devices in response to the agent's request. (*Opinion* p.4-5)

When the agent asked if he could "take a look" at the devices, Mr. Butler consented, handed the smartphones to the agent, and eventually unlocked the devices. (*Opinion* p.5) The agent clarified that he was going to take the smartphones to a nearby table approximately twenty feet away so that agents could "take a look...". (*Opinion* p.5)

Upon "tak[ing] a look", agents discovered an adult pornography website and Google Hangouts applications running in the background. (*Opinion* p.6) After being questioned by the agent about the running applications, Mr. Butler responded that he did not recognize the chat and that the pornography website "didn't look familiar". (*Opinion* p.7) FBI agents seized the smartphone and entered it into evidence. (*Opinion* p.8) But in total, nothing illegal was found when agents "[took] a look" at Mr. Butler's smartphones on May 2, 2018.

Later that day, Mr. Butler was arrested by state law enforcement agents upon belief that he had violated the terms of supervised release. (*Opinion* p.8) Following a probation-violation hearing, Mr. Butler was subsequently released from custody on approximately August 31, 2018. (*Opinion* p.10)

Full Forensic Extraction of the Smartphone

Although the FBI seized the smartphone on May 2, 2018, federal agents did not review the contents of the smartphone until September 21, 2018 – almost a month after Mr. Butler was released from state custody and nearly five months after federal agents seized the phone. (*Opinion* p.9)

On June 26, 2018, the FBI conducted a cursory logical extraction of the smartphone. This extraction revealed information what a user of the smartphone can view, including text messages, calendar, videos, call logs, and similar information. (*Opinion* p.8)

On August 15, 2018, the FBI conducted a full physical forensic extraction of the phone. The agent testified that this is a much more detailed extraction which reveals information such as deleted items, file system information, and data from third-party applications. (*Opinion* p.8)

But the FBI agent did not review the contents of both extractions until September 21, 2018 – almost five months after the seizure and only after Mr. Butler was released from state custody. The agent testified that the off-site examination of the smartphone revealed 65 videos depicting a minor in a bedroom, 35 screenshots captured from the videos, and 8 images of instructions from a user manual for a

remote hidden wireless camera. At least five of the videos depicted the minor masturbating while others depicted her genitalia. Based on this discovery, the agent applied for a search warrant, confirmed that the minor was under age 18, and discovered that the minor was living with Mr. Butler's mother.

Evidentiary Hearing

At the evidentiary hearing on the second motion to suppress, Mr. Butler testified that he was in state custody from May 2, 2018 until approximately August 31, 2018. He testified that he never consented to a full forensic extraction of the smartphone. He testified that he did not revoke his consent to federal agents searching the smartphone because he was never advised by the FBI that he could revoke his consent, and even if he had been so advised, he was in *state* custody and unable to contact *federal* FBI agents. (*Opinion* p.11)

District Court's Order Denying Suppression

Although the district court denied the motion to suppress, the district court noted that "this case falls within the outer bounds of what is reasonable" under the Fourth Amendment. (*Order* p.6) Although the district court noted that there was no Fourth Amendment violation, the court wrote that "law enforcement should have nonetheless obtained a warrant after the passage of such a long time, especially given that this was a forensic search of a cell phone." (*Opinion* p.13; *Order* p.6)

Eleventh Circuit's Opinion

The Eleventh Circuit agreed with the district court that no Fourth Amendment violation occurred: the appeals court found that waiting almost five months after Mr. Butler consented to allowing agents “take a look” at the contents of the smartphone at his residence also gave agents consent to conduct a full logical and forensic examination of the smartphone at an off-site FBI field office almost five months after its seizure. (*Opinion* p.15-19) The court also cited that, even though incarcerated from May 2, 2018 to August 31, 2018, Mr. Butler made no attempt to contact *federal* agents to revoke consent to search...while he was incarcerated in *state* custody. (*Opinion* p.19)

This petition for a writ of certiorari now follows.

REASONS FOR GRANTING THE WRIT

I. Under the Fourth Amendment, does consent to “take a look” at a smartphone at a table twenty feet away outside a suspect’s residence extend to a full forensic physical and logical extraction of the smartphone at an FBI field office almost five months later?

Question Presented

The question presented in this petition is, under the Fourth Amendment, whether consent to a “take a look” at a smartphone at a table twenty feet away outside a suspect’s residence extend to a full forensic physical and logical extraction of the smartphone at an FBI field office almost five months later.

Proceedings Below

In the direct appeal of judgment and sentence below, the Eleventh Circuit Court of Appeals found that consent for law enforcement to search a suspect’s smartphone (which was given at his residence to “take a look” at the contents of the smartphone) extended to a full forensic logical and physical off-site extraction of the contents of the smartphone almost five months later at an FBI field office.

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(Opinion p.2)

The entirety of the evidence forming the basis of these convictions were videos and still photographs which the FBI discovered on a smartphone which was seized during the execution of a search warrant at a multiple person residence. Mr. Butler was not the target or subject of the search warrant.

Mr. Butler moved to suppress the contents of the smartphone on the basis that his consent to “take a look” at the smartphone at his residence did not extend to a full forensic logical and physical off-site extraction of the contents of the smartphone almost five months later at an FBI field office.

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Fourth Amendment. Although the district court noted that there was no Fourth Amendment violation, the court wrote that “law enforcement should have nonetheless obtained a warrant after the passage of such a long time, especially given that this was a forensic search of a cell phone.” (*Opinion* p.13; *Order* p.6)

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LAW

The Fourth Amendment guarantees:

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. Reasonableness is the crux of a Fourth Amendment search: “where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, reasonableness generally requires...a judicial warrant.” Riley v. California, 573 U.S. 373, 382 (2014).

Generally, consent to search is an exception to the warrant requirement. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). The standard for measuring the scope of a person's consent to a search is that of "objective" reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251 (1991).

But under the Fourth Amendment, smartphones are unique. See Riley, 573 U.S. at 393-94. Unlike other types of seized objects, a smartphone requires separate authorization to search its contents. Id. at 401-02. Indeed, this Court found in Riley that a search warrant would be required to search a smartphone incident to an arrest because of the magnitude of personal information stored on the device. Id.

While Riley dealt with a warrantless search of personal smartphones without the suspect's consent, this Court has never ruled upon consent to search a personal smartphone in terms of scope: duration, location, purpose, and extent of consent.

Meanwhile, the lower courts have had to come up with their own tests for the scope of consent regarding personal electronic devices and how the scope of that consent may be limited by location, duration, purpose, and extent of consent:

- Consent to "look at" a pager did not include consent to activate pager and retrieve numbers, because looking at pager could be construed to mean "what the device is, or how small it is, or what brand of pager it may be..." United States v. Blas, 1990 WL 265179, at *20 (E.D. Wis. Dec. 4, 1990).

- Written consent to seizure of “any property” under the defendant’s control and to “a complete search of the premises and property” at the defendant’s address merely permitted the agents to seize the defendant’s computer from his apartment, not to search the computer off-site because it was no longer located at the defendant’s address. United States v. Carey, 172 F.3d 1268, 1274 (10th Cir. 1999).
- A defendant’s verbal consent to search his smartphone extended to a full forensic examination of the device where the purpose of the search was to investigate the defendant’s recent drug sales, the defendant showed the agents names and numbers of drug-related contacts in the smart phone, the defendant did not expressly place any limitations on the consent to search, and the defendant did not seek return of his smartphone. United States v. Thurman, 889 F.3d 356, 361-62, 368 (7th Cir. 2018).
- Full forensic extraction of computer’s hard drive exceeded the scope of defendant’s consent which was limited to his son’s user account. Wisconsin v. Jereczek, 961 N.W.2d 70, 72 (Wis. Ct. App. 2021).
- Consent to search a computer to determine who was impermissibly gaining access to it did not extend to a search of defendant’s videos on the computer. Maine v. Bailey, 989 A.2d 716, 725 (Me. 2010).

- A warrantless search was upheld where the defendant signed a consent form authorizing a “complete” search of his iPhone. United States v. Gallegos-Espinal, 970 F.3d 586, 591-92 (5th Cir. 2020).
- A five-month delay in searching a computer seized under a warrant did not violate the Fourth Amendment. United States v. Conrad, No. 3:12-cr-134-J-34TEM, 2013 WL 4028273, at *11 (M.D. Fla. Aug. 7, 2013).

See also 3 Wayne R. LaFave, Search and Seizure § 8.1(c), at 620 (3d ed. 1996) (“When a purpose is included in the [officer’s] request, then the consent should be construed as authorizing only that intensity of police activity necessary to accomplish the stated purpose.”)

ARGUMENT

This Court has never decided a case regarding the scope of consent to search a personal smartphone or other digital device. In other words, this Court has never offered guidance on how long that consent is valid, to what extent that consent is valid, for what purpose the consent is valid, the location(s) that the consent encompasses, and similar issues.

With smartphones increasingly becoming part of everyday life, it is an important issue of Fourth Amendment law for this Court to issue guidance regarding whether a suspect’s consent to “take a look” at his personal smartphone or other digital device is limited only to:

- (1) the purpose and/or circumstances under which consent is obtained;¹
- (2) the location at which the consent is obtained; and
- (3) Whether the consent to search extends beyond the physical location in which the consent is obtained.

In the alternative, it is important for this Court to issue guidance on whether that consent to “take a look” at a smartphone or other digital device extends beyond the purpose and/or circumstances under which the consent is obtained, beyond the physical location in which consent is given, and similar issues.

Accordingly, Ms. Butler asks this Court to decide whether, under the Fourth Amendment, consent to a “take a look” at a smartphone at a table twenty feet away outside a suspect’s residence extends to a full forensic physical and logical extraction of the smartphone at an FBI field office almost five months later.

¹ In this case, FBI agents obtained consent to “take a look” at the smartphone while executing a search warrant in connection with a child pornography investigation unrelated to Mr. Butler.

CONCLUSION

Petitioner requests that this Court grant a writ of certiorari and award him any and all further relief to which she is entitled.



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