

Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD RONALD ATES,

Petitioner,

v.

ATTORNEY GENERAL NEW JERSEY;
ADMINISTRATOR NEW JERSEY STATE PRISON,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Is the New Jersey Wiretap Statute, N.J.S.A. 2A:156A-1 et seq., unconstitutional because it permits law enforcement to intercept phone calls (both cell phone calls and land line calls) placed by and received by out-of-state individuals who have no connection to New Jersey, without the knowledge of or the authority from a tribunal in the jurisdiction where such telephones are registered?
- II. Was the Remedy, which was to suppress a privileged telephone call and all subsequent calls, imposed by the Trial Court for the illegally intercepted attorney-client privileged telephone call inadequate, in light of the fact that trial defense strategy was discussed during the improperly intercepted privileged telephone call?

PARTIES TO THE PROCEEDING

EDWARD RONALD ATES

v.

ATTORNEY GENERAL NEW JERSEY;
ADMINISTRATOR NEW JERSEY STATE PRISON

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDIX	v
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
THE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED	1
STATEMENT OF THE CASE	19
REASONS FOR GRANTING THE PETITION	24

I.	THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT'S DECISION WAS IN ERROR IN THAT REASONABLE JURISTS COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION AND COULD CONCLUDE THAT THERE ARE SUFFICIENT ISSUES PRESENT IN ORDER TO PROCEED WITH AN APPEAL	24
A.	The Wiretap in this case and the New Jersey Wiretap Act violate the Fourth Amendment to the United States Constitution	25
B.	The illegally intercepted privileged telephone call and the Trial Court's inadequate remedy violated the Sixth Amendment to the United States Constitution	21
	CONCLUSION	38

TABLE OF APPENDIX

Appendix A (Order of the United States Court of Appeals for the Third Circuit, Decided January 17, 2019)	1a
Appendix B (Opinion of the United States District Court for the District of New Jersey, Decided May 24, 2018)	3a
Appendix C (Order of the United States District Court of the District of New Jersey, Decided May 24, 2018)	31a
Appendix D (Order of the United States Court of Appeals for the Third Circuit, Decided November 7, 2018)	33a

TABLE OF AUTHORITIES

Cases

<u>Application of Mahler</u> , 177 N.J. Super. 337 (App. Div. 1981)	27
<u>Carpenter v. United States</u> , 585 U.S. ____; 138 S.Ct. 2206 (2018)	23, 30
<u>In re Morgenthau</u> , 188 N.J. Super 303 (App. Div. 1983)	27
<u>Johnson v. Zerbst</u> , 304 U.S. 458 (1938)	34
<u>Kirby v. Illinois</u> , 406 U.S. 682 (1972)	34
<u>Miller-El v. Cockrell</u> , 537 U.S. 322 (2003)	24, 25
<u>Powell v. Alabama</u> , 287 U.S. 45 (1932)	34
<u>Rodriguez v. Rosenblatt</u> , 58 N.J. 281 (1971)	34
<u>Slack v. McDaniel</u> , 529 U.S. 473 (2000)	24
<u>State v. Ates</u> , 217 N.J. 253 (2014)	27

<u>State v. Denofa</u> , 187 N.J. 24 (2006)	26
<u>State v. Sugar</u> , 8 N.J. 1 (1980)	33, 34, 35, 36
<u>United States v. Rodriguez</u> , 968 F.2d 1130, <u>cert. denied</u> , 506 U.S. 847 (1992)	28, 29

Statutes

18 U.S.C. § 2254	1
28 U.S.C. § 1254(1)	1
28 U.S.C. § 2253(c)(2)	24
28 U.S.C. § 2254(d)(2)	24
<u>N.J.S.A. 2A:156A-2</u>	3
<u>N.J.S.A. 2A:156A-3a</u>	25
<u>N.J.S.A. 2A:156A-8</u>	9, 26
<u>N.J.S.A. 2A:156A-9</u>	10
<u>N.J.S.A. 2A:156A-10</u>	13
<u>N.J.S.A. 2A:156A-12</u>	15

<u>N.J.S.A.</u> 2A:156A-12h	.	.	.	26
<u>N.J.S.A.</u> 2A:156A-12v	.	.	.	26
<u>N.J.S.A.</u> 2A:156A-21	.	.	.	18
<u>N.J.S.A.</u> 2C:1-3(a)(1)	.	.	.	26
<u>N.J.S.A.</u> 40A:14-152	.	.	.	26

Constitutional Provisions

<u>N.J. Const. Art.</u> 1, ¶ 7	.	.	.	2
<u>N.J. Const. Art.</u> 1, ¶ 10	.	.	.	2
<u>U.S. Const. amend.</u> IV	.	.	.	2
<u>U.S. Const. amend.</u> VI	.	.	.	2

PETITION FOR WRIT OF CERTIORARI

Petitioner, Edward Ronald Ates, by his attorney, Joseph R. Donahue, respectfully petitions that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered in this matter on November 7, 2018.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit in the Appendix at pp. 1a to 2a. The Opinion of United States District Court for the District of New Jersey in the Appendix at pp. 3a to 30a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on November 7, 2018. A petition for Panel Rehearing and Rehearing En Banc was denied by the United States Court of Appeals for the Third Circuit on January 17, 2019. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2254 and the Petition is being filed pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

THE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

This case involves the application of the following:

N.J. Const. Art. 1, ¶ 7.

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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

N.J. Const. Art. 1, ¶ 10.

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

U.S. Const. amend. IV

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. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

N.J.S.A. 2A:156A-2. Definitions

As used in this act:

a. "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception, including the use of such connection in a switching station, furnished or operated by any person engaged in providing or operating such facilities for the transmission of intrastate, interstate or foreign communication. "Wire communication" includes any electronic storage of such communication, and the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;

b. "Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but does not include any electronic communication;

c. "Intercept" means the aural or other acquisition of the contents of any wire, electronic or oral communication through the use of any electronic, mechanical, or other device;

d. "Electronic, mechanical or other device" means any device or apparatus, including an induction coil, that can be used to intercept a wire, electronic or oral communication other than:

(1) Any telephone or telegraph instrument, equipment or facility, or any component thereof, furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties; or

(2) A hearing aid or similar device being used to correct subnormal hearing to not better than normal;

e. "Person" means that term as defined in R.S.1:1-2 and includes any officer or employee of the State or of a political subdivision thereof;

f. "Investigative or law enforcement officer" means any officer of the State of New Jersey or of a political subdivision thereof who is empowered by law to conduct investigations of, or to make arrests for, any offense enumerated in section 8 of P.L.1968, c. 409 (C.2A:156A-8) and any attorney authorized by law to prosecute or participate in the prosecution of any such offense;

g. "Contents," when used with respect to any wire, electronic or oral communication, includes any information

concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication, except that for purposes of sections 22, 23, 24 and 26 of P.L.1993, c. 29 (C.2A:156A-28, C.2A:156A-29, C.2A:156A-30, and C.2A:156A-32) contents, when used with respect to any wire, electronic, or oral communication means any information concerning the substance, purport or meaning of that communication;

h. "Court of competent jurisdiction" means the Superior Court;

i. "Judge," when referring to a judge authorized to receive applications for, and to enter, orders authorizing interceptions of wire, electronic or oral communications, means one of the several judges of the Superior Court to be designated from time to time by the Chief Justice of the Supreme Court to receive applications for, and to enter, orders authorizing interceptions of wire, electronic or oral communications pursuant to this act;

j. "Communication common carrier" means any person engaged as a common carrier for hire, in intrastate, interstate or foreign communication by wire or radio or in intrastate, interstate or foreign radio transmission of energy; but a person engaged in radio broadcasting shall not, while so engaged, be deemed a common carrier;

k. "Aggrieved person" means a person who was a party to any intercepted wire, electronic or oral communication or a person against whom the interception was directed;

l. "In-progress trace" means the determination of the origin of a telephonic communication to a known telephone during the communication;

m. "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photo-optical system that affects interstate, intrastate or foreign commerce, but does not include:

- (1) Any wire or oral communication;
- (2) Any communication made through a tone-only paging device; or
- (3) Any communication from a tracking device;

n. "User" means any person or entity who:

- (1) Uses an electronic communication service; and
- (2) Is duly authorized by the provider of such service to engage in such use;

o. "Electronic communication system" means any wire, radio, electromagnetic, photo-optical or photoelectronic facilities for the transmission of electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

p. "Electronic communication service" means any service which provides to the users thereof the ability to send or receive wire or electronic communications;

q. "Electronic storage" means:

(1) Any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(2) Any storage of such communication by an electronic communication service for purpose of backup protection of the communication;

r. "Readily accessible to the general public" means, with respect to a radio communication, that such communication is not:

(1) Scrambled or encrypted;

(2) Transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(3) Carried on a subcarrier or other signal subsidiary to a radio transmission;

(4) Transmitted over a communication system provided by a common carrier, unless the communication is a tone-only paging system communication; or

(5) Transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

s. "Remote computing service" means the provision to the public of computer storage or processing services by means of an electronic communication system;

t. "Aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

u. "Tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or device;

v. "Point of interception" means the site at which the investigative or law enforcement officer is located at the time the interception is made;

w. "Location information" means global positioning system data, enhanced 9-1-1 data, cellular site information, and any other information that would assist a law enforcement agency in tracking the physical location of a cellular telephone or wireless mobile device.

N.J.S.A 2A:156A-8. Authorization for application for order to intercept communications.

The Attorney General, county prosecutor or a person designated to act for such an official and to perform his duties in and during his actual absence or disability, may authorize, in writing, an ex parte application to a judge designated to receive the same for an order authorizing the interception of a wire, or electronic or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation when such interception may provide evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, a violation of paragraph (1) or (2) of subsection b. of N.J.S.2C:12-1, a violation of section 3 of P.L.1997, c. 353 (C.2C:21-4.3), a violation of N.J.S.2C:21-19 punishable by imprisonment for more than one year, a violation of P.L.1994, c. 121 (C.2C:21-23 et seq.), a violation of sections 1 through 5 of P.L.2002, c. 26 (C.2C:38-1 through C.2C:38-5), a violation of N.J.S.2C:33-3, a violation of N.J.S.2C:17-2, a violation of sections 1 through 3 of P.L.1983, c. 480 (C.2C:17-7 through 2C:17-9), a violation of N.J.S.2C:12-3 (terroristic threats), violations of N.J.S.2C:35-3, N.J.S.2C:35-4 and N.J.S.2C:35-5, violations of sections 112 through 116, inclusive, of the "Casino Control Act," P.L.1977, c. 110 (C.5:12-112 through 5:12-116), a violation of section 1 of P.L.2005, c. 77 (C.2C:13-8), a violation of N.J.S.2C:34-1 punishable by imprisonment for more than one year, arson, burglary, theft and related offenses punishable by imprisonment for more than one year, endangering the welfare of a child pursuant to N.J.S.2C:24-4, escape, forgery and fraudulent practices punishable by imprisonment for more than one year, alteration of motor vehicle identification numbers, unlawful manufacture, purchase, use, or transfer of firearms, unlawful possession or use of destructive devices or explo-

sives, weapons training for illegal activities pursuant to section 1 of P.L.1983, c. 229 (C.2C:39-14), racketeering or a violation of subsection g. of N.J.S.2C:5-2, leader of organized crime, organized criminal activity directed toward the unlawful transportation, storage, disposal, discharge, release, abandonment or disposition of any harmful, hazardous, toxic, destructive, or polluting substance, or any conspiracy to commit any of the foregoing offenses or which may provide evidence aiding in the apprehension of the perpetrator or perpetrators of any of the foregoing offenses.

N.J.S.A. 2A:156A-9. Contents of Application.

Each application for an order of authorization to intercept a wire, electronic or oral communication shall be made in writing upon oath or affirmation and shall state:

- a. The authority of the applicant to make such application;
- b. The identity and qualifications of the investigative or law enforcement officers or agency for whom the authority to intercept a wire, electronic or oral communication is sought and the identity of whoever authorized the application.
- c. A particular statement of the facts relied upon by the applicant, including: (1) The identity of the particular person, if known, committing the offense and whose communications are to be intercepted; (2) The details as to the particular offense that has been, is being, or is about to be committed; (3) The particular type of communication to be intercepted; and a showing that there is probable cause to believe that such communication will be communicated on

the wire or electronic communication facilities involved or at the particular place where the oral communication is to be intercepted; (4) Except as provided in subsection g. of this section, the character and location of the particular wire or electronic communication facilities involved or the particular place where the oral communication is to be intercepted; (5) A statement of the period of time for which the interception is required to be maintained; if the character of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; (6) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;

d. Where the application is for the renewal or extension of an order, a particular statement of facts showing the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results;

e. A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to intercept a wire, electronic or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each such application;

f. Such additional testimony or documentary evidence in support of the application as the judge may require; and

g. An application need not meet the requirements of paragraph (4) of subsection c. of this section if:

(1) with respect to the application for an interception of an oral communication:

(a) the application is approved by the Attorney General or county prosecutor or a person designated to act for such an official and to perform his duties in and during his actual absence or disability; and

(b) the application contains a full and complete statement as to why specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(c) the judge finds that such specification is not practical.

(2) with respect to the application for an interception of a wire or electronic communication:

(a) the application is approved by the Attorney General or county prosecutor or a person designated to act for such an official and to perform his duties in and during his actual absence or disability; and

(b) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing of a purpose, on the part of that person, to thwart interception by changing facilities; and

(c) the judge finds that such purpose has been adequately shown.

An interception of a communication under an order issued in conformity with this subsection shall not begin until the facilities from which, or the place where, the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communication service that has received an order as provided for in this subsection may make a motion that the court modify or quash the order on the ground that the provider's assistance with respect to the interception cannot be performed in a timely or reasonable fashion. The court upon notice to the Attorney General or county prosecutor shall decide such a motion expeditiously.

N.J.S.A. 2A:156A-10. Consideration of application; basis of order.

Upon consideration of an application, the judge may enter an ex parte order, as requested or as modified, authorizing the interception of a wire, electronic or oral communication, if the court determines on the basis of the facts submitted by the applicant that there is or was probable cause for belief that:

a. The person whose communication is to be intercepted is engaging or was engaged over a period of time as a part of a continuing criminal activity or is committing, has or had committed or is about to commit an offense as provided in section 8 of P.L.1968, c. 409 (C. 2A:156A-8);

b. Particular communications concerning such offense may be obtained through such interception;

- c. Normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ;
- d. Except in the case of an application meeting the requirements of subsection g. of section 9 of P.L.1968, c. 409 (C. 2A:156A-9), the facilities from which, or the place where, the wire, electronic or oral communications are to be intercepted, are or have been used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, such individual;
- e. The investigative or law enforcement officers or agency to be authorized to intercept the wire, electronic or oral communication are qualified by training and experience to execute the interception sought; and
- f. In the case of an application, other than a renewal or extension, for an order to intercept a communication of a person or on a facility which was the subject of a previous order authorizing interception, the application is based upon new evidence or information different from and in addition to the evidence or information offered to support the prior order, regardless of whether such evidence was derived from prior interceptions or from other sources.

As part of the consideration of an application in which there is no corroborative evidence offered, the judge shall inquire in camera as to the identity of any informants or any other additional information concerning the basis upon which the investigative or law enforcement officer or agency has applied for the order of authorization which the judge

finds relevant in order to determine if there is probable cause pursuant to this section.

N.J.S.A. 2A:156A-12. Order; contents; limitations; extensions; renewals; progress reports; assistance of providers; point of execution

Each order authorizing the interception of any wire, electronic or oral communication shall state:

- a. The judge is authorized to issue the order;
- b. The identity of, or a particular description of, the person, if known, whose communications are to be intercepted;
- c. The character and location of the particular communication facilities as to which, or the particular place of the communication as to which, authority to intercept is granted, or, in the case of an application meeting the requirements of subsection g. of section 9 of P.L.1968, c. 409 (C.2A:156A-9) that specification is not practical or that the purpose to thwart interception by changing facilities has been shown;
- d. A particular description of the type of the communication to be intercepted and a statement of the particular offense to which it relates;
- e. The identity of the investigative or law enforcement officers or agency to whom the authority to intercept a wire, electronic or oral communication is given and the identity of whoever authorized the application; and

f. The period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

No order entered under this section shall authorize the interception of any wire, electronic or oral communication for a period of time in excess of that necessary under the circumstances. Every order entered under this section shall require that such interception begin and terminate as soon as practicable and be conducted in such a manner as to minimize or eliminate the interception of such communications not otherwise subject to interception under this act by making reasonable efforts, whenever possible, to reduce the hours of interception authorized by said order. In the event the intercepted communication is in a language other than English, or is in a code, and an interpreter or expert in that language or code is not reasonably available during the interception period or a portion of the interception period, minimization shall be accomplished as soon as practicable after the interception. Except as provided below in subsection g. of this section, no order entered under this section shall authorize the interception of wire, electronic or oral communications for any period exceeding 20 days. Extensions or renewals of such an order may be granted for two additional periods of not more than 10 days. No extension or renewal shall be granted unless an application for it is made in accordance with this section, and the court makes the findings required by sections 10 and 11 of P.L.1968, c. 409 (C.2A:156A-10 and 2A:156A-11) and by this section.

g. Orders entered under this section to provide evidence of racketeering in violation of N.J.S.2C:41-2, leader of

organized crime in violation of subsection g. of N.J.S.2C:5-2, or leader of narcotics trafficking network in violation of N.J.S.2C:35-3, may authorize the interception of wire, electronic or oral communications for a period not to exceed 30 days and extensions or renewals of any order may be granted for additional periods of not more than 30 days, without limitation on the number of extension or renewal orders; provided, however, that orders authorized pursuant to this subsection shall not exceed six months.

h. Whenever an order authorizing an interception is entered, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the court may require.

An order authorizing the interception of a wire, electronic or oral communication shall, upon request of the applicant, direct that a provider of electronic communication service shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such provider is affording the person whose communications are to be intercepted.

The obligation of a provider of electronic communication service under such an order shall include but is not limited to conducting an in-progress trace during an interception and shall also include the provision of technical assistance and equipment and utilization of any technological features which are available to the provider of electronic communication service. The obligation of the provider of electronic communication service to conduct an in-progress trace and

provide other technical assistance may arise pursuant to court order based upon probable cause, under circumstances not involving an interception pursuant to this act. Any provider of electronic communication service furnishing such facilities or assistance shall be compensated therefore by the applicant at the prevailing rates. Said provider shall be immune from civil liability for any assistance rendered to the applicant pursuant to this section.

An order authorizing the interception of a wire, electronic or oral communication may be executed at any point of interception within the jurisdiction of an investigative or law enforcement officer executing the order.

N.J.S.A. 2A:156A-21. Actions to suppress contents of intercepted communications

Any aggrieved person in any trial, hearing, or proceeding in or before any court or other authority of this State may move to suppress the contents of any intercepted wire, electronic or oral communication, or evidence derived therefrom, on the grounds that:

- a. The communication was unlawfully intercepted;
- b. The order of authorization is insufficient on its face;
- c. The interception was not made in conformity with the order of authorization or in accordance with the requirements of section 12 of P.L.1968, c. 409 (C. 2A:156A-12).

The motion shall be made at least 10 days before the trial, hearing, or proceeding unless there was no opportunity to make the motion or the moving party was not aware of the grounds for the motion. Motions by coindictees are to be heard in a single consolidated hearing.

The court, upon the filing of such motion by the aggrieved person, shall make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication, or evidence derived therefrom, as the court determines to be in the interests of justice. If the motion is granted, the entire contents of all intercepted wire, electronic or oral communications obtained during or after any interception which is determined to be in violation of this act under subsection a., b., or c. of this section, or evidence derived therefrom, shall not be received in evidence in the trial, hearing or proceeding.

In addition to any other right to appeal, the State shall have the right to appeal from an order granting a motion to suppress if the official to whom the order authorizing the intercept was granted shall certify to the court that the appeal is not taken for purposes of delay. The appeal shall be taken within the time specified by the Rules of Court and shall be diligently prosecuted.

STATEMENT OF THE CASE

Edward Ronald Ates was charged and convicted of First Degree Murder, Burglary, Possession of a Weapon for an unlawful purpose, Possession of an unlicensed firearm, Conspiracy to Commit the Crime of Hindering Apprehension, Obstruction of Governmental Function, and Inducing a Witness to Testify Falsely.

On August 23, 2006, police found the body of Paul Duncsak at 95 West Crescent Avenue, Ramsey, New Jersey. Mr. Duncsak had been shot multiple times with a .22 caliber firearm. Mr. Duncsak was the ex-husband of Stacy Walker, the daughter of Petitioner. Dottie Ates is the wife of the Petitioner and Myra Barnes is the mother of the Petitioner.

In connection with the homicide investigation, on September 18, 2006, the Honorable Marilyn C. Clark, P.J.Cr. authorized the electronic interception of cellular telephone and telephone communications between Stacey J. Walker, Edward Ronald Ates, Dottie Ates and others. In connection with this Order, Bergen County, New Jersey Assistant Prosecutor James Santulli circulated a memo to all Bergen County detectives and investigators who were assigned to monitor the phone calls from Edward Ronald Ates's cellular telephone number (772) 519-0987. The memo advised that all personnel had to follow certain minimization procedures including:

A. There shall be no interceptions of any conversations of a privileged nature, e.g. lawyer-client, doctor-patient, husband-wife. It should be noted that there is a special need to intercept the otherwise privileged communications between Edward Ronald Ates and Dottie Ates who live together as husband and wife.

B. Whenever the monitor determines that a conversation involves personal, non-relevant matters, they should immediately cease interception of said call.

C. All calls shall be evaluated by monitors on a call by call basis. In those instances when the monitors are unsure whether they should minimize the interceptions or

not, greater weight should be given to terminating the interception rather than to continue with it.

The discovery in this case was voluminous and included 80 compact discs, two of which contained 15,155 pages of paper discovery. Disc 69 contained 307 phone calls from Edward Ronald Ates's cell phone and Disc 70 contained 320 phone calls from Edward Ronald Ates's home phone, number (772) 940-9066.

The defense moved to suppress the wiretap intercepted telephone conversation outside New Jersey on jurisdictional and constitutional grounds. On December 10, 2008, the Honorable Harry G. Carroll, P.J.S.C., orally denied the motion. The defense also moved to dismiss the Indictment based upon the State's interception of an attorney-client privileged telephone conversation between Petitioner and his defense counsel, which is call #278 placed on October 23, 2006. This motion was denied on July 21, 2009, however all communications from October 23, 2006 and after were suppressed based upon a finding that the State failed to properly monitor, minimize, and subsequently report to the Court the interception of this privileged communication.

Thereafter, the trial commenced on September 9, 2009 before Judge Carroll and a jury and continued for 23 days.

On October 8, 2009, Russell Christiana, the State's main witness and lead Detective on the case, testified concerning the investigation, the obtaining of the search warrants, the reenactment of the drive from Ramsey, New Jersey to Sibley, Louisiana, and other matters. The Petitioner testified in his own defense. Following the trial, Mr. Ates

was found guilty of First Degree Murder, Burglary, possession of a Weapon for an unlawful purpose, possession of an unlicensed firearm, conspiracy to commit the crime of hindering apprehension, obstruction of a governmental function, and inducing a witness to testify falsely.

On December 17, 2009, Petitioner was sentenced to life imprisonment for the crime of First Degree Murder. Mr. Ates must serve 63.75 years of his sentence before he is eligible for parole.

Mr. Ates appealed the case raising, among other issues, the argument that the wiretaps authorized in his case and the New Jersey Wiretapping and Electronic Surveillance Control Act were unconstitutional. On April 17, 2012, the New Jersey Superior Court, Appellate Division affirmed the conviction holding that the wiretaps and the Act were constitutional. On March 18, 2014, the New Jersey Supreme Court also affirmed the conviction holding, as a matter of first impression, that the wiretaps and the Act were constitutional. Mr. Ates subsequently filed a Petition for Writ of Certiorari to this Court, which was denied on October 14, 2014.

On or about May 21, 2015, Mr. Ates filed a Petition for federal habeas relief which was denied on May 24, 2018 by the Honorable Kevin McNulty, U.S.D.J. Judge McNulty also denied the issuance of a Certificate of Appealability. Mr. Ates appealed to the United States Court of Appeals for the Third Circuit requesting that the Court issue a Certificate of Appealability so Mr. Ates could appeal the denial of the Petition for Writ of Habeas Corpus to the United States Court of Appeals for the Third Circuit. On or about November 7, 2018, the Third Circuit Court of Appeals denied Mr. Ates's application for a certificate of appealability.

On or about November 21, 2018, Mr. Ates filed a petition to the Third Circuit Court of Appeals for rehearing by the panel and the Court, *en banc*. On January 17, 2019, the petition for rehearing by the panel and the Court, *en banc*, was denied.

It must be noted that after the denial of the Petition for federal habeas relief on June 22, 2018 by the United States District Court, This Court issued its opinion, Carpenter v. United States, 585 U.S. __; 138 S.Ct. 2206 (2018), addressing an individual's expectation of privacy under the Fourth Amendment and requiring the Government to obtain a search warrant before acquiring certain cell-site location information data. The holding in Carpenter v. United States is relevant to this case because, at a minimum, the case serves to highlight the trend in recent case law to offer more protections to individuals in cases involving the use of information obtained through cell phone technology.

Consequently, it is respectfully requested that This Court grant the instant Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

- I. THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT'S DECISION WAS IN ERROR IN THAT REASONABLE JURISTS COULD DISAGREE WITH THE DISTRICT COURT'S RESOLUTION AND COULD CONCLUDE THAT THERE ARE SUFFICIENT ISSUES PRESENT IN ORDER TO PROCEED WITH AN APPEAL.

The facts and circumstances of this case involve questions of exceptional importance, specifically whether the wiretaps authorized in this case and the Wiretap Act were unconstitutional because the Wiretap Act permits law enforcement to intercept phone calls of out-of-state individuals who have no connection to New Jersey.

In order for a certificate of appealability to be granted a defendant need only demonstrate “a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). On appeal from a denial, “an appellate court reviewing a federal habeas petition, [is] required by § 2254(d)(2) to presume the state court findings correct unless [it] determine[s] that the findings result in a decision which is

unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence." Miller-El, 537 U.S. at 330. (citing 28 U.S.C. § 2254(e)(1)).

The Third Circuit Court of Appeals denied the Petitioner's application for a certificate of appealability because it concluded that jurists of reason would not debate the District Court's conclusion that the Petitioner is barred from his Fourth Amendment challenge because he was afforded in State Court an opportunity for full and fair litigation of his Fourth Amendment claim. Additionally, the Court found that jurists of reason would not dispute that his Sixth Amendment claim fails. 33a to 35a.

It is respectfully submitted that the Third Circuit Court of Appeals erred because the Fourth Amendment claim was not fully and fairly litigated and the wiretap in this case and the New Jersey Wiretap Act violate the Fourth Amendment to the United States Constitution. Additionally, the Third Circuit Court erred because the illegally intercepted privileged telephone call and the Trial Court's inadequate remedy violated the Sixth Amendment to the United States Constitution.

A. The Wiretap in this case and the New Jersey Wiretap Act violate the Fourth Amendment to the United States Constitution.

The Fourth Amendment to the United States Constitution guards against unreasonable searches and seizures. U.S. Const. amend. IV. The Wiretap Act makes it unlawful for any person to purposely intercept any wire, electronic, or oral communication. N.J.S.A. 2A:156A-3a. However, the

law specifically permits the Attorney General and county prosecutors to apply to a judge for an order authorizing law enforcement officers, who are investigating particular crimes, to intercept wire, electronic, and oral communications. N.J.S.A. 2A:156A-8.

N.J.S.A. 2A:156A-12h provides that “an order authorizing the interception of a wire, electronic or oral communication may be executed at any point of interception within the jurisdiction of an investigative or law enforcement officer executing the order.” N.J.S.A. 2A:156A-12h. “Point of Interception” is defined as “the site at which the investigative or law enforcement officer is located at the time the interception is made.” N.J.S.A. 2A:156-12v. The Wiretap Act thus authorizes investigators to intercept out-of-state calls at a listening post in New Jersey.

Under the Wiretap Act, the State is permitted to intercept any calls originating from or directed to any citizen anywhere in the country. Therefore, the Act eliminates jurisdictional boundaries between New Jersey and other states, which is counter to the jurisdictional limits imposed on the State of New Jersey which may only prosecute crimes within its own territorial borders. See N.J.S.A. 2C:1-3(a)(1); State v. Denofa, 187 N.J. 24, 36 (2006); see also N.J.S.A. 40A:14-152 (imposing territorial limits on law enforcement). By permitting the wiretap to be issued where the point of interception is located, this statute opened the floodgates for law enforcement to wiretap any telephone in the country, even when the individual or telephone number has absolutely no connection to the State of New Jersey. The Wiretap Act does not limit this power to only communications occurring on mobile devices.

The New Jersey Supreme Court found that the “[f]ederal circuit courts have consistently upheld wiretaps based on the location of the listening post, and no circuit court has found Title III unconstitutional on that ground.” State v. Ates, 217 N.J. 253, 269 (2014). In upholding the Wiretap Act as constitutional, the New Jersey Supreme Court was persuaded by the inherent mobility of cell phones. The Court found that “[t]he inherent mobility of the modern cell phone could defeat even the most responsible efforts to monitor it. In short, defendant's reading of the Act would make it impractical to intercept cell phone conversations. Viewed in that light, the Act's definition of 'point of interception' —the site where an officer is located when an interception is made, N.J.S.A. 2A:156A-2v—makes rational sense.” Ates, 217 N.J. at 272-73.

It is indisputable that New Jersey law enforcement is required to enlist the aid of neighboring States when searching residences in those States. See In re Morgenthau, 188 N.J. Super 303 (App. Div. 1983); see also Application of Mahler, 177 N.J. Super. 337 (App. Div. 1981). Likewise, law enforcement should be required to enlist the aid of other States when wiretapping phones located in other jurisdictions, or at minimum law enforcement should be required to enlist the help of the jurisdiction where the telephone is registered. Without such a requirement, the Wiretap Act essentially eradicates boundaries and gives New Jersey national jurisdiction over any and all telephones, whether mobile or otherwise.

It is evident that interpreting one state law as permitting that state to wiretap individuals in another state without those individuals having any connection to the authorizing state and without that state having to enlist the help of the individual's home state is egregious. It essentially eliminates

the borders between the states. Such a vast expansion of power of one state cannot possibly stand as constitutional under the Fourth Amendment to the United States Constitution.

Even at the Federal level, which does fall under one larger jurisdiction, caution has been urged. In United States v. Rodriguez, Judge Meskill, in his concurring opinion, highlighted the dangers inherent in upholding the constitutionality of Title III as such a broad law. United States v. Rodriguez, 968 F.2d 1130, cert. denied, 506 U.S. 847 (1992). In Rodriguez, Judge Meskill stated “I do not agree with the majority’s treatment of the wiretap issue, which effectively repeals 18 U.S.C. § 2518(3)’s requirement that a judge may only enter an order authorizing the interception of communications “within the territorial jurisdiction of the court in which the judge is sitting.” Id. at 143-44. Judge Meskill found that “[u]nder the majority’s interpretation of the statute any federal district court, circuit court of appeals or appropriate state court may authorize a wiretap any place in the country. A judge in the Southern District of New York may now authorize a tap on a phone in Chippewa Falls, Wisconsin, Nome, Alaska or Prescott, Arizona, even if no calls are ever placed to the east coast, as long as the listening post is set up in Manhattan.” Id. at 144. Judge Meskill was particularly troubled by the fact that “[l]aw enforcement officials are now able to shop, free from territorial constraints, for a judge who would be likely to authorize a wiretap.” Id. “If a judge in one district denies authorization, law enforcement officials may simply move their listening posts to another jurisdiction until they find a judge willing to authorize the wiretap.” Id.

Judge Meskill found that “[t]he majority accomplishes this result by holding that a single captured communication is “intercepted” in more than a single jurisdiction,

and that authorization in any one such jurisdiction is sufficient to satisfy Title III. While I agree that a federal court sitting in the jurisdiction in which the telephone to be tapped is located has authority to authorize a wiretap, I cannot join the majority in holding that the unilateral decision of law enforcement agents as to where to set up their listening post can grant authority to a judge in any jurisdiction to authorize a phone tap in any other jurisdiction." Id.

Although the case in Rodriguez is distinguishable because it involves two different federal jurisdictions and federal law, it serves to highlight the inherent dangers in upholding as constitutional the fact that a law may permit one jurisdiction to have the authority to wiretap any telephone communication anywhere in the country so long as the listening post is located within that jurisdiction. The Fourth Amendment to the U.S. Constitution serves to protect individuals from such vast intrusions. Although, as the New Jersey Supreme Court noted, cell phones are inherently mobile, the location of where they are registered is not and neither are landlines. It is logical that under the Wiretap Act that the State should be required to obtain warrants both in New Jersey where the telephone communications would be heard and in the home State of the telephone, specifically where the telephone number is registered. This would afford the State in which the individual is presumably residing or, at least, where the telephone is registered, the ability to protect its citizens from unwarranted intrusions by law enforcement from other states. This would also afford greater protections for individuals and greater oversight by having two separate tribunals authorize a wiretap. Greater oversight would help to curb abuse by the government, such as what occurred in this case.

To hold otherwise and permit one state to essentially wiretap a telephone in any location within the country, without the jurisdiction where the telephone is registered even knowing about it, simply does not pass constitutional muster. It affords one state national jurisdiction and tramples on the rights of individuals in other states and on the individual sovereignty of the various states. Such a result could not possibly have been envisioned by the framers of the Constitution in drafting and adopting the Fourth Amendment.

Consequently, it is respectfully submitted that the Wiretap Act is overly broad and therefore unconstitutional under the Fourth Amendment to the United States Constitution. As a result, Mr. Ates's Fourth Amendment rights were violated and it is respectfully submitted that reasonable jurists can disagree with the District Court's resolution in this case and could conclude that there are sufficient issues present in order to proceed with this appeal.

Additionally, in a recent case, the United States Supreme Court addressed an individual's expectation of privacy under the Fourth Amendment and held that the Government is required to obtain a search warrant before acquiring certain cell-site location information data. Carpenter v. United States, 585 U.S. ____; 138 S.Ct. 2206 (2018). This holding, although addressing a distinguishable issue, is relevant to this case because, at a minimum, the case serves to highlight the trend in recent case law to offer more protections to individuals in cases involving the use of information obtained through cell phone technology.

Consequently, it is respectfully requested that This Court grant this Petition for Writ of Certiorari in order to determine whether a Certificate of Appealability should issue

in this case because there are questions of exceptional importance at issue that reasonable jurists could differ on.

B. The illegally intercepted privileged telephone call and the Trial Court's inadequate remedy violated the Sixth Amendment to the United States Constitution

The Trial Court Order which authorized the wiretap in this case specifically precluded law enforcement from recording or listening to telephone communications that were privileged under the attorney-client privilege. In connection with this Order, a memo was circulated to all Bergen County detectives and investigators advising them that, among other things, no interceptions of any attorney-client privileged communications were permitted. Despite this Order, a call was intercepted on October 23, 2006 between Mr. Ates and his defense counsel discussing very specific details and issues related to the case, defense counsel's theory of the case and defense counsel's trial strategy.

The defense moved before the Honorable Harry G. Carroll, P.J.S.C., to dismiss the Indictment based upon the State's interception of this attorney-client privileged telephone conversation and the State's subsequent failure to advise the Court and the defense of this communication. A Rule 104 hearing was held at which time the Assistant Prosecutor and two Prosecutor's Office detectives testified. Judge Carroll found that the communication, which went on for over five minutes, was indeed privileged and that the interception of the call was a violation of Judge Clark's Order and the Prosecutor's Office protocol. Additionally, and most troubling, Judge Carroll found that the State failed

to disclose this intercepted privileged communication to either the Court or the defense.

Judge Carroll found that the interception of this privileged communication and the events which transpired after the interception of this communication were troubling. Judge Carroll chastised the prosecution for not immediately advising Judge Clark that her Order had been violated and that a privileged communication had been intercepted. Instead, the detective who intercepted the communication informed his supervisor of the interception and the State then remained silent on what had occurred. Judge Carroll found that because the State chose to remain silent, Judge Clark was never given an opportunity to remedy the situation, which could have included substituting the investigation team, having the Attorney General's office investigate, sealing the recording, terminating the wiretap, refusing to enter any further wiretap orders, etc. Judge Carroll found that the State's conduct was "egregious".

Despite having found that the State engaged in egregious conduct by intercepting this privileged communication and then by covering up what it had done, Judge Carroll did not dismiss the Indictment, nor did he suppress all of the wiretap communications. Rather, Judge Carroll suppressed only those intercepted communications which occurred from that point forward.

It is respectfully submitted that the remedy imposed by Judge Carroll was inadequate under the circumstances because the intercepted communication involved trial strategy and its interception tainted the defense's ability to adequately defend at trial. Additionally, the interception by the State of the privileged communication violated the Sixth

Amendment of the United States Constitution because the State's interception of this privileged communication compromised the defense's ability to provide effective representation.

In State v. Sugar, a defendant was arrested in connection with the murder of his wife. State v. Sugar, 8 N.J. 1, 22 (1980). The police intercepted and recorded a conversation between the defendant and his counsel while he was in custody. Id. at 5-9. The New Jersey Supreme Court was understandably appalled at the conduct of law enforcement in Sugar.

In analyzing the case, the Court recognized the importance of the attorney-client privilege and found:

Any interference with the intimate relationship between attorney and client may do profound violence to the individual privacy of the client. Instead of receiving the protection that counsel can provide, the client unwittingly reveals his innermost thoughts to the unscrupulous. Such an invasion is unconscionable. The privacy between attorney and client is but an extension of the client's personal privacy. While generally there is no reasonable expectation that a party to a private conversation will not disclose to the government what he has learned, ... the lawyer's duty to respect confidences is beyond dispute . . . and receives zealous enforcement Even in the courtroom, where the search for truth is of singular importance, an evidentiary privilege surrounds

those confidences. Only the client may waive that protection....

Id. at 14 (citations omitted). The Court emphasized that such conduct “may be more than unlawful, it may also be criminal.” Id. The Court noted “[t]he fact that the individuals responsible for invading defendant’s privacy are law enforcement officials heightens our concern and sparks our sense of outrage.” Id.

The Court then turned to the protections of the Sixth Amendment of the United States Constitution and Article I, paragraph 10 of the New Jersey Constitution. The Court noted how “[t]hose guarantees recognize the obvious but important truth that ‘the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty’” Id. at 15 (quoting Johnson v. Zerbst, 304 U.S. 458, 462-463 (1938)); see also Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971). “Because the assistance of counsel is essential to insuring fairness and due process in criminal prosecutions, a convicted defendant may not be imprisoned unless counsel was available to him at every ‘critical’ point following ‘the initiation of adversary judicial criminal proceedings.’” Id. (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972)). In Sugar the Court went on to find that “[t]he circumstances under which a lawyer provides counsel must not ‘preclude the giving of effective aid in the preparation and trial of the case.’” Id. at 17 (quoting Powell v. Alabama, 287 U.S. 45, 71 (1932)). The Court highlighted how imperative it is for defense counsel’s representation to be untrammeled and unimpaired and held that if a counsel’s ability to do so is impaired then the assistance provided is not constitutionally adequate. Id.

As in this case, in Sugar, the defendant contended that the illegal eavesdropping irreparably compromised his attorney's ability to be an effective advocate. The Court in Sugar noted that "[t]here are two possible ways in which this could occur. The first is that official knowledge of the contents of the overheard conversation would prevent defendant's counsel from constructing and presenting an adequate defense. The second potential source of impairment arises from public knowledge of the interview between defendant and his attorneys." Id. The New Jersey Supreme Court then noted under what circumstances an intrusion into the attorney client relationship would result in a denial of the right to effective assistance of counsel. The Court found:

The value of counsel to a criminal defendant depends in part on his skill in formulating trial strategy. This in turn requires that counsel enjoy the absolute trust and confidence of his client, since an effective defense will follow only when a defendant has made full and frank disclosure of his knowledge of events surrounding the alleged crime. Any interference with the relationship of trust between attorney and client may destroy counsel's effectiveness. Likewise, any disclosure of counsel's trial strategy puts the defense at an immeasurable disadvantage. An accusatorial system of criminal justice requires that defense counsel's strategic discussions take place in secret. Premature disclosure of trial strategy upsets the presumed balance of advocacy that lies at the heart of a fair trial. In either case official intrusion would prevent defense counsel from providing constitutionally effective assistance. . . . A dismissal

of the prosecution would thus be necessary as the only means to avoid the denial of one of the fundamental requirements of due process of law.

Id. at 18-19. The Court in Sugar held that “dismissal of a prosecution is the appropriate remedy for official intrusion upon attorney-client relationships only where it destroys that [confidential] relationship or reveals defendant’s trial strategy.” Id. at 21.

In Sugar, the Court ultimately declined to dismiss the Indictment because the interrupted conversations did not involve any attorney-client conversation that revealed trial strategy. Id. at 22. However, the Court noted that if trial strategy had been discussed, then “dismissal of the prosecution would be required.” Id. In the present case, the conversation between Mr. Ates and his counsel did involve trial strategy as well as counsel’s theory of the case. The issues discussed go to the very heart of trial strategy and are the very thing that the attorney-client privilege seeks to protect.

In addition to intercepting such privileged and critical communications, the State followed up its unlawful activity by seeking to hide the fact that it had done so. The detective who first intercepted the privileged communication brought this fact to the attention of his supervisor. However, this revelation was never brought to the attention of the Court and was never brought to the attention of the defense. As a result, this information was never sealed and no measures were taken to ensure that this communication was not heard or used by the State. Judge Carroll was understandably appalled by the State’s conduct, however he found that suppression of the privileged communication and all com-

munications which were intercepted afterwards was a sufficient remedy.

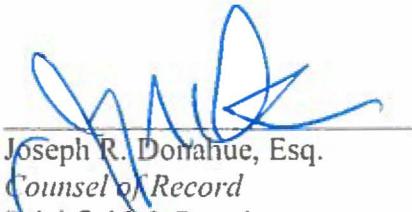
It is respectfully submitted that suppression of the privileged communication and all communications which were intercepted afterwards was insufficient in this case. The Sixth Amendment of the United States Constitution requires that if communications which involve a strategy to be implemented at trial are intercepted, then dismissal of the Indictment is the necessary remedy. In the present case, the communication between Mr. Ates and his counsel involved counsel's theory of the entire case and strategy that he would implement at trial. As a result, suppression alone was inadequate and therefore Mr. Ates's Sixth Amendment rights under the United States Constitution were violated.

Consequently, it is respectfully requested that This Court grant this Petition for Writ of Certiorari in order to determine whether a Certificate of Appealability should issue in this case because there are questions of exceptional importance at issue that reasonable jurists could differ on.

CONCLUSION

Wherefore, Petitioner requests that the relief sought herein be granted.

By:


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