

No. 17-
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IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT J. RICE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

=====

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The 1968 federal Wiretap Act, 18 U.S.C. §§ 2510–2522, as amended by the 1986 Electronic Communications Privacy Act (collectively, “the Act”), provides for “suppression” of illegally seized “wire” and “oral” communications but not of illegally seized “electronic” communications. See *id.* §§ 2515, 2518(10)(a), 2518(10)(c). Yet the Act also provides that witnesses must not “disclose” illegally seized “electronic” communications through testimony during a trial. *Id.* §§ 2511(1)(c), 2517(3).

Does the Wiretap Act, as amended, require courts to bar trial testimony that would disclose illegally seized electronic communications?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Rice and respondent United States). There were no co-defendants or co-appellants.

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

Robert J. Rice respectfully petitions this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Third Circuit affirming his convictions and sentence.

OPINIONS BELOW

The Third Circuit's non-precedential opinion (per Fuentes, J., with Jordan & Chagares, JJ.), dated November 16, 2017, is attached as Appendix A. It is not yet published in the Federal Appendix, but is available at 2017 WL 5495584. The United States District Court for the Middle District of Pennsylvania (Conner, Ch.J.) wrote a memorandum opinion (designated "Order"), filed November 19, 2015, addressing the applicant's pretrial motion to suppress. That Order is not published in the Federal Supplement or otherwise available on electronic databases. A copy is attached as Appx. B. An unrelated, pre-sentence memorandum of the district court deciding a Double Jeopardy motion (to merge counts) is available at 2016 WL 3654455 (July 8, 2016).

JURISDICTION

On November 16, 2017, the United States Court of Appeals for the Third Circuit filed its opinion and judgment affirming the applicant's conviction. Appx. A. No petition for rehearing was filed by any party. As a result, pursuant to this Court's Rules 13.1 and 13.3, a petition for certiorari was initially due for filing not

later than February 14, 2018. By Order dated February 6, 2018, under Docket 17A821, Justice Alito extended the time for filing a petition for a writ of certiorari until March 16, 2018, and then, by Order dated March 9, 2018, further extended the time to April 15, 2018, making the petition due not later than Monday, April 16. This petition is timely filed on or before that extended due date. Rules 13.1, 13.3, 13.5. Petitioner invokes this Court’s jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTES INVOLVED

Chapter 119 of Title 18, U.S. Code (“Wire and Electronic Communications Interception, and Interception of Oral Communications”), provides, in pertinent part:

§ 2510. Definitions

As used in this chapter—

(1) “wire communication” means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;

(2) “oral communication” means any oral communication uttered by a person exhibiting an expectation that such communication is not

subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

* * * *

(12) “electronic communication” means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—

- (A) any wire or oral communication;
- (B) any communication made through a tone-only paging device;
- (C) any communication from a tracking device (as defined in section 3117 of this title); or
- (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

* * * *

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) Except as otherwise specifically provided in this chapter any person who —

- (a) Intentionally intercepts ... any wire, oral, or electronic communication;

* * *

(c) intentionally discloses ... to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) Intentionally uses ... the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection

...

Shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * * *

(2) * * *

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

* * * *

(4)(a) Except as provided in paragraph (b) of this subsection or in subsection (5), whoever violates subsection (1) of this section shall be fined under this title and imprisoned not more than five years, or both.

(b) Conduct otherwise an offense under this subsection that consists of or relates to the interception of a satellite transmission * * * is not an offense under this subsection unless the conduct is for the purposes of direct or indirect commercial advantage or private financial gain.

(5)(a)(i) If the communication is —

(A) a private satellite video communication

(B) a radio communication

then the person who engages in such conduct shall be subject to suit by the Federal Government

(ii) In an action under this subsection

* * *

(b) The court may use any means within its authority to enforce an injunction issued under paragraph (ii)(A), ...

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer,

agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefore, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirma-

tion in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

* * * *

§ 2518. Procedure for interception of wire, oral, or electronic communications

* * * *

(10)

(a) Any aggrieved person in any trial ... may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that —

(i) the communication was unlawfully intercepted; ...

* * *

(c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

* * * *

§ 2520. Recovery of civil damages authorized

(a) **In general.**—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral or electronic communication is intercepted, disclosed or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United

States, which engaged in that violation such relief as may be appropriate.

(b) Relief.—In an action under this section, appropriate relief includes —

(1) such preliminary and other equitable declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases;

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) Computation of damages.— * * * *

* * * *

§ 2521. Injunction against illegal interception

Whenever it shall appear that any person is engaged or is about to engage in any act which constitutes or will constitute a felony violation of this chapter, the Attorney General may initiate a civil action in a district court of the United States to enjoin such violation. * * *

STATEMENT OF THE CASE

Petitioner Robert J. Rice, a colonel in the U.S. Army assigned to the War College in Carlisle, Pennsylvania, was found guilty after a five-day jury trial in May 2016 on both counts of a two-count indictment in the Middle District of Pennsylvania. Count One charged possession of child pornography over a two-and-a-half-year period, in violation of 18 U.S.C. § 2252A(a)(5). Count Two charged receipt and distribution of child pornography, in violation of *id.*(a)(2), during certain days near the end of that same time period.

Petitioner moved before trial to suppress evidence seized during an electronic search of his personal computer. The warrant application was predicated upon information gleaned by the use of illegal “spyware” installed by petitioner’s wife on his laptop as their marriage deteriorated. The pretrial motion invoked statutory (Wiretap Act) as well as constitutional grounds. In particular, the defendant’s motion and supporting brief argued that any disclosure of the evidence in court during a hearing or trial would constitute a further violation of the Act, which the court must prohibit. The district court denied this motion, reasoning principally that the illegal search of petitioner’s computer, if any, was a private search by his wife, giving him no basis for relief on constitutional grounds, and that the Wiretap Act did not allow for suppression of illegally seized “electronic” communications. Appx. B.

At trial, petitioner’s wife, Marilyn Rice-Goldie, then in the process of divorce, testified that in January 2013 she installed a form of “spyware” called Spector Pro on petitioner’s laptop computer, without

his knowledge or consent. This program surreptitiously intercepted and tracked websites visited and web searches conducted on the computer. The program also performed key logging, recorded the contents of chats and emails, and took screen shots of the monitored laptop. Six days later Ms. Rice-Goldie checked and discovered that the laptop had been used to download and upload both still images and video of child pornography.

Ms. Rice-Goldie initially hid the laptop, but about ten days later turned it over to local police. Based on her statements, the police obtained a search warrant for the laptop, found evidence of child pornography, and on that basis obtained further warrants. A forensic examination of the laptop revealed contraband only in what Spector Pro had saved and in two (ordinarily inaccessible) “cache” areas. The examination revealed that contraband images had been saved to an external hard drive, but the external hard drive was never found in any search. Petitioner was convicted of possessing and distributing child pornography based on what a federal agent testified he had found in the activity tracked by the Spector Pro spyware.

Prior to sentencing, the district court dismissed Count One on double jeopardy grounds, based on petitioner’s October 11, 2016, court martial conviction for related conduct.¹ Petitioner was sentenced on

¹ An appeal of Col. Rice’s court martial conviction and sentence (which is running concurrently with his federal district court sentence) is pending before the United States Army Court of Criminal Appeals, at Docket No. ARMY 20160695. That appeal contends that all specifications of the

December 28, 2016, to serve 142 months' imprisonment (that is, 12 years adjusted for time served), concurrent with his court martial sentence, with ten years' supervision to follow, and to pay a \$5000 fine.

Petitioner Rice filed a timely, counseled appeal from his conviction. He argued to the Third Circuit that the key evidence used against him at trial was inadmissible under the federal Wiretap Act, 18 U.S.C. §§ 2510–2522 (“Title III”). He also argued on appeal that a prejudicial comment by the prosecutor required a declaration of mistrial. He did not pursue any constitutional challenge to the search of his computer, relying instead solely on the statute’s prohibition on “disclosure,” including in court, of illegally seized communications, including electronic communications. In a non-precedential opinion, the court of appeals rejected those arguments and affirmed his conviction. Appx. A.

The court of appeals reasoned that:

18 U.S.C. § 2515—the Wiretap Act’s suppression provision—only mandates the exclusion of unlawfully intercepted wire and oral communications. ... Recognizing that § 2515’s exclusion rule does not apply to electronic communications, Rice asserts that 18 U.S.C. § 2517(3) creates, by negative implication, a suppression remedy for electronic communications under the Wiretap Act. We reject this argument. Section 2517(3) does not suggest that unlawfully intercepted electronic communications should be suppressed. Rather, § 2517(3) merely describes

(cont'd)
military charges were barred by double jeopardy after petitioner’s conviction at the May 2016 civilian trial.

the limited purposes for which information concerning electronic communications received by authorized means may be disclosed under the Wiretap Act.

App. 5a–6a (footnotes omitted). Petitioner did not seek rehearing in the court of appeals.

This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

The decision of the court below disregards this Court’s precedent and defeats the purpose of the Wiretap Act through misconstruction of the statute.

This case presents an important question of federal law, concerning two seemingly conflicting sets of provisions found in the 1968 Wiretap Act (“Title III”), 18 U.S.C. §§ 2510–2522, as amended in 1986 by Title I of the Electronic Communications Privacy Act, Pub.L. No. 99-508, § 101(c), 100 Stat. 1848, 1851 (“ECPA”). On the one hand, the statute provides for “suppression” of illegally seized wire and oral communications but not of “electronic” communications, such as involved here. At the same time, the statute prohibits and penalizes “disclosure” in court of illegally seized electronic communications.

Petitioner's then-wife intercepted electronic communications on a private account on his laptop computer, without his knowledge or consent, through the spying software Spector Pro. This violated the Act,² which applies fully to private as well as official conduct and allows no exception for intrafamilial surveillance. *See* 1 JAMES G. CARR, PATRICIA L. BELLIA & EVAN A. CREUTZ, LAW OF ELECTRONIC SURVEILLANCE § 3:67 (Dec. 2017 update). Likewise in violation of the Act was her disclosure of the illegally intercepted information to law enforcement. Accordingly, the further disclosure of that information in the courtroom through the federal prosecutors' presentation of testimony against petitioner at his trial violated Title III as amended by ECPA.

² When Spector Pro is installed on a computer, the software monitors and reports on the computer's activity, performing key logging and taking continuous screen shots. It also captures web sites visited, search engines such as Google or Yahoo, the content of chatroom and email conversations, and other applications and programs in use on the computer. CA3 App. 229, 355–57, 450, 464, 541–42. This constitutes an “interception” covered by the Act. *United States v. Szymuszkiewicz*, 622 F.3d 701, 705–06 (7th Cir. 2010) (per Easterbrook, J.); *see* Computer Crime and Intellectual Property Sect., Crim. Div., U.S. Dept. of Justice, *Prosecuting Computer Crimes* (Exec. Office for U.S. Attorneys, 2010 ed., 2015 rev.), at 64 (available at <https://www.justice.gov/sites/default/files/ccips/legacy/2015/01/14/ccmanual.pdf> (last accessed 8/10/17)); 1 JAMES G. CARR, PATRICIA L. BELLIA & EVAN A. CREUTZ, LAW OF ELECTRONIC SURVEILLANCE § 3:27 (Dec. 2017 update). The operation of Spector Pro, by design, thus violates ECPA when it is used without the consent of the person whose communications are to be captured. There was no dispute that Ms. Rice-Goldie lacked consent to intercept petitioner's electronic communications.

Section 2511 of Title III sets forth a general prohibition against the disclosure of the contents of intercepted “electronic communications” unless some specific statutory exception applies.³ Section 2517(3) of the Act provides and delineates the key exception to § 2511’s prohibition, for present purposes: it allows testimony in court concerning intercepted communications (or evidence derived therefrom). But this exception, by the terms of the statute, only applies where the interception of the electronic communication was in accordance with the Act.⁴ That exception did not apply here, because the surreptitious use of Spector Pro spying software by petitioner’s wife, from which the evidence used at trial was derived, was in direct violation of the Wiretap Act.

The plain language of § 2517(3) prohibits the *prospective* disclosure at trial or other court proceedings of testimony or any other evidence of or derived from the unlawful interception of electronic, as well as oral and wire, communications:

§ 2511. Interception and disclosure of wire, oral, or electronic communications prohibited

(1) *Except as otherwise specifically provided in this chapter any person who –*

(a) Intentionally intercepts ... any wire, oral, or *electronic* communication;

* * *

(c) intentionally discloses ... to any other person the contents of any wire, oral, or

³ See Statutes Involved, *ante*, at 4–5.

⁴ See Statutes Involved, *ante*, at 6–7.

electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

* * *

Shall be punished ... or shall be subject to suit

§ 2517. Authorization for disclosure and use of intercepted wire, oral, or electronic communications

* * * *

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or *electronic* communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

18 U.S.C. §§ 2511, 2517 (emphasis added).

Title III, as amended, thus makes illegal the intentional interception, disclosure or use by any person, including private persons such as family members, of another individual's electronic communications without the consent of at least one of the parties to that communication, unless specifically excepted in the Act. 18 U.S.C. §§ 2511(1)(a), (c), (d);

id. § 2511(2)(d).⁵ Nor does the Wiretap Act provide any “clean hands” exception for the government when it receives and proposes to use illegally intercepted communications. While asserting that “§ 2517(3) merely describes the limited purposes for which information concerning electronic communications received by authorized means may be disclosed,” App. 6a, the court of appeals made no mention of the provision that any other disclosure is made both criminal and tortious. Contrary to the holding in the court below, section 2517(3) would be stripped of meaning if not interpreted to disallow testimony and other evidence of electronic communications intercepted in violation of the Act.

As this Court recognized almost exactly fifty years ago: “A ruling admitting evidence in a criminal trial ... has the necessary effect of legitimizing the conduct which produced the evidence” *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Yet under the holding of the court below, a trial judge is required to consciously permit the commission of a federal felony by the witness (and by the prosecutor who calls the witness⁶) through the further disclosure at trial of evidence known to have been unlawfully intercepted and disclosed. See *id.* § 2511(4)(a).⁷

Section 2511 both prohibits and penalizes the interception, disclosure or use of any electronic communication (*inter alia*), unless the disclosure

⁵ See Statutes Involved, *ante*, at 3–4.

⁶ “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.” 18 U.S.C. § 2(a).

⁷ See Statutes Involved, *ante*, at 5

comes within a specific exception stated in the Act. Every interception of communications is deemed to be an unwarranted invasion of individual privacy unless expressly authorized in Title III. See *Gelbard v. United States*, 408 U.S. 41, 46 (1972).

It is true, as the court below noted, that § 2515 of the Act specifically provides for exclusion from evidence in any federal or state court proceeding of *wire and oral* communications intercepted in violation of the Act, and is silent with respect to *electronic* communications, as are involved here. App. 5a.⁸ See also 18 U.S.C. § 2518(10)(a) (standing to move to suppress, also referencing only oral and wire communications).⁹ The analysis of the court below, however,¹⁰ was significantly flawed in starting and ending with the silence of § 2515 in determining that suppression (that is, exclusion from evidence) is not an available remedy for violations of the Act through interception of electronic communications. That section's silence means only that it does not address the present situation.

⁸ See Statutes Involved, *ante*, at 5–6.

⁹ See Statutes Involved, *ante*, at 7.

¹⁰ While consistent with the holdings of the other Circuits to have faced this issue, none of those decisions has confronted or addressed the problem of judicially authorized “disclosure” in violation of the Act. See *United States v. Barajas*, 710 F.3d 1102, 1110 n.5 (10th Cir. 2013) (conclusory holding based on party concession that “suppression” is unavailable); *United States v. Steiger*, 318 F.3d 1039, 1050–52 (11th Cir. 2003) (alternate holding, no “suppression” under ECPA based on illegal “interception” of electronic communications); *United States v. Meriwether*, 917 F.2d 955, 960 (6th Cir. 1990) (alternate holding, no analysis).

The opinion of the court below likewise errs in its discussion of § 2517(3). The court states:

We reject this argument. Section 2517(3) does not suggest that unlawfully intercepted electronic communications should be suppressed. Rather, § 2517(3) merely describes the limited purposes for which information concerning electronic communications received by authorized means may be disclosed under the Wiretap Act.

App. 6a. The court of appeals thus read § 2517(3) in isolation from § 2511(1)(c), to which it provides a limited exception. The latter provision states the general rule: “Except as otherwise specifically provided in this chapter any person who ... intentionally discloses ... to any other person the contents of any ... electronic communication,” is liable to punishment or suit. In other words, § 2517(3) does not “merely” describe the purposes for which lawfully intercepted communications may be “disclosed,” it is part of complex statutory regime under which unlawfully intercepted communications may not be disclosed at all.

In this Court’s most pertinent prior decision, *United States v. Ojeda Rios*, 495 U.S. 257 (1990), the Court noted that even where the “general suppression remedy” of § 2518(10)[(a)] of Title III is not applicable,¹¹ a fair reading of the Act may nevertheless require exclusion of evidence. In that case, wire communications had been lawfully intercepted, but the tapes of those conversations had then not been promptly sealed, as also required by the statute. This

¹¹ Oddly, the *Ojeda Rios* opinion makes no reference to § 2515.

Court held that the provision in § 2518(8)(a) making proper sealing a prerequisite to admissibility established by necessary implication an additional “explicit exclusionary remedy” in the event of noncompliance with that requirement. *Id.* 260 & n. 1.¹² The same principle should apply here, but the court below made no mention of the *Ojeda Rios* precedent.

Section 2518(10)(c), a provision added by ECPA in 1986, addresses “remedies and sanctions” for past violations of the chapter.¹³ Nothing in that paragraph expressly or impliedly abrogates the prospective prohibition created by §§ 2511 and 2517(3) against a further “disclosure” at trial of evidence of electronic communications that was obtained or disclosed in violation of the Act, nor should it be construed to do so by implication. Section 2518(10)(c) refers only to “remedies and sanctions” for “the *interception* of electronic communications” (emphasis added), and makes no mention of permissible “*disclosure*” of such communications. For the judge to prevent another violation (in the form of a prohibited “disclosure”)

¹² Footnote 1 of the opinion in *Ojeda Rios* errs (or is perhaps carelessly worded) in stating that the suppression remedy of § 2518(10)[(a)] is applicable to “electronic communications,” at least as the latter term is defined in the statute. As set forth in the Statutes Involved, *ante*, that section provides for the filing of a motion “to suppress the contents of any *wire or oral* communication” on certain grounds, but does not mention “electronic communications.” The *Ojeda Rios* opinion was issued in 1990, several years after the 1986 enactment of the ECPA, although it concerns events which occurred prior to 1986. The opportunity to clarify or correct this language from that opinion provides another reason to grant the instant petition.

¹³ See Statutes Involved, *ante*, at 7.

from occurring at trial is not to provide a disallowed “remedy” or “sanction” for the past violations, that is, for the illegal “interception,” as limited by the language of section 2518(10)(c).

The provisions of a complex statute like the Wiretap Act should be read in light of a strong presumption that Congress intended a “harmonious whole,” not an internal contradiction. *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 100 (2012), quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). Yet under the court of appeals’ interpretation, we are to understand that Congress simultaneously forbade the testimony used to convict petitioner Rice (because it would constitute an unlawful “disclosure”) yet disabled the trial judge from doing anything to prevent that illegality-in-the-courtroom before it occurred. Since the limited scope of the Act’s suppression provisions is “capable of co-existence” with the prohibition against further unlawful disclosures, “it is the duty of the courts ... to regard each as effective.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The solution, as already suggested, is to view disallowing disclosure through testimony as something other than “suppression” of evidence derived from past illegality, that is, not a backward-looking “remedy” or “sanction,” but instead as a form of forward-looking enforcement designed to prevent any compounding of the violation.

Title III was designed to protect the victim of an unlawful interception of communications by affording a specified array of remedies. But the Act was also designed, in part, to protect the integrity of the courts from further invasions and violations of privacy rights through impermissible disclosures. For the court to

allow such evidence, as in this case, is to sanction the commission of a felony in the courtroom. It is necessarily unreasonable and wrong to construe a federal statute as demanding this result. Recognizing and implementing the overarching purpose of the Act to protect the privacy of Americans' communications resolves the apparent contradiction in the statutory language of the two sets of provisions.

The important question presented arises squarely on the uncomplicated record of this case. The issue was properly raised by pretrial motion, and was then pursued and addressed on appeal. The evidence against petitioner at trial consisted almost entirely of testimony and electronic exhibits disclosed to the jury in direct violation of the language of the Act. Petitioner's case is therefore a perfect vehicle for decision of the significant issue of federal statutory construction, implicating important privacy rights, that is discussed in this petition.

The construction of the Wiretap Act by the court below rewards illegal conduct, disregards this Court's precedent, and defeats the principal objective of the statute, which is to protect individual privacy. To reject that interpretation, this Court should grant the petition.

CONCLUSION

For the foregoing reasons, petitioner Rice prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

— **Fed.Appx. —, 2017 WL 5495584**
United States Court of Appeals, Third Circuit

UNITED STATES of America

v.

Robert J. **RICE**, Appellant

No. 17-1102

Submitted Under Third Circuit L.A.R. 34.1(a)

October 13, 2017

(Opinion filed: November 16, 2017)

On Appeal from the United States District Court for the Middle District of Pennsylvania (No. 1:14-cr-00119-001), District Judge: Honorable Christopher C. Conner

James T. Clancy, Esq., Chelsea B. Schinnour, Esq.,
Office of United States Attorney, Harrisburg, PA, for
Plaintiff-Appellee

Peter Goldberger, Esq., Ardmore, PA, Joseph D.
Caraciolo, Esq., Karen L. DeMarco, Esq., Foreman &
Caraciolo, Harrisburg, PA, for Defendant-Appellant

Before: CHAGARES, JORDAN, and FUENTES,
Circuit Judges

OPINION*

FUENTES, Circuit Judge.

***1** Robert Rice appeals his jury conviction for knowing possession of child pornography, and knowing receipt and distribution of child pornography. For the

* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent

following reasons, we will affirm.

I.

Because we write exclusively for the parties, we set forth only those facts necessary to our disposition. Rice, who was an officer in the United States Army, had a laptop computer. Without his knowledge, his wife, Marilyn Rice-Goldie, installed a spyware program called “Spector Pro” on the laptop. Spector Pro—the presence of which was not readily apparent to computer users—monitored and reported on the activity of Rice’s entire computer, including accounts on the laptop that Rice had not authorized Rice-Goldie to access. Among other things, Spector Pro logs keystrokes, takes screen shots, captures web sites visited, and saves the contents of searches, emails and chats.

After installing Spector Pro, Rice-Goldie reviewed Spector Pro’s records and discovered child pornography on the laptop. Rice-Goldie eventually turned the laptop over to the police. Based on Rice-Goldie’s reports, the police obtained a search warrant and found evidence of child pornography on the laptop.

Rice was charged with one count of knowing possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5), and one count of knowing receipt and distribution of child pornography, in violation of 18 U.S.C. § 2252A(a)(2). Before trial, Rice moved to suppress the evidence seized under the above warrants, arguing, *inter alia*, that it was acquired in violation of the Wiretap Act.¹ The District

¹ The Wiretap Act, 18 U.S.C. § 2510, *et seq.*, “formally known as the 1968 Omnibus Crime Control and Safe Streets Act,” was technically superseded by the Electronic Communica-

Court denied Rice's motion.

In May 2016, Rice was tried by jury. On the first day of trial, Rice-Goldie appeared as a government witness. During defense counsel's cross-examination of Rice-Goldie, the prosecutor erroneously commented, in the jury's presence, that defense counsel's questioning might elicit information related to "a separate investigation into a national security issue."² Defense counsel immediately objected and moved for a mistrial. After speaking with counsel at sidebar, the District Court took a recess to consider the transcript and how to proceed. After the recess, the District Court spoke further with counsel about their respective arguments, but ultimately rejected defense counsel's motion for a mistrial. Rather, after recalling the jury, the District Court delivered a short curative instruction informing the jury that the prosecutor's reference to a national security investigation was in error and instructing them to disregard it. With that, Rice's trial continued and the prosecutor's remark was not mentioned again during the rest of the five-day trial.

***2** Ultimately, the jury convicted Rice on both counts.³ Rice was then sentenced to 142 months' imprisonment, to run concurrently with the four-year term of

_____(cont'd)

tions Privacy Act of 1986. *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 110, 113 n.7 (3d Cir. 2003), *as amended* (Jan. 20, 2004). For the sake of convenience, we refer to the Wiretap Act throughout.

² App. 301.

³ On Rice's motion, the court later dismissed Rice's conviction under 18 U.S.C. § 2252A(a)(5) pursuant to the Double Jeopardy Clause of the Fifth Amendment because Rice was convicted by court-martial for the "same offense." App. 903.

imprisonment imposed by the Army following court-martial. This appeal followed.⁴

II.

Rice appeals his conviction on two grounds. First, Rice contends that the District Court erred in denying his pretrial motion to suppress all evidence that the government seized pursuant to warrants based on Rice-Goldie's alleged violation of the Wiretap Act. Second, Rice argues that the District Court abused its discretion by denying his motion for a mistrial and instead giving a curative instruction after the prosecutor erroneously mentioned once in the jury's presence that Rice's case was related to "a separate investigation into a national security issue."⁵ We address these issues in turn.⁶

A. Suppression Motion

Rice first maintains that the District Court should have suppressed evidence obtained through Rice-Goldie's installation of Spector Pro on his laptop as a wrongful interception of his electronic communica-

⁴ The District Court had jurisdiction under 28 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291.

⁵ App. 301.

⁶ "We review the denial of a suppression motion for clear error as to the underlying facts, but exercise plenary review as to its legality in light of the [D]istrict [C]ourt's properly found facts." *United States v. Jackson*, 849 F.3d 540, 544 (3d Cir. 2017) (quoting *United States v. Coles*, 437 F.3d 361, 365 (3d Cir. 2006)). The District Court's denial of a motion for a mistrial is reviewed for abuse of discretion. *United States v. Liburd*, 607 F.3d 339, 342 (3d Cir. 2010).

tions under the Wiretap Act.⁷ This argument fails. “The Wiretap Act does not provide a suppression remedy for electronic communications unlawfully acquired under the Act.”⁸ Instead, 18 U.S.C. § 2515—the Wiretap Act’s suppression provision—only mandates the exclusion of unlawfully intercepted wire and oral communications.⁹ Indeed, while the legislative history for the USA Patriot Act demonstrates that Congress considered amending § 2515 to extend to electronic communications, no such provision was added.¹⁰

***3** Recognizing that § 2515’s exclusion rule does not apply to electronic communications, Rice asserts that

⁷ The Wiretap Act defines “electronic communication” as “any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce.” 18 U.S.C. § 2510(12).

⁸ *United States v. Steiger*, 318 F.3d 1039, 1052 (11th Cir. 2003); see also *United States v. Meriwether*, 917 F.2d 955, 960 (6th Cir. 1990) (“The [Electronic Communications Privacy Act] does not provide an independent statutory remedy of suppression for interceptions of electronic communications.”).

⁹ See 18 U.S.C. § 2515 (“Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court ... if the disclosure of that information would be in violation of this chapter.”) (emphasis added); *United States v. Barajas*, 710 F.3d 1102, 1110 n.5 (10th Cir. 2013) (“In 1986, Congress amended [the Wiretap Act] with the Electronic Communications Privacy Act, and clarified that only wire and oral communications are subject to statutory suppression.”).

¹⁰ See *Steiger*, 318 F.3d at 1050.

18 U.S.C. § 2517(3) creates, by negative implication, a suppression remedy for electronic communications under the Wiretap Act. We reject this argument. Section 2517(3) does not suggest that unlawfully intercepted electronic communications should be suppressed.¹¹ Rather, § 2517(3) merely describes the limited purposes for which information concerning electronic communications received by authorized means may be disclosed under the Wiretap Act.¹²

B. Mistrial Motion

Lastly, Rice argues that the District Court abused its discretion in denying his motion for a mistrial based on the prosecutor's incorrect statement, before the jury, that Rice's case was related to "a separate investigation into a national security issue."¹³ We disagree. The prosecutor's single reference to a national security investigation, which occurred on the first day of trial and was not mentioned again during

¹¹ See *United States v. Jones*, 364 F.Supp.2d 1303, 1308 (D. Utah 2005) ("[I]t is clear from the general context of § 2517(3) that it does not create by implication a suppression remedy for electronic communications.").

¹² See 18 U.S.C. § 2517(3) ("Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication ... may disclose the contents of that communication ... while giving testimony under oath or affirmation in any proceeding held under the authority of the United States...."); see also *Jones*, 364 F.Supp.2d at 1308 ("Read in context, § 2517 describes the limited purposes for which communications received by authorized means may be used or disclosed; its effect has no implication for communications received by unauthorized means.").

¹³ App. 301.

the rest of the five-day trial, was corrected by the District Court's prompt and succinct curative instruction, and could not have prejudiced Rice in light of the overwhelming evidence presented regarding Rice's possession, receipt, and distribution of child pornography.¹⁴

III.

For the foregoing reasons, we will affirm Rice's conviction.

¹⁴ See *United States v. Rivas*, 493 F.3d 131, 140 (3d Cir. 2007) ("A mistrial is not required where improper remarks were harmless, considering their scope, their relation to the context of the trial, the ameliorative effect of any curative instructions and the strength of the evidence supporting the conviction.").

APPENDIX B
**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA**

UNITED STATES	:	CRIMINAL
OF AMERICA	:	NO. 1:14-CR-119
v.	:	(Chief Judge
ROBERT J. RICE,	:	Conner)
Defendant	:	

ORDER

AND NOW, this 19th day of November, 2015, upon consideration of the motions (Docs. 33, 34, 35) to suppress evidence filed by defendant Robert J. Rice (“Rice”), wherein Rice asserts that all evidence seized pursuant to search warrants in the matter *sub judice* concerning possession, receipt, and distribution of child pornography is subject to suppression because (1) the inceptive evidence—screen shots of internet websites, emails, and instant message conversations captured surreptitiously from Rice’s computer and conveyed to the Pennsylvania State Police by Rice’s wife—was obtained in violation of 18 U.S.C. §§ 2510-22 (“Wiretap Act”), which provides for the exclusion of certain unlawfully acquired communications, *id.* § 2515; (Docs. 33, 39); (2) law enforcement officers omitted material information from the probable cause affidavits underlying the search of Rice’s computer, in violation of the Fourth Amendment, see U.S. CONST. amend. IV; (Docs. 34, 38); and (3) the search warrants were secured based upon illegally obtained evidence, in violation of the Fourth Amendment, see U.S. CONST. amend. IV; (Docs. 35, 37), and further upon consideration of the government’s omnibus brief (Doc. 40) in opposition to the motions, and the court

observing that although the Wiretap Act proscribes the unlawful interception of any “wire, oral, or electronic communication,” 18 U.S.C. § 2511, the Wiretap Act only mandates evidentiary exclusion of unlawfully intercepted wire and oral communications, *excepting* electronic communications, *id.* § 2515; *see United States v. Barajas*, 710 F.3d 1102, 1110 n.5 (10th Cir.) *cert. denied*, 134 S. Ct. 230 (2013); *United States v. Reed*, 575 F.3d 900, 915 (9th Cir. 2009); *United States v. Steiger*, 318 F.3d 1039, 1050-51 (11th Cir. 2003); *United States v. Meriwether*, 917 F.2d 955, 960 (6th Cir. 1990), and it appearing that Rice does not contest that the evidence allegedly obtained by his wife in violation of the Wiretap Act constitutes electronic communication *in toto*, (*see* Doc. 39 at 7-8), and the court concluding that the Wiretap Act’s suppression remedy is inapplicable to the evidence herein, (*see* Docs. 33, 39), and the court observing that the Fourth Amendment protects individuals from unreasonable searches and seizures, *see* U.S. CONST. amend. IV; *Horton v. California*, 496 U.S. 128, 133 (1990), and that generally a search is reasonable only if effectuated with a warrant supported by probable cause, *see City of L.A. v. Patel*, 135 S. Ct. 2443, 2452 (2015), and the court recognizing that probable cause may be established when there exists a fair probability that evidence of a crime will be found in the location sought to be searched based upon the circumstances set forth in the supporting affidavit, *United States v. Vosburgh*, 602 F.3d 512, 526 (3d Cir. 2010), and that a criminal defendant who endeavors to void a warrant and suppress all concomitant evidence “must show . . . that there would have been no probable cause but for the incorrect statement” or material omission, *United States v. Shields*, 458 F.3d

269, 276 (3d Cir. 2006); see Franks v. Delaware, 438 U.S. 154, 171, (1978); United States v. Conley, 4 F.3d 1200, 1208 n.7 (3d Cir. 1993), and it appearing that Rice argues that the initial search of his computer conducted by law enforcement officers was unsupported by probable cause because the underlying affidavits omitted the methods employed by Rice's wife in gathering his private electronic communications, (Doc. 38 at 5-8), and the court noting that the Fourth Amendment does not protect against searches effected by private individuals "not acting as . . . agent[s] of the [g]overnment or with the participation or knowledge of any governmental official," United States v. Jacobsen, 466 U.S. 109, 113 (1984)); see Walter v. United States, 447 U.S. 649, 656 (1980), and that "the [g]overnment may retain for use . . . incriminating documents which were stolen by private individuals, without governmental knowledge or complicity, and turned over to the [g]overnment," Wotring v. Stuski, No. 1:14-CV-1843, 2015 WL 4478775, at *3 (M.D. Pa. July 22, 2015) (quoting Meister v. C.I.R., 504 F.2d 505, 508 (3d Cir. 1974)); see Walter, 447 U.S. at 656; United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003), and the court finding that because Rice's wife acted as a private individual when she independently recorded, reviewed, and submitted to law enforcement officials Rice's electronic communications without Rice's knowledge or consent, the omission of her allegedly unlawful conduct from supporting affidavits was immaterial to the issuing magistrate's probable cause determination, see Walter, 447 U.S. at 656; Wotring, 2015 WL 4478775, at *3, and the court concluding that the circumstances set forth in the affidavits—namely, that Rice's wife (1) reported that she had

recently discovered images of child pornography and evidence of chat room conversations regarding same on Rice's computer, and (2) provided factual detail regarding the substance of certain of these images and internet conversations, (Doc. 40-1, Ex. 1)—established a fair probability that evidence of criminal activity would be found on Rice's computer, see United States v. Miknevich, 638 F.3d 178, 182-83 (3d Cir. 2011), and thus supported a finding of probable cause, (see Docs. 34, 38), and it appearing that Rice additionally asserts that reliance of the probable cause affidavits upon illegally obtained information violated his Fourth Amendment rights, (Doc. 37 at 6-9), but the court observing that, as noted *supra*, “private wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully,” Walter, 447 U.S. at 656, and the court concluding that the information proffered by Rice's wife provided sufficient support for a finding of probable cause, (see Docs. 35, 37), it is hereby ORDERED that Rice's motions (Docs. 33, 34, 35) to suppress evidence are DENIED.

/s/ CHRISTOPHER C. CONNER
Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania

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Filed 11/19/15