CAUSE NO. 2022-8014

IN THE

Supreme Court of the United States

OCTOBER TERM 2022

JEFFREY WINDSOR
Petitioner,

—against—

UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

ORAL ARGUMENT REQUESTED

H67
Attorneys for Petitioner

ISSUES PRESENTED FOR REVIEW

I. Whether the automobile exception justifies a warrantless search of electronic data from devices installed in an automobile given the requirements of the Fourth Amendment and this Court's decision in *Riley in California*, 573 U.S. 373 (2014).

II. Whether a magistrate judge's acceptance of a Rule 11 felony guilty plea is valid and binding under the Federal Magistrates Act of 1968 without the acceptance of the plea by an Article III judge.

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The magistrate judge's opinion on Respondent's motion *in limine* to suppress of the United States District Court for the District of Wythe is unreported. R. at 1–3. The district judge's opinion on Respondent's motion *in limine* to suppress and motion to withdraw of the United States District Court for the District of Wythe is unreported. R. at 4–13. The opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported. R. at 14–22.

PROVISIONS INVOLVED

"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.

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . ." U.S. CONST. art. III.

Section 841(a)(1) of Title 21 of the United States Code states: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1).

"A defendant may withdraw a plea of guilty or nolo contendere . . . before the court accepts the plea, for any reason or no reason; or after the court accepts the plea, but before it imposes sentence if: the court rejects a plea agreement under Rule 11(c)(5); or the defendant can show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(1)–(2).

In pertinent part, Rule 59(a) discusses nondispositive matters: "A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense.

The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination." FED. R. CRIM. P. 59(a). In pertinent part, Subsection (b) discusses dispositive matters: "A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact." FED. R. CRIM. P. 59(b).

Section 636(b)(3) of the Federal Magistrates Act states: "Notwithstanding any provision of law to the contrary . . . [a] magistrate judge may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3).

"The purpose of this chapter is to reduce traffic accidents and deaths and injuries resulting from traffic accidents. Therefore it is necessary to prescribe motor vehicle safety standards for motor vehicles and motor vehicle equipment in interstate commerce; and to carry out needed safety research and development." 49 U.S.C.S. § 30101.

STATEMENT OF THE CASE

Respondent is Indicted Under 21 U.S.C. § 841(a)(1)

Respondent was indicted on one count of intent to distribute fentanyl in violation of 21 U.S.C. § 841(a)(1). R. at 1. In the District Court of Wythe, Respondent filed a motion *in limine* to suppress evidence recovered from his car's on-board computer without a warrant. R. at 1. This motion was denied by the district court. R. at 1. The district court found there was no case within the Thirteenth Circuit limiting the automobile exception regarding a vehicle's electronic devices. R. at 3. On April 5, 2022, Respondent entered a conditional plea before Magistrate Judge Jude Thorfinson, reserving his right to appeal his motion *in limine*. R. at 4. Additionally, Respondent filed a separate motion to withdraw his plea pursuant to Rule 11(d)(1). R. at 4. The district court affirmed the magistrate judge's order denying Respondent's motion *in limine* and denied Respondent's motion to withdraw his plea. R. at 4. The district court held the search of Respondent's vehicle data was proper under the automobile exception and that Respondent had no legal right to withdraw his plea under Rule (11) because it was validly accepted. R. at 8, 11.

Respondent Appeals to Both the Denial of His Motion to Suppress and Motion to Withdraw His Guilty Plea

In the Thirteenth Circuit Court of Appeals, Respondent appealed the district court's denial of his motion to suppress and the subsequent denial of his motion to withdraw his guilty plea. R. at 14. The Thirteenth Circuit affirmed the holding of the lower court. R. at 15. The appellate court held the automobile exception allowed the search of the vehicle's data and that a warrant was not required to conduct the search because *Riley's* holding was limited to cell phones seized incident to arrest. R. at 18. The appellate court also concluded that magistrate judges can accept felony guilty pleas under the Federal Magistrates Act when the litigant consents. R. at 18. Judge Beauregard dissented, holding the privacy interest's in the data of an on-board vehicle computer

outweigh the governmental interests in the automobile exception and the authority of magistrate judges only allows them to submit a report and recommendation for felony guilty pleas. R. at 20–21.

This appeal followed. R. at 23.

SUMMARY OF THE ARGUMENT

I.

Police officers clearly violated Mr. Windsor's Fourth Amendment right to be free from unreasonable searches and seizures when a Berla device was used to extract data from his vehicle's on-board computer without a warrant. The extraction of Mr. Windsor's data from his vehicle was a search in violation of *Riley v. California*, where the Court held a search warrant is required to search a cell phone seized incident to an arrest. Because the on-board computer in Mr. Windsor's car is analogous to a cell phone, *Riley* applies even when no arrest is made. Further, the automobile exception to the warrant requirement set forth in *California v. Acevedo* and *Carroll v. United States* is not applicable because the on-board computer is not a "container" for purposes of the exception and the nature of the device's storage capacity requires a warrant to extract its contents. No other exceptions to the warrant requirement are applicable. Even if the automobile exception was applicable, police officers did not have probable cause to warrantlessly search the vehicle. Additionally, the search exceeded the scope of what has been considered reasonable under the automobile exception. Finally, the automobile exception cannot be automatically extended to this case because the purposes of the automobile exception must be balanced with Mr. Windsor's privacy interests, which are too great to be overcome. As such, the automobile exception does not apply to this case and the search of Mr. Windsor's on-board computer was an unreasonable search in violation of the Fourth Amendment requiring any evidence or derivative evidence obtained to be excluded.

II.

The magistrate judge's acceptance of Mr. Windsor's felony guilty plea was an unlawful act in violation of the Federal Magistrates Act, the Federal Rules of Criminal Procedure, and the

Constitution. While magistrates have broad authority under the additional duties clause of the Federal Magistrates Act, this authority does not and should not extend to dispositive matters such as plea acceptance. A felony guilty plea is more like a felony jury trial, which is a matter exclusively reserved for Article III judges. The authority vested in Article III judges may not be transferred to magistrates through the additional duties clause of the Federal Magistrates Act or the consent of a defendant. District court judges, and especially litigants, do not possess the authority to delegate such an important task. However, even if the Court finds magistrates may accept a felony guilty plea under the Federal Magistrates Act, they are still constrained by Federal Rule of Criminal Procedure 59. Rule 59 requires a magistrate to issue a report and recommendation to a district court judge for dispositive matters instead of deciding the issue. A felony guilty plea is unquestionably a dispositive matter, as it is the final step in a case before a judgment is rendered and a defendant's claim or defense is disposed of. Finally, allowing magistrate judges to accept felony guilty pleas would chip away at the Constitution. The Constitution is very specific in its delegation of authority to Article III judges, so magistrates, who were created by the legislature, may not exercise the same authority as Article III judges. Over time, if district court judges delegate dispositive matters to magistrates, there will be nothing left of the Constitution.

ARGUMENT

I. A WARRANTLESS SEARCH OF AN ON-BOARD VEHICLE COMPUTER IS UNREASONABLE UNDER BOTH THE FOURTH AMENDMENT AND *RILEY V. CALIFORNIA*.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. If the government[1] conducts a search or seizure of a constitutionally protected space such as a home or car, the Fourth Amendment is implicated. *See Katz v. United States*, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places."). A search occurs when the government either: 1) physically intrudes on a constitutionally protected area for the purpose of obtaining information; or 2) interferes with a citizen's legitimate expectation of privacy that society recognizes as reasonable. *See United States v. Jones*, 565 U.S. 400, 407 (2012) (holding a GPS attached to a Jeep for the purpose of obtaining information was a search); *see also Katz*, 389 U.S. at 361 (Harlan, J., concurring) (holding the use of a recording device on the outside of a telephone booth constituted a search because Katz had a reasonable expectation of privacy in his conversation in the phone booth). If either standard is satisfied, a Fourth Amendment search has occurred, and the question then becomes one of reasonableness. *Jones*, 565 U.S. at 409; *see Cnty. of Los Angeles, Calif. v. Mendez*, 581 U.S. 420, 427 (2017) ("Reasonableness is always the touchstone of Fourth Amendment analysis, and reasonableness is generally assessed by carefully weighing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.").

Generally, reasonableness "requires obtaining a judicial warrant" and the Fourth Amendment suggests a "strong preference for searches conducted pursuant to a warrant." *Vernonia School*

[1] The Fourth Amendment only protects against government action. *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)*; Illinois v. Gates*, 462 U.S. 213, 236 (1983). Even if a warrant is required, a warrantless search is nevertheless permissible provided that one of the "few specifically established and well-delineated exceptions" apply. *California v. Acevedo*, 500 U.S. 565, 580 (1991). Pertinent here is the automobile exception where "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *See Carroll v. United States*, 267 U.S. 132, 149 (1925) (holding a vehicle may be searched if there is probable cause to believe it contains evidence of a crime because it could quickly be moved out of the jurisdiction before a warrant is secured); *see also Acevedo*, 500 U.S. at 580 (holding with probable cause a vehicle and its containers may be searched for evidence of the crime). A vehicle may also be searched after police have impounded it under the automobile exception. *United States v. Johns*, 469 U.S. 478, 488 (1985). Hence, an automobile or "personal motor vehicle is plainly among the 'effects' with which the Fourth Amendment . . . is concerned." *United States v. Chadwick*, 433 U.S. 1, 12 (1977). Further, "police may search a vehicle incident to a recent occupant's arrest when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search" and "when it is reasonable to believe evidence relevant to the crime of arrest might be found . . . ." *See Arizona v. Gant*, 556 U.S. 332, 344 (2009). This is because in *Chimel v. California* the Court held a search incident to a lawful arrest is permitted to protect the safety of officers and prevent the destruction of evidence. *Chimel v. California*, 390 U.S. 752, 763 (1969).

However, there is a gap in federal law as it stands today concerning when police may warrantlessly extract data from a vehicle. Riley Beggin, *Question Arise Over Police Searches of Car Data* Systems, GOVERNMENT TECHNOLOGY (Jan. 4, 2022), https://www.govtech.com/public-safety/questions-arise-over-police-searches-of-car-data-systems. This Court has not determined

whether on-board vehicle computers should be treated as cell phones, because lower courts have found it increasingly difficult to determine how to treat electronic devices under the Fourth Amendment in the presence of never-ending technological advancement. *See generally Riley v. California*, 573 U.S. 373 (2014) (discussing how cell phones fit within the confines of Fourth Amendment jurisprudence and rejecting the extension of other warrant exceptions to cell phones). Despite this, the Court has shown a preference for protecting personal information obtained by invasive searches using electronic devices. *See Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (holding individuals have an expectation of privacy in the "whole of their physical movements" as captured through cell-site location information); *see also Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding the use of a thermal-imaging device to extract information from inside the home was a search in violation of the Fourth Amendment); *see also Leaders of a Beautiful Struggle v. Baltimore Police Dept.*, 2 F.4th 330, 347–48 (4th Cir. 2021) (discussing the use and consequences of long-term aerial surveillance for ongoing location tracking). Most importantly, the Supreme Court extended constitutional protection to cell phones because of their unique nature by holding a warrant is required to search a cell phone seized incident to an arrest. *Riley*, 573 U.S at 401.

A. The Automobile Exception Does Not Apply because *Riley v. California* Extends to On-board Vehicle Computers.

The automobile exception does not apply to this case because *Riley v. California* should extend to on-board vehicle computers, regardless of if they are searched incident to an arrest. In *Riley*, the Court contemplated how cell phones should be treated during arrests. *Id.* at 385. The Court ultimately concluded police must obtain a search warrant to search the contents of a cell phone seized incident to a lawful arrest. *Id.* at 401. The Court reasoned a warrant was required because of the unique ability of cell phones to store vast amounts of detailed data. *Id*. The Court also

explained once the subject is in custody and police have confiscated the cell phone, the digital data does not pose a danger to officers and can't be destroyed.[2] *See id*. at 373 ("The digital data stored on cell phones does not present either *Chimel* risk" which include potential harm to officers and destruction of evidence).

Riley is a landmark case in Fourth Amendment jurisprudence because "[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone." *Id.* at 393. As "minicomputers," the most significant feature of a cell phone is their immense storage capacity,[3] making cell phones a treasure trove of personal information related to nearly every aspect of a person's life. *Id*. at 375, 393. The Court in *Carpenter*, another landmark case in Fourth Amendment jurisprudence, also highlighted the fact that "[m]uch like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled." *Carpenter,* 138 S. Ct. at 2216. The device at issue in this case, a Surround Vision Recorder ("SVR"), not only has the capability to store the same data as a GPS, but it can store the same kind of data as a cell phone as well. R. at 6–7.

To have standing to bring a Fourth Amendment claim, a person aggrieved by an unreasonable search or seizure must have been the person against whom the search was directed. *Rakas v. Illinois,* 439 U.S. 128, 134 (1978). Here, an unreasonable search in violation of *Riley* and the Fourth Amendment occurred. Mr. Windsor certainly has standing to contest the search because a

[2] Remote wiping is not a prevalent issue. *Riley*, 573 U.S. at 373. As such, it follows remote wiping would also not be prevalent in an Event Data Recording device like a Surround Vision Recorder due to the data being much more difficult to access than that of cell phone data.

[3] Cell phones can "store millions of pages of text, thousands of pictures, and hundreds of videos." *Id.* at 375.

physical trespass onto his personal vehicle occurred under *Jones* when police used a Berla device[4] "to pull the crash and other electronic data from the Defendant vehicle's computer." R. at 2. A search also occurred under *Katz* because Mr. Windsor had a legitimate expectation of privacy in the computer within his vehicle that society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 351; *see Mobley v. State*, 834 S.E.2d 785, 793 (Ga. 2019) (holding police must have a warrant before they can access data stored in a car's computer system). Thus, Mr. Windsor has met his burden on his motion to suppress.[5] On a motion to suppress "the proponent . . . has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *United States v. Simmons*, 390 U.S. 377, 389–90 (1968). Once the defendant has established a basis for his motion to suppress, "the burden shifts to the government to prove the admissibility of the challenged evidence by a preponderance of the evidence." *United States v. Hunter*, 63 F. Supp. 3d 614, 619 (2014); *United States v. Matlock*, 415 U.S. 164, 177 (1974). Therefore, the burden rests with the Government to prove the search of Mr. Windsor's SVR was constitutionally permissible.

The search was unreasonable for three reasons: 1) the SVR is extremely similar to a cell phone and should be treated as such under *Riley*; 2) even if the automobile exception were applicable, the SVR is not a "container" and thus could not be searched without a warrant; and 3) no exigency existed to justify the warrantless search. Additionally, because the search violated the Fourth Amendment, the evidence obtained from the search should be suppressed and excluded

[4] Berla devices help investigators "identify, acquire, and analyze critical information stored within vehicle systems to uncover key evidence that determines what happened, where it occurred, and who was involved." BERLA, https://berla.co (last visited Jan. 8, 2023).

[5] Denials of a motion to suppress are reviewed *de novo*, thus this Court shall not give any deference to the holdings of the courts below. *United States v. Camou*, 773 F.3d 932, 937 (9th Cir. 2014); *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

under the exclusionary rule. *See Illinois v. Krull*, 489 U.S. 340, 347 (1987) ("When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure."). The illegally obtained evidence included SVR data from the time of the crash and personal footage of Mr. Windsor inside his home. R. at 2. Furthermore, no recognized exception to the exclusionary rule applies and the evidence found on the SVR should be excluded.[6]

1. On-board vehicle computers are analogous to cell phones.

SVR's are extremely similar to cell phones and are protected under *Riley*. The holding of *Riley* precipitated out of a recognition that cell phones "are now a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 573 U.S. at 385, 393. Cell phones are "both quantitatively and qualitatively" different from other physical objects that might be found during a search, and so are SVRs. *Id*. at 395. Like cell phones, SVR's are a type of event data recorder capable of storing large quantities of files from recording events happening around the car. CADILLAC, https://www.cadillac.com/dos-template-library/search-results/content-display.html?documentId=CSP89 (last visited Jan. 14, 2023). In *Riley*, the Supreme Court refers to cell phones as "minicomputers." *Riley*, 573 U.S. at 385-86. Here, the Thirteenth Circuit also referred to the SVR in Mr. Windsor's vehicle as a "computer" or "on-board computer." R. at 1–3, 5, 7, 9, 15. As such, if cell phones are "minicomputers" and SVR's are computers, they should receive the same constitutional protection, meaning SVR data is a "paper" or "effect" itself

[6] The recognized exceptions to the exclusionary rule include: 1) good faith; 2) independent source; 3) inevitable discovery; 4) attenuation; and 5) the fruit of the poisonous tree doctrine. *See United States v. Leon,* 486 U.S. 897 (1984); *Murray v. United States*, 487 U.S. 533 (1988); *Nix v. Williams*, 467 U.S. 431 (1984); *Wong Sun v. United States*, 371 U.S. 471 (1963)*; Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).

protected by the Fourth Amendment and *Riley*. *See Carpenter*, 138 S. Ct. at 2206 (Gorsuch, J., dissenting) (describing digital data as "modern-day papers and effects"); *see also Camou*, 773 F.3d at 942 ("[W]e find no reason not to extend the reasoning in *Riley* from the search incident to arrest exception to the vehicle exception.").

Since this is an issue of first impression, this Court can look to the states for guidance. In *Mobley v. State*, Georgia became the first state to extend the reasoning of *Riley* to on-board vehicle computers. *Mobley*, 834 S.E.2d at 793. The Georgia Supreme Court did not explicitly mention *Riley* and instead decided the case purely on Fourth Amendment grounds, though the ideas set forth in *Riley* are implicit in the court's reasoning. *See id.* at 792 ("The retrieval of data without a warrant at the scene of the collision was a search and seizure that implicates the Fourth Amendment regardless of any expectations of privacy."). In *Mobley*, officers attached a crash data retrieval device ("CDR") to search and retrieve data from Mobley's airbag control module ("ACM") at the scene of the crash. *Id*. at 788. The data indicated Mr. Mobley had been speeding and he was later indicted for vehicular homicide. *Id*. at 788–89. Mobley filed a motion to suppress the evidence retrieved from the ACM, arguing it was acquired in violation of the Fourth Amendment. *Id*. Mobley's motion was denied by the trial court and he was found guilty. *Id*. at 788–89. However, Mobley was eventually successful in his efforts on appeal when the Georgia Supreme Court held the police officers' actions did in fact constitute an unreasonable search in violation of the Fourth Amendment and a search warrant was required to retrieve data from the vehicle's on-board computer. *Id*. at 793. The Court reasoned the data from the ACM on Mobley's car was an unreasonable search because "searches and seizures without a 'warrant are per se unreasonable under the Fourth Amendment . . . .'" *Id.* at 792 (citing *State v. Slaughter*, 252 Ga. 435, 436 (1984)).

Here, the search of Mr. Windsor's SVR was also unreasonable because Mr. Windsor's SVR, like Mr. Mobley's ACM, has the capability to store vast amounts of information similar to a cell phone. R. at 6–7. Thus, a search warrant was required before police officers could use a Berla retrieval device to extract Mr. Windsor's personal information. R. at 2. Contrary to the Government's contention, protections provided by *Riley* are not limited to searches incident to arrests. R. at 17. Because on-board computers are themselves effects protected by the Fourth Amendment, and because *Riley* stands for the proposition that all digital data is constitutionally protected, it is irrelevant the search here was not conducted incident to an arrest.[7] *Riley*, 573 U.S. at 403 ("The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.").

2. On-board vehicle computers are not "containers" within the meaning of the automobile exception.

Despite the government's assertions, *Riley* is extended to SVRs, and the automobile exception does not apply to them because they are not "containers." In *California v. Acevedo*, the Court further defined the limitations of the automobile exception and narrowed *Ross*[8] when it concluded "police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained." *Acevedo*, 500 U.S. at 580. A "container" is "any object capable of holding another object" and include "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as

[7] In *Riley*, the cell phone was seized incident to an arrest and the Court's holding was based on the fact that the concerns which justify a search incident to an arrest were not present. *Riley*, 573 U.S. at 401.

[8] The Court in *United States v. Ross* held if police had probable cause to believe a car contained evidence they could search anywhere in the car without limitations. *United States v. Ross*, 456 U.S. 798, 821–22 (1982).

luggage, boxes, bags, clothing, and the like." *New York v. Belton*, 453 U.S. 454, 472 (1981). Nowhere does the Court describe an electronic device as a container. Additionally, the Supreme Court stated in *Riley* that "treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained . . . ." *Riley*, 573 U.S. at 397. Other courts have also agreed analogizing a computer to a container is an oversimplification of the Fourth Amendment. *United States v. Carey*, 172 F.3d 1268, 1275 (10th Cir. 1999) (quoting Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH. 75, 104 (1994)); *United States v. Lucas*, 640 F.3d 168, 178 (6th Cir. 2011).

In *United States v. Camou*, the Ninth Circuit decided a cell phone was not a container for purposes of the automobile exception. *Camou*, 773 F.3d at 942–43. While transporting undocumented immigrants across a border checkpoint, Chad Camou was stopped by border patrol agents. *Id.* at 935. Once his illegal activities were discovered, Camou was arrested, and agents seized and searched his cell phone without a warrant to investigate the call log. *Id.* at 936. During the search agents found pornographic images of children. *Id.* Camou filed a motion to suppress the images as fruits of an unlawful search in violation of the Fourth Amendment and entered a conditional guilty plea to possession of child pornography. *Id.* He later appealed the denial of his motion to suppress and won. *Id.* The Ninth Circuit held cell phones were not containers for purposes of the vehicle exception, because there would be no "practical limit" as to what police could search on cell phones," giving "police officers unbridled discretion to rummage at will among a person's private effects." *Id.* at 942–43. The Court in *Riley* also vocalized this fear, and the search of Mr. Windsor's SVR data brought that fear to life. *Riley*, 573 U.S. at 393–94. In *Riley*, Justice Roberts discussed how digital data searches are physically unlimited unlike searches

of tangible items. *Id.* For searches of physical items, people would have to carry a trunk full of all their possessions to allow officers the same unlimited discretion. *Id.*

Here, the same anxieties discussed in *Camou* and *Riley* came to fruition when "investigators noticed that the vehicle's SVR had earlier recorded defendant entering a garage."[9] R. at 7. Not only was this beyond the scope[10] of the investigation, the footage "investigators noticed" encroached onto the Fourth Amendment's most protected area—the home.[11] R. at 2. In a way, an SVR is more similar to house than a container. Like a home, an SVR has layers upon layers of data, similar to rooms in a house, which can only be searched with a warrant particularly describing the places to be searched and the things to be seized. U.S. CONST. amend. IV. The Government argues officers were searching for evidence of reckless driving, but the record shows the unbridled search revealed much more than data related to the crash R. at 3. If the SVR were treated as a container, Mr. Windsor might as well divulge his darkest secrets to officers, as there would be no bounds as to how far the search could go. Therefore, the SVR, like a cell phone, has unlimited storage capabilities and is thus not a container that can be warrantlessly searched. R. at 3.

Further, the automobile exception is justified by the lower expectation of privacy people have in their vehicles and the mobility of vehicles which allows evidence to be easily concealed or removed. *Carroll*, 267 U.S. at 153; *California v. Carney*, 471 U.S. 386, 392 (1985). Mr. Windsor had a legitimate and well-recognized expectation of privacy in the data stored in his SVR, as the device was physically embedded within his personal vehicle and contained his personal data, much

[9] Mr. Windsor's garage is protected by the Fourth Amendment because it is within the curtilage of the home. *See United States v. Dunn*, 480 U.S. 294, 300 (1987) (defining "curtilage" as "the area immediately surrounding a dwelling house" that is also protected by the Fourth Amendment).
[10] *See* discussion *infra* Part B.
[11] *See Florida v. Jardines*, 569 U.S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.").

like a cell phone. *See Katz*, 389 U.S. at 351; *see generally Riley v. California*, 573 U.S. 373 (2014) (explaining the Court's preference for recognizing a legitimate expectation of privacy in digital data). The Government mistakenly contends SVRs are subject to extensive regulation, and thus, like cars under the automobile exception, have a reduced expectation of privacy. R. at 17. The fact that the SVR was in a vehicle, and is a heavily regulated device, is of no consequence to Mr. Windsor because "[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." 49 U.S.C.S. § 30101 (2005); *Riley*, 573 U.S. at 392. Therefore, the SVR in Mr. Windsor's automobile is not a "container" for purposes of the automobile exception and is instead its own effect protected by *Riley* and the Fourth Amendment.

3. No exigency existed to justify a warrantless search.

There was no exigency to justify the warrantless search of Mr. Windsor's SVR and bypass the requirements of both the Fourth Amendment and *Riley*. Despite the requirements of *Riley*, cell phones are not "immune from search." *Riley*, 573 U.S. at 376–77. Even though a warrant is generally required to search a cell phone, exigent circumstances may permit police to warrantlessly search a cell phone. *Id*. at 376–77. If exigent circumstances are present, "officers may make a warrantless search if: (1) they have probable cause to believe that the item or place to be searched contains evidence of a crime, and (2) they are facing exigent circumstances that require immediate police action." *Warden v. Hayden*, 387 U.S. 294, 298–301 (1967). Whether an exigency existed to justify a warrantless search or seizure is determined on a case-by-case basis, as there are no blanket rules for the exception. *Missouri v. McNeely*, 569 U.S. 141, 150 (2013). For a search to be reasonable under this exception, it must be limited in scope "so that it is strictly circumscribed by the exigencies which justify its initiation." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978).

In *Schmerber v. California*, Mr. Schmerber was convicted of the criminal offense of driving an automobile while under the influence of alcohol. *Schmerber v. California*, 384 U.S. 757, 758 (1966). To ensure evidence was not destroyed, police took a blood sample from Schmerber in the hospital to determine his blood alcohol content. *Id.* at 759. The test revealed Mr. Schmerber was extremely intoxicated and this evidence was introduced at trial. *Id.* This Court ultimately held the blood sample was constitutional under the Fourth Amendment because an officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence . . . .''' *Id.* at 771–72. This exigency was justified because the percentage of alcohol in blood diminishes shortly after the individual stops drinking. *Id.* Basically, the warrantless bodily intrusion was reasonable because there was an imminent risk of evidence being destroyed.

No such exigency exists here as it did in *Schmerber*. While the seriousness of the accident cannot be debated, the manner in which police acted after the accident occurred can. Here, police searched the SVR without a warrant at the scene of the accident. R. at 5. Any argument on behalf of the Government that police "had to treat the scene as if it was a crash investigation" so they did not have time to obtain a warrant is without merit and does not justify the decision to forgo obtaining a warrant. R. at 6. Today, police can even receive warrants over the phone in a matter of minutes. *See Steagald v. United States*, 451 U.S. 204, 222 (1981) ("[I]f a magistrate is not nearby, a telephonic warrant can usually be obtained."). At the time of search, the victims had already been taken to the hospital and everyone at the scene was cooperating, indicating police had, at the very least, a few minutes to obtain a warrant telephonically. R. at 5. Officer Seward stated, "that in vehicle collisions that involve fatalities, [police] try to investigate as thoroughly as possible" but at this point there were no known fatalities and the individuals who were injured

made a full recovery. R. at 6. Nothing in this scenario indicates there was any kind of exigency to justify the warrantless search of the SVR, or at a minimum, that police could not have gotten a telephonic warrant. If the police had obtained a warrant, and there is no indication they were unable to do so, only then would police have been permitted to search the SVR. Despite this Court's holding in *Johns*,[12] if an exigency truly had existed, police would not have waited until "two days later" to review the data they illegally retrieved from Mr. Windsor's vehicle. R. at 6. On the contrary, if police had thought there was a significant risk of the evidence on the SVR being destroyed or the vehicle being moved and evidence lost, then a warrantless search may have been permitted just as it was in *Schmerber*. However, that is not the case before this Court. Thus, no exigency existed, and a warrant was required to search Mr. Windsor's SVR.

B. Even If the Automobile Exception Applies, Officers Did Not Have Probable Cause to Search the Vehicle for Evidence of Reckless Driving.

Alternatively, if the Court decides to apply the automobile exception to the case at bar, the warrantless search was still unreasonable because police did not have probable cause to search the vehicle for reckless driving. Under the series of cases that make up the automobile exception, police can warrantlessly search a vehicle and the containers within it so long as they have probable cause to believe evidence of the crime will be found. *Carroll*, 267 U.S. at 149; *Acevedo*, 500 U.S. at 500. Probable cause is a "practical, nontechnical conception. In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are factual and practical considerations of everyday life on which reasonable prudent men, not legal technicians act." *Gates*, 462 U.S. at 231. Probable cause to search a vehicle exists when the objective facts in their totality would lead a reasonable person to believe evidence will be located

[12] *See* discussion *supra* Part I.

in the vehicle. *Carroll,* 267 U.S. at 149. However, in order for there to be "probable cause to believe that evidence of a crime is located within an automobile, there must first be probable cause to believe that a crime has occurred." *State v. West,* 548 S.W.3d 406, 419 (Mo. App. W.D. 2018).

In *State v. West,* a semi-truck driver was charged with manslaughter after his involvement in a car accident. *Id.* at 409. While West was in the hospital being treated for his injuries, officers searched the Electronic Control Module ("ECM")[13] in the truck to search for data to investigate the accident. *Id.* at 410. There was a debate on whether West consented to the search, but he argued the search of the ECM was unconstitutional because he had a legitimate expectation of privacy in the ECM, meaning officers needed a warrant. *Id.* at 416. The Missouri Court of Appeals upheld the lower court's decision based partly on the fact that the automobile exception did not apply because officers searched the vehicle to determine if a crime had occurred, and not for evidence of a specific crime. *Id.* at 419. The court was unwilling to extend the automobile exception to "permit a warrantless search of an ECM to determine whether a crime was committed" because "[t]o do so would emasculate the Fourth Amendment's protection of vehicles from unreasonable searches and seizures." *Id.* at 410.

West is instructive here. In this case, the evidence cited by the Government does not lend support to a finding of probable cause to search the vehicle because it does not indicate Mr. Windsor was "potentially driving hazardously." R. at 5. When officers arrived on the scene, Mr. Windsor, to the best of his ability, explained to officers that he and his passenger, Mr. Freidel, turned around the bend and tried to swerve away when they saw the other car. R. at 5. Another officer spoke with Mr. Freidel who candidly stated he "did not see much because he had been

[13] "The ECM is like the brain of the truck. It controls all the functions of braking, throttle, transmission." *West,* 548 S.W.3d at 411.

texting." R. at 5. The officers also interviewed the driver of the oncoming vehicle who said Mr. Windsor "quickly moved into his lane before swerving back to the other." R. at 5. After the search of the SVR occurred, Officer Seward explained "because a witness stated that the defendant was driving recklessly and evidence from the roadway displayed as such, [officers] believed that the defendant had been speeding at the time of the collision and that evidence of his reckless driving would be within the vehicle's recorded data . . . ." R. at 6. The Government further explained "officers had probable cause to believe the data would reveal evidence of a crime." R. at 3. This is the same conduct the Missouri Court of Appeals in *West* determined ran afoul of the requirements of the automobile exception because a search cannot take place to determine if a crime has been committed, but only to determine if evidence of a crime is in the vehicle. *West*, 548 S.W.3d at 410. Officers also stated the "vehicle seemed to have video footage which would clearly show that Defendant was driving recklessly." R. at 3. This contradicts the purposes of the Fourth Amendment, because the ends of an illegal search do not justify the unlawful means in which it is conducted.

Most concerning to this Court is there is little evidence in the record to support these statements which the Government used to justify their illegal search. This Court will not find any statement in the record where a witness stated the defendant was driving recklessly. The statements given to officers at the scene of the accident were ambiguous at best and indicate the crash was purely an accident. R. at 5. This does not amount to probable cause and is a conclusory determination on the part of the Government. There is also no evidence in the record to indicate what the physical conditions of the road were after the accident. The only physical evidence of the crash noted in the record is the condition of the Camry. R. at 6. Based solely on the witness' elusive statements, police conducted a warrantless search to decide if a crime had been committed, not for evidence

of the crime alone. R. at 3. The automobile exception is far reaching, but it does not reach that far. Like *West*, probable cause did not exist to justify the warrantless search of the electronic device in Mr. Windsor's vehicle for evidence of a crime.

1. Even if the Court holds the officers had probable cause to search the SVR, the scope of the search was impermissibly broad.

The warrantless search exceeded the permissible scope of a search conducted pursuant to the automobile exception. In *Carroll*, the Court did not address the scope of searches that would be permissible under the automobile exception. *Carroll*, 267 U.S. at 800. The Court later clarified this issue in *Ross* and held "the scope of a warrantless search based on probable cause is no narrower-and no broader-than the scope of a search authorized by a warrant supported by probable cause." *Id.* at 822. This necessitates a particularity requirement to be met for warrants which describes what the officers are looking for and where they will look for it. U.S. CONST. amend. IV. However, the scope of a search may change if electronic devices are found within the vehicle, and *Riley* signals that the Court will favor privacy interests in digital data when there is little justification for a warrantless search. Dylan Bonfigli, *Get A Warrant: A Bright-Line Rule for Digital Searches Under the Private-Search Doctrine*, 90 S. CAL. L. REV. 307, 318 (2017). This is a newer issue in Fourth Amendment jurisprudence that has left the courts to grapple over how officers are to identify what they are looking for on electronic devices. The Ninth Circuit, however, provided a solution in 1982. *See generally United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982) (holding documents which are not subject to seizure should be segregated to prevent a limited search from becoming a general search).

United States v. Tamura predated the dawn of the digital age, but the Ninth Circuit nevertheless set forth suggestions and procedures for the future. *Id.* at 595–96. The court determined that "in the comparatively rare instances where documents are so intermingled that

they cannot feasibly be sorted on site, . . . the Government [should] seal[] and hold[] the documents pending approval by a magistrate of a further search . . . ." *Id.* Twenty-eight years later in *United States v. Comprehensive Drug Testing*, the court confronted the issue of determining the scope of a search on an electronic document and applied *Tamura's* framework to a digital spreadsheet. *United States v. Comprehensive Drug Testing Inc.*, 621 F.3d 1162, 1170–71 (9th Cir. 2010). In 2002, the government commenced an investigation into a lab that was suspected of providing steroids to professional athletes. *Id.* at 1166. After a few test results indicated a group of athletes tested positive for banned substances, the government obtained a search warrant for the lab facility. *Id.* The warrant was limited only to the ten players the government had probable cause to believe tested positive for banned substances. *Id.* at 1168. When the warrant was executed, the government seized the records of hundreds of players by downloading electronic copies directly from the computer. *Id.* Rather than segregating the data police had probable cause to search for, they searched the entire directory. *Id.* at 1170. The court condemned the search because "the Government demonstrated a callous disregard for the rights of those persons whose records were seized and searched outside the warrant." *Id.* at 1169–70. The takeaway from *Comprehensive Drug Testing Inc.* is that an electronic copy of a spreadsheet had distinct zones of privacy that the paper copy didn't, making each zone of the electronic copy entitled to its own Fourth Amendment protections. Josh Goldfoot, *The Physical Computer and the Fourth Amendment*, 16 BERKELEY J. CRIM. L. 112, 116 (2011).

Like the spreadsheet in *Comprehensive Drug Testing Inc.*, the SVR in Mr. Windsor's car has distinctive zones of privacy. If the Court determines police did in fact have probable cause to search the vehicle (and the SVR), the search should have stopped when they discovered the accident data. This is because the SVR can hold more information than just data related to the

crash, just like the spreadsheet in *Comprehensive Drug Testing Inc*. contained information in excess of what the police had probable cause to search for. R. at 6. The Government claims they had "probable cause to believe the data would reveal evidence of a crime." R. at 3. However, the evidence in the record does not support a finding of probable cause for data related to Mr. Windsor's crime of arrest. When reviewing the evidence from the crash, "investigators noticed that the vehicle's SVR had earlier recorded Defendant entering a garage." R. at 7. At this point, officers should have ceased viewing the footage altogether because it exceeded the scope of evidence officers allegedly had probable cause to search for. R. at 3. Instead, the "investigator then examined the location data stored on the vehicle's computer" in further violation of Mr. Windsor's constitutional rights to "determine that [the] garage from the SVR security-mode video was attached to Defendant's home residence." R. at 7.

This search constituted a further constitutional violation not only because officers did not have probable cause to search for this additional data, but because of this Court's recent holding in *Carpenter*. In *Carpenter*, this Court ruled individuals have a legitimate expectation of privacy in their physical movements as captured through cell-site location information, which is a form of location data. *Carpenter*, 138 S. Ct. at 2217. The location data obtained illegally from the SVR gave police access to Mr. Windsor's location and led them to his home, which is a *prima facie* violation of *Carpenter*. *Id.* Thus, the SVR has distinct zones of privacy and the warrantless search of its data, including the location data, exceeded the scope of the evidence officers claim they had probable cause to search for.

2. Warrantless searches of on-board vehicle computers have the potential to violate the constitutional rights of people who are not a party to the suit.

Another concern with warrantless searches of electronic devices is the potential they have to impact the constitutional rights of others not involved in the investigation. As a result of the

role electronics play in our everyday life, "people now have personal data that are stored with that of innumerable strangers." *See Comprehensive Drug Testing Inc.*, 621 F.3d at 1176 ("Seizure of, for example, Google's email servers to look for a few incriminating messages could jeopardize the privacy of millions."). *Riley* also addressed this concern in the context of cell phones where "the data viewed on many modern cell phones may in fact be stored on a remote server," meaning a search can go well beyond the proximity of the device officers are searching. *Riley*, 573 U.S. at 376. If the government intrudes into individuals' personal devices to obtain data, it has the "potential to expose exceedingly sensitive information about countless individuals not implicated in any criminal activity, who might not even know that the information about them has been seized and thus can do nothing to protect their privacy." *Comprehensive Drug Testing Inc.*, 621 F.3d at 1177. This is a particular concern with Berla devices because of their ability to extract vast amounts of data including "call history, contacts, music preferences, social media data, text messages, and more."[14] Beggin, *supra* at 6. The problem is "[t]here is no way to be sure exactly what an electronic file contains without somehow examining its contents . . . ." *Comprehensive Drug Testing Inc.*, 621 F.3d at 1176. This means *Tamura* must apply to electronic devices and officers must segregate data that is seizable from data that is not, exerting "greater vigilance . . . in striking the right balance between the government's interests in law enforcement and the right of individuals to be free from unreasonable searches and seizures." *Id.* at 1177.

Here, a Berla device was used to extract the data from Mr. Windsor's SVR. R. at 5. A Berla extraction tool has the capacity to access data from previously connected devices containing

[14] "In a podcast interview reported by the Intercept, Berla founder Ben LeMere said the company recovered such data from 70 phones after connecting to a single Ford Explorer rental car at Baltimore's airport." Beggin, *supra* at 22.

data belonging to an immeasurable number of people beyond just the owner of that device. R. at 6. This is concerning because as the Ninth Circuit suggested, obtaining this information could violate the constitutional rights of anyone who has ever connected their device to Mr. Windsor's car and deprive them of an opportunity to defend themselves. *Comprehensive Drug Testing Inc.*, 621 F.3d at 1177. Further, the device retrieved footage recorded within the curtilage of Mr. Windsor's home, which could also implicate the privacy rights of anyone else who lived at the residence. R. at 7. Essentially, the warrantless search of Mr. Windsor's SVR was unreasonable and has the potential to impact the constitutional rights of many other individuals in violation of the Fourth Amendment.

C. The Fourth Amendment Requires an Individual's Privacy Interests to be Balanced with the Purposes of a Warrant Exception Before It Is Extended to a New Scenario.

The automobile exception cannot automatically extend to the case at bar because this Court must thoroughly review a new application of the exception to its purposes. *Florida v. Royer*, 460 U.S. 491, 500 (1983). To determine whether an exception to the warrant requirement is applicable to a given situation, the Court should assess "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The automobile exception is justified by the need of the government to warrantlessly search vehicles because of their mobility and susceptibility to regulation. *Carroll*, 267 U.S. at 153; *Carney*, 471 U.S. at 392. These governmental interests are important, but an individual's privacy interests in their personal data outweighs any need of the government to warrantlessly intrude into their vehicle's devices in search of evidence. The individual privacy interests at stake are substantial given that cell phones (and other electronic devices) can "place vast quantities of personal information literally in the hands of individuals." *Riley*, 573 U.S. at 386. The

"automobile exception is not a categorical one that permits the warrantless search of a vehicle anytime," and the purposes of the exception cannot justify a warrantless search of an electronic device. *Collins v. Virginia*, 138 S. Ct. 1663, 1667 (2018).

Additionally, the Fourth Amendment "is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." *Carroll*, 267 U.S. at 284. The Fourth Amendment was enacted to protect the people from widespread exploratory searches of the home, so a widespread exploratory search of an electronic device would likely be deemed unreasonable by the framers as well. *Maryland v. Garrison*, 480 U.S. 79, 84 (1987). The search in this case does not further the purpose of the Fourth Amendment. Even if requiring a search warrant for on-board vehicle computers means impeding the efforts of law enforcement, the Fourth Amendment must be scrupulously adhered to in order to protect the privacy rights of individuals. *See Steagald*, 451 U.S. at 222 ("Any warrant requirement impedes to some extent the vigor with which the Government can seek to enforce its laws, yet the Fourth Amendment recognizes that this restraint is necessary in some cases to protect against unreasonable searches and seizures."). The Court in *Riley* acknowledged this concern and affirmatively consented to the hardship *Riley's* holding may place on police. *See Riley*, 573 U.S. at 401 ("We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.").

Here, the warrantless search was a direct assault on the Fourth Amendment. If police were permitted to use Berla devices to search an on-board vehicle computer without a warrant, the

Fourth Amendment would cease to exist. The amount of data electronic devices like a cell phone or SVR can hold is limitless, and Berla devices allow for a thorough and invasive search of every inch of data within these devices. This is directly akin to a widespread exploratory search of a home, which is the chief evil against which the Fourth Amendment was intended to protect. *Payton v. New York*, 445 U.S. 573, 585 (1980). The search of Mr. Windsor's SVR was certainly exploratory, as it revealed personal data recorded at Mr. Windsor's home some time before the accident. R. at 2. To make matters worse, the data extricated from Mr. Windsor's SVR was not searched until two days after it was received, indicating there was ample time to obtain a warrant. R. at 2. If the Court determines the automobile exception applies, this length of time is likely to be considered reasonable. *See Johns*, 105 S. Ct. at 888 (holding a search of a vehicle's contents three days after it was seized was reasonable). However, because the automobile exception cannot automatically extend to this case, the search of the data two days after it was extracted indicates the interests of law enforcement were not so important that the data needed to be warrantlessly extracted. Mr. Windsor's privacy interests in the data on his SVR were simply too important to be overcome by the Government's improper use of the automobile exception as a Fourth Amendment hall pass. Allowing the automobile exception to apply to the case would create a slippery slope for future cases, as there would hardly be any kind of data beyond the reach of police officers.

Ultimately, the automobile exception does not apply to this case. The Court was clear in its holding in *Riley* that digital data is to be protected and a warrant is required to search electronic devices. *Id.* Today, *Riley's* holding applies to on-board vehicle computers. Even if the Court chose to apply the automobile exception, officers did not have probable cause to conduct the search and the search was impermissibly broad. Lastly, because the automobile exception cannot be

extended to this case due to the substantial privacy interests at stake, the evidence obtained from the SVR and its derivative evidence which led to Mr. Windsor's indictment should be suppressed under the exclusionary rule. The answer to the first question presented by this Court can be summed up with the Court's closing line in *Riley*: "get a warrant." *Riley*, 573 U.S. at 403.

II. A FELONY GUILTY PLEA ACCEPTED BY A MAGISTRATE JUDGE IS INVALID UNDER THE FEDERAL MAGISTRATES ACT, THE CONSTITUTION, AND FEDERAL RULE OF CRIMINAL PROCEDURE 59(b).

Article III of the Constitution vests the judicial power in "one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. The judicial power of the U.S. "must be exercised by courts having the attributes described in Art. III," which does not include magistrate judges because they are governed by Article I. *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982); 21 U.S.C. § 631–39. Article III judges are the exclusive members of the Judicial Conference of the United States, which determines "the number of magistrate positions for each district" which protects against "the designation of so many magistrates that effective judicial control is lost." 28 U.S.C. § 633(b); *Pacemaker Diagnostic Clinic of Am. Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir. 1984). Within the powers granted to the judiciary by Article III, district court judges are "permitted a degree of control and discretion for the design and shape of [their] own system. The Magistrates Act implements this constitutional authority." *Id.*

In 1968, Congress enacted the Federal Magistrates Act ("FMA") to relieve the growing and "overwhelming caseload" burden of many district courts. *United States v. Kahn*, 774 F. Supp. 748, 750 (E.D.N.Y. 1991). The FMA defines the scope of a magistrate's duties and "added provisions that [give] magistrate judges the authority to oversee minor offenses," and perform duties such as jury selection and plea colloquies. *United States v. Garcia*, 936 F.3d 1128, 1134

(10th Cir. 2019); *United States v. Peretz*, 501 U.S. 923, 931–33 (1991). Section 636(b)(3) of the FMA, also known as the additional duties clause, permits district courts to assign to magistrate judges "additional duties as are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). Constitutional in this sense means that magistrates can perform additional duties not enumerated in the statute so long as "those duties have not been held to be within the sole domain of Article III judges, such as presiding over felony trials." Joshua R. Hall, *The FMA and the Constitutional Validity of Magistrate Judges' Authority to Accept Felony Guilty Pleas*, 38 CAMPBELL L. REV. 131, 136 (2016) (citing *Gomez v. United States*, 490 U.S. 858, 872 (1989)).

A. A Magistrate Judge Does Not Have Any Kind of Authority to Accept a Defendant's Felony Guilty Plea.

The scope of a magistrate judge's authority is a complex matter that has led to a circuit split over whether a magistrate can accept a felony guilty plea under the additional duties clause of the FMA. *United States v. Harden*, 758 F.3d 886, 891 n.1 (7th Cir. 2014). The Fourth, Tenth, and Eleventh Circuits are in the majority holding magistrate judges may accept felony guilty pleas with the consent of a defendant. *United States v. Benton*, 523 F.3d 424, 433 (4th Cir. 2008); *United States v. Woodard*, 387 F.3d 1329, 1333 (11th Cir. 2004); *United States v. Ciapponi*, 77 F.3d 1247, 1251 (10th Cir. 1996). The Seventh Circuit is in the minority but correctly holds magistrate judges may not accept felony guilty pleas, even with consent. *Harden*, 758 F.3d at 888. This is due to the simple fact that felony guilty pleas are too important to be designated to magistrate judges and must remain within the power of Article III judges. Furthermore, statutory interpretation of the FMA is a question of law reviewed *de novo*. *United States v. Ray*, 375 F.3d 980, 988 (9th Cir. 2004).

1. A felony guilty plea is analogous to a federal jury trial which is exclusively reserved for Article III judges.

Magistrate judges are not permitted to accept felony guilty pleas under Article III because they are extremely similar to jury trials, making them too important to be designated to magistrates. In 1989, the Supreme Court held a magistrate judge does not have the authority to preside over a felony trial because the FMA explicitly says magistrates have the authority to preside over civil and misdemeanor matters and makes no mentions of felony trials. *Gomez v. United States*, 490 U.S. 858, 871–72 (1989). Thus, Congress implicitly withheld the authority of magistrates to conduct felony trials. *Id.* at 872; *see Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 80 (2002) (explaining the statutory canon of *expressio unius est exclusion alterius* which means "expressing one item of [an] associated group or series excludes another left unmentioned") (internal quotation marks omitted). Therefore, magistrates are only permitted to assist district court judges by issuing a report and recommendation for the plea after conducting the plea colloquy. FED. R. CRIM. P. 59(b).

In *Harden*, the Seventh Circuit allowed Mr. Harden to withdraw his guilty plea after consenting to its acceptance by a magistrate because the acceptance was unconstitutional and usurped the power delegated to district court judges under Article III. *Harden*, 758 F.3d at 887. Essentially, the court equated a felony guilty plea with the importance of conducting a felony trial which magistrates are not permitted to conduct, "even with consent." *Id.* at 889. The Court asserted "a guilty plea is even more final than a guilty verdict," because "[o]nce a defendant's guilty plea is accepted, the prosecution is as at the same stage as if a jury had just returned a verdict of guilty after a trial." *Id.* Ultimately, by accepting the felony guilty plea, even with Harden's consent, the magistrate judge violated the FMA and Harden did not waive his objection to the acceptance of the plea. *Id.*

Here, Mr. Windsor finds himself in a situation nearly identical to that of Mr. Harden. Mr. Windsor moved in the district court, pursuant to Rule 11(d)(1), to withdraw his guilty plea because "a magistrate judge is unable to accept a plea agreement" under the FMA and Rule 59. R. at 8. Under section (d)(1), a guilty plea can be withdrawn "before the court accepts the plea, for any reason, or no reason." FED. R. CRIM. P. 11(d)(1). Under section (d)(2), after the court accepts the plea and before it imposes a sentence, a defendant may withdraw their plea if the court rejects a plea agreement under Rule 11(c)(5) or if "the defendant can show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2)(A)–(B). Just like *Harden*, Mr. Windsor's felony guilty plea is analogous to a federal jury trial, and the magistrate should not have been permitted to accept this plea under the Constitution. Additionally, Mr. Windsor correctly points out that under Article III, a magistrate judge cannot accept a felony guilty plea. R. at 12. Thus, Mr. Windsor may withdraw his plea under section (d)(1) because it was not properly accepted and is not binding. *Harden*, 758 F.3d at 887.

Even if the Court holds the plea was properly accepted by the magistrate, Mr. Windsor may still withdraw his plea under section (d)(2). When a court is considering a motion to withdraw a guilty plea before sentencing, it "must consider: '(1) whether the defendant has asserted a viable claim of innocence; (2) whether the delay between the guilty plea and the motion to withdraw has substantially prejudiced the government's ability to prosecute the case; and (3) whether the guilty plea was somehow tainted.'" *United States v. Tolson*, 372 F. Supp. 2d 1, 9 (D.D.C. 2005) (citing *United States v. West*, 392 F.3d 450, 458 (D.C. Cir. 2004)). Mr. Windsor, through his motion to suppress, has certainly asserted a claim of innocence. R. at 4. Under the fruit of the poisonous tree doctrine, if the evidence obtained in violation of the Fourth Amendment is suppressed, the derivative evidence which this case rests upon would also be suppressed. *Silverthorne Lumber*

Co., 251 U.S. at 392. Further, Mr. Windsor did not delay in withdrawing his plea because he filed his motion to withdraw shortly after entering the plea agreement. R. at 7. Finally, the guilty plea was tainted and is not binding because only an Article III judge may accept a guilty plea.

Even with consent, Mr. Windsor did not waive his right to have an Article III judge accept his plea. Typically, "waiver is a knowing and intentional relinquishment of a right, . . . but Article III power cannot be waived by consent." *United States v. Knox*, 540 F.3d 708, 713 (7th Cir. 2008); *Garcia*, 936 F.3d at 1141. Because a defendant cannot "transfer power away" from the judiciary, "notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Garcia*, 936 F.3d at 1141; *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 834, 852 (1986).[15] Even though Mr. Windsor affirmatively consented to the magistrate's acceptance of the plea, his consent is irrelevant because he did not possess the authority to authorize this unconstitutional act. R. at 7. Therefore, "when a federal judge or tribunal performs an act of consequence that Congress has not authorized, reversal on appeal may be appropriate even if the defendant has waived the issue or otherwise consented." *Harden*, 758 F.3d at 890 (citing *Rivera v. Illinois*, 556 U.S. 148, 161 (2009)). Thus, Mr. Windsor may withdraw his plea for any reason under Rule 11(d)(1).

2. A magistrate judge may not accept a felony guilty plea under the guise of the Federal Magistrate Act's additional duties clause.

The additional duties clause is not a vessel magistrates can use to justify accepting a felony guilty plea. The mere fact that magistrate judges "are empowered to take on more responsibility under the additional duties clause does not mean this power is unlimited." *Garcia*, 936 F.3d at

[15] *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("[T]here is a presumption against the waiver of constitutional rights . . . .").

1136. This Court has recognized two approaches to determine whether an act falls under the additional duties clause of the FMA. First, in *Peretz*, whether an act falls under the additional duties clause depends on if it is "comparable" to the enumerated proceedings in the FMA. *Peretz*, 501 U.S. at 933. The Court in *Gomez*, however, held that whether an act falls under the additional clause depends on if the matter is dispositive or nondispositive, determining that dispositive matters should be adjudicated by an Article III judge. *Gomez*, 490 U.S. at 873–74. Regardless of the approach used, the acceptance of a felony guilty plea is not an enumerated duty under the FMA and is too significant of an undertaking to be delegated to magistrates. *Harden*, 758 F.3d at 888.

In *Harden*, the court stressed that "unlike the preliminary nature of *voir dire*—which is an important, but preliminary, juncture that will be followed by numerous other substantive opportunities to contest the government's evidence, case, and conduct . . . the acceptance of a guilty plea is dispositive." *Id.* at 889. The court further explained a felony guilty plea "results in a final consequential shift in the defendant's status" and "is a task too important to be considered a mere 'additional duty' permitted under § 636(b)(3): it is more important than the supervision of a civil or misdemeanor trial, or presiding over *voir dire.*" *Id.* at 888–89. Thus, the interpretation of the additional duties clause cannot be stretched to reach acceptance of felony guilty pleas, even with a defendant's consent." *Id.* at 888.

Here, Mr. Windsor engaged in a plea colloquy with magistrate Judge Thorfinson who said, "you understand that I am a magistrate judge, not a district judge, and that by signing this waiver and consent, if I accept your plea agreement, that it is final, correct?" R. at 7. No party contends the colloquy was defective, but this should have been the only plea-related conduct the magistrate engaged in with Mr. Windsor. Instead, the magistrate judge improperly accepted Mr. Windsor's felony guilty plea. R. at 7. The acceptance of the plea, even with affirmative consent, was an

extreme exercise of authority and is unsupported by even the most strained interpretation of the additional duties clause. Therefore, "the appropriate decision would be to find that while a magistrate can report and recommend the acceptance of a guilty plea . . . the final determination should rest solely with the District Judge . . . ." R. at 22. Thus, the authority of magistrates extends only to the plea colloquy, not the acceptance of felony guilty pleas.

B. Even if the Court Finds Magistrate Judges Have the Authority to Accept Felony Guilty Pleas Under the Federal Magistrates Act, this Authority is Limited by Federal Rule of Criminal Procedure 59(b).

Rule 59 further bolsters the conclusion that accepting felony guilty pleas is beyond the scope of authority of magistrate judges. Rule 59(b) states for dispositive matters, "[a] district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary." FED. R. CRIM. P. 59(b).

Unlike dispositive matters, magistrate judges have the authority to hear and determine nondispositve matters without making a report or recommendation for the district judge. FED. R. CRIM. P. 59(a). A matter is not dispositive if it does not dispose of a party's claim or defense. *Id.* For example, a plea colloquy is not dispositive because it is merely procedural. *Benton*, 523 F.3d at 431; Tomi Mendel, *Efficiency Run Amok: Challenging the Authority of Magistrate Judges to Hear and Accept Felony Guilty Pleas*, 68 VAND. L. REV. 1795, 1797 n.5 (2015) ("A Rule 11 colloquy is the procedure, drawn from FED. R. CRIM. P. 11, by which a court must assess the factual basis, voluntariness, and knowingness of a criminal defendant's guilty plea."). Magistrate judges have the authority to conduct plea colloquies with the consent of the litigant and no circuit has held

otherwise. *Benton*, 523 F.3d at 431. Some courts have held Rule 11 colloquies are like other tasks performed by magistrates because, "the defendant's guilt or innocence is not being contested," so the magistrate judge performs more of an administrative rather than an adjudicatory function. *Khan*, 774 F. Supp. at 752. This delegation of authority to conduct Rule 11 plea colloquies unclutters district court dockets of a "time consuming exercise" that is "less complicated than a number of duties the Magistrates Act specifically authorizes magistrates to perform." *Id*. at 749; *United States v. Williams*, 23 F.3d 629, 632 (2d Cir. 1994).

On the other hand, plea acceptances are dispositive. *See Garcia*, 936 F.3d at 1141 ("The acceptance of a felony guilty plea is a dispositive matter . . . ."). Dispositive matters dispose of a party's claim or defense and typically encompass more serious matters such as a guilty plea or a motion for summary judgment. FED. R. CRIM. P. 59(b). Some courts have argued because "plea acceptance involves none of the complexity of a plea colloquy," magistrate judges obviously have the authority to accept a guilty plea under the additional duties clause. *See Benton*, 523 F.3d at 431 ("[T]he acceptance of a plea is merely the natural culmination of a plea colloquy."); *see also United States v. Arami*, 536 F.3d 479, 482–83 n.1 (5th Cir. 2008) ("[T]he Fourth Circuit likely would rule that when a defendant consents to having a magistrate judge perform the plea colloquy and accept the plea, the court has accepted the plea for purposes of Rule 11(d)(1) once the magistrate judge completes the plea colloquy."). However, other circuits have correctly stated that when a Rule 11 hearing is conducted by a magistrate, the plea acceptance occurs *only* when the district judge adopts the magistrate's recommendation, indicating a magistrate judge must make a report and recommendation to the district court rather than accepting the plea. *United States v. Torres-Rosario*, 447 F.3d 61, 67 (1st Cir. 2006); *United States v. Reyna–Tapia*, 328 F.3d 1114, 1119–22 (9th Cir. 2003) (en banc); *United States v. Torres*, 258 F.3d 791, 796 (8th Cir. 2001);

United States v. Dees, 125 F.3d 261, 265 (5th Cir. 1997); *Williams*, 23 F.3d at 631–34. A felony guilty plea is certainly a dispositive matter. *See Garcia*, 936 F.3d at 1141 ("The acceptance of a felony guilty plea is a dispositive matter, finding the criminal defendant guilty of the crimes charged and disposing of the matter before the court. It is a final judgment against the defendant—the same final judgment that would have issued had a jury of his peers found him guilty."); *see also Harden*, 758 F.3d at 889 ("[T]he acceptance of a guilty plea is dispositive.").

In *Garcia*, the Tenth Circuit struggled with the possibility of overruling binding precedent within its circuit, but ultimately adopted the view that a felony guilty plea is a dispositive matter that may be accepted by a magistrate if the defendant consents. *Garcia*, 936 F.3d at 1139. The conflict was that *Ciapponi*, a Tenth Circuit case, stands for the proposition that "with a defendant's express consent, the broad residuary 'additional duties' clause of the [FMA] authorizes a magistrate judge to conduct a Rule 11 plea proceeding . . . ." *Ciapponi*, 77 F.3d at 1251. Had the court not been bound by *Ciapponi*, it signaled it would have ruled otherwise because it was "persuaded that the acceptance of a felony guilty plea is in fact a dispositive matter" because "it is a final judgment against the defendant—the same final judgment that would have issued had a jury of his peers found him guilty." *Garcia*, 936 F.3d at 1140–41. The Tenth Circuit also recognized that Rule 59 speaks of decisions that "dispose of a charge or offense." *Garcia*, 936 F.3d at 1140. In essence, "a guilty plea does exactly that." *Id*. Thus, *Garcia* reinforces that Rule 59(b) requires a magistrate to submit a report and recommendation to the district judge for dipositive matters, leaving the acceptance of felony guilty pleas to the district court. FED. R. CRIM. P. 59(b). This is consistent with the separation of powers doctrine and prevents the magistrate from encroaching onto the district judge's authority. *See infra* Part C. Thus, even if the Court held magistrates do have the authority to accept a plea under the additional duties clause of the FMA, "this authority

is limited by Rule 59" and the magistrate must issue a report and recommendation to comply with Rule 59(b)(1). *Garcia*, 936 F.3d at 1140.

Here, Mr. Windsor argues a felony guilty plea is a dipositive matter, permitting him to withdraw his plea agreement for any reason under Rule 11(d)(1) because the magistrate improperly accepted the plea. R. at 8. Mr. Windsor is correct that a felony guilty plea is a dispositive matter because it effectively authorizes a judgment to be entered without a jury trial and closes the case. These types of matters fall only within the purview of an Article III judge and requires a magistrate to make a recommendation to the district judge before the plea can be accepted, even if the defendant consented to the magistrate's jurisdiction. R. at 7. This is not to say that magistrates do not play an integral role in easing the burden of overwhelming caseloads in the courts, but plea acceptance, no matter how hard one may try to stretch the bounds of the Constitution or the FMA, does not fall within the realm of congressionally authorized authority of magistrate judges. As Judge Beauregard urged on appeal, this Court should find the "final determination" of a guilty plea should rest with the district judge. R. at 22. As such, Mr. Windsor may withdraw his plea for any reason pursuant to Rule 11(d)(1) because a felony guilty plea is a dispositive matter which magistrate judges do not have the power to accept.

C. A Strained Interpretation of the Additional Duties Clause Would Frustrate the Framers' Intent and Erode the Constitution.

Delegating plea acceptance to magistrates raises several constitutional concerns. Throughout the Constitution, the Founding Fathers speak of the importance of the right to be adjudicated. U.S. CONST. amend. IV, V, VI, VIII. Specifically, the Constitution predominantly contemplates adjudication by an Article III judge. U.S. CONST. art. III. The judiciary was "designed by the Framers to stand independent . . . [and] maintain the checks and balances of the constitutional

structure . . . ." *Northern Pipeline Const. Co.*, 458 U.S. at 58. On the other hand, magistrates are creatures of the legislature and do not possess the same authority as an Article III judge despite the efforts of some courts to extend this authority to them via strained interpretations of the FMA and Constitution. *Gomez*, 490 U.S. at 865; *Benton*, 523 F.3d at 432 (allowing a magistrate to accept a felony guilty plea because there were no alleged constitutional issues); *Woodard*, 387 F.3d. at 1332 (alleging magistrates can accept a felony guilty plea because it is less complex than other enumerated duties). Because their authority is not derived from the Constitution, "magistrate judges do not bear the indicia of political independence that are characteristic of Article III adjudicators." Tomi Mendel, *Efficiency Run Amok: Challenging the Authority of Magistrate Judges to Hear and Accept Felony Guilty Pleas*, 68 VAND. L. REV. 1795, 1799 (2015). Accordingly, it is imperative the additional duties clause of the FMA "not be interpreted in terms so expansive that the paragraph overshadows all that goes before." *Gonzalez v. United States*, 553 U.S. 242, 245 (2008). An expansive interpretation of the FMA and its contents is a major threat to the Constitution, and the Seventh Circuit is the only circuit to show an interest in preserving the powers delegated to Article III judges. *Harden*, 758 F.3d at 888. If the Framers had meant for magistrates to overtake the judiciary, they would have said as much in Article III.

Even if the Court finds magistrates may accept a felony guilty plea under the FMA, there are other individual and constitutional rights at stake that may not be delegated to magistrates. A felony guilty plea "is a waiver of important constitutional rights designed to protect the fairness of a trial." *Johnson v. Ohio*, 419 U.S. 924, 925 (1974). While a defendant certainly has the power to waive their right to be adjudicated by an Article III judge, "the same is not true of structural separation-of-powers protections." Mendel, *supra* 1807 at 37. The strained interpretation of the additional duties clause the majority of circuit courts support insults the Constitution by permitting

defendants to transfer power away from the judiciary and into the hands of the legislature through magistrates and their acceptance of pleas. *See Garcia*, 936 F.3d at 1142 (referencing Article III judges by explaining how a criminal defendant may not "authorize the transfer of power away from an independent branch of government"). This is unlawful because magistrates are "prohibited from encroaching on the constitutionally granted powers of the Article III judiciary." Mendel, *supra* 1807 at 25. To prevent this, Article III judges must retain control over the most crucial aspects of judicial power and refuse to delegate them to magistrates. *Crowell v. Benson*, 285 U.S. 22, 51 (1932).

In *United States v. Dees*, Janet Dees plead guilty to bank fraud and later appealed her sentence. *Dees,* 125 F.3d at 262. By its own motion, the court raised and rejected a jurisdictional challenge to the conviction because a magistrate judge presided over the plea proceedings. *Id.* Nonetheless, the Fifth Circuit observed "[i]n 1991, the Judicial Conference's Committee on the Administration of the Magistrate Judges System rejected a proposal to endorse magistrate judges' taking of guilty pleas." *Id.* at 263. The Committee expressed the view that "judicial duties in critical stages of a felony trial, particularly the acceptance of guilty pleas . . . are fundamental elements of the authority of district judges under Article III . . . ." *Id.* The court further explained the delegation of authority from an Article III judge to a magistrate must be done so as not to upset the "constitutional balance of power." *Id.* at 267. Therefore, "[t]hese duties . . . should not be delegated to magistrate judges as a matter of policy, regardless of whether the parties consent to the delegation." *Id.*

Here, when Magistrate Judge Thorfinson accepted Mr. Windsor's felony guilty plea the constitutional balance of power was disturbed because a magistrate judge was "exercising the judicial power of the United States" and rendering a final judgment" when "[t]his judicial power

is exclusively vested in Article III courts." *Garcia*, 936 F.3d at 1141. This power cannot be given away by a defendant. *Id.* Therefore, Mr. Windsor's consent to the magistrate's acceptance of his plea is invalid because he does not possess the authority to transfer this kind of power. R. at 7. Lastly, Mr. Windsor's motion to withdraw his plea is not asking for a "dry run or dress rehearsal," since the magistrate never had the authority to accept the plea in the first place. *Benton*, 523 F.3d at 432.

Ultimately, this Court should hold the acceptance of Mr. Windsor's plea was invalid because "[t]he 'slippery slope' scenario here is easy to envision. District courts might begin by delegating small felony trials to magistrate judges . . . [and] eventually Congress would notice the trend . . . [and] seek to increase the number of magistrate judges." *Dees*, 125 F.3d at 267 n.6. Thus, delegating plea acceptance to magistrates is a direct threat to the judicial power of the United States, meaning this Court should follow suit with the Seventh Circuit and preserve the power given to Article III judges. *Harden*, 758 F.3d at 887. Magistrate judges may perform a number of services to contribute to the success of the courts in this country, but the acceptance of felony guilty pleas cannot be one of them. Accordingly, Mr. Windsor's plea must be permitted to be withdrawn under Rule 11(d)(1).

CONCLUSION AND PRAYER

For the reasons set forth, this Court should hold the automobile exception does not apply to on-board vehicle computers given the requirements of the Fourth Amendment and *Riley v. California* and magistrate judges only have the authority to submit a report and recommendation to a district judge for felony guilty pleas. Accordingly, Respondent prays that this Court reverse the holdings of both the Thirteenth Circuit Court Appeals and the District Court for the District of Wythe.

Respectfully submitted this 28th day of January, 2023.

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ATTORNEYS FOR PETITIONER