



## The Fourth Amendment Is Unconcerned With State Borders



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In *United States v. Pratt*, \_\_\_ F.3d \_\_\_, 2019 WL 489053 (4th Cir. Feb. 8, 2019), the United States Court of Appeals for the Fourth Circuit was asked to determine whether the Government's thirty-one (31) day delay in obtaining a search warrant for Defendant Samuel Pratt's cell phone after the phone was seized by the FBI was unreasonable in violation of Pratt's Fourth Amendment rights. The Fourth Circuit found that it was.

FBI agents in the Carolinas investigated Defendant Samuel Pratt for running a prostitution ring that included juveniles. The agents found a post on Backpage.com in which Pratt advertised the sexual services of seventeen-year-old "RM" at a hotel in Columbia, South Carolina. An FBI agent scheduled a "date" with RM at the hotel for February 3, 2016. When the agent entered the hotel room, he identified himself to RM as law enforcement, and she agreed to speak with several agents. RM told them that she was seventeen and was working as a prostitute at the hotel. She also said her "boyfriend" Pratt brought her across state lines from North Carolina. Responding to an agent's question, she said that she had texted nude photographs of herself to Pratt's phone. RM then allowed FBI agents to take her cellphone.

At the same time, two FBI agents spoke to Pratt in the hotel parking lot. Agent Stansbury, who had spoken with RM, joined them. Stansbury confronted Pratt, who was holding an iPhone. Pratt told Stansbury that the phone was his. Stansbury asked if Pratt had any nude photos of RM on the phone. Pratt responded "yes, I've got pictures of her on the phone."

Stansbury then seized the phone and told Pratt that the FBI would get a search warrant for it. Nevertheless, Pratt refused to consent to the seizure of his iPhone or to disclose the phone's passcode. Although the FBI obtained a search warrant, the FBI did not get the warrant to search Pratt's phone until March 4, 2016—a full 31 days after seizing it. When agents finally searched the phone, they found nude images of RM and also discovered incriminating text conversations with RM and others.

Soon thereafter, a federal grand jury indicted Pratt. At Pratt's initial appearance, a United States Magistrate Judge ordered him to have no contact with anyone "who is a witness, or may be a witness, or a victim." Despite that order, Pratt repeatedly called his mother from prison to coordinate continued prostitution operations. In several calls, Pratt had his mother put RM on the phone, and he repeatedly told RM not to testify or to cooperate.

Before trial, Pratt moved to suppress evidence from his phone. In his written pleadings, Pratt only contended that the seizure of the phone was unconstitutional. But at the suppression hearing, Pratt also argued that the

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delay between the seizure and obtaining the search warrant was unconstitutional. The Government explained that the delay came from the need to decide whether to seek a warrant in North Carolina or South Carolina. Ruling from the bench, the District Court denied Pratt's suppression motion, found that the seizure was justified, and concluded that the delay was reasonable. Ultimately, a jury convicted Pratt on all charged counts. The District Court imposed life sentences on four counts and concurrent time on the other four.

Pratt timely appealed the denial of his suppression motion. On appeal, Pratt contended that the District Court should have suppressed information from his cellphone because the FBI unreasonably delayed getting a search warrant. Pratt did not contend that the seizure of the phone itself was unconstitutional. To justify the delay, the Government pointed to the difficulty of coordinating the various law enforcement agencies involved in the Pratt investigation and deciding where to seek a search warrant for the phone. In the alternative, the Government argued that it could keep the phone indefinitely because it was an instrumentality of Pratt's crimes.

The Fourth Circuit began its consideration of Pratt's appeal by noting that the constitutional question was whether the extended seizure of Pratt's phone was reasonable. The Fourth Circuit explained that a seizure that is lawful at its inception can, nevertheless, violate the Fourth Amendment because its manner of execution unreasonably infringes upon an individual's possessory interests. To determine if an extended seizure violates the Fourth Amendment, courts balance the Government's interest in the seizure against the individual's possessory interest in the object seized. A strong Government interest can justify an extended seizure, but if the individual's interest outweighs the Government's interest, then an extended seizure may be unreasonable. On the other hand, an individual diminishes his interest if he consents to the seizure or voluntarily shares the seized object's contents.

Here, the Fourth Circuit concluded that Pratt did not diminish his possessory interest in the phone. Pratt didn't consent to its seizure, nor did he voluntarily share the phone's contents. The Government's only explanation for the 31-day delay in obtaining a warrant was that Pratt committed crimes in both North Carolina and South Carolina, and agents had to decide where to seek a warrant. However, the Fourth Circuit found the Government's explanation insufficient to justify the extended seizure of Pratt's phone and further found that the Government had no persuasive justification for the delay in obtaining a search warrant for Pratt's phone.

Simply put, the Fourth Circuit held that the agents failed to exercise diligence by spending a whole month debating where to get a warrant. That decision shouldn't have taken a month because it was unlikely that the forum for the warrant would affect a later prosecution. In fact, the Government conceded that point at oral argument before the Fourth Circuit.

Furthermore, the Fourth Circuit stated that its conclusion was supported by the fact that Pratt had an undiminished possessory interest in the cellphone, i.e. he did not consent to the seizure, and he was not allowed to retain any of the phone's files. Given Pratt's undiminished interest, the Fourth Circuit concluded that a 31-day delay violated the Fourth Amendment where the Government neither proceeded diligently nor presented an overriding reason for the delay. Accordingly, the Fourth Circuit held that that the delay in obtaining a search warrant for Pratt's phone was unreasonable and that the District Court erred in denying Pratt's motion to suppress.

But even though the District Court should have suppressed the evidence from Pratt's cellphone, the Fourth Circuit explained that it had to examine whether the error was harmless. The Fourth Circuit explained that, on appeal, any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. The essential question is whether it was clear beyond a reasonable doubt that a rational jury would have found Pratt guilty absent the error.

To answer that question, the Fourth Circuit stated that it looks at the strength of the Government's remaining evidence, the centrality of the issue, steps taken to mitigate any error, and the closeness of the case. The Government bears the burden of establishing harmlessness.

After examining the trial evidence, the Fourth Circuit was not satisfied that the Government had met its burden for count two, charging Pratt with producing images containing child pornography, and count five, charging him with possessing images containing child pornography. Both charges required the Government to prove that the images depicted a minor engaging in "sexually explicit conduct." The two offenses include slightly different categories of conduct. But under both definitions, the only relevant category is lascivious exhibition of the genitals or pubic area. Thus, if the trial evidence that did not come from Pratt's phone was insufficient to find that the images fit into this category, then the error cannot be considered harmless.

The Fourth Circuit concluded that, beyond Pratt's phone, the Government introduced insufficient evidence that the images meet the statutory requirements. As evidence for the child pornography counts, the Government introduced Agent Stansbury's recollection of statements RM and Pratt made at the hotel. In each statement, the photos were described solely with the generic terms "naked" or "nude." Some "naked" or "nude" photos are lascivious and display the genitals or pubic area. But many photos that an ordinary viewer would describe as "naked" or "nude" are not lascivious, nor do they depict the genitals or pubic area. Thus, without more, the Fourth Circuit said that it cannot infer that the photos contained sexually explicit conduct as defined by child pornography statute.

Therefore, considering all of the trial testimony, the Fourth Circuit determined that there was insufficient evidence for a rational trier of fact to find the essential element that the photos contained sexually explicit conduct. Given this failure of proof, the Fourth Circuit held that the District Court's error was not harmless regarding counts two and five, and it vacated Pratt's convictions for the two child pornography offenses.

Thereafter, the Fourth Circuit stated that it had to decide whether to vacate Pratt's entire sentence in light of this error, and it had to consider certain other evidentiary rulings made by the District Court to determine whether any of those alleged errors entitled Pratt to a vacation of his entire conviction and sentence. The Fourth Circuit found it best to vacate Pratt's entire sentence and to remand the case to the District Court for resentencing. The Fourth Circuit, however, refused to find any error in the District Court's evidentiary rulings that the District Court had made at trial or to find that the District Court committed any other reversible error that would justify vacating Pratt's convictions on the other counts upon which a jury had found him guilty.

In sum, the Fourth Circuit held that the District Court erred by refusing to suppress information from Pratt's cellphone based upon the Government's unreasonable delay in obtaining a search warrant to search the phone. The District Court's error was not harmless because the Government's other evidence could not establish the statutory elements of counts two and five on which Pratt was convicted after a jury trial. On the evidentiary issue, the Fourth Circuit held that the District Court did not err by admitting RM's hearsay statements. Therefore, the Fourth Circuit vacated Pratt's convictions for counts two and five and affirmed his remaining convictions. The Fourth Circuit also vacated Pratt's sentence and remand to the District Court for resentencing.