**REAL PARTY IN INTEREST'S
SUPPLEMENTAL APPENDIX**

IN THE 252nd DISTRICT COURT
JEFFERSON COUNTY, TEXAS

————

Cause No. 10-10213-A

————

Ex Parte
Joseph Colone
Applicant

————

ORDER AND CERTIFICATE

Having considered Mr. Colone's Application for Out-of-State Subpoena Seeking Production of STRmix™ Source Code and Related Documents, the Court hereby GRANTS that motion and certifies to all judges of the courts of record in the State of California that the production of the materials listed below by the witness, Custodian of Records for GitHub and/or GitHub general counsel Tyler Fuller, is material and necessary for the administration of justice in this State.

This Court therefore requests an order directing the witness(es) to produce the listed materials for review electronically at the Akron, Ohio, office of the firm Brennan Manna Diamond, consistent with the terms of this Court's Protective Order issued November 21, 2019, beginning on the 24 day of February 2020, at 11:00 AM EST o'clock, through the 25 day of February, 2020.

At the appointed time and place, the witnesses shall produce: (1) A time-limited copy of the

STRmix™ v2.3.07 software; (2) The STRmix™ source code for v2.3.07; (3) the STRmix™ User's Manual; (4) STRmix™ Implementation and Validation Guide; (5) STRmix™ Installation Manual; (6) STRmix™ developmental validation records (not including underlying data) including test scripts, gap analysis documents, risk identification documents (the latter two items being for a more recent version of STRmix™, v2.5.11, as gap analysis and risk identification documents do not exist for v2.3.07); (7) Change Request forms; and (8) Release and Testing Reports for v2.3.07. As set forth in this Court's Protective Order, all the items may be electronically transferred except for the source code, which will be reviewed in the Akron office of Brennan Manna Diamond.

The witness's reasonable costs associated with the production of the listed materials shall be reimbursed up to but not exceeding the amount of $4,000 dollars.

ORDERED AND SIGNED on this 3 day of January, 2020.

/s/ K. Michael Mayes
Judge K. Michael Mayes
Sitting by assignment
252nd Criminal District Court
Jefferson County, Texas

I hereby certify that the Honorable K. Michael Mayes, whose signature is affixed to the foregoing certificate, is the qualified Judge appointed to preside over this matter in the 252nd Criminal District Court of Jefferson County, Texas, and was such judge at the time he signed said certificate.

/s/ K. Holmes
Clerk of the Court
of Jefferson County, Texas

I hereby certify that <u>K. Holmes</u>, whose signature is affixed to the foregoing certificate, is the ~~regularly elected and~~ [KMM] qualified Clerk of the District Court of Jefferson County, Texas, and was such Clerk at the time s/he signed such certificate.

<u>/s/ K. Michael Mayes</u>
Judge K. Michael Mayes
Sitting by assignment
252nd Criminal District Court
Jefferson County, Texas

SUBP-035

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Marshall M. Searcy (Bar No. 169269) Quinn Emanuel Urquhart & Sullivan LLP 865 S. Figueroa St., 10th Fl. Los Angeles, CA 90017 TELEPHONE NO.: 213-443-3000 FAX NO.: 213-443-3100 E-MAIL ADDRESS: marshallsearcy@ quinnemanuel.com ATTORNEY FOR *(Name):* Joseph Colone	*FOR COURT USE ONLY*
Court for county in which discovery is to be conducted: San Francisco SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Francisco STREET ADDRESS: 400 McAllister St, MAILING ADDRESS: 400 McAllister St, CITY, STATE, San Francisco, CA AND ZIP CODE: 94102 BRANCH NAME: San Francisco Superior Court	
Court in which action is pending: Jefferson County Courthouse Name of Court: 252nd State District Court STREET ADDRESS: 1085 Pearl Street MAILING ADDRESS: 1085 Pearl Street CITY, STATE, Beaumont, TX AND ZIP CODE: 77701 COUNTRY: USA	
PLAINTIFF/ PETITIONER: Ex Parte Joseph Colone	CALIFORNIA CASE NUMBER (if any assigned by court):
DEFENDANT/ RESPONDENT:	

SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS IN ACTION PENDING OUTSIDE CALIFORNIA	CASE NUMBER (of action pending outside California):
	10-10213-A

THE PEOPLE OF THE STATE OF CALIFORNIA, TO *(name, address, and telephone number of deponent, if known):*

GitHub Inc. 88 Colin P. Kelly Jr. Street, San Francisco, CA 94107

1. YOU ARE ORDERED TO PRODUCE THE BUSINESS RECORDS described in item 3, as follows:

To *(name of deposition officer):* Marshall M. Searcy III	
On (date): 02/23/2020	At *(time):* 9:00 am
Location *(address):* 50 California St., 22nd Fl. San Francisco, CA	
Do not release the requested records to the deposition officer prior to the date and time stated above.	

a. ☐ by delivering a true, legible, and durable copy of the business records described in item 3, enclosed in a sealed inner wrapper with the title and number of the action, name of witness, and date of subpoena clearly written on it. The inner wrapper shall then be enclosed in an outer envelope or wrapper, sealed, and mailed to the deposition officer at the address in item 1.

b. ☐ by delivering a true, legible, and durable copy of the business records described in item 3 to the deposition officer at the witness's address, on receipt of payment in

cash or by check of the reasonable costs of preparing the copy, as determined under Evidence Code section 1563(b).

c. ☑ by making the original business records described in item 3 available for inspection at your business address by the attorney's representative and permitting copying at your business address under reasonable conditions during normal business hours.

2. The *records are to be produced by the date and time shown in item 1 (but not sooner than 20 days after the issuance of the deposition subpoena, or 15 days after service, whichever date is later). Reasonable costs of locating records, making them available or copying them, and postage, if any, are recoverable as set forth in Evidence Code section 1563(b). The records must be accompanied by an affidavit of the custodian or other qualified witness pursuant to Evidence Code section 1561.*

3. The records to be produced are described as follows *(if electronically stored information is demanded, the form or forms in which each type of information is to be produced may be specified):*

☑ Continued on Attachment 3 *(use form MC-025).*

4. Attorneys of record in this action or parties without attorneys are *(name, address, telephone number, and name of party represented):*

☐ Continued on Attachment 4 *(use form MC-025).*

5. If you have been served with this subpoena as a custodian of consumer or employee records under Code of Civil Procedure section 1985.6 and a motion to quash or an objection has been served on you, a court order or agreement of the parties,

witnesses, and consumer or employee affected must be obtained before you are required to produce consumer or employee records.

6. ☐ Other terms or provisions from out-of-state subpoena, if any *(specify):*

☐ Continued on Attachment 6 *(use form MC-025).*

DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COURT. YOU WILL ALSO BE LIABLE FOR THE SUM OF $500 AND ALL DAMAGES RESULTING FROM YOUR FAILURE TO OBEY.

Date issued: [SEAL]

____JAN 31 2020____   ___/s/ VANESSA WU___
(TYPE OR PRINT NAME)   (SIGNATURE OF PERSON
                              ISSUING SUBPOENA)

                              CLERK OF THE COURT
                              (TITLE)

PROOF OF SERVICE OF SUBPOENA FOR PRODUCTION OF BUSINESS RECORDS

1. I served this *Subpoena for Production of Business Records In Action Pending Outside California* by personally delivering a copy to the person served as follows:

   a. Person served *(name):*

   b. Address where served:

   c. Date of delivery: d. Time of delivery:

   e. Witness fees and mileage both ways *(check one):*

   (1) ☐ were paid. Amount......$_____

   (2) ☐ were not paid.

   (3) ☐ were tendered to the witness's public entity employer as required by Government Code section 68097.2. The amount tendered was *(specify)*:
   $ _____

   f. Fee for service:......................$ _____

2. I received this subpoena for service on *(date):*

3. ☐ I also served a completed *Proof of Service of Notice to Consumer or Employee and Objection* (form SUBP-025) by personally delivering a copy to the person served as described in 1 above.

4. Person serving:

   a. ☐ Not a registered California process server

   b. ☐ California sheriff or marshal

   c. ☐ Registered California process server

d. ☐ Employee or independent contractor of a registered California process server

e. ☐ Exempt from registration under Business and Professions Code section 22350(b)

f. ☐ Registered professional photocopier

g. ☐ Exempt from registration under Business and Professions Code section 22451

h. Name, address, telephone number, and, if applicable, county of registration and number:

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

(For California sheriff or marshal use only) I certify that the foregoing is true and correct.

Date:

Date:

_____ (signature)   _____ (signature)

_____

ATTACHMENT *(Number):* 3_____

(This Attachment may be used with any Judicial Council form.)

See attachment Order from Texas.

DECLARATION OF MARO ROBBINS

I, Maro Robbins, am over the age of twenty-one and am competent to make this declaration. I declare as follows:

1. I am a supervising attorney at the Texas Office of Capital & Forensic Writs (OCFW) and lead counsel representing Joseph Kennedy Colone in *Ex parte Joseph Colone*, 10-10213-A (WR-89,538-01), a post-conviction application for writ of habeas corpus currently before the 252nd District Court in Jefferson County, Texas.

2. The attached Exhibit A is a true and accurate copy of an email dated April 8, 2020 from counsel for ESR (the Institute of Environmental Science and Research), containing ESR's objection to OCFW's request to have an expert acting on Mr. Colone's behalf access and review the STRmix™ source code hosted by GitHub, Inc.

3. The attached Exhibit B is a true and accurate copy of an email dated April 21, 2020 from staff at GitHub, Inc., declining OCFW's request that they comply with the subpoena issued on Mr. Colone's behalf requesting access to the source code in ESR's GitHub account and/or platforms.

I declare under penalty of perjury that the foregoing is true and correct. Executed at 7710 Lazy Lane, Austin, in Travis County, State of Texas on April 27, 2020.

/s/ Maro Robbins
Maro Robbins

Exhibit A

Maro Robbins

From:	Hamilton DeSaussure <hdesaussure@bmdllc.com>
Sent:	Wednesday, April 8, 2020 12:55 PM
To:	Maro Robbins; Blake R. Gerney
Cc:	Mark Fuller
Subject:	RE: Ex Parte Colone subpoena
Attachments:	RE: Ex Parte Colone Sumpoena

Hello Maro: Things are a bit in turmoil but all is well on our end. I hope the same for you.

I understand that the Texas court issued a certificate for a subpoena. I have not seen the subpoena to GitHub. I would appreciate it if you would send me the subpoena sent to GitHub. Please advise if it has been served.

The position of ESR has not changed. Given the proprietary nature of the source code, as we have discussed in the past, ESR does object to any review of the source code without a signed NDA. On that point, I believe Blake Gerney sent you a revised NDA earlier this year. We provided it as well to your local counsel in early March (see attached). We have not heard back from you on that. Coming to agreement on the language of the NDA would be the most efficient way of getting the source code review conducted.

ESR certainly objects to any review conducted of any STRmix™ source code which may be hosted on the GitHub site.

I am happy to discuss this further with you.

Regards,

Hal

12a

HAMILTON DeSAUSSURE, JR.
Partner

P: 330.436.8914
C: 330.697.5190
F: 330.436.8911
E: hdesaussure@bmdllc.com
Website | Map

BRENNAN MANNA DIAMOND
75 E. Market Street Akron, OH 44308

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From: Maro Robbins
    <Maro.Robbins@ocfw.texas.gov>
Sent: Tuesday, April 7, 2020 1:54 PM
To: Blake R. Gerney
    <brgerney@bmdllc.com>;
    Hamilton DeSaussure
    <hdesaussure@bmdllc.com>
Cc: Mark Fuller
Subject: Ex Parte Colone subpoena

External User

Hi Hal, Blake,

I hope you and yours are all safe and well despite all the recent turmoil.

As I believe you are aware, in addition to the subpoenas in Akron, our request for a subpoena seeking access to the STRmix source code from GitHub in California also was approved. In light of that approval, does ESR object to our expert reviewing the source code hosted by GitHub?

Thank you,

Maro

Maro Robbins
Staff attorney
Texas Office of Capital and Forensic Writs
maro.robbins@ocfw.texas.gov
Ph: (512) 463-7034

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Exhibit B

Maro Robbins
From:	Sieger Cejas (GitHub Staff) <help@github.com>
Sent:	Tuesday, April 21, 2020 7:01 PM
To:	Maro Robbins; Marshall Searcy
Cc:	Mark Fuller
Subject:	RE: Ex Parte Colone subpoena
Attachments:	Re: RE: Subpoena to GitHub – Ex Parte Colone

Hi Mr. Robbins —

Thanks for your follow-up message below regarding your subpoena for the "STRmix" source code. Please note that you can review and download all of the the publicly available source code published by the "ESR-NZ" account on their profile page: <https://github.com/ESR-NZ>

If you believe that the "STRmix" source code may be in a private repository, GitHub cannot inspect a user's private stored communications (or permit anyone else to do so) without the user's consent. Moreover, as mentioned previously, even if GitHub could inspect the account's private contents, we do not have any knowledge about the contents of that account or the "STRmix" source code. The account owners would be the ones best positioned to identify and produce the relevant source code from their private repositories. If you believe that the "STRmix" source code is located in their private storage, your subpoena should be directed to them, not GitHub.

It sounds as though you already know how to get in touch with the presumptive account holder; however, if you need to obtain their contact information, as mentioned previously GitHub could produce the

subscriber information we have for the "ESR-NZ" account upon receipt of a revised subpoena asking for identifying information about the account holder.

Best regards,

Jesse

—— Original Message ——

Hi Mr. Geraci,

I am following up on the subpoena seeking the STRmix source code on GitHub's platforms. We do believe that the ESR-NZ account is the relevant one, but ESR (the Institute for Environmental Science and Research) has indicated that it opposes our subpoena for the source code. As a result, there is no reason to believe ESR would help us obtain access to materials in their GitHub account. Given the concern that you have raised about identifying the source code, our request is that GitHub comply with the subpoena either (1) by permitting our expert to access all of the materials in ESR's account/storage space and identify the source code or (2) by asking ESR to identify the source code to GitHub so that GitHub can make only the code available for review by our expert. Please let us know whether you are willing to proceed with either of these options.

Thank you,

Maro Robbins
Staff attorney
Texas Office of Capital and Forensic Writs
maro.robbins@ocfw.texas.gov
Ph: (512) 463-7034

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——Original Message——

From:	Jesse Geraci (GitHub Staff) <help@github.com>
Sent:	Tuesday, March 3, 2020 10:01 AM
To:	Marshall Searcy <marshallsearcy@quinnemanuel.com>
Cc:	Maro Robbins <Maro.Robbins@ocfw.texas.gov>
Subject:	Re: Subpoena to GitHub – Ex Parte Colone

Hi Marshall —

Unfortunately, we are still unable to locate the source code and supporting documents requested in your subpoena based on the information you have provided. As I mentioned previously, GitHub does not have any knowledge about the "STRmix" software or source code. Based on the additional information you provided, we were able to locate an account that appears to be associated with the Institute for Environmental Science and Research — see <https://github.com/ESR-NZ>. But GitHub does not

have any knowledge about the contents of that account and cannot say whether it contains the "STRmix" source code or supporting documents requested in the subpoena. The account owners would be the ones who might be able to answer those questions for you. Furthermore, if the account has responsive code located in their private storage space, the account owner could and should be able to produce that information to you, and GitHub would not be able to produce that content without the account owner's consent.

If you believe that the "ESR-NZ" account is relevant to your case, you could send GitHub a revised subpoena asking for identifying information about the account holders so that you could then contact them to inquire whether they have the "STRMix" code.

Let me know if you have any further questions.

- Jesse

QUINN EMANUEL URQUHART & SULLIVAN, LLP
Marshall M. Searcy (Cal. Bar. No. 169269)
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
Telephone: (213) 443-3000
Facsimile: (213) 443-3100

TEXAS OFFICE OF CAPITAL AND
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Attorneys for Joseph Colone

————

ELECTRONICALLY FILED
Superior Court of California,
County of San Francisco
06/18/2020
Clerk of the Court
BY: EDNALEEN ALEGRE
Deputy Clerk

————

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

————

20a

Case No. CPF-20-517083
(Texas Writ Cause No. 10-10213-A)

————

EX PARTE. Joseph Colone

Applicant

————

AMENDED NOTICE OF MOTION AND MOTION
TO COMPEL PRODUCTION OF RECORDS
PURSUANT TO CAL. PENAL CODE § 1334.2;

————

DECLARATION OF MARSHALL SEARCY;

DECLARATION OF MARO ROBBINS;

PROPOSED ORDER

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Date: July 23, 2020
Time: 9:00 a.m.
Dept.:   302

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on July 23, at 9:00 a.m. or as soon thereafter as may be heard, in Department 302 of the above-entitled Court, Joseph Colone, through Mr. Colone's Texas counsel, the Office of Capital and Forensic Writs (OCFW), will move and hereby moves the Court, pursuant to California Penal Code Section 1334.2, for an order compelling production of the source code listed in the subpoena issued by the Court on January 31, 2020, consistent with the Order and Certificate from the 252nd District Court

in Texas, certifying that the requested materials are material and necessary to ongoing post-conviction proceedings in a death penalty case.

With this Motion, Mr. Colone seeks production of materials created by an agency that sold its software for use in Texas courts and now seeks to avoid the jurisdiction of Texas courts. The creator of the STRmix™ software is the Institute of Environmental Science and Research (ESR), which is based in New Zealand. Because the conviction of Mr. Colone was based upon use of STRmix™ software, Mr. Colone seeks to have an expert review the source code for the STRmix™ software that was used to analyze DNA evidence in his death penalty trial. As stated in the Order and Certificate issued by the 252ⁿᵈ District Court in Texas, the STRmix™ source code is material and necessary to the litigation in Mr. Colone's case.

GitHub is a California firm that, upon information and belief, hosts the STRmix™ source code for ESR on an online or cloud-based platform. At the request of the 252nd District Court in Texas, this Court previously issued a subpoena *duces tecum* calling on GitHub to provide Mr. Colone's expert online access to the source code. GitHub, whose services include securely hosting source code for various businesses on online or cloud-based platforms, acknowledges that ESR has a GitHub account, yet, to date, GitHub has declined to comply with the subpoena. GitHub contends that it has no knowledge of the materials in ESR's GitHub account and that it cannot produce those materials without ESR's consent.

However, ESR refuses to permit Mr. Colone's expert access to the source code because ESR it says that it is dissatisfied with the protective order that the Texas court issued to govern review of the source code. By

refusing to cooperate with the end result being that GitHub has not complied with the subpoena—ESR appears to be counting on the fact that it is a New Zealand entity with no registered agents in the United States and is therefore beyond the reach of a subpoena or other Texas court order despite the fact that ESR markets its software in multiple U.S jurisdictions.

Accordingly, Mr. Colone moves this Court to compel GitHub to comply with the subpoena. Mr. Colone's motion is based on the attached memorandum of points and authorities, and the declarations of Marshall Searcy and Maro Robbins.

Dated: June 18, 2020

> QUINN EMANUEL URQUHART & SULLIVAN, LLP
>
> By /s/ Marshall Searcy
>   Marshall Searcy
>   Attorneys for Joseph Colone

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This motion arises from a case in Texas where Petitioner has been sentenced to the death penalty. DNA evidence was central to the prosecutors' case in Mr. Colone's trial in Texas. However, while the case was awaiting trial, forensic laboratories in Texas and around the country became aware of flaws in their methods for interpreting mixtures of DNA. As a result, prosecutors in Mr. Colone's case received nearly a year of additional time to resolve those issues. Ultimately, to sidestep the problems that analysts were having interpreting DNA mixtures, the state-

funded crime laboratory turned to the probabilistic genotyping software STRmix™ to analyze mixtures of DNA evidence in Mr. Colone's trial. As a result, the prosecution's experts testified—for the first time in a Texas death penalty trial—to the results of analysis conducted by software. Yet Mr. Colone's trial counsel took no steps to independently assess the accuracy or reliability of this evidence. No hearing was held out of the presence of the jury to examine the bases for the conclusions drawn by the State's DNA experts despite the fact that, under the Texas Rules of Evidence, defendants in criminal cases are entitled to learn the facts and data underlying expert testimony. *See* TEX. R. EVID. 705(b) ("an adverse party . . . in a criminal case must . . . be permitted to examine the expert about the[ir] underlying facts or data"). Neither was a hearing conducted to determine whether STRmix's computer-created evidence was sufficiently reliable to be admitted pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993) and *Kelly v. State*, 824 S.W.2d 568 (Tex. Crim. App. 1992).

Mr. Colone was ultimately convicted and sentenced to death. The Office of Capital and Forensic Writs (OCFW) was then appointed to investigate potential post-conviction claims on Mr. Colone's behalf. As part of its statutorily mandated investigation,[1] the OCFW sought the data and records needed to understand and assess the State's DNA evidence. To this end, the OCFW sought production of various records addressing the DNA evidence, including access to STRmix™'s source code. When the OCFW subpoenaed the source

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[1] *See, e.g.,* TEX. CODE CRIM. PROC. art. 11.071 sec. 3(a); State Bar of Texas, *Guidelines and Standards for Texas Capital Cases*, Guideline 12.2(B).

code from the Texas Department of Public Safety (DPS) Crime Laboratory, which had conducted the DNA analysis with STRmix™ on the prosecution's behalf. In response, DPS indicated that it did not possess the source code and that the OCFW would have to obtain them from STRmix™'s vendor.

The OCFW then asked the Texas court to issue an order requiring STRmix™'s creator, the Institute of Environmental Science and Research Limited (ESR), to make available certain materials relating to the operation of the software, including the source code. The Texas court did so on May 5, 2019, however, in addition, the court *sua sponte* modified the terms of the order so that it required the OCFW to sign a non-disclosure agreement (NDA) drafted by ESR before reviewing the source code. Because some terms of ESR's NDA were onerous and unnecessary, the OCFW asked the court to modify its order and, instead of requiring the OCFW to sign ESR's NDA, to issue a protective order that would address the OCFW's concerns while protecting ESR's proprietary interests in the STRmix™ source code.

After listening to and considering ESR's objections, the Texas court on November 21, 2019 issued a Protective Order that would safeguard the confidentiality of ESR's proprietary information while permitting Mr. Colone's expert to conduct the necessary review of the source code. However, on December 4, 2019, counsel for ESR advised the OCFW that ESR was refusing to provide access to the STRmix™ source code under the terms of the court's Protective Order because ESR was dissatisfied with the protective order. At that time, ESR's counsel advised that, to proceed, the OCFW would need to subpoena the source

code but that ESR's counsel would not accept service of a subpoena.

As a result, Mr. Colone sought to subpoena the STRmix™ source code from GitHub, which, upon information and belief, hosts the source code on an online platform. To that end, the Texas court issued an Order and Certification stating that the source code and other related items sought by Mr. Colone were material and necessary to the review of Mr. Colone's post-conviction proceedings in Texas. In turn, this Court issued on January 31, 2020 a subpoena to GitHub for the source code, consistent with the Uniform Act to Secure Attendance of Witness From Without State, codified at Section 1334.2 of the California Penal Code. Instead of requiring witnesses to appear and/or bring the documents to Texas, the subpoena called on GitHub to permit Mr. Colone's experts to review the source code online, or in GitHub offices, or in the Ohio office of ESR's counsel, pursuant to the terms of the Protective Order attached to the Order and Certificate from the 252nd District Court of Texas. (*See* Jan 3, 2020 Order and Certificate, Attachment 3 to Subpoena to GitHub. The January 31, 2020 subpoena to GitHub is attached as Exhibit A to the declaration of Marshall Searcy).

After receiving the subpoena, GitHub acknowledged that ESR maintains a GitHub account. GitHub staff stated that the firm will not produce content from one of its accounts without the account holder's consent. Additionally, GitHub staff indicated that they have no knowledge of the materials in ESR's account and no way of knowing whether those materials include the STRmix™ source code.

The OCFW asked ESR's counsel whether ESR would consent to Mr. Colone's expert reviewing the

source code materials on GitHub. On April 8, 2020, ESR's counsel responded that ESR objects to any review of any STRmix™ source code hosted on any GitHub site. (Robbins Declaration, Exhibit A).

Having received ESR's objection, OCFW asked GitHub to comply with the subpoena in one of two ways: (1) by providing access to the materials in the ESR account and permitting Mr. Colone's expert to identify the source code, or (2) by asking its client ESR to identify the source code so that GitHub could provide access to only that material. GitHub's representatives declined to do so. (Robbins Declaration, Exhibit B).

Mr. Colone now asks this Court to enforce the subpoena by compelling GitHub to produce the materials in its possession. To comply with the subpoena, GitHub can either (1) provide access to the materials in ESR's GitHub account and permit Mr. Colone's expert to identify the source code, or (2) GitHub can ask its client ESR to identify the source code so that GitHub provides access to only that material.

II. ARGUMENT AND AUTHORITIES

A. The Authority of the Court Under the California Penal Code

In codifying the Uniform Act to Secure Attendance of Witnesses from Without State, Section 1334.2 of the California Penal Code states that, if a witness fails without good cause to comply with a subpoena, the witness "shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state."

Section 1331 of the California Penal Code states that disobedience to a subpoena may be punished by the Court as contempt. Section 166(a)(4) of the Penal Code defines contempt as encompassing willful disobedience of a lawfully issued court order or out-of-state court order.

In this matter, GitHub has declined to either provide the subpoenaed materials in its possession or take even reasonable steps to ascertain whether it has the relevant materials in its possession.

The Court therefore may take action to enforce its lawfully issued subpoena requiring GitHub to produce the STRmix™ source code for review by Mr. Colone's expert, pursuant to the terms of the Protective Order issued by the 252nd District Court of Texas. At this time, rather than ask this Court to hold GitHub in contempt, Mr. Colone simply asks the Court to enforce its subpoena by ordering GitHub to provide access to the materials in its possession.

B. The Subpoena is Valid

The subpoena was valid when issued by the Court, and it remains enforceable. A true and correct copy is attached, along with proof of service. Additionally, GitHub had actual knowledge of the subpoena. GitHub was served with the subpoena on February 4, 2020 and has since acknowledged receipt. Therefore, GitHub cannot challenge the subpoena's validity.

C. Enforcement of the Subpoena Would Not Be Unduly Burdensome

GitHub acknowledges that ESR is a client that uses GitHub's services to maintain materials on GitHub's online platform. GitHub therefore has access to the materials on its own platforms, and GitHub can

permit Mr. Colone's expert to identify the source code among the materials in ESR's account, or GitHub can ask its client ESR to identify the STRmix™ source code and provide only that code for Mr. Colone's expert to review.

No one would need to travel to Texas and appear in court to comply with the subpoena. GitHub could make the materials available to Mr. Colone's expert online, in GitHub's offices, or, if ESR so desires, in the Ohio office of ESR's counsel. Finally, review of the source code would be governed by the Protective Order issued by the Texas court to protect the confidentiality of any proprietary information. Therefore, enforcement of the subpoena is both reasonable and warranted.

III. PRAYER FOR RELIEF

The subpoena at issue seeks documents that have been deemed necessary and material by a Texas court overseeing post-conviction review of a death sentence. The creator of those documents, ESR, is a foreign organization that sold its software for use in Texas criminal cases but now refuses to submit itself to the jurisdiction of a Texas court or to subject its software to the adversarial scrutiny that is necessary to reliable due process. Because ESR operates in New Zealand, out of reach of a subpoena, Mr. Colone is forced to seek the necessary and material records from the California firm that hosts those records for ESR on its online or cloud-based platforms. Recognizing that these items are material and necessary to ongoing death penalty litigation in Texas, this Court issued the subpoena in question, which was then served upon GitHub. For the foregoing reasons, Mr. Colone respectfully requests that this Court enforce its valid subpoena by issuing an order requiring GitHub to comply with the sub-

poena by (1) providing access to the materials in ESR's GitHub account so that Mr. Colone's expert can identify the source code, or (2) asking its client ESR to identify the source code and providing Mr. Colone's expert with access to only that material.

Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By /s/ Marshall Searcy
    Marshall Searcy
    Attorneys for Joseph Colone

DATED: June 18, 2020

30a

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Attorneys for GitHub, Inc.

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SUPERIOR COURT FOR THE
STATE OF CALIFORNIA FOR THE
COUNTY OF SAN FRANCISCO

————

Case No. CPF-20-517083

————

EX PARTE. Joseph Colone

APPLICANT

————

DECLARATION OF
W. DOUGLAS SPRAGUE

————

Honorable Judge Ethan P. Schulman
Department: 302

Hearing Date: July 28, 2020
Hearing Time: 9:00 a.m.

————

I, W. Douglas Sprague, declare as follows:

1.   I am a member of the bar of the State of California. I am a partner at the law firm Covington & Burling, LLP and am counsel to GitHub in this matter.

2.   I make this declaration based on personal, firsthand knowledge, and if called and sworn as a witness, I could and would testify competently thereto.

3.   Attached hereto as Exhibit 1 is a true and correct copy of a letter from Hamilton DeSaussure, Jr., which I received by e-mail on July 14, 2020.

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

Executed on this 15th day of July, 2020, at Piedmont, California.

By /s/ W. Douglas Sprague
      W. DOUGLAS SPRAGUE

Exhibit 1

Hamilton DeSaussure, Jr.
Partner
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July 14, 2020

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Re: Subpoena to GitHub, Inc./Motion to Compel
Production Case No. CPF-20-517083, Superior
Court of the State of California, County of San
Francisco

Dear Counsel:

I am writing on behalf of the Institute of Environmental Science and Research, and its subsidiary, STRmix, Ltd. (referred to herein as "ESR"). ESR has been advised by counsel for GitHub that GitHub has received a subpoena seeking information concerning software developed by ESR which is now the subject of a Motion to Compel Production. ESR understands that this matter is scheduled for a hearing later this month in the Superior Court of California, County of San Francisco. This letter will outline ESR's efforts to provide information to the Texas Office of Capital and Forensic Writs ("OCFW") in connection with the proceedings in the matter of Ex Parte Joseph Kenney Colone.

I have corresponded with Atty. Maro Robbins to discuss providing material as requested by the OCFW. To my knowledge and belief, all the material being sought by the OCFW from ESR has been produced subject to a Protective Order in the Texas proceeding, with the sole exception being the review of the source code for version 2.3.07 of the forensic DNA analysis software known as STRmix™. In connection with the requested source code review, I have corresponded with Atty. Robbins to negotiate suitable terms for a non-disclosure agreement to be signed by the expert witnesses utilized by OCFW in this matter.

Exhibit A attached hereto comprises various email correspondence between my office and Atty. Maro Robbins dating back to November, 2019. This email correspondence is not exhaustive but does contain communication relating to the negotiations over the terms of a non-disclosure and confidentiality agreement required by ESR before it can produce the STRmix source code for inspection.

In connection with the proceedings in Ex Parte Colone, Atty. Robbins has requested that Nathan Adams review the STRmix™ source code for Version 2.3.07. I understand that Nathan Adams works for the Forensic Bioinformation Services Company in Fairborn, Ohio. Nathan Adams has previously reviewed the source code for STRmix™ in connection with other criminal proceedings.

Nathan Adams has executed a "Non-Disclosure and Confidentiality Agreement" on prior occasions to gain access the STRmix™ source code in connection with providing expert testimony in criminal proceedings. Exhibit B attached hereto is the Non-Disclosure and Confidentiality Agreement executed by Nathan Adams on May 8, 2018. After executing this agreement, Nathan Adams reviewed the STRmix™ source code for Version 2.3.07 in my office in Canton, Ohio.

ESR stands ready to allow an examination of the STRmix™ source code for Version 2.3.07 provided that any reviewing expert executes an acceptable non-disclosure agreement containing terms establishing the manner of inspection. ESR is willing to allow Nathan Adams to review the source code for Version 2.3.07 again if he agrees in writing that the terms of the May 8, 2018 Non-Disclosure and Confidentiality Agreement will apply to his review. ESR has no objection to Adams providing testimony in Ex Parte Colone based on his May, 2018 examination of the source code.

Finally, ESR is willing to continue negotiations on the terms of the Non-Disclosure and Confidentiality Agreement in an attempt to develop an agreement satisfactory to ESR, OCFW and its expert witness.

Please contact me if you would like to discuss this matter further.

Very truly yours,

/s/ Hamilton DeSaussure, Jr.
Hamilton DeSaussure, Jr.

HD:blh

Encl.

DECLARATION OF MARO ROBBINS

I, Maro Robbins, am over the age of twenty-one and am competent to make this declaration. I declare as follows:

1. I am a supervising attorney at the Texas Office of Capital & Forensic Writs (OCFW) and lead counsel representing Joseph Kenneth Colone in *Ex parte Joseph Colone*, 10-10213-A (WR-89,538-01), a post-conviction application for writ of habeas corpus currently before the 252nd District Court in Jefferson County, Texas.

2. In that proceeding, Mr. Colone is challenging the constitutionality of the proceedings in the 252nd District Court that resulted in his being convicted and sentenced to death in 2017.

3. Mr. Colone was convicted at a trial in which DNA evidence played a central role in the prosecution. However, while the case was pending trial, forensic laboratories in Texas and around the country became aware of flaws in their methods for interpreting mixtures of DNA. Ultimately, the prosecution's laboratory turned to the probabilistic genotyping software STRmix™ to analyze mixtures of DNA evidence in Mr. Colone's case. As a result, the prosecution's experts in Mr. Colone's case testified—for the first time in a Texas death penalty trial—to the results generated by the software.

4. At the time of trial, the Texas Rules of Evidence entitled defendants to learn the facts and data underlying an expert's conclusions. TEX. R. EVID. 705(b). Additionally, approximately eight months before trial, a prominent group of scientists warned that

probabilistic genotyping programs, such as STRmix™, "require careful scrutiny." *See* President's Council of Advisors on Science and Technology, *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods,* § 5.2 (Sept. 2016) at 79.

5. Yet, the OCFW's post-conviction investigation indicates that Mr. Colone's trial lawyers did not obtain the prosecution experts' DNA data or laboratory records; nor did the trial attorneys seek to examine or challenge the reliability or admissibility of the STRmix™'s results under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993). After the trial, the OCFW was appointed to investigate and prepare on Mr. Colone's behalf an Application for a Writ of Habeas Corpus. Like trial counsel, post-conviction counsel such as the OCFW have a duty to conduct an independent examination of the prosecution's evidence. *See* State Bar of Texas, *Guidelines and Standards for Texas Capital Cases*, Guideline 11.1(A) ("Counsel at every stage have an obligation to conduct thorough and independent investigations"); Guideline 12.2(B) (post-conviction counsel have a "duty to conduct a searching inquiry into claims involving . . . flawed forensic methods"); American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (rev. ed. 2003), Guideline 1.1 cmt. Mr. Colone's Application for a Writ of Habeas Corpus contends that his lawyers' neglect of the DNA evidence, including the STRmix™ results, rendered their representation ineffective.

6. Judge K. Michael Mayes, presiding by assignment in the 252nd District Court of Texas, has issued an Order designating certain issues raised by Mr. Colone's Application as needing resolution. Among

those issues were the questions of whether Mr. Colone's lawyers were ineffective in failing to investigate the reliability or validity of the prosecution's STRmix™ evidence, and whether this failure prejudiced Mr. Colone's defense. *See* Designation of Controverted, Previously Unresolved Factual Issues Material to the Legality of Applicant's Confinement, *Ex parte Joseph Kenneth Colone*, 10-10213-A (Dec. 26, 2019).

7. The OCFW first sought to subpoena the STRmix™ source code from the state-owned crime laboratory that used STRmix™ to examine the evidence in Mr. Colone's case, but the lab's staff indicated that they did not have the code in their possession. The OCFW then asked the Texas court to issue an order requiring STRmix™'s creator, the Institute of Environmental Science and Research Limited (ESR), to make available certain materials relating to the operation of the software, including the source code.

8. The Texas court issued the order on May 5, 2019, however, in addition, the court *sua sponte* modified the terms of the order so that it required the OCFW to sign a non-disclosure agreement (NDA) drafted by ESR before reviewing the source code. Because some of ESR's NDA terms appeared onerous and unnecessary, the OCFW asked the Texas court to modify the order and, instead of requiring the OCFW to sign ESR's NDA, to issue a protective order that would address the OCFW's concerns while protecting ESR's proprietary interests in the STRmix™ source code.

9. In regard to the request for a protective order, the Texas court sought and received ESR's position orally and in writing. Appendices 1 (ESR's letter to the Texas court), 2 (email scheduling telephone conference). During that process, ESR's counsel

advised the Texas court that they were willing to provide access to the source code if Mr. Colone's expert signed an NDA similar to one the expert had previously signed in an unrelated case. ESR also asked the Texas court to incorporate the terms of its NDA in a protective order. Appendix 1. After listening to ESR's arguments, the Texas court on November 21, 2019 issued a Protective Order that did not include all of ESR's requested provisions but would safeguard the confidentiality of ESR's proprietary information while permitting Mr. Colone's expert to conduct the necessary review of the source code. *See* Ex. A (Protective Order attached to the Texas court's Certificate). However, on December 4, 2019, counsel for ESR advised the OCFW that ESR was refusing to provide access to the STRmix™ source code under the terms of the court's Protective Order because ESR was dissatisfied with the order. At that time, ESR's counsel advised that, to review the source code, the OCFW would need to subpoena the source code but that ESR's counsel would not accept service of a subpoena.

10. On January 1, 2020, the OCFW filed in the Texas court an application for out-of-state subpoenas seeking production of the STRmix™ source code from, among others, GitHub. The application referenced, among other things, an expert's declaration that had been previously submitted to the court when the OCFW asked the Court to order production of the source code from the prosecution. In that declaration, Mr. Colone's DNA expert stated, "It is not possible to assess or confront STRmix™'s conclusions without a particularized understanding of the analysis it performs, and that understanding cannot be obtained without a review of the software's source code." At the time of filing, a copy of Mr. Colone's application for an out-of-state subpoena seeking the source code from

GitHub was emailed to ESR's counsel. Appendix 3 (email from ESR's counsel confirming receipt of the application for an out-of-state subpoena). I have no information or reason to believe that ESR submitted any opposition to this request to the Texas court.

11. On January 3, 2020, the Court granted Mr. Colone's Application for an Out-of-State Subpoena Seeking Production of the STRmix Source Code from GitHub. In so doing, the Court issued an Order and Certificate in which the Judge certified that production of the STRmix™ source code, among other items, was "material and necessary for the administration of justice in" Texas. Ex. A.

12. So that the record can be developed in regard to STRmix™ and other issues, the Texas court has ordered the parties in Mr. Colone's case to conduct depositions. Following the onset of the COVID-19 pandemic, the Court issued an Order calling for the depositions to occur remotely using Zoom videoconferencing so that none of the parties or witnesses would need to travel to the Jefferson County Courthouse in Beaumont, Texas. The Order also permitted the OCFW to issue subpoenas to secure the necessary testimony and permitted the parties to reach an agreed upon schedule for that testimony. Appendix 4 (Order on Applicant's Motion for Court Reporting Services, *Ex parte Joseph Kenneth Colone,* 10-10213-A, April 17, 2020.).

I declare under penalty of perjury that the foregoing is true and correct. Executed at 7710 Lazy Lane, Austin, in Travis County, State of Texas on July 21, 2020.

/s/ Maro Robbins
Maro Robbins

[1] IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR THE
CITY AND COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE
ETHAN P. SCHULMAN,
JUDGE PRESIDING

DEPARTMENT NO. 302

————

CERTIFIED TRANSCRIPT
No. CPF-20-517083

————

IN RE APPLICATION OF: JOSEPH COLONE

————

REPORTER'S TRANSCRIPT OF PROCEEDINGS
TUESDAY, JULY 28, 2020

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APPEARANCES
(via Zoom)

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————

[2] July 28, 2020   9:36 a.m.

PROCEEDINGS

THE COURT: The only other matter I have on calendar that I'm aware of, that is contested is line 6, In re Application of Joseph Colone, C-o-l-o-n-e.

May I have appearances on that matter?

MR. SEARCY: Good morning, Your Honor, Marshall Searcy, S-e-a-r-c-y, of Quinn Emanuel;

And with me today to argue the motion is Maro Robbins.

MR. ROBBINS: Good morning, Your Honor. Maro Robbins. That's spelled R-o-b-b-i-n-s. I'm with the Texas Office of Capital and Forensic Writs;

I also have a motion pro hac vice admission pending.

THE COURT: Um . . . All right. And is counsel present for GitHub?

MR. SPRAGUE: Yes, Your Honor. Good morning. Douglas Sprague, S, as in Sam, p as in Peter, r-a-g-u-e, from Covington & Burling on behalf of GitHub.

And I would like to introduce my colleagues, Alex Berengaut and Megan Crowley, who are also in the hearing.

And Mr. Berengaut intends to argue the motion. He also has a pro hac vice motion pending, which the tentative is to grant.

And I'll turn it over to Alex.

THE COURT: Yeah, and the reason I was hesitating is I did receive Mr. Berengaut's application, pro hac application, and Ms. Crowley's.

I did not receive, Mr. Robbins, your application, but I'll [3] allow — so I don't know where it is, ha. But I'll certainly allow you to argue the matter this morning.

If you haven't actually filed any application, or if it somehow got lost in the bowels of the filing system here, I apologize. But why don't you submit it if it hasn't previously been submitted at the close of the hearing. And I'll assume that you are qualified to appear in this court.

MR. SEARCY: Thank you, Your Honor. This is Marshall Searcy. Just to interrupt Mr. Robbins, the pro hac application was filed on June 29th; so it appears to have been lost in the bowels of the system.

THE COURT: All right. Fair enough.

THE CLERK: It didn't get hearing date, Your Honor. So we'll have to look for papers and see if we can un-review it.

THE COURT: Thank you, ma'am clerk.

The only other thing I would add here, although I'm not going to particularly stand on ceremony in this regard, Mr. Robbins, is that you did not timely contest the tentative ruling, as required by the tentative, by the local rules, and by the Rules of Court. But since opposing counsel is here and everybody apparently wants to be heard, I'm not gonna preclude you from arguing the motion.

MR. ROBBINS: Thank you, Your Honor. I apologize. I just was not aware of the tentative ruling before at the time, it was necessary. So I responded in *contested* as soon as I was aware of it.

THE COURT: All right. So I guess my question initially to you is . . . you know, we have this *O'Grady* case, which, of [4] course, is binding on me as a trial judgment.

And which says, quite explicitly:

"A subpoena is not enforceable if compliance would violate the SCA," referring to the Stored Communications Act. "Any disclosure violates the SCA unless it falls within an enumerated exception to the general prohibition."

So I don't see an argument in your papers that any enumerated exception under the Stored Communications Act applies here. It seems to me that's the end of the analysis.

Where did I go wrong?

MR. ROBBINS: Well, Your Honor, first, our opposition is that there really isn't controlling California authority on the question of whether the Stored Communication Act blocks the subpoena like ours, which is in a criminal proceeding.

I mean, to start with, just the California Supreme Court has never squarely ruled that the SCA blocks a criminal defendant's subpoena for private communications.

THE COURT: It doesn't matter; if the Court of Appeal has done so, I'm bound by that decision under the *Auto Equity Sales* case.

MR. ROBBINS: So, in terms of *O'Grady*, the issue — our issue with *O'Grady* is that, for one thing, it addresses purely civil litigation, not a proceeding of a criminal nature like ours;

And, secondly, and perhaps more importantly, *O'Grady* just doesn't address the binding Supreme Court doctrine that requires courts to avoid reading statutes in a way that create [5] evidentiary privileges that simply block legal process.

THE COURT: Well, I've read that whole argument and it's very interesting and creative; and it's apparently based, in part, on some forthcoming law review article. But this is not a law school debate; I am bound by California authority.

And you may think, and it seems to me the implication of your argument is that *O'Grady* was wrongly decided.

You may or may not be proven right, but I'm bound by it.

So the only part of your argument that carries any weight here is the argument that *O'Grady* didn't address criminal subpoenas, as opposed to subpoenas in civil litigation.

But it seems to me . . . first of all, I've cited to you some federal authority for the proposition that every court in the country to consider the issue has

concluded that the general prohibition on disclosure of the contents of covered communications under the Stored Communications Act does apply to criminal defendants' subpoenas;

And, second of all, and more broadly, it seems to me that the entire rationale of *O'Grady* applies equally to criminal subpoenas as it does to civil subpoenas.

MR. ROBBINS: If I may, I guess, just . . . respectfully in terms of *O'Grady,* I just would add that when that issue was there, no one briefed our privilege issue; and so, you know, the litigants who don't contest those rulings, you know, waive them. And so that's why it's very different from our proceeding where we have raised the issue.

But, in going further, I think if you're referring to *Wint,* which I think is what the tentative ruling also cites, I [6] mean that is not controlling — it's also, I don't believe, federal; I think it's from the D.C. Court of Appeals, the highest sort of state court, as it were, out of D.C.

THE COURT: You're right. Thank you for the correction. Although it does cite federal authority from across the country.

MR. ROBBINS: But, if I may, I would say that *Wint* isn't persuasive for a couple reasons.

I mean the ruling sort of briefly acknowledges some of the Supreme Court precedent that is in our favor, a case like such as *Baldrige versus Shapiro*, but it — I guess our response to that, to *Wint* is two:

One is that it misinterprets *Baldrige* as saying courts can basically find implied privileges in statute; and so we – we cite in our reply, in response to that, cases like the Ninth Circuit rulings *Zambrano,* and

the Eleventh Circuit ruling *In re Nelson,* which correctly read *Baldrige* as a case that dealt with a statute that dealt with an explicit privilege.

I mean there the statute, unlike the SCA here, said that the protected information, quote, "shall be immune from legal process."

And there the Supreme Court held the statute explicitly provided for non-disclosure.

There's simply no such explicit language here that makes it — this case like *Baldrige*.

And I guess our second position is that even if the Court were to accept that the Court of Appeals in D.C. correctly read *Baldrige* to say that a privilege can be implied, that reading [7] wouldn't block our subpoena because, again, the circumstances of Baldrige, they've recognized an extremely narrowed, implied privilege.

And when the statute, unlike the statute here, said, explicitly, information would be immune from legal process;

And, furthermore, the statute there, unlike the statute here, barred all disclosures with zero exceptions except for returning information to its source. And the Supreme Court there relied on that to say that that statute was explicit congressional intent to preclude all disclosure.

But the SCA here just doesn't have the necessary language that — that shows it's a explicit privilege;

It doesn't talk about discovery, which Congress can very well do and it has done;

It also has lots of disclosures, which shows that Congress wasn't trying to block all disclosure in the

way that *Baldrige* was and that, you know, therefore *Wint's* reading of the precedent isn't persuasive, and it's certainly not controlling authority.

THE COURT: Let's back up a step.

Before we get to your . . . novel privilege argument, you know, normally speaking, when one looks at a statute, we look at statutory language first.

Is there an enumerated exception under the Stored Communications Act to the rule that service providers may not disclose the contents of stored messages that you contend applies here?

Or is your argument rather that there doesn't need to be [8] an enumerated exception because of this argument that you've just made that somehow a court has to conclude that Congress didn't intend the SCA to apply in this context?

MR. ROBBINS: I think — I mean we don't point to a specific enumeration that encompasses it, but we do — I mean this is the rule — we don't necessarily start with the language; we start with the proposition from Supreme Court doctrine, from cases like *St. Regis Paper; Baldrige;*

And *Pierce v Guillen*, that's —

THE COURT: No, no, I'm going to interrupt you. I asked you a specific question: Do you contend that any specific enumerated exception under the SCA applies here?

Yes or no.

MR. ROBBINS: Well, there's — there is no enumerated one that clearly permits it but, at the same time, there's no express provision that clearly blocks it either.

THE COURT: All right. I guess I have a practical question here too. I mean, in all candor — I mean I'll hear from Mr. Berengaut.

In all candor, I'm not persuaded by your argument, but the practical question I have here is what's really going on here?

I mean if I understand the papers, the . . . the software company — you know, GitHub here is basically kind of caught in the middle; they're just a service provider that happens to host this software source code and other materials for their clients, and I'm forgetting the name of it. It's . . . What's the name of — oh, ESR, which, as I understand it, [9] is based in New Zealand and Australia or something . . . as I understand the papers here, ESR has in the past made available the source code, subject to a non-disclosure agreement that your office entered into and — or at least that folks representing other criminal defendants entered into.

And for some reason, which nobody has illuminated for me here, you're not willing to get the source code directly from its source, that is, from ERS, because you're not willing to enter into the non-disclosure agreement.

And I guess I'm perplexed at why not. What is going on here that you all haven't told me?

MR. ROBBINS: Just sort of . . . if I may, if right — our office has never entered into an NDA with ESR. Our expert has, in unrelated cases, completely — you know, having nothing to do with us.

And, again, I'll answer the Court's question, but I guess I would just sort of preface it with saying that, you know, as far as the enforcement of a subpoena, you

know, it's been, you know — we have a certificate showing its material and necessary by a court who's aware of the full, you know, factual goings on and has been part of it, with us.

And that there's no sort of, you know — you know, absent a showing, like GitHub's showing that this imposes an undue burden on them, they don't — I mean this sort of factual background isn't particularly at issue or relevant to the Court's ultimate finding of whether the subpoenas should be enforced.

But — I mean the history is that . . . ESO — we initially [10] spoke to ESR about trying to do this;

They offered a — that they would review this information under the terms of a non-disclosure agreement;

There was several provisions that we thought were onerous and unnecessary. So we asked our court, that we're in front of, to issue a protective order that would deal with the issue at safeguarding ESR's proprietary information but deal with our concerns.

So there've been — the concerns that sort of remain outstanding and at issue is that ESR refuses to let our court, the court that they sold the software for, used in Texas courts and in criminal proceedings, but they are refusing to let those same courts govern the adversarial scrutiny that their products should receive.

And by that I mean the court heard from them, heard their concerns, heard what they wanted in a protective order, and the court granted a bunch of it but not everything that they wanted, particularly what they wanted that remains a sticking point is they want both the non-disclosure agreement to grant them

a right of private civil action, separate and apart from our — from our case in courts separate to us. And they — they were also asking, I think, for our expert to make certain you know, concessions about that, that litigation, and grant, you know, venue in, you know, in another state, but I think — it's just that it's a separate court.

In our view, it is unnecessary. The Texas court found it unnecessary. In our view, it is basically a way for them to get extra leverage and harassment on one of the few experts [11] that is providing independent scrutiny for their product.

So they have — their secrets, their privacy concerns, which are the core of the SCA, are guarded and are not at issue in this case, because the Texas court has granted a protective order, which this court has before it, attached to the Texas court certificate.

So, at this point, our expert, for the reasons stated in his declaration, attached to our reply, is not willing to sign that non-disclosure agreement for several reasons that he recites; and so that avenue, that alternate avenue is not simply open and available to our client.

THE COURT: All right. Anything else you want to add on — going back to the merits of the tentative ruling?

MR. ROBBINS: Well, I guess I just would like to, just to add that, in addition to our, you know, reliance on the Supreme Court doctrine that asks or tells courts to construe the statutes like this narrowly, just as there's also a constitutional basis for enforcing our subpoena.

And that's — you know, in addition to cases like *Pennsylvania versus Ritchie*, which find that there's a due process right to production of material evidence, there's cases that — basically GitHub's interpretation of the statute creates a due process violation; it creates a fundamentally unfair imbalance because, according to them, the statute would give the records we're seeking to law enforcement but they won't give it to us.

And that's precisely the kind of fundamentally unfair imbalance that the Supreme Court has said violates due process [12] in cases like *Wardius versus Oregon*, and *Washington versus Texas*.

So I guess, just to conclude, you know, given all the circumstances here, the fact that there's Supreme Court precedent that supports our position;

There's a lack of binding precedent in California that blocks the subpoena that clearly, squarely falls in these circumstances;

The fact that a Texas court has found that these records are materially necessary to a death penalty case in Texas;

And that that court issued a protective order that basically deals with the privacy concerns that are at issue, we would respectfully ask this court to enforce this subpoena.

THE COURT: Thank you. Mr. Berengaut?

MR. BERENGAUT: Thank you, Your Honor. Very briefly.

We don't have a lot to add to the tentative ruling, Your Honor.

O'Grady is directly on point and dispositive of the SCA argument that Mr. Colone makes.

Just to respond to his constitutional argument, there are two problems with it.

THE COURT: Well, hang on just a sec, before you go on to that . . .

MR. BERENGAUT: Yes, Your Honor.

THE COURT: He makes the point that *O'Grady* only dealt with a civil discovery subpoena, and that what we're dealing with here is obviously a post-conviction subpoena in the context of a criminal case.

[13] Does that make a difference?

MR. BERENGAUT: No, Your Honor, for three reasons.

First, this — the underlying post-conviction proceeding here is a civil proceeding, not a criminal one, as matter of California law;

Second, even if you did —

THE COURT: Well, wait a sec. A post-conviction — this is a habeas proceeding; right?

MR. BERENGAUT: Yes, Your Honor.

THE COURT: That's a civil proceeding?

MR. BERENGAUT: Yes.

THE COURT: And how does California law have anything to say about what kind of proceeding it is? It's proceeding in Texas; it's not proceeding in California; right?

MR. BERENGAUT: Yes, Your Honor.

But if the question is whether *O'Grady,* by its terms, applies to this specific subpoena —

THE COURT: Right.

MR. BERENGAUT: — that question depends on whether, as a matter California law, this subpoena is civil or criminal. And the fact that habeas —

THE COURT: A post-conviction habeas proceeding brought by a convicted criminal defendant is a civil proceeding? Doesn't that strike you as odd?

MR. BERENGAUT: Your Honor, habeas is a — is an odd creature that has elements of both criminal and civil law to it. And as a formal matter, in California, it is treated as a civil proceeding.

[14] But there's no need to rule on that basis, because even if you construed this particular subpoena as a defendant's subpoena, that . . . the rationale of O'Grady would still apply by its terms, which doesn't depend on the particular form of the subpoena; it depends on whether the particular instrument falls outside the enumerated exceptions in 2702, which this — which this does. There is no applicable exception here.

And apart from that —

THE COURT: That's certainly what I . . . at least understood counsel to admit, a couple of minutes ago, when I was asking him that question.

MR. BERENGAUT: Yes, Your Honor.

And then, lastly, Your Honor, as you noted, they're cited in the *Wint* case but there are cases where precisely defendants' subpoenas have been litigated in this context.

And the holding there was the same as in *O'Grady*; the conclusion was a defendant's subpoena, like a civil litigant's subpoena, doesn't fall within an express exception, and so cannot be sustained under the SCA.

THE COURT: All right. Why don't you go on. You were — I interrupted you, and you were about to address the constitutional argument that Mr. Robbins ended with.

MR. BERENGAUT: Yes, Your Honor. I was just going to mention that there too *Wint* surveys the law on that, and notes correctly that that constitutional argument has been uniformly rejected. Although, as the Court pointed out, the SCA has been on the books for more than thirty years.

The notion that there is an asymmetry between the tools [15] available to the prosecution and the tools available to the defense is unremarkable. Lots of aspects of the criminal justice system give tools, some tools to the prosecution and other tools to the defense. And that's never been found to be a fundamental due process violation, as those courts have recognized.

THE COURT: Well, in any event . . . I mean if in fact I am bound *O'Grady,* under these circumstances, it's not clear to me that I either can or should reach any constitutional issues.

MR. BERENGAUT: Yes, Your Honor; we agree.

THE COURT: All right. Mr. Robbins, any rebuttal?

MR. ROBBINS: Yes, thank you, Your Honor.

I guess, just in turn, the — it is — I think that the Court, I think . . . intuited or understands this already, but I think the case law makes very clear our underlying case in Texas is not a civil proceeding.

Texas law treats habeas primarily as criminal proceedings. We cite *Ex parte Smith* in our reply, basically saying that.

California has similarly sort of refused to treat habeas proceedings as civil, and we cite *People v Duvall* in our reply basically showing that the court has refused — because it doesn't seem an apt analogy, a civil — refused to apply habeas matters — or civil rules of pleadings to habeas procedures.

And there's a long line of cases, including Supreme Court cases like *Harris v Nelson* that also say that that's just not a fact.

So we . . . strongly disagree with any character-ization or attempt to mislabel our case as civil. And, likewise, disagree [16] with any suggestion that we fall outside the clear language of 33.14, or 3314 of the California Penal Code, which codifies the Uniform Act.

It's very clear that it applies to dealing with witnesses in criminal actions, prosecutions, and proceedings.

And I think the California Penal Code, which establishes habeas proceedings and describes them as special proceedings of a criminal nature, shows that we are — that a habeas proceeding, even in California law, not just Texas law, it is a criminal proceeding.

So I think we — this falls squarely within what 3314 authorizes subpoenas for.

As far as this constitutional, any asymmetry that the Constitution may permit, it ends, though, I think, when you are dealing with records that have been found to be both material and necessary.

That's when the Courts step in and say, *we will not permit that imbalance.* And that's why you get the outcome like you did in *Texas v Jackson* and *Wardius*.

I guess I'd also add that the Eighth Amendment, that this — I don't think *Wint* cites capital law because *Wint was* — there's no death penalty in D.C.; so the Eighth Amendment, because this is a capital proceeding, the Eighth Amendment demands heightened scrutiny and extra-liable proceedings and that that is a further reason that requires this material and necessary evidence to be available to the Court, assessing our client's death sentence.

So that's a further constitutional basis that *Wint* doesn't [17] address.

THE COURT: All right. This motion or application raises a variety of interesting issues. I don't find it necessary to decide most of them, in view of my view that I am bound by the Court of Appeal's decision in *O'Grady* here.

In light of the fact that there is no applicable — as the applicant concedes, no applicable exception to these stored Communication Act prohibition on disclosure, that's the end of it. The subpoena is not enforceable. And it seems to me that the applicant's argument is really an argument that *O'Grady* was incorrectly decided.

Whether it was or it wasn't, it is binding on me as a Superior Court judge; and therefore I am adopting the tentative and denying the motion to compel.

Thank you.

MR. BERENGAUT: Thank you, Your Honor.

MR. ROBBINS: Thank you, Your Honor.

MR. SEARCY: Thank you, Your Honor.

(10:03 a.m.)

[18] STATE of CALIFORNIA   )
)
COUNTY of SAN FRANCISCO   )

I, MARIA ANTONIA TORREANO, DO HEREBY CERTIFY:

That the foregoing is a full, true and correct transcript of the testimony given and proceedings hereinbefore entitled;

That it is a full, true and correct transcript of the evidence offered and received, acts and statements of the court, also all objections of counsel and all matters to which the same relate;

That I reported the same in stenotype to the best of my ability, being the duly-appointed, qualified and official stenographic reporter of said court, and there-after had the same transcribed, as herein appears.

DATE: <u>August 11, 2020</u>

> <u>/s/ Maria A. Torreano [stamp]</u>
> Maria A. Torreano,
> CSR, CRR, RMR, CCRR
> Certificate No. 8600

Goverment Code §69954(d): "Any court, party or person who has purchased a transcript may, without paying a further fee to the reporter, reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, but shall not other-wise provide or sell a copy or copies to any other party or person.

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

[Filed March 11, 2021]

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Case No. MS-2020-00-0011

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In Re: Joseph Colone,

APPLICANT FOR SUBPOENA

————

ORDER ON APPLICANT'S OBJECTIONS
TO MAGISTRATE'S DECISION

Upon due consideration of Applicant's Objections to the Magistrate's Decision, this court hereby rejects the findings asserted in the Magistrate's Decision filed on February 18, 2021 and denies the movant's Motion to Quash Subpoena filed on March 18, 2020 and Motions to Strike filed on November 2 and 6, 2020.

The movant is ordered to comply with the applicant's subpoena served on February 24, 2020 and produce the STRmix source code for review by Mr. Colone's expert pursuant to the terms of the Protective Order issued on November 21, 2019 by the 252nd District Court of Texas, Jefferson County, at a date and time agreeable to both parties to this action.

IT IS SO ORDERED

/s/ [Illegible]
PRESIDING JUDGE
COURT OF COMMON PLEAS
SUMMIT COUNTY

60a

STATE OF OHIO   )
)ss:
COUNTY OF SUMMIT   )

————

IN THE COURT OF APPEALS NINTH
JUDICIAL DISTRICT

————

C.A. No. 29960

————

IN RE JOSEPH COLONE,

Applicant for Subpoena

————

MAGISTRATE'S ORDER

Pursuant to Local Rule 16 and upon recommendation of the Mediation Attorney, this appeal has been identified as appropriate for a pre-mediation telephone conference.

A pre-mediation telephone/video conference is scheduled for Friday, May 14, 2021, at 11:00 am. The Mediation Attorney has provided contact information for the conference. If notice was not received, contact the Mediation Attorney at (330) 643-6452.

Based on a recommendation from the Mediation Attorney, the parties' briefing schedule is temporarily stayed. A new briefing schedule will be ordered, if necessary, at the conclusion of the mediation process.

/s/ C. Michael Walsh
C. Michael Walsh
Magistrate