

No. _____

In the Supreme Court of the United States

BRIAN HARLING,

Petitioner,

Versus

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

MARK O'BRIEN, ESQUIRE
Counsel of Record
Attorney at Law
O'BRIEN HATFIELD, P.A.
511 West Bay Street
Suite 330
Tampa, Florida 33606
(813) 228-6989
mjo@markjobrien.com

QUESTION PRESENTED

This Court’s opinion in *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984), established that the Fourth Amendment applies only to governmental action and is “wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as the agent of the Government or with the participation or knowledge of any governmental official.” The questions presented are:

Whether the private party exception to Fourth Amendment violations allows law enforcement officers to view files on an electronic device, i.e. a laptop, USB thumb drive, etc., that have not been viewed by a private party so long as that private party has viewed other files on the same electronic device?

PARTIES TO THE PROCEEDING

All the parties to this proceeding are named in the caption.

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
TABLE OF CONTENTS.....	iii
INDEX TO APPENDICES.....	v
TABLE OF AUTHORITIES.....	vi
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS.....	2
STATEMENT OF THE CASE.....	2
A. Statement of jurisdiction in the lower courts, in accordance with this Court’s Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.....	2
B. Factual Background.....	3
C. Procedural History in the District Court.....	5
D. Eleventh Circuit’s Consideration of the Matter.....	6
REASONS FOR GRANTING THE PETITION.....	7
A. There is Acknowledged Conflict Amongst Appellate Courts on Whether the Private Party Exception to the Fourth Amendment Applies to Agents of the Government’s Searches of Electronic Devices that Exceeds the Original Search Conducted by the Private Party.....	7
B. In Light of <i>United States v. Jacobsen</i> , 466 U.S. 109 (1984), the Eleventh Circuit’s Position is Wrong.....	11

C. This Case Squarely Presents a Likely Recurring Issue of Substantial Legal and Practical Importance.....	14
CONCLUSION.....	17

INDEX TO APPENDICES

APPENDIX A	OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (8/28/2017).....	A1
APPENDIX B	ORDER DENYING MOTION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (11/27/2017).....	A22
APPENDIX C	JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION, Doc. # 154 (3/3/2015).....	A24
APPENDIX D	ORDER DENYING MOTION TO SUPPRESS OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION, Doc. # 92 (8/5/2014).....	A29
APPENDIX E	REPORT AND RECOMMENDATION AS TO MOTION TO SUPPRESS OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, FORT MYERS DIVISION, Doc. # 74 (4/29/2014).....	A47

TABLE OF AUTHORITIES

CASES

<i>Rann v. Atchison</i> , 689 F.3d 832 (7th Cir. 2012).....	8
<i>Riley v. California</i> , -- U.S. --, 134 S.Ct. 2473 (2014).....	<i>passim</i>
<i>United States v. Andrus</i> , 483 F.3d 711 (10th Cir. 2007).....	7
<i>United States v. D’Andrea</i> , 648 F.3d 1 (1st Cir. 2011).....	11
<i>United States v. Donnes</i> , 947 F.2d 1430 (10th Cir. 1991).....	15
<i>United States v. Goodale</i> , 738 F.3d 917 (8th Cir. 2013).....	10
<i>United States v. Heckenkamp</i> , 482 F.3d 1142 (9th Cir. 2007).....	7
<i>United States v. Jacobsen</i> , 466 U.S. 109 (1984).....	<i>passim</i>
<i>United States v. Lichtenberger</i> , 786 F.3d 478 (6th Cir. 2015).....	9, 10, 12
<i>United States v. Lifshitz</i> , 369 F.3d 173 (2d Cir. 2004).....	7
<i>United States v. Moore</i> , 943 F.2d 884 (8th Cir. 1991).....	15
<i>United States v. Oliver</i> , 630 F.3d 397 (5th Cir. 2011).....	15
<i>United States v. Richards</i> , 301 Fed. Appx. 480 (6th Cir. 2008).....	15
<i>United States v. Ross</i> , 456 U.S. 798 (1982).....	7
<i>United States v. Runyan</i> , 275 F.3d 449 (5th Cir. 2001).....	8, 9
<i>United States v. Story</i> , 327 Fed. Appx. 422 (4th Cir. 2009).....	14
<i>United States v. Tosti</i> , 733 F.3d 816 (9th Cir. 2013).....	10
<i>United States v. Walser</i> , 275 F.3d 981 (10th Cir. 2001).....	16
<i>Walter v. United States</i> , 447 U.S. 649 (1980).....	12

STATUTES

18 U.S.C. § 2252.....	5
18 U.S.C. § 3231.....	2
18 U.S.C. § 3742.....	2
28 U.S.C. § 1254.....	1
28 U.S.C. § 1291.....	2
U.S. Const., amend. IV.....	<i>passim</i>

RULES

Eleventh Circuit Rule 35.....	1
Federal Rule of Appellate Procedure 35.....	1
Supreme Court Rule 14.....	2

PETITION FOR WRIT OF CERTIORARI

Brian Harling respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this matter on August 28, 2017, affirming the judgment of the United States District Court for Middle District of Florida, Fort Myers Division.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished and appears at *United States v. Harling*, 705 Fed. Appx. 911 (11th Cir. 2017). It is also attached as **Appendix A**.

The judgment of the United States District Court for the Middle District of Florida, Fort Myers Division, is unpublished and is attached at **Appendix C**. The district court's findings on this matter, also unpublished, appear in the records attached as **Appendix D-E**.

JURISDICTION

The court of appeals entered its order on August 28, 2017. Pursuant to Federal Rule of Appellate Procedure 35 and 11th Circuit Rule 35, a timely petition for rehearing and rehearing *en banc* was filed on September 18, 2017. Ultimately, the United States Court of Appeals for the Eleventh Circuit denied the petition on November 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves application of the Fourth Amendment to the United States Constitution, providing that: “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.”

STATEMENT OF THE CASE

A. Statement of jurisdiction in the lower courts, in accordance with this Court’s Rule 14(1)(g)(ii), and suggestion of justification for consideration, as suggested under Rule 10.

The Petitioner, Brian Harling, faced federal criminal charges in the district court under 18 U.S.C. § 3231, which grants exclusive original jurisdiction to district courts over offenses against the laws of the United States. The district court entered judgment on March 3, 2015. Mr. Harling filed a timely notice of appeal on March 3, 2015. The Eleventh Circuit exercised jurisdiction over Mr. Harling’s appeal under 28 U.S.C. § 1291, which authorizes review of final judgments of the district courts, and 18 U.S.C. § 3742(a), which authorizes review of sentences.

This case concerns an important Fourth Amendment question that is the subject of an acknowledged conflict among federal courts of appeals and also an important federal question that conflicts with the Court’s decision in *United States v. Jacobsen*, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984): whether the recognized private search exception to Fourth Amendment violations allows for law enforcement

officers to exceed the scope of a private party search by viewing files on an electronic device that were not the same files previously viewed by the private party?

B. Factual Background.

Before his arrest, Mr. Harling was the owner of a residence located at 4790 Cleveland Avenue in Fort Myers, Florida. Mr. Harling ultimately entered into an agreement to lease his residence to a tenant based upon an advertisement he placed in Craigslist. The agreed move-in date was July 1, 2013. Mr. Harling finished moving out of his apartment on the same day that the tenant was scheduled to move in. Prior to leaving the apartment, Mr. Harling texted the tenant and advised her that if forgot any of his belongings, to please let him know. During the next two days, the tenant completed her move-in. Pet. App. A48, 51.

Nicole Dunwody (hereafter referred to as “Nicole”) was the new tenant that had entered into the agreement with Mr. Harling. While Nicole was unpacking her belongings at the condo on July 4, 2013, she bumped the interior door frame of the hall closet with a large drawing pad, causing three USB thumb drives to fall from above the interior door frame. Rather than calling Mr. Harling and advising him that he had accidentally left something behind, Nicole took the three drives over to her mother’s house, Ada Dunwody (hereafter referred to as “Ada”). Pet. App. A52.

Upon arriving at her mother’s house, Nicole gave the three drives to her mother and Ada put the first one in the computer. When accessing the drives, thumbnail images were generated and Nicole testified that they did not make them any larger. Nicole saw the images on the first thumb drive and then stepped away.

Nicole did not view any more of the drives or their contents. Ada, on the other hand, continued to look and ultimately put the second and third thumb drives into the computer. Ada put in the second drive and observed pictures and videos of more children that appeared to be minors. Ada did open one of the videos to see if she could identify who the adult was in the video, but immediately closed it. Ada then put in the third drive, but was unable to see anything. While Ada continued to look at the drives, Nicole had stepped away and contacted law enforcement. Pet. App. A53.

Nicole returned to the condo where she met Officer Domonic Zammit of the Fort Myers Police Department, to whom she described what she and her mother had seen on the first USB thumb drive and what her mother had viewed on the others. Nicole turned over all three USB thumb drives in a Ziploc bag. The drives were not marked in any way to decipher which drive was which. Nicole then showed Officer Zammit where the three USB thumb drives had fallen from and Officer Zammit discovered two additional USB thumb drives. Pet. App. A53. Officer Zammit put the two new drives in a plastic bag, separate from those given to him by Nicole. Pet App. A60.

Officer Zammit then met FMPD Sergeant Doro at the Sergeant's office and they both reviewed the two *new* thumb drives to see if they could locate who they belonged to. They also reviewed all five USB thumb drives "to make sure that what Ms. Nicole Dunwody said she observed on them actually [was] accurate and on the thumb drives. ... The officers accessed only one picture and one video on each of the five USB drives." Pet. App. A60-61.

C. Procedural History in the District Court.

On July 24, 2013, a federal grand jury returned in the Middle District of Florida, Ft. Myers Division, a one count indictment charging that from an unknown date but by at least May 2, 2011 through on or about July 4, 2013, in Lee County, Florida, the Appellant did knowingly possess one or more matters which contained a visual depiction that had been transported in interstate and foreign commerce, and which had been produced using materials which had been transported, by any means including by computer, where the production of such visual depiction involved the use of a minor engaging in sexually explicit conduct, and such visual depiction is of such conduct, in violation of Title 18 United States Code, Sections 2252(a)(4)(B) and 2252(b)(2). (Doc. 14).

On November 8, 2013, the Appellant filed a Motion to Suppress wherein the Appellant sought to suppress all evidence obtained from five certain USB drives, the Appellant's residences, and all evidence and statements which resulted from the search of those devices. Pet. App. A47. On April 29, 2014, Honorable Judge Carol Mirando issued a Report and Recommendation as to the Appellant's Motion to Suppress, wherein it was recommended that the motion be denied. Pet. App. A47. Ultimately, on August 5, 2014, the district court adopted the Report and Recommendations and denied the Appellant's Motion to Suppress. Pet. App. A29.

D. Eleventh Circuit’s Consideration of the Matter.

On appeal, a three-judge panel of the Eleventh Circuit held that no Fourth Amendment violation occurred when law enforcement searched the contents of all five USB thumb drives. As it related to the first two USB thumb drives, the Court found that Nicole and Ada were private citizens who acted in their own accord when they viewed the contents of the drives. Pet. App. A10. The Court found that law enforcement’s subsequent search of those two USB thumb drives was not in violation of the Fourth Amendment because law enforcement “replicated a search already conducted by private citizens who acted independently, observed what they thought to be child pornography, and shared their concerns with the officers, who then confirmed that the drives contained what Nicole and Ada reported.” Pet. App. A10-11. As it relates to the third, fourth and fifth USB thumb drives, the Court found that the initial search by law enforcement was in violation of the Fourth Amendment because Nicole and Ada had not viewed any content on the drives prior to the warrantless search. Pet. App. A11. However, the Court found that the evidence was still admissible under the independent-source doctrine. Pet. App. A11-13.

Mr. Harling moved for a Petition for Rehearing and Rehearing *En Banc* after the Eleventh Circuit rendered its decision. Mr. Harling argued that the panel’s decision was contrary to precedent of the United States Supreme Court as it related to private party searches. However, Mr. Harling’s petitions were ultimately denied. No Judge in regular active service on the Eleventh Circuit panel requested that the Court be polled on rehearing en banc. Pet. App. A22.

REASONS FOR GRANTING THE PETITION

A. There is Acknowledged Conflict Amongst Appellate Courts on Whether the Private Party Exception to the Fourth Amendment Applies to Agents of the Government's Searches of Electronic Devices that Exceeds the Original Search Conducted by the Private Party.

The Eleventh Circuit's decision in this case widens the conflict over whether, or in what circumstances, a private party's search of electronic devices then provides law enforcement with the ability to conduct a search of the same device, and to what extent, without being seen as a violation of the Fourth Amendment. This split arises after courts have analogized the files on an electronic device to closed containers such as suitcases or briefcases. By looking at the files on a device in that manner, the courts have found that individuals have a reasonable expectation of privacy within those electronic files because they would have an expectation of privacy in the contents of a closed container. *See, United States v. Ross*, 456 U.S. 798, 822-23 (1982). As a result, it has been consistently found that accessing information stored in a computer or similar electronic storage device will implicate the owner's reasonable expectation of privacy in the information. *See, United States v. Heckenkamp*, 482 F.3d 1142, 1146 (9th Cir. 2007) (finding there is a reasonable expectation of privacy in a personal computer); *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004) (holding that individuals generally possess a privacy interest in their home computers); *United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007) ("finding that "[a] personal computer is often a repository for private information the computer's owner does not intend to share with others. For most people, their computers are their most private spaces." (internal quotation omitted)). Unfortunately, because

there are also distinguishing features between an electronic device and a closed physical container, such as the depth of information contained inside an electronic device, issues surrounding an individual's privacy interest in the separate files within an electronic device have begun to surface.

The Eleventh Circuit joins the Fifth and Seventh Circuit in holding that police officers do not exceed the scope of a private party search if officers examine an electronic device after the private party did, even if the officers examine more files on the device than the private party previously had. In the first of these decisions, *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), the Fifth Circuit entertained a case after the defendant's wife provided law enforcement with several computer disks containing child pornography. The Fifth Circuit compared the computer disks to "containers" for purposes of analyzing them under the Fourth Amendment. *Id.* The Fifth Circuit ultimately found that the wife had viewed some files on one of the disks, and as a result, law enforcement's subsequent viewing of that specific computer disk was not a violation of the defendant's Fourth Amendment right, **even if the officers examined more files than the wife had.** *Id.* at 464-65. (Emphasis added). The Fifth Circuit did find the officers exceeded the private party search when they viewed additional computer disks the wife had not personally viewed because the officers could not have concluded with "substantial certainty" that all disks contained child pornography. *Id.*

The second of these decisions, *Rann v. Atchison*, 689 F.3d 832 (7th Cir. 2012), adopted the holding in *Runyan* after finding that its holding was persuasive and

finding that the Seventh Circuit had not yet ruled on the application of *Jacobsen* to searches of digital storage devices. The Seventh Circuit cited to the opinion in *Runyan* and found its holding was

Sensible because it preserves the competing objectives underlying the Fourth Amendment's protections against warrantless police searches. A defendant's expectation of privacy with respect to a container unopened by the private searchers is preserved unless the defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search. Moreover, this rule discourages police from going on "fishing expeditions" by opening closed containers.

Atchison, 689 F.3d at 837 (citing *Runyan*, 275 F.3d at 463-64).

The Eighth, Sixth, Ninth and First Circuits have taken the contrary position. In *United States v. Lichtenberger*, 786 F.3d 478 (6th Cir. 2015), the Sixth Circuit ultimately found that police officer's warrantless search of the defendant's laptop computer exceeded the scope of his girlfriend's search earlier that day, because there was no "virtual certainty" that the officer's review of the files was limited to the files that the girlfriend had viewed earlier that day. *Id.* at 485. The Sixth Circuit's holding was based, in large part, on "the extensive privacy interests at stake in a modern electronic device like a laptop..." *Id.* The Sixth Circuit relied heavily on the Supreme Court's decision in *Riley v. California*, -- U.S. --, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

Of particular relevance to our inquiry, the Supreme Court discussed the particular qualities of electronic devices that must be considered. Cell phones, the Court noted, "are in fact minicomputers that also happen to have the capacity to be used as a telephone ... One of the most notable distinguishing features of modern cell phones is their immense storage capacity." *Id.* at 2489. That storage capacity

“Has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information – an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record. Second, a cell phone’s capacity allows even just one type of information to convey far more than previously possible. The sum of an individual’s private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.”

[*Riley*, 134 S.Ct. at 2489]. Thus, the likelihood that an electronic device will contain 1) many kinds of data, 2) in vast amounts, and 3) corresponding to a long swath of time, convinced the *Riley* Court that officers must obtain a warrant before searching such a device incident to arrest. *Id.*

Lichtenberger, 786 F.3d at 487-88 (*citing Riley*). The Sixth Circuit found that when considering the extent of information that can be stored on an electronic device such as a laptop computer, the “virtual certainty” threshold in *Jacobsen* applies to whether there was virtual certainty that the police officers were viewing the same files as the private party and that there was virtual certainty that the remaining files would have the exact same content. *Id.*

In sync with the *Lichtenberger* holding, the Eighth, Ninth and First Circuits adopted similar rulings. *See, United States v. Goodale*, 738 F.3d 917 (8th Cir. 2013) (finding that the private search exception applied because the officer’s search of the defendant’s computer internet history did not go beyond or further than the private party’s search); *United States v. Tosti*, 733 F.3d 816 (9th Cir. 2013) (holding that detectives did not exceed scope of prior private search of defendant’s computer

because detectives viewed same photographs previously viewed); *United States v. D'Andrea*, 648 F.3d 1 (1st Cir. 2011) (finding the same).

Although there is a clear split amongst the circuits, all decisions that discuss the private search exception rely on the United State Supreme Court decision in *United States v. Jacobsen*, 466 U.S. 109 (1984). The problem with applying *Jacobsen* in these cases revolves around the fact that the search of electronic devices and the privacy rights that attach to said devices is much more complicated than the search of a physical package. Only this Court's review can establish a national rule that eliminates inconsistent views about how far government agents can search an electronic device before that search is deemed as going beyond the scope of an original private search.

B. In Light of *United States v. Jacobsen*, 466 U.S. 109 (1984), the Eleventh Circuit's Position is Wrong.

The Eleventh Circuit opinion held that the Petitioner's Fourth Amendment rights had not been violated when law enforcement searched the USB thumb drives because their search fell within the private search doctrine. The opinion relies on the opinion in *United States v. Jacobsen*, 466 U.S. 109 (1984) as its sole basis for coming to this conclusion.

In *United States v. Jacobsen*, 466 U.S. 109 (1984), the United States Supreme Court was faced with the question as to whether a governmental search of a private package violated the Fourth Amendment after a private party had searched that same private package. The Court discussed how the first clause of the Fourth Amendment protects people from several things, including unreasonable searches by

governmental action. *Id.* at 1656. However, the Fourth Amendment does not protect people from a search “effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.” *Id.* (citing, *Walter v. United States*, 447 U.S. 649, 662, 100 S.Ct. 2395, 2404, 65 L.Ed. 2d 410 (1980) (BLACKMUN, J., dissenting)). The facts of *Jacobsen*, as summarized by the Sixth Circuit in *Lichtenberger*, are crucial to the Court’s ultimate holding and analysis:

In 1981, Federal Express (“FedEx”) employees were inspecting a package – a box wrapped in brown paper – that had been damaged in transit. *Id.* at 111, 104 S.Ct. 1652. The employees opened the box and discovered that it contained a duct-tape tube about ten inches long nestled among wadded sheets of newspaper. *Id.* The employees removed the tube from the box and cut a slit in the end of the tube. *Id.* Inside, they found multiple zip-lock bags of a white, powdery substance. *Id.* The employees placed the bags back in the tube, put the tube back in the box, and called the Drug Enforcement Administration (“DEA”). *Id.* A DEA agent arrived and found the box open on a desk. *Id.* The agent observed that the tube inside had a slit cut into it, and removed the bags from the tube. *Id.* He then opened each bag and removed a trace amount of the powder for an on-site field test. *Id.* at 111-12, 104 S.Ct. 1652. The test positively identified the substance as cocaine. *Id.* at 112, 104 S.Ct. 1652. Based on the agent’s findings, the DEA procured a warrant to search the place to which the package had been addressed and subsequently arrested the defendants. *Id.*

Lichtenberger, 786 F.3d at 481-82 (citing *Jacobsen*, *supra*). In light of the circumstances, the Court ultimately found that the DEA’s search was not in violation of the Fourth Amendment because the search replicated that of the FedEx employees. 466 U.S. at 120. The Court found that once a private individual takes action and conducts a search, even one that violates an individual’s expectation of privacy, the Fourth Amendment does not forbid the government from replicating the search, as

long as government officials **constrain their search to the parameters of the search conducted by the private individual**. *Id.* at 115. (Emphasis added). The Court held that the agent’s viewing of “what a private party had freely made available for his inspection did not violate the Fourth Amendment.” *Id.* at 119. In other words, the government’s ability to conduct a warrantless “follow-up” search of this kind is expressly limited by the scope of the initial private search. *Id.* at 116.

Pursuant to *Jacobsen*, a government agent is allowed to replicate the search of a private party without obtaining a search warrant and without violating the Fourth Amendment **so long as** the search does not exceed the scope of the search conducted by the private party. An electronic device and the files therein are to be looked at as “closed containers”. As a result, in the instant case, a Fourth Amendment violation would not have occurred had law enforcement conducted a search within the parameters of the search conducted by Nicole and Ada, meaning that law enforcement would have only been allowed to look at the same files opened by Nicole or Ada (i.e., the same “containers”). In light of the evidence, the government agents that viewed the thumb drives did not know which of the five thumb drives were viewed by Nicole or Ada and did not know which files within the thumb drives had been viewed by either private party. The Eleventh Circuit’s finding that no Fourth Amendment violation had occurred in light of the Court’s opinion in *Jacobsen* was incorrect because per *Jacobsen*, the search by governmental agents exceeded the scope of the private search and thus, a violation did occur.

C. This Case Squarely Presents a Likely Recurring Issue of Substantial Legal and Practical Importance.

Citizens of the United States have become tech-savvy, as the technology around us advances every day. Unfortunately, some citizens use that technology to commit crimes, while others use technology as a convenient storage device for evidence of their crimes. Regardless, with these new technological advances, the issue of what privacy rights are protected within those advances continues to surface, as well as questions about which devices governmental agents are allowed to search without a warrant.

Our society, as a whole, continues to grow towards a more pro-electronic way of storing personal effects. When the United States Constitution was created, it specifically secured the people's right to be secure in their "papers." Now that the people's "papers" are changing into electronic documents located on laptop computers, iPads, iPhones, and thumb drives, it is imperative that this Court determine, to what extent, one "paper" is protected within an electronic device in comparison to other "papers".

Historically, searches that were subject to potential Fourth Amendment violations were searches conducted of physical items or places, and the bounds of what could be searched were quite obvious. For example, if law enforcement searched a room or container, there has seldom been a question as to what constitutes a violation of an individual's privacy interest as it relates to a private search, mainly because the bounds of what was searched by the private party was obvious. *See, United States v. Story*, 327 Fed. Appx. 422 (4th Cir. 2009) (finding that initial search

of hotel room by police officer did not exceed scope of search conducted by hotel employees under private search exception); *United States v. Oliver*, 630 F.3d 397 (5th Cir. 2011) (holding that government's search of a cardboard box was not a violation of the Fourth Amendment because it did not exceed the scope of private individual's search of box); *United States v. Richards*, 301 Fed. Appx. 480 (6th Cir. 2008) (concluding that police search of storage unit did not extend beyond scope of private search and therefore there was no Fourth Amendment violation); *United States v. Donnes*, 947 F.2d 1430 (10th Cir. 1991) (officer exceeded scope of private search after officer opened camera lens case found inside glove when the private party had only looked inside the glove and not the case); *United States v. Moore*, 943 F.2d 884 (8th Cir. 1991) (concluding that DEA's subsequent search of packing box was not a Fourth Amendment violation because the search did not exceed the original search by the private express company employee). However, now that the private search exception is being applied to the search of electronic devices, the question of when law enforcement must secure a warrant versus searching the device without one is a question whose answer is not as clear.

As identified in *Riley*, the search of an electronic or digital device is fundamentally different than physical objects because digital devices can contain "millions of pages of text, thousands of pictures, and hundreds of videos." *Riley, supra*, 134 S.Ct. at 2489. The Court also found that electronic or digital devices are different because they contain highly sensitive data, including "[i]nternet search and browsing history," "[h]istoric location information," "transaction records," as well as data from

a variety of new mobile “apps” that relate to private activities and interests. *Riley*, *supra*, 134 S.Ct. at 2490. The difference between electronic devices and physical objects has been discussed by other courts as well. *See, United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001) (observing that “[t]he advent of the electronic age and ... the development of desktop computers that are able to hold the equivalent of a library’s worth of information, go beyond the established categories of constitutional doctrine. Analogies to other physical objects, such as dressers or file cabinets, do not often inform the situations we now face as judges when applying search and seizure law”).

Although a thumb drive does not equate to a cell phone, the data contained on a thumb drive is comparable to that stored on a cell phone. A thumb drive can hold several gigabytes of data and can store an unlimited amount of information including medical records, contact lists, personal photos, and other types of confidential documents. Due to the significant amount of information that can be stored on a thumb drive or other electronic device, it is imperative that boundaries be established by the Court as to what government agents are allowed to search after a private search has been conducted. Does a private person opening one single file that contains an image of child pornography provide law enforcement with free range to access every file on an electronic device or does that search of one file only provide law enforcement with access to that one single file?

This case presents an ideal opportunity to resolve this important and recurring issue. The issue was squarely presented and thoroughly discussed. The case’s

procedural history reveals no disputed issues of fact nor any jurisdictional questions that would interfere with this Court's resolution of the question. The issue has been thoroughly analyzed by numerous federal and state courts. The issue is ripe for review, and nothing would be gained from delaying review further.

CONCLUSION

For the reasons stated above, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Brian Harling, Petitioner

Date: February 9, 2018



MARK O'BRIEN, ESQUIRE

Counsel of Record

Attorney at Law

O'BRIEN HATFIELD, P.A.

511 West Bay Street

Suite 330

Tampa, Florida 33606

(813) 228-6989

mjo@markjobrien.com