No. 99-949

In the Supreme Court of the United States

KARL L. DAHLSTROM, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the presence of a state law enforcement officer at the scene when employees of petitioner's corporation removed corporate records made that removal a governmental seizure subject to the Fourth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 180 F.3d 677.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1999. The petition for a writ of certiorari was filed on October 7, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of fraud in connection with the purchase and sale of securities, in violation of 15 U.S.C. 78j(b); one count of fraud in the offer and sale of

securities, in violation of 15 U.S.C. 77q(a); one count of the sale of unregistered securities, in violation of 15 U.S.C. 77e(a); one count of acting as an unregistered broker-dealer, in violation of 15 U.S.C. 78*o*(a)(1); and eight counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner was sentenced to 78 months' imprisonment, to be followed by three years' supervised release, and was ordered to make restitution in the amount of $1,997,003. The court of appeals affirmed. Pet. App. 1a-18a.

1. In 1991, petitioner and his daughter Karla solicited investments for the production and marketing of Uni-snuff, a gel designed to extinguish oil well fires like the ones raging in Kuwait at the time. Uni-snuff, however, was not commercially viable. Petitioner knew that efforts to market Uni-snuff in Mexico and Kuwait had failed, that the product would rot if it remained in a mixed solution for a few days, that mixing the components at the scene of a fire was impractical, and that an independent report had concluded that Uni-snuff would not perform well on oil well fires. Petitioner told his investors, however, that the product was out of the prototype stage, that it had been successfully tested on all types of fires, and that it was commercially viable. Pet. App. 1a-3a.

In April 1991, after ten people had agreed to invest in the product, petitioner incorporated Inferno Snuffers, Inc. (ISI) for the sole purpose of producing and marketing Uni-snuff. ISI maintained its office and laboratory in Bryan, College Station, Texas. Pet. App. 2a.

Petitioner encouraged the selling of securities to meet the ever increasing need for investment money. By July 1991, the number of investors in ISI had exceeded the number permitted under securities laws

for unregistered securities; to evade those restrictions, petitioner placed new investors into "trusts." Petitioner also attempted to circumvent laws requiring the registration of brokers and dealers in securities by designating fees he received for selling securities as "consulting fees." In September 1991, the Texas Securities Board advised petitioner that securities sold to the general public had to be registered and could be sold only by registered dealers absent an applicable exemption. Nonetheless, petitioner and his daughter continued to sell securities. Pet. App. 2a, 4a-6a; Gov't C.A. Br. 11-14, 45.

An audit later revealed that the company had suffered a loss of more than $2 million and that no product had been sold. In April 1992, petitioner made a formal rescission offer to the stockholders, but the company did not have enough money to fund the offer. Pet. App. 6a.

ISI's lease on its offices expired on April 30, 1992. The Board of Directors decided to move the company to another plant, in Navasota, Texas. At that time, petitioner no longer held a majority interest in ISI and was not on the Board of Directors. When petitioner learned of the planned move, however, he attempted to bar ISI employees from removing any property from the premises. On May 11, 1992, ISI employees arrived at the ISI offices to relocate the company's property to the Navasota plant. They were accompanied by a local sheriff's deputy. Petitioner asked the employees to leave, but they refused. The employees then entered the premises and removed a file cabinet, computers, documents, and other property. The sheriff's deputy did not say anything during the exchange between petitioner and the ISI employees, and he stayed about eight feet away, in a hallway, when the employees were

removing property from the ISI offices. At one point, Robert Frenza, an ISI employee who was working when the ISI movers arrived, walked out to his car with a box and a briefcase. An employee asked Frenza to open the trunk of his car and his briefcase to see whether Frenza was carrying ISI documents. When Frenza refused, the sheriff ordered him to open the trunk and the briefcase. The employees determined that Frenza was carrying only his personal effects. Pet. App. 7a; Gov't C.A. Br. 71-74.

In 1993, the FBI opened an investigation into petitioner's activities. During that investigation, the FBI obtained, by subpoena, documents that had been removed from the ISI premises by the employees and were in the custody of the ISI receiver at the Navasota plant. Gov't C.A. Br. 74.

2. Petitioner moved to suppress the documents removed from ISI offices in 1992 by ISI employees, arguing that the removal of those documents was an invalid warrantless seizure in violation of the Fourth Amendment. The district court denied the motion to suppress, finding that the employees were not acting as government agents when they removed the documents, and that those employees were acting for their own purposes and not for law enforcement purposes in taking the documents. See Gov't C.A. Br. 76.

The court of appeals affirmed. The court held that the ISI employees' removal of documents from the ISI offices did not violate the Fourth Amendment because that removal was not a governmental search or seizure subject to the Fourth Amendment. See Pet. App. 7a-9a. The court observed first that whether a person is acting as a government agent for Fourth Amendment purposes is a question of fact reviewable on appeal only for clear error. *Id.* at 7a-8a. The court also stated that

an individual acts on behalf of the government, or as an agent or instrument of the government, for Fourth Amendment purposes only if "(1) the government has offered the individual some form of compensation for the search; (2) if the individual did not initiate the idea on his own that he would conduct the search; and (3) the government lacked specific knowledge that the individual intended a search." *Id.* at 8a. Applying that standard, the court ruled that no government search occurred in this case because the "individuals conceived the plan on their own and solely for their own benefit. The officer's presence was merely requested to keep the peace. In addition, the government did not acquire possession of the documents until much later through proper discovery proceedings." *Id.* at 9a.

ARGUMENT

Petitioner contends that the presence of a sheriff's deputy at the scene while ISI employees removed company records, later introduced into evidence against him, converted that removal into a government seizure under the Fourth Amendment. That contention lacks merit and does not warrant further review.

1. The Fourth Amendment applies only to the government, not to private persons. See *Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921). Thus, "a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official" does not contravene the Amendment. *United States* v. *Jacobsen*, 466 U.S. 109, 113 (1984).

Recognizing that the Fourth Amendment is limited to governmental searches and seizures, the lower courts have consistently held that an otherwise private search or seizure is not converted into governmental

action merely because a government agent is present during the search or seizure. If the private individual conducts the search or seizure for a private purpose (other than the motive to aid law enforcement) and the law enforcement officer is present during the search or seizure merely to keep the peace, ensure safety, or prevent destruction of evidence, then the search or seizure is private. See *United States* v. *Leffall*, 82 F.3d 343, 347-349 (10th Cir. 1996) (airline employee opened suspicious package to prevent harm to passengers and employees); *United States* v. *Cleaveland*, 38 F.3d 1092, 1093-1094 (9th Cir. 1994) (power company inspector did search to check for illegal hookup; police officer present to ensure inspector's safety); *United States* v. *Jennings*, 653 F.2d 107, 110-111 (4th Cir. 1981) (airline employee searched suspicious package "on his own initiative and for his own purposes"; officer's presence was merely "passive"); *United States* v. *Entringer*, 532 F.2d 634, 637 (8th Cir.) (air freight company conducted inventory of apparently stolen package to determine extent of loss; officer present to witness inventory and prevent destruction of evidence), cert. denied, 429 U.S. 820 (1976); see also *Menchaca* v. *Chrysler Credit Corp.*, 613 F.2d 507, 511-513 (5th Cir.) (in action brought under 42 U.S.C. 1983, finding no state action in repossession of automobile despite presence of police officers because the sole reason for their presence during the repossession was to respond to a complaint about a disturbance), cert. denied, 449 U.S. 953 (1980).

The decision of the court of appeals in this case is to the same effect. The court of appeals declined to suppress the documents at issue because the employees who removed the ISI documents "conceived the plan on their own and solely for their own benefit. The officer's presence was merely requested to keep the peace."

Pet. App. 9a. Nor is there any evidence that the sheriff encouraged the employees to remove the property or attempted to view the records while they were being moved.

2. Petitioner seeks to rely on a number of decisions in which the courts of appeals have found that government agents were sufficiently involved in searches by private individuals to turn those searches, at least arguably, into governmental action. Those decisions, however, turn on significantly greater official encouragement of or involvement in the private search, and are therefore distinguishable from this case. In *United States* v. *Reed*, 15 F.3d 928 (9th Cir. 1994), the police officers acted as "lookouts" while a motel employee searched a room for evidence of drug trafficking and listened while the employee announced the results of his finds. The court stressed that the employee had no legitimate private purpose for the search, and that the employee's motive of finding evidence of criminal activity was not independent of the government; given the direct participation of the police in the search, the court found that the search was conducted for law enforcement purposes. *Id.* at 932-933. In *United States* v. *Knoll*, 16 F.3d 1313 (2d Cir.), cert. denied, 513 U.S. 1015 (1994), the court of appeals remanded for fact-finding on whether the prosecutor encouraged private persons who had stolen the defendant's files to expand their search, in order to determine the contents of the files. That encouragement, if proven, would have established that the private persons were in fact acting as agents of the government. See *id.* at 1319-1320.

In *Specht* v. *Jensen*, 832 F.2d 1516 (10th Cir. 1987), the court found sufficient official involvement in a private search to constitute state action where one officer demanded entry into an office building, another officer

threatened a person with arrest if she did not cooperate in the supposedly private search of a residence, and a third officer supervised the other two. *Id.* at 1523-1524. The court did not dispute, however, that no state action exists when a police officer merely "stand[s] by in case of trouble," or acts as "a mere peace-keeping bystander," *ibid.*, as was true in this case. In *Booker* v. *City of Atlanta*, 776 F.2d 272 (11th Cir. 1985), the court reversed an order granting summary judgment for the city because there was a genuine factual dispute as to whether the police officer was merely present "to prevent a breach of the peace," *ibid.*, or "had the effect of intimidating [the plaintiff] into not exercising his right to resist, thus facilitating the repossession," *id.* at 274. That case is not inconsistent with the decision below, in which the court of appeals concluded that the sheriff's deputy was present during the private search of petitioner's offices merely to prevent trouble.*

Petitioner's reliance (Pet. 6-7) on *Soldal* v. *Cook County*, 506 U.S. 56 (1992), is also misplaced. In *Soldal*, the owner of a trailer home filed an action under 42 U.S.C. 1983 against a county, alleging that the owners of the trailer park conspired with county deputies to conduct an unlawful search and seizure by forcibly removing his trailer home from the owner's trailer park. The Court ruled that the forcible removal of the trailer home constituted a seizure under the Fourth Amendment. The Court assumed that state action was

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* Petitioner also cites (Pet. 4) *United States* v. *Van Dyke*, 643 F.2d 992 (4th Cir. 1981), but in that case, the court of appeals held only that law enforcement agents violated the defendant's rights under the Fourth Amendment by entering the curtilage of the defendant's residence without a warrant; no private search issue was presented.

present; it did not review the court of appeals' holding that there was sufficient evidence of a conspiracy between the deputies and the trailer park owners to foreclose summary judgment on that issue for the county. 506 U.S. at 60 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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