No._____

In The

# Supreme Court of the United States

PAUL BECKMANN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Eighth Circuit

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Under the Fourth Amendment, is a search of external devices or data storage media, connected either by wires or through intangible cloud technology, reasonable when police are given consent to search only a computer with no specific consent to search other devices or media?

II. Whether the Fourth Amendment and Fifth Amendment of the Constitution actually protects individuals when, in execution of a warrant, the government intentionally and deliberately disregards the Federal Rules of Criminal Procedure and what conduct constitutes such an intentional and deliberate disregard of the Federal Rules of Criminal Procedure that requires suppression of the evidence obtained?

## PARTIES TO THE PROCEEDINGS

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

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The opinion of the United States Court of Appeals for the Eighth Circuit is recorded at 786 F.3d 672 (2015) and is attached hereto in the Appendix. This appeal affirmed the Magistrate's Order and Recommendation, District Court's Order regarding suppression and the District Court's Judgment and Sentence. These materials are reproduced in the Appendix.

## JURISDICTIONAL STATEMENT

The district court in the Eastern District of Missouri had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Beckmann's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on April 10, 2015. No petition for rehearing was filed.

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

## CONSTITUTIONAL PROVISIONS

Fourth Amendment

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.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## STATEMENT OF THE CASE

*Procedural History*

On July 24, 2013, Paul Beckmann was charged by indictment with one count of possession of child pornography in violation of 18 U.S.C. § 2252A(a)(5)(B). Thereafter, Beckmann filed a motion to suppress evidence challenging the search and seizure of his computer and external hard drive. Police searched his external hard drive without proper consent to do so. Magistrate Judge Noce entered his report and recommendation finding that the motions be denied. The Magistrate's findings and recommendations were adopted as to the search of the external hard drive in District Court Judge Jackson's final order denying the motion.

On May 12, 2014, Beckmann entered a conditional plea reserving his right to appeal the Order and Recommendation regarding his motions to suppress and also reserving his right to appeal his sentence. On August 26, 2014, Beckmann was sentenced to 120 months in the United States Bureau of Prisons. Further, Defendant was ordered to make restitution payments in the amount of $3,000 to each of the three alleged victims, L.S., Vicky and Cindy, making the total restitution due $9,000.

*Factual History*

The Search in Question

On August 2, 2011, Jefferson County Deputies Anthony Barbato and Brett Thebeau[1] were assigned to participate in a joint sex offender residence verification with the United States Marshal's Service. The officers, at approximately7:25 a.m., arrived at Beckmann's residence to verify his address and ensure he was following his sex offender registration requirements. The deputies knocked on the door. When Beckmann answered, they told him they needed to come inside to verify his sex offender registration. Once inside the residence, the deputies saw a closed ASUS Laptop computer ("laptop") on Beckmann's coffee table and immediately began to question him about it. Beckmann informed the deputies that he was under no supervised release conditions and that he was lawfully allowed to have a computer and internet access. Deputy Barbato requested to search the laptop and Beckmann gave him consent to do so. While Deputy Barbato was looking at the contents of the laptop, Deputy Thebeau told Beckmann to show him around the rest of the house.

Beckmann showed Deputy Thebeau around the house which included an upstairs office where another computer was located, a Compaq Presario ("computer"). A Maxtor external hard drive was also located near the computer. Deputy Barbato found

[1] Deputy Thebeau was not called to testify at the motion to suppress hearing.

nothing in his investigation of Beckmann's laptop. After finishing his examination of the laptop, Deputy Barbato went upstairs where Deputy Thebeau and Beckmann were located. Deputy Thebeau was in the bathroom and according to Deputy Barbato Beckmann was in the office unplugging the external hard drive.

Deputy Barbato made his presence known, saw that the external hard drive's power cord was unplugged, and proceeded to plug the external hard drive into the power source and search the computer and external hard drive. Beckmann testified that he did not give either verbal or written[2] consent to search the computer or the external hard drive. Two reports were submitted in this case. In Deputy Barbato's initial report he did not include anything about specific consent to search Beckmann's upstairs computer. Only after it had been reviewed by a supervisor, was the report altered to include a paragraph regarding consent before it was finally approved. The district court found that Beckmann had given Deputy Barbato consent to search the upstairs computer based solely on Barbato's statement that he obtained consent.

In order for Deputy Barbato to access the contents of the external hard drive, he was required to plug the device into the wall. Deputy Barbato testified that Beckmann never gave consent to search the external hard drive nor was he given consent to

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[2] Deputy Barbato had consent to search forms in his vehicle, but he did not have Beckmann sign any forms in relation to the items searched.

plug in the device. Barbato plugged in the external hard drive into its power source and proceeded to open the contents of the external hard drive. He found folders named "Patriot" and "Unfinished." Deputy Barbato did not believe that these folder names were out of place; however, he proceeded to open the folders. Deputy Barbato found files in the folder titled "Unfinished" that he believed might contain child pornography. Upon discovering file names that suggested child pornography, Deputy Barbato requested Beckmann return to the room and asked him whether he knew what the file names on the monitor involved. Beckmann made no statement regarding the file names. The deputies then detained Beckmann, placing him in handcuffs and removed him from the area of the computer to the downstairs living room, and instructed him to sit on the couch.

Execution and Return of Warrant

After detaining Beckmann, Detective Virgil Martin and Sergeant Kavanaugh were individually called to the residence to conduct further investigation. After interviewing Beckmann and allowing Beckmann to speak with an attorney, the computer, the laptop and external hard drive were removed from Beckmann's residence. The search warrant for these items was issued thirteen days later on August 15, 2011. The search warrant required that it be executed no later than August 29, 2011. The search and examination of the laptop and computer began months later on November 11, 2011. On January 24, 2012, the external hard drive at issue in this case was copied and searched. On April 25, 2012, a report was prepared documenting what was

found during the various searches. A return of inventory was filed with the district court on November 15, 2013. No request for extension of the deadlines for execution of the warrant or submission of the return of the warrant was requested by Detective Kavanaugh or Detective Martin. Detective Kavanaugh testified that his agency rarely meets warrant deadlines at the State and Federal level. Detective Martin testified that it was the usual practice to ask for more time. The return of inventory that was eventually filed only stated what was seized and not what was found during the search as commanded by the warrant.

*Proceedings in the Court of Appeals*

On appeal, Beckmann argued the District Court erred by failing to grant his motion to suppress because the contraband found on his external hard drive was obtained as the result of an illegal search in violation of his Fourth Amendment rights. Next he argued, the District Court erred in denying his motion to suppress because the record indicated an intentional and deliberate disregard for Rule 41 of the Federal Rules of Criminal Procedure requiring prompt execution and return of a search warrant. Finally, Beckmann argued the District Court abused its discretion when it ordered restitution totaling $9,000 at $3,000 per identifiable victim, in that, he was nothing more than a mere possessor of child pornography and his offense conduct does not justify the amount of restitution ordered by the District Court. On March 15, 2015, the Eighth Circuit Court of Appeals upheld the lower Court's decision on all points of appeal.

## REASONS FOR GRANTING WRIT

### I. Under the Fourth Amendment, is a search of external devices or data storage media, connected either by wires or through intangible cloud technology, reasonable when police are given consent to search only a computer with no specific consent to search other devices or media.

The evolution of computers since their inception has blurred the line as to what constitutes a computer and what is a separate device. Beckmann's case provides this Court with an ideal vehicle to define the term "computer" and declare what constitutes a reasonable search when police are given consent to search only a computer and nothing more. The need for specificity in consent to search cases involving computers is more prevalent in the modern era than it was in the past. Cellular phones are now arguably miniature computers that also operate as a cellular telephone. Data stored on one computer can be accessed by an unlimited number of computers through data storage external hard drives and cloud based technology. Individuals carry with them cellular phones, laptop computers, external hard drives, thumb drives, and disks that may contain a dearth of personal information. Thus, privacy rights in electronically stored data have become ever more important that before. Defining a reasonable search of a computer means much more now than it did less than a decade ago.

The ultimate touchstone of the Fourth Amendment is reasonableness. *Riley v. California*, 134 S. Ct. 2473 (2014). Supreme Court case law has

made clear that where a search is undertaken by law enforcement to discover evidence of criminal wrong-doing . . . reasonableness generally requires the obtaining of a judicial warrant. *Id.* at 2482. Such a warrant ensures that the inferences to support a search are "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. *Id.* The purpose of the warrant is to describe with particularity that place to be searched and the persons or things to be seized. U.S. Const. amend IV and Fed. R. Crim. P. 41(e)(2). The reason for this requirement is that the limitation safeguards an individual's privacy interests against the "wide-ranging exploratory searches the Framers intended to prohibit." *Md. v. Garrison*, 480 U.S. 79, 84 (1987).

In absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement. *Riley*, 134 S. Ct. at 2482. Consent is an exception to the warrant requirement. *United States v. Martin*, 806 F.2d 204, 206 (8th Cir. 1986). In order to be deemed voluntary, consent must be "unequivocally, *specifically*, and intelligently given, uncontaminated by any duress or coercion." *United States v. Tillman*, 963 F.2d 134, 143 (6th Cir. 1992) (emphasis added). To exempt a search from the warrant requirement, the court must assess the degree to which the search intrudes upon an individual's privacy rights against the degree to which the search is needed to promote a legitimate government interest. *Riley* at 2484. Similar to the warrant requirement of specificity, the consent to search exception requires specificity of places to be

searched and items to be seized. Consent does not leave the officer to guess or imply as to what they can search as arguably they will search as much as they can without restriction.

Beckmann's case involves consent to search a computer, but not an external hard drive. However, the district court concluded that the external hard drive fell within the definition of computer. *See United States v. Herndon*, 501 F.3d 683, 690 (6th Cir. 2007) (defining computer as the collection of components involved in the computer's operation). Beckmann argues that the external hard drive searched is not a component involved in the computer's operation; rather, it is a separate, distinct storage device that does not fall within the definition of computer. Beckmann's computer, along with nearly every computer in the world, came equipped with its own hard drive and functions without the use of any external storage device. Even adopting the Sixth Circuit's expansive definition, it is not reasonable to believe that an external storage device is involved in the computer's operation. Components that are involved in the computer's operation would be the monitor, the computer's tower (containing the computer's own storage device), the mouse, and the keyboard. The Eighth Circuit's ruling conflicts with the spirit of the Fourth Amendment protections against unreasonable searches and seizures. Specifically, it allows the government to guess or imply what it may or may not search based on consent to search a general item. But the Framers required more of the government when they drafted the Constitution.

The Eighth Circuit's approval of the District Court's order creates a slippery slope. In its reasonableness determination, the District Court reasoned that plugging in the external hard drive to search it was reasonable because it was attached to the computer by a wire. Following this analysis, anything attached to a computer could be deemed a part of the computer. For instance, cellular phones now are often attached to computers for the purpose of syncing data. If a cellular device is plugged into a computer, may an officer search the cellular phone without specific consent to do so? External hard drives are now being replaced by cloud based technology. The distinction between connection by a physical wire and cloud technology is irrelevant as both are "connected" to a computer. Individuals may access the cloud from multiple different computers and devices. If an individual uses a computer to access the cloud, is the cloud now deemed part of that computer? Many law firms and companies have software allowing their employees remote access to the company's server from their phones or home computers. Has the company server now become part of the computer because it is "connected" to it?

Beckmann's external hard drive was without power and only connected to a computer through a wire. The deputy did not need the external hard drive to operate the computer. Much like a cellular phone and cloud based storage system, Beckmann's external hard drive was not a component involved in the computer's operation rendering the search of it reasonable. The term computer has become quite ambiguous and now, more than ever, needs to be defined. If computer is not defined, the government

will be left to search whatever electronic devices, computers, storage systems, and cellular phones that it sees fit when given consent to search a computer.

This Court's decision in *Riley*, emphasizes the need for greater protections in the modern era for electronic devices. As Justice Roberts wrote, most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read – nor would they have any reason to attempt to do so. *Riley*, 134 S. Ct. at 2489. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant. *Id.* Justice Roberts' concern is a reality in Beckmann's case. This Court limited the search incident to arrest exception by requiring a search warrant to search the contents of a cellular phone. *Id.* Beckmann only consented to search his computer and laptop with no other specific consent to search. Specificity in consent is needed in cases where the items to be searched have the capacity to contain one's entire life in a device that is the size of a book or smaller.

Beckmann had been cooperative up to a point. He allowed the deputies to enter his home, search his laptop, and even show a deputy around his house. The deputies never had any reason to suspect Beckmann of committing a crime. Simply unplugging an external hard drive is not enough for the police to begin a warrantless fishing expedition into the contents of Beckmann's private storage devices. The external hard drive could have contained extremely personal information such as family, medical, or financial information, that Beckmann did not intend

others to see. The end result of an illegal search does not justify the initiation of the search. If the deputies had found nothing of evidentiary value on the external hard drive, is the government to tell Beckmann, "Thank you for letting the police rifle through your private information, sorry we were wrong"?

This Court needs to answer what constitutes a reasonable search when consent to search a computer is given and the search extends beyond the computer.

**II. Whether the Fourth Amendment and Fifth Amendment of the Constitution actually protects individuals when, in execution of a warrant, the government intentionally and deliberately disregards the Federal Rules of Criminal Procedure and what conduct constitutes such an intentional and deliberate disregard of the Federal Rules of Criminal Procedure that requires suppression of the evidence obtained.**

The Federal Rules of Criminal Procedure lays the framework for procedure in the federal criminal justice system. The district courts have stripped these rules of any force against the government and the courts of appeals have routinely upheld these decisions. Criminal defendants must often adhere to strict deadlines in filing petitions or appeals to challenge their convictions. If they do not meet these deadlines, they are forever barred. The government should be required to adhere to deadlines as well or at a minimum request an extension of time or apply for a new warrant. Allowing the government to disregard the rules of criminal procedure evidences

favoritism by the courts for the government. And police know that they may take advantage of the leniency afforded by the federal courts. The Framers would not have thought it too much to ask the government to comply with the rules of procedure the same as a criminal defendant must.

Non-compliance with Fed. R. Crim. P. 41 does not automatically require exclusion of evidence in a federal prosecution. However, execution of a search warrant by state officials *requires* exclusion of evidence if the defendant has suffered prejudice or there has been an *intentional and deliberate disregard* for Fed. R. Crim. P. 41. *See United States v. Schoenheit*, 856 F.2d 74, 76-77 (8th Cir. 1998) (emphasis added). The use of the word "or" suggests that if prejudice cannot be shown, then suppression is still warranted based on an intentional and deliberate disregard for the rule. The government should not benefit from their failure to comply with the rules, while criminal defendants are punished for *any* disregard for the rules of procedure.

In Beckmann's case, the police seized his laptop, computer, and external hard drive on August 2, 2011. On August 15, 2011, the district court issued a search warrant for these items. The search warrant required that it be executed no later than August 29, 2011. On November 11, 2011, over two months after expiration of the warrant, the computer was copied and searched. On November 21, 2011, the laptop was copied and searched. On January 24, 2012, the external hard drive was copied and searched, almost five months after the expiration of lawful authority to search. On April 25, 2012, a report was prepared

documenting what was found during the searches. A return of inventory was not filed with the district court until November 15, 2013, only after Beckmann filed his motion to suppress evidence on November 12, 2013. This return of inventory merely stated what was seized, not what was found during the search as commanded by the warrant. The delay in execution and return of the warrant caused a more than two year delay in the prosecution of Beckmann. The government never asked for additional time to execute the warrant. Further, the detectives never asked the court for an extension of time prior to the deadline in the warrant or after the deadline had expired. Detective Kavanaugh admitted at the motion to suppress hearing that his agency rarely meets these warrant deadlines at the Federal and State level.

The legal authority to search a computer was clearly stated on the search warrant. No search or mirror image of the items seized was made by the deadline in the warrant. Failure to make the mirror image copy within 14 day deadline and failure to file a return of inventory for over two years establishes a conscious disregard for the rules of criminal procedure. If the search occurs outside the time frame, it is not a lawful search and is a warrantless search in violation of the Fourth Amendment. Items seized beyond the purview of the warrant are subject to suppression. *United States v. Riesselman*, 646 F.3d 1072, 1078 (8th Cir. 2011). A reasonably cautious detective would check with his supervisor or the prosecuting attorney before searching beyond the dates of the warrant unless these deadlines are ignored as common practice.

Traditionally, due process has required that only the most basic procedural safeguards be observed. *Medina v. California*, 505 U.S. 437, 453 (1992). The Bill of Rights speaks in explicit terms to many aspects of criminal procedure. *Id.* at 443. The Fifth Amendment ensures one's right to due process by stating that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend V. The Federal Rules of Criminal Procedure lay the framework for practice in the federal courts and the basic procedural safeguards for due process. When these rules of procedure are not adhered to by the government, the defendant is being denied his right to due process. Beckmann's due process right was violated when the government failed to comply with the Rule 41. Beckmann was deprived of his personal property for an extended period of time. He awaited nearly two years before being brought before a court after the government illegally searched his computer, which arguably violates the Sixth Amendment right to a speedy trial as well. Had the government been required to comply with Rule 41, Beckmann's right to due process would not have been violated.

The evidence in Beckmann's case should have been suppressed as a check and balance on the government. The government's actions demonstrated a clear and deliberate disregard for the rule. This Court needs to ensure that the rules of criminal procedure are enforced against the government as they are against criminal defendants. Otherwise, the government will continue to abuse the rules of procedure in reliance upon the leniency afforded by the Courts. Currently, as applied to the government,

the Federal Rules of Criminal Procedure have no teeth.

## CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

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## CERTIFICATE OF COMPLIANCE

No. _____

PAUL BECKMANN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 3,923 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 13, 2015

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