

No. **20-6562**

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

REYNALDO SALINAS JR. — PETITIONER
(Your Name)

FILED
NOV 17 2020
OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for Fifth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Reynaldo Salinas JR.
(Your Name)

Federal Correctional Institution,
(Address) 1900 Simler Ave,

Big Spring Texas 79720
(City, State, Zip Code)

N/A.
(Phone Number)

QUESTION(S) PRESENTED

- 1.) Was this a Military or Civilian Investigation?
- 2.) If Military, what Article under U.C.M.J, were they investigating. ?
- 3.) If Civilian, what authority were they operating under?
- 4.) Why weren't there any Civilian Law Enforcement in this case, as I was civilian at time of offense?
- 5.) Did AFOSI violated the PCA in investigating Salinas ?
Air Force office of Special Investigations, Posse Comitatus Act

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

N/A

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- 1.) Applewhite v. U.S. Air Force, 995 F.2d 997 (10th Cir (1993)
- 2.) Payne v. United States, 289 F.3d 377 (5th Cir 2002)
- 3.) U.S. v. Aguirre, 664.3d 606 (5th Cir 2011)
- 4.) U.S. v. Red Feather, 392 F. Supp. 916 (D.S.D 1975)
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- 7.) U.S. v. Wolffs, 594 F.2d. 77 (5th Cir 1979).

STATUTES AND RULES

- 1.) 10 U.S.C § 802
- 2.) 18 U.S.C § 1385
- 3.) 18 U.S.C § 3742
- 4.) 28 U.S.C § 1291
- 5.) 32 U.S.C § 101
- 6.) DoDD 5525-5
- 7.) Fed. R. App. P.4
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- 10.) 21 Yale L. & POL'Y REV. 383 (2003).

OTHER

- 1.) Brian L. Porto, Annotation, Construction and Application of Posse Comitatus Act, and Similiar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws
- 2.) Major J. Scott Randall, The Army Lawyer,
- 3.) Sean J. Kealy, Reexamining the Posse Comitatus Act; Toward a Right to Civil Law Enforcement.

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

- ☐ reported at U.S. COA 5th Cir.; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

- ☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 9/9/2020.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 1.) The Posse Comitatus Act
- 2.) Suppression under The Posse Comitatus Act

STATEMENT OF THE CASE

U.S. Dist Ct, denied Motion to Suppress evidence. Defendant, a member of Texas Army National Guard ROA 1027, serving as Military mechanic at Camp Bullis Texas, ROA. 805-806, 828, 868, 884, When not serving as National Guard, he work as a Civilian mechanic, at his residence. ROA. 805-806, 828, 868, 884, It is undisputed defendant did not engage in any misconduct connected to his arrest while serving on an active duty status with U.S. Army, ROA. 625. (Concession by prosecutor that defendant "was not on active duty and was a civilian mechanic at time of offense.")

Agents of U.S. Air Force Office of Special Investigation "OSI", at Joint Base San Antonio, "JBSA", were in charge of operation leading to defendant's arrest. ROA 108, 125.

OSI ensure safety of military personnel at JBSA. ROA 108, 115. This entails periodic assessment of potential Child Predators in JBSA, through Internet Crimes Against Children Task Force, comprised of Federal, States, Local Law Enforcement officers investigating internet crimes. ROA 115.

Defendant investigation began when OSI posed as 14 yr-old female "Cassie" on mobile application call Whisper - Sept 27, 2017 ROA. 125. Whisper identified defendant, responded to post. ROA 126. Defendant converse with Cassie, to perform sexual act, ROA. 126, by sending his erect penis, he attempted to solicit nude photos from her. ROA 126. He and her later arrange to meet on JBSA - Lackland. ROA 127. He entered JBSA - Lackland on 10/20/2017 to meet "Cassie". ROA 127. When he accessed the base using his military identification card, OSI agents detained him. ROA 127. Agents gave him military rights advisement, he admitted inter alia, with "Cassie" believing her to be 14 yrs old. ROA 127, also admitted he entered JBSA - Lackland to engage in Sexual Activity with her.

The Gov't Indicts Defendant for his Attempted Coercion/Enticement of Minor. His conduct caused prosecution. On 11/1/2017, Gov't filed 2 Count Indictment in Federal Dist. Court. Western Dist. of TX, (San Antonio Division) ROA 34-36. Charges are as follows:

- 1- Attempted Coercion or Enticement of a Minor in violation of 18 U.S.C. § 2422b. (Count One)
- 2) Attempted Transfer of Obscene Materials to Minor in violation of 18 U.S.C. § 14 (Count Two).

(Count Two). ROA.34-36. Salinas subsequently filed a motion to suppress the evidence seized by military law enforcement agents in connection with their undercover operation. ROA.108-12. The central argument of Salinas's motion is that OSI's investigation and arrest of Salinas violated the Posse Comitatus Act. ROA.108-12.

The Trial Court Holds an Evidentiary Hearing on Appellant's Motion to Suppress

Senior United States District Judge David Ezra held a one-day evidentiary hearing on Salinas's motion to suppress on January 18, 2019. ROA.561. At the evidentiary hearing, the Government presented the testimony of several witnesses—OSI Agent David Drake and OSI Agent Casey Sabin—and introduced into evidence several exhibits, which included the message exchanges between Salinas and "Cassie." *See, e.g., Govt. Exh. 1 & 1a.* Salinas did not call any witnesses or present any evidence at the hearing, instead opting to rest after the Government presented its case. ROA.617. The Government's witness testimony at the suppression hearing is summarized below:

Special Agent David Drake

Agent Drake testified he is an OSI agent with the Air Force stationed at JBSA-Lackland. ROA.563. He testified the main purpose or mission of OSI is to protect the interests of the Department of Defense ("DoD") for the Air Force as well law enforcement investigations and the counter intelligence charter for the DoD. ROA.565. Agent Drake explained that any criminal conduct occurring within the boundaries of military installations, "like Joint Base San Antonio at Lackland and at Fort Sam," fall under the overarching purpose of maintaining law and order and protecting the interests of the DoD. ROA.565. A crime committed by either a civilian or active duty military member falls within OSI's mission. ROA.565.

Agent Drake testified that part of OSI's mission is to provide assistance and direction to the DoD. ROA.566. He stated that OSI may get involved with an investigation "any time there's an established military nexus with either the subject, the target, or the victim, the victim's location or the victim's affiliation or the location." ROA.566.

In November 2017, Agent Drake received training to participate in the Internet Crimes Against Children Taskforce ("ICAC"). ROA.564. Agent Drake testified that one of his missions included "Operation Iceberg Three," which sought to "aggressively combat the trafficking of child pornography and sexual solicitation of minors over the Internet affecting the Air Force." ROA.573. The ICAC undercover agent during the mission was tasked with identifying and collecting "prosecutable evidence against military and Department of Defense affiliated persons involved in the exploitation, solicitation and sexual abuse of children as well as to locate and provide support to any child victimized by such individuals." ROA.573. The targets of the mission included active duty military personnel and persons with "privileged access" to the base. ROA.573.

Agent Drake testified he is familiar with the principles of the Posse Comitatus Act through his training and experience in the military. ROA.566-67. He stated this principle mandates that OSI is not to engage in civilian law enforcement activities.

ROA.567. Agent Drake explained "the Department of Defense instructions and then Air Force instructions . . . guide how we're supposed to conduct and initiate investigations from a criminal standpoint" to ensure no Posse Comitatus Act violation occurs. ROA.567-68. In addition, Agent Drake stated DoD instructions, case law, and statutes determine the scope of his permissible law enforcement activities. ROA.567-68.

Agent Drake explained that DoD policy requires OSI to "identify a DoD nexus before initiating a criminal investigation." ROA.570. Specifically, to initiate an investigation. Agent Drake stated:

[T]he Department of Defense nexus [is required] where [a] reasonable likelihood occurs for the location of the crime as a DoD installation, the resources or equipment from the Department of Defense are used in the commission of that crime, the Department of Defense entities, civilian employees or service members or their dependents are the victims of the crime, and the -- again the subject of the investigation is either affiliated to the Department of Defense at the time when the offense occurred or is subject to the United States Code Of Military Justice.

ROA.570.

With respect to Salinas's investigation, Agent Drake alleged that he established a military nexus immediately by placing the purported 14-year-old victim on the military installation itself. ROA.571-72. Because Agent Drake placed the purported victim on the military installation itself, he determined everything about Salinas's case fell under the provision of a military nexus as required by policy. ROA. 578-79. Agent Drake stated Air Force OSI and Army CID function as the primary law enforcement agencies on JBSA, and that there was no assistance being provided by these agencies to any civilian law enforcement agency in connection with Salinas's case. ROA.578-79. He confirmed that he participated in Salinas's investigation as part of the "takedown team." ROA.580.

Special Agent Casey Sabin

Agent Sabin testified he also works with the Air Force Office of Special Investigation. ROA.581-82. He confirmed he participated in the 2017 undercover operation that resulted in

Salinas's arrest. ROA.583. Agent Sabin confirmed he is an agent authorized to conduct ICAC operations. ROA.582-84. As part of Salinas's investigation on September 27, 2017, Agent Sabin created an online persona posing as a 14-year-old female named "Cassie" and posted it in a mobile application called "Whisper." ROA.583-85.

Agent Sabin testified that Salinas responded to his "Whisper" post and began exchanging messages with "Cassie." ROA.584-87. Salinas disclosed to "Cassie" that he is a mechanic for the military working out of JBSA. ROA.584-89.; ROA.590. (showing defendant is a National Guard Army private). Within six messages, "Cassie" told Salinas she attended school on JBSA-Fort Sam Houston. RAO.586-87. He described the sexual acts he wanted to perform with "Cassie," sent her images of his exposed erect penis, sent her pictures of himself in his underwear, and solicited "Cassie" numerous times for nude photographs of herself. ROA.591-93, 600.

On October 20, 2017, Salinas entered JBSA-Lackland using his military identification card, *i.e.*, his Common Access

Card, to meet with "Cassie." ROA.592-93. OSI agents immediately detained Salinas and gave him his statutory and constitutional warnings upon entering the JBSA installation. ROA.594. After waiving his rights, Salinas admitted to OSI agents on the takedown team that he had engaged in ongoing digital conversations with "Cassie." ROA.594. Salinas further admitted to agents that he entered JBSA-Lackland to meet with "Cassie" and have sexual intercourse with her. ROA.594.

On cross examination, Agent Sabin admitted the ICAC training he received is not military related training, but rather training for civilian law enforcement agents. ROA.597. Agent Sabin further acknowledged that the techniques and platforms he used during Salinas's investigation are the same as the ones civilian police officers would have used during an ICAC investigation. ROA.597-98. He conceded the "Whisper" application he used for the investigation is used by "millions and millions of people," which include both civilian and military personnel. ROA.599.

When a post is made on Whisper, like OSI's post about "Cassie," Agent Sabin acknowledged that anybody, including both civilian and military personnel, around the world could access the post. ROA.599-600. Agent Sabin testified that besides Salinas, multiple people outside of JBSA responded to his post. ROA.600-02.; see ROA.607-11. (confirming there are lots of civilians within the geo tag radius of "Cassie's" post who could receive and respond to it). He also alleged that but for Salinas's military affiliation and willingness to access JBSA to meet with "Cassie," he would not have pursued an investigation into Salinas's conduct. ROA.616.

The District Court Denies Appellant's Suppression Motion

The Government urged the District Court to deny Salinas's suppression motion at the conclusion of the evidentiary hearing. It asserted Salinas's affiliation to the Army National Guard gave OSI the military nexus it needed to pursue its investigation against him. ROA.624-25. As for its probable cause, the Government referred to Salinas's desire to have sex with Cassie as the necessary cause to arrest him.

ROA.626. The Court took the matter under advisement and later denied Salinas's motion via written order. ROA.125-37.

Appellant Exercises His Right to Trial by Jury & the Court Sentences Him to Serve 180-Months Imprisonment

After the District Court denied Salinas's motion to suppress, Salinas exercised his right to trial by jury. The jury, however, found Salinas guilty of both federal charges after a four-day trial. ROA.532. The District Court later sentenced Salinas a 180-month term of imprisonment to be followed by concurrent 10-year terms of supervised release. ROA.533-34 (showing the District Court sentenced the defendant to 180 months imprisonment as to Count One and 120-months imprisonment as to Count Two, sentences to run concurrently). The District Court did not impose any fines or restitution, but ordered Salinas to pay a total \$200 special assessment. ROA.537. Salinas timely perfected his appeal to this Honorable Court after the entry of the District Court's judgment.

SUMMARY OF THE ARGUMENT

This case requires the Court to decide whether military law enforcement's engagement in civilian law enforcement constitutes a violation of the Posse Comitatus Act, and if so, whether that violation warrants excluding evidence obtained against Salinas as a result of its involvement. The facts giving rise to the criminal charges against Salinas present a clear violation of a congressional directive prohibiting the use of the military in civilian law enforcement. The facts of this case compel suppression because they demonstrate that suppression is needed to deter future violations of the Posse Comitatus Act, which are repeated and widespread in the military. Salinas therefore respectfully requests this Court to hold the District Court erroneously denied Salinas's motion to suppress. Accordingly, Salinas's conviction and sentence must be set aside and his case remanded to the District Court for further proceedings. *See, e.g., United States v. Ibarra*, 965 F.2d 1354, 1359-60 (5th Cir. 1992) (where trial judge concluded that the Due Process Clause called for suppression because

“the conduct of the officers was ‘outrageous’ and qualified ‘as the sort of arbitrary and capricious police conduct that shocks [a court’s] sense of justice and fundamental fair play.’”).

ARGUMENT

I. The District Court Erred When It Denied Appellant’s Motion to Suppress.

This case requires the Court to decide whether military personnel’s involvement in civilian law enforcement constitutes a violation of the Posse Comitatus Act (“PCA”), and if so, whether that violation warrants excluding the evidence obtained as a result of the involvement. The facts giving rise to the criminal charges against Salinas present a clear violation of the congressional directive prohibiting the use of the military in civilian law enforcement. The District Court thus erred in declining to compel suppression because the facts of this case clearly demonstrate that suppression is needed to deter future PCA violations. Salina therefore respectfully requests this Court to vacate his conviction and sentence and remand his case to the District Court for further proceedings.

A. *Standard of Review & Applicable Law*

1. The Posse Comitatus Act

The Posse Comitatus Act provides as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1385. “The term ‘posse comitatus’ ([which means literally the] ‘power of the county’) denotes a sheriff’s common law authority to command the assistance of able-bodied citizens in order to enforce the law.” Brian L. Porto, *Annotation, Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Execute Laws*, 141 A.L.R. Fed. 271 § 2[a] (1997).

“Although British common law considered military personnel eligible to assist law enforcement, the American tradition has been to limit the role the military could play on the domestic scene.” Sean J. Kealy, *Reexamining the Posse*

Comitatus Act: Toward a Right to Civil Law Enforcement, 21 YALE L. & POL'Y REV. 383, 389 (2003). "This tradition reflects an American concern, formed well before the Revolution, about the dangers of using a standing army to keep civil peace" and "[t]his tradition was codified in 1878 with the [PCA], which forbade the use of the Army to execute the laws or to provide aid to civil authorities in the enforcement of civilian laws." *Id.*; see also *State v. Gonzales*, 149 N.M. 226, 229 (N.M. Ct. App. 2010) (recognizing "underlying the PCA is the continuing recognition of the threat to civil liberties caused by the use of military personnel to execute civilian laws.").

The PCA does precisely what the text of the statute indicates, and upholds "the American tradition of restricting military intrusions into civilian affairs, except where Congress has recognized a special need for military assistance in law enforcement." *United States v. Al-Talib*, 55 F.3d 923, 929 (4th Cir. 1995). The PCA expressly prohibits using "the Army or the Air Force" to execute the laws of the United States, and has since been construed, together with 10 U.S.C. § 375, to extend

to all active duty members of the armed forces. *United States v. Khan*, 35 F.3d 426, 431 (9th Cir. 1994).

Courts have explained that military personnel in accordance with PCA are generally prohibited from providing specified forms of direct civilian law enforcement assistance. *United States v. Dreyer*, 804 F.3d 1266, 1274 (9th Cir. 2015). These activities include: “search or seizure”; “evidence collection”; “surveillance ... of individuals [or] items, ... or acting as undercover agents, informants, [or] investigators”; and “[f]orensic investigations or other testing of evidence obtained from a suspect for use in a civilian law enforcement investigation in the United States unless there is a DoD nexus.” *Id.*

Further, relevant case law has held that the PCA does not prohibit the military from providing “‘indirect assistance’ to civilian authorities that does not subject civilians to the exercise of military power that is regulatory, proscriptive, or compulsory in nature.” *Khan*, 35 F.3d at 431. To be considered “indirect,” the military’s “involvement must not constitute the

exercise of regulatory, proscriptive, or compulsory military power, must not amount to direct active involvement in the execution of the laws, and must not pervade the activities of civilian authorities.” *Id.*

2. Suppression under statute

Although suppression is generally a remedy applicable to violations of the Fourth, Fifth, and Sixth Amendments, the Supreme Court has held that suppression can be appropriate for certain statutory violations as well. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348–49 (2006); *Miller v. United States*, 357 U.S. 301, 313–14 (1958); *McNabb v. United States*, 318 U.S. 332, 344–45 (1943). Courts have stated “there is no reason why the rule should not be applied to the violation of a statute with . . . a substantial constitutional foundation.” *Dreyer*, 804 F.3d at 1283. If the facts demonstrate “widespread and repeated [PCA] violations” and “a need for the remedy” of suppression, courts have declared that it is permissible to invoke the exclusionary rule against the offending party to exclude evidence derived from the violative conduct. *Id.* at

1279 (citing *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986)); *United States v. Mullin*, 178 F.3d 334, 342 (5th Cir. 1999) (quoting *United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979)).

3. A limited standard of review applies to motions to suppress

This Court's review of a district court's denial of a motion to suppress is limited. *United States v. Aguirre*, 664 F.3d 606, 610 (5th Cir. 2011). When reviewing a district court's denial of a motion to suppress, this Court reviews the lower court's findings of fact for clear error and its conclusions of law *de novo*. *United States v. Charles*, 469 F.3d 402, 405 (5th Cir. 2006); *United States v. Lopez-Moreno*, 420 F.3d 420, 429 (5th Cir. 2005); *United States v. Hicks*, 389 F.3d 514, 526 (5th Cir. 2004).

In reviewing findings of fact, the Court views the evidence in the light most favorable to the party prevailing below. *United States v. Shelton*, 337 F.3d 529, 532 (5th Cir. 2003); *United States v. Cantu*, 230 F.3d 148, 150 (5th Cir. 2000). If this review leads the Court to the "definite and firm conviction that

a mistake has been committed[,]" then the district court's factual finding is deemed clearly erroneous. *Payne v. United States*, 289 F.3d 377, 381 (5th Cir. 2002). Whether the PCA has been violated is a mixed question of law and fact that this Court reviews *de novo*. *United States v. Lara*, 850 F.3d 686, 690 (4th Cir. 2017); *United States v. Dreyer*, 804 F.3d 1266, 1271 (9th Cir. 2015). This Court may affirm the District Court's suppression decision on any basis established by the record. *Charles*, 469 F.3d at 405; *United States v. Ibarra-Sanchez*, 199 F.3d 753, 758 (5th Cir. 1999).

B. OSI's investigation violated the PCA

1. Military law enforcement agents actively engaged in all phases of Salinas's investigation

PCA-like restrictions prohibit direct military involvement in civilian law enforcement activities, but they permit some indirect assistance, such as involvement that arises "during the normal course of military operations or other actions that 'do not subject civilians to the use of military power that is regulatory, prescriptive, or compulsory.'" *United States v. Hitchcock*, 286 F.3d 1064, 1069 (9th Cir. 2002). Permissible

indirect assistance “must not ‘constitute the exercise of regulatory, proscriptive, or compulsory military power,’ must not ‘amount to direct active involvement in the execution of the laws,’ and must not ‘pervade the activities of civilian authorities.” *Khan*, 35 F.3d at 431 (*quoting United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir.1991)). “If any one of these tests is met, the assistance is not indirect.” *Id.*

Even if military investigators may look into violations of civil law that occur on military bases, *see United States v. Griley*, 814 F.2d 967, 976 (4th Cir. 1987), their pervasive involvement in an investigation may violate the PCA. *See United States v. Wolffs*, 594 F.2d 77, 85 (5th Cir. 1979); *United States v. Walden*, 490 F.2d 372 (4th Cir. 1974). For example, in *United States v. Walden*, the Fourth Circuit held that the use of undercover military agents on base in an investigation of individuals’ violation of federal law violated a Navy regulation that adopted the PCA. 490 F.2d at 373 (holding that the Treasury Department’s use of Marines as undercover

agents in an investigation of sale of firearms to minors and nonresidents on base violated the regulation).

As the evidence presented at the hearing on Salinas's motion to suppress shows, the OSI's involvement in this matter was extensive and pervasive. The Government simply has no basis to argue that OSI's involvement in Salinas's investigation constituted permissible indirect assistance to civilian law enforcement agencies. First, no state or federal law enforcement agencies had any involvement whatsoever in the underlying investigation ROA.574. (confirming no state law enforcement played a role in the defendant's investigation). The Air Force investigation of Salinas was part of an organized sting operation, an undercover operation aimed "to aggressively combat the trafficking of child pornography and sexual solicitation of minors over the internet. The operation was entirely undertaken by military personnel. ROA.999-1000, 1001-04, 1016-19, 1020-21, 1022-23. The agent working undercover posing as Cassie is military. The agents who investigated Salinas and arrested him are military. After his

arrest, the agents who interrogated Salinas are military. After his arrest, military law enforcement officers obtained Salinas's consent to search. Finally, military law enforcement agents carried out the searches related to the offense conduct.

OSI agents initiated an operation to search for online child predators and actively handled all phases of the investigation, operation, arrest, and interrogation of Salinas. This conduct is expressly prohibited under the PCA as direct assistance. See DoDD 5525.5 § E4.1.3. (identifying under "[r]estrictions on [d]irect [a]ssistance" "a search or seizure" and the "[u]se of military personnel for surveillance or pursuit of individuals, or as undercover agents, informants, investigators, or interrogators"); see also *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D.1975) ("Activities which constitute an active role in direct law enforcement [include] investigation of a crime...."); cf. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1259 (9th Cir. 1998) (concluding no PCA violation where the Navy merely supplied equipment, logistical support, and backup security); *Khan*, 35 F.3d at

431-32 (same). OSI's active involvement in Salinas's case invaded the traditional functions of civilian law enforcement officers, such as in making arrests, conducting searches, and seizing evidence. These military efforts against Salinas undeniably violate the core principles of the PCA.

2. The Government's "military nexus" justification misses the mark

The Government's position at the suppression hearing was that OSI's investigation of Salinas did not violate the PCA because there was an appropriate military interest/nexus underlying the investigation. ROA.624-25. Whether an appropriate military nexus/interest existed to justify OSI's investigation of Salinas simply does not resolve the question of whether that investigation violated the PCA as applied to Salinas's unique circumstances.

Although the PCA restricts military involvement in civilian law enforcement, it is not the intent of the PCA to limit the military from investigating criminal activities committed by its own members whether such activities occur on or off a military base. *Applewhite v. U.S. Air Force*, 995 F.2d 997, 1001

(10th Cir. 1993); *United States v. Griley*, 814 F.2d 967, 976 (4th Cir. 1987). For example, “investigations and other actions related to enforcement of the Uniform Code of Military Justice” could be considered an exception. See DoDD 5525.5 § E4.1.2.1.1); *United States v. Stoltz*, 720 F.3d 1127, 1130 (9th Cir. 2013) (recognizing courts have construed the UCMJ to prohibit members of the armed forces from engaging in child pornography related offenses); *United States v. Brown*, 529 F.3d 1260, 1262 (10th Cir. 2008) (same); *United States v. Allen*, 53 M.J. 402, 407 (C.A.A.F. 2000) (same). Such an exception, however, only applies to active duty military personnel—not National Guard members acting solely in their civilian status.

There can be no question that Salinas, a Private in the Army National Guard, was not on active duty with the United States Army or serving in any other type of military status at the time of his offense conduct. See ROA.625. (concession by prosecutor that defendant “was not on active duty” and was a “civilian mechanic” at time of offense); *see also* ROA.1099.

(acknowledgment by District Court that defendant is in the National Guard and "wasn't a full-time active duty soldier"); ROA.1025-27. (showing Salinas arrested out of military standards and had nothing more than a military identification card in his possession at time of his arrest); ROA.1766, 1782-84. (showing Salinas is not on military status because he is taking care of his grandmother in the city and he is stuck with her all of the time because his car is broken); ROA.1779. (admitting defendant does not have to report everyday as a reservist and that is why he "don't have to, like, keep my grooming standard everyday"); ROA.1779-80. (admitting his unit wants him back because he "is the best mechanic they have" but the unit told him "just stay home man"); ROA.1813. (reflecting OSI failed to perform a personnel records review or unit interviews to determine whether the defendant was on any type of military orders/status at the time of his offense conduct).

What was ignored by the OSI agents below, is that Salinas's enlistment in the Army National Guard carried with

it a federal role, a state role, and a civilian one. *Clark v. United States*, 322 F.3d 1358, 1366-67 (Fed. Cir. 2003). Members of the National Guard only serve the federal military when they are formally called into the military service of the United States. *Id.* At all other times, National Guard members serve solely as members of the State militia under the command of a state governor. *Id.*; see 32 U.S.C. § 101(19). This concept is best described by the “hat” analogy presented in *Perpich v. Department of Defense*, where the Supreme Court stated:

[A]ll of [the National Guard members] now must keep three hats in their closets—a **civilian hat, a state militia hat, and an army hat—only one of which is worn at any particular time.** When the state militia hat is being worn, the “drilling and other exercises” . . . are performed pursuant to “the Authority of training Militia according to the discipline prescribed by Congress,” but when that hat is replaced by the federal hat, the Militia Clause is no longer applicable.

Perpich v. Dept. of Defense, 496 U.S. 334, 348 (1990) (emphasis added). “[T]he state affiliation is suspended in favor of an entirely federal affiliation during the period of active duty.” *Id.* at 349. So, when a member of the National Guard is

not performing drill/military exercises or ordered to active duty in the Army, the member retains his status as a civilian. *See id.* at 348-49; *Clarke*, 322 F.3d at 1366-67.

What hat Salinas wore at the time of his offense is critical. The Government and the District Court focused solely on the fact that Salinas served in the National Guard and accessed JBSA using his military identification to meet with “Cassie.” Unfortunately, none of these acts subjected Salinas to the jurisdiction of the Uniform Code of Military Justice (“UCMJ”). Soldiers and Airmen in the National Guard are subject to the Uniform Code of Military Justice (“UCMJ”) and Manual for Courts-Martial only if activated (mobilized or recalled to active duty) in a Federal capacity under Title 10 by an executive order issued by the President, or during their Annual Training periods, which are orders issued under Title 10, during which periods of duty they are federalized into the National Guard of the United States. *See* 10 U.S.C. § 802.

When serving under their state military affiliation “hat,” *i.e.*, under 32 U.S.C. § 101 orders, individual members of the

Army National Guard and Air Force National Guard are merely subject to their respective State Codes of Military Justice, which often resemble the UCMJ. See Major T. Scott Randall, THE ARMY LAWYER, DA PAM 27-50-486 (November 2013) (noting the Texas Code of Military Justice is applicable to all members of the state's military who are not in federal service). Because the record is devoid of evidence establishing Salinas was on Title 10 federal military orders at the time of his alleged misconduct, he was exempt from the criminal jurisdiction of the U.S. military and outside the purview of OSI's criminal jurisdiction.

The OSI used Whisper to conduct a statewide post that entrapped multiple civilians besides Salinas within its operation. Although OSI agents testified they declined to pursue civilian responses to its post, it nonetheless pursued an investigation against Salinas even though he too was acting as a civilian when he responded to its posts. So, contrary to OSI's contentions, it swept up someone that did not fall under the jurisdiction of the UCMJ. This Court therefore cannot

conclude that OSI's investigation had a legitimate independent military purpose because the methodology OSI employed violated DoD policy as well as the boundary Congress imposed through the PCA and § 375.

OSI improperly subjected Salinas, a civilian at the time of his alleged offense, "to the use of military power that is regulatory, prescriptive, or compulsory." *United States v. Hitchcock*, 286 F.3d 1064, 1069 (9th Cir. 2002). As a result, OSI's direct active involvement in the execution of civilian laws constitutes a clear PCA violation that must be remedied by this Court. See *Khan*, 35 F.3d at 431 (quoting *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir.1991)).

C. *The underlying investigation is yet another example of a pervasive and systemic problem that needs to be remedied by this Court*

Even where a violation of the PCA is established, courts have recognized that the exclusionary rule may not apply unless it can be shown that, based on widespread and repeated violations of the PCA, the evidence should be suppressed for deterrent purposes. See, e.g., *Wolffs*, 594 F.2d

at 85. This is not the first-time military law enforcement personnel have disregarded the mandates of the PCA. There have been repeated and widespread violations of the PCA in recent times, demonstrating that it is time for this Court to intervene.

This Court can infer repeated violations of the PCA from the fact other Circuits have recently encountered investigative scenarios similar to the operation that entrapped Salinas. *Cf. Dreyer*, 804 F.3d at 1280 (declining to enforce exclusionary rule relating to the military's use of new computer search technology in the context of the PCA because it was the first known instance of such abuse by the military); *United States v. Holloway*, 531 Fed.Appx. 582, 583 (6th Cir. 2013) (not designated for publication) (showing yet another instance where an NCIS agent carried out an online child pornography investigation that targeted a civilian). Besides these cases, other courts have faced situations confirming the military has been ineffective in enforcing the PCA's mandates. *See Walden*, 490 F.2d at 377 (declining to enforce exclusionary rule

because the court determined it “is the first instance to our knowledge in which military personnel have been used as the principal investigators of civilian crimes in violation of the Instruction.”); *State v. Pattioay*, 78 Hawaii 455, 896 P.2d 911, 925 (1995) (deeming suppression necessary where “to ignore the violation ... would be to justify the illegality and condone the receipt and use of tainted evidence in the courts of this state.”); *Taylor v. State*, 645 P.2d 522, 524–25 (Okla.Crim.App.1982) (deeming suppression necessary where “the military intervention was excessive” as a military police officer actively participated in the undercover drug purchase, pulled a gun during the arrest, and participated in the search of the appellant’s house after the arrest).

At this juncture, Salinas believes there is ample “evidence of widespread or repeated violations” of the PCA and “ineffectiveness of enforcement [of the PCA] by the military.” *See id.*; *Hayes v. Hawes*, 921 F.2d 100, 104 (7th Cir.1990) (noting the exclusionary rule does not apply “absent widespread and repeated violations”); *Wolffs*, 594 F.2d at 85

("If this Court should be confronted in the future with widespread and repeated violations of the Posse Comitatus Act an exclusionary rule can be fashioned at that time."). The time is now for this Court to intervene and apply the exclusionary rule to serve as a future deterrent. This Court should there for exclude the evidence obtained by the OSI through their investigation, dismiss the charges against him, or provide Salinas with any other relief to which this Court deems him entitled.

CONCLUSION

Military investigators targeted a civilian and acted in a manner to enforce civilian laws in violation of the PCA. As a result, Salinas's motion to suppress should have been granted by the District Court. Based on the foregoing, Salinas respectfully requests this Court to vacate his convictions/sentences and to remand his case to the District Court for further proceedings.

REASONS FOR GRANTING THE PETITION

A.F.O.S.I. violated Posse Comitatus Act (PCA), 18 U.S.C. 1385, when it targeted a civilian, namely defendant, to enforce civilian laws, as there was no Civilian Agents in this case, requestes Court to be remanded to Court of Appeals to resolve the question present to have Conviction and Sentence vacated, to be remanded to the custody of Military.

CONCLUSION

The petition for a writ of certiorari should be granted.

(Respectfully submitted,)

 _____

(Date:) 11/04/2020

APPENDIX - A