

No. _____

In the Supreme Court of the United States

MAURICIO AGUILERA, PETITIONER

vs.

UNITED STATES OF AMERICA, RESPONDENT

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

Petitioner MAURICIO AGUILERA, respectfully petitions this Court for a Writ of Certiorari, *in pro per*, to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Mauricio Aguilera
Reg # 91309-011
FCI Fort Dix
5756 Hartford & Pointville Rd
Joint Base MDL, NJ 08640

In Pro Per

QUESTIONS PRESENTED

- I. Whether the Court of Appeals erred in holding that Petitioner authorized a warrantless search of his seized cell phone when he had explicitly authorized only that a mirror image of the phone be made so the phone could be returned to him by the authorities, thereby so far departing from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page of this petition.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	
A. Background	
B. Proceedings in the Ninth Circuit	
C. The Evidentiary Hearing	
REASONS FOR GRANTING THE PETITION.....	
I. The Ninth Circuit Erred in Affirming the District Court’s Decision Denying Petitioner’s Motion to Suppress a Warrantless Search of his Cell Phone on the Ground that Petitioner had Authorized the Search, when the uncontroverted Evidence showed that He Had Authorized only that a Mirror image of the Phone be created so the phone Could Be Returned to Him.	
A. The Relevant Warrant and Letter-Agreement of the Parties Prohibited Any Search of Mr. Aguilera’s Cell Phones until a Subsequent Warrant Specifically Authorizing Such a Search Was Obtained	

B. The Examination Process Used Was Not Substantially the Same as the Mirror Imaging Agreed to by the Parties and Constituted a Search Under the Fourth Amendment

C. This Case Should Be Remanded to the District Court with Directions to Conduct a Hearing to Determine the Impact of Detective Posadas’s Unconstitutional Search of the Contents of Appellant’s Cell Phone

CONCLUSION

PROOF OF SERVICE

INDEX TO APPENDICES

APPENDIX A: Ninth Circuit Court of Appeals’ Unpublished Opinion (September 18, 2017)

APPENDIX B: Transcript of Evidentiary Hearing & Denial of Motion to Suppress in the United States District Court for the Northern District of California on Remand (August 19, 2016)

APPENDIX C: Ninth Circuit Court of Appeals’ Unpublished Opinion (January 27, 2015)

APPENDIX D: Judgement of the United States District Court for the Northern District of California (August 29, 2012)

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Illinois v. Andreas</i> , 463 U.S. 765 (1983)	16
<i>Katz v. United States</i> , 389 U.S. 347 (1967)	15
<i>Murray v. United States</i> , 487 U.S. 533 (1988)	12
<i>Riley v. California</i> , 134 S.Ct 2473 (2014)	16, 17
<i>United States v. Duran-Orozco</i> , 192 F.3d 1277 (9 th Cir. 1999)	12
<i>United States v. Hibbitt</i> , 208F.Supp. 2d. 1026 (D. Alaska 2010)	16
<i>Walter v. United States</i> , 447 U.S. 649 (1980)	16

Other Authority

U.S.C. 4 th Amendment	15, 17
--	--------

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

OPINIONS BELOW

The opinions and orders relevant to this petition are as follows: the August 29, 2012 Judgment of the United States District Court for the Northern District of California, Case. No. 09-cr-0988 CRB (Appendix D); the Ninth Circuit Court of Appeal's January 27, 2015 unpublished decision reversing in part and remanding the case for an evidentiary hearing, 591 Fed. Appx. 555 (9th Cir. 2015)(Appendix C); the transcript for the evidentiary hearing and order denying Petitioner's motion to suppress following remand, of the United States District Court for the Northern District of California, Case No. 09-cr-0988 CRB (Appendix B); and the Ninth Circuit Court of Appeal's September 18, 2017 unpublished decision affirming judgment, 2017 U.S. App. LEXIS 18053 (9th Cir., 9/18/2017) (Appendix A).

JURISDICTION

The United States District Court for the Northern District of California had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

On September 18, 2017, the Ninth Circuit entered its judgment. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Petitioner bases the claims contained in this petition for writ of certiorari on the Fourth Amendment to the United States Constitution. The Fourth Amendment provides:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

STATEMENT OF THE CASE

Mr. Aguilera was indicted on or about October 13, 2009. (Dkt. 1.) He was named in two counts of a five-count Indictment that included four co-defendants. Count One charged Mr. Aguilera and the four co-defendants with conspiracy to possess with intent to distribute and to distribute five or more kilograms of cocaine. Count Five charged only Mr. Aguilera with possession with intent to distribute and distribution of 500 grams or more of cocaine. Two of the named co-defendants were arrested and resolved their cases without trial. The two remaining co-defendants have yet to be arraigned on the Indictment.

Mr. Aguilera proceeded to trial before the Honorable Charles R. Breyer on January 10, 2012. The jury returned its verdict on January 18, 2012, finding Mr. Aguilera guilty on both counts. (Dkt. 283.)

On August 29, 2012, Judge Breyer imposed judgment and sentenced Mr. Aguilera to one hundred sixty-eight (168) months. (App. D). Mr. Aguilera timely appealed. (Dkt. 323). Following briefing and argument, this Court reversed and remanded the case to the District Court for an evidentiary hearing on Mr. Aguilera's claim that evidence illegally obtained from his cellular telephone should have been suppressed at trial. (App. B). On August 19, 2016, the District Court held an evidentiary hearing pertaining to this issue. At the conclusion of this hearing, the District Court again denied the motion to suppress. (App. C, Evid Hearing Trans., p. 71). Mr. Aguilera timely appealed. (Dkt. 370). Meanwhile, on November 17, 2016, the District Court reduced Appellant's sentence to 135 months based on 18 U.S.C. § 3582(c)(2), USSG §1B1.10(b)(1) and Amendment 782 to the United States Sentencing Manual, relating to guideline sentencing of cocaine offenses. (Dkt. 377). On September 18, 2017, following briefing, the Ninth Circuit denied Petitioner's appeal and affirmed the judgment of the District Court. (App. A). This petition follows.

STATEMENT OF FACTS

A. Background

The government obtained search warrants for various residences associated with the defendants, and executed those warrants on the morning of November 4, 2009. During the execution of the warrants Mr. Aguilera was arrested at his place.

of employment where his cellular telephone was seized from his person. (2 RT 284-285.) A second cellular telephone was seized from Mr. Aguilera's residence. (2 RT 329.)

The search warrant expressly precluded the government from searching any cellular telephones seized pursuant to it unless and until a subsequent search warrant for such phones was obtained, and even then, the electrically stored information (ESI) on the telephones had to be reviewed by a "filter agent" to determine what ESI, if any, fell within the scope of the search warrant. After several months the government had not yet obtained the necessary search warrants to search the cellular telephones, so Mr. Aguilera entered a written agreement with the government allowing the Federal Bureau of Investigation ("FBI") to make a "mirror image" or "exact duplicate" of his electronic devices so the property could be returned to him. (Dkt. 210; Ex. I.)

The government eventually obtained a second search warrant³ allowing the cellular telephones to be searched for ESI on September 7, 2010, and December 20, 2010. (Dkt. 210; Exs. K & L.) The government's "filter agent" turned over all ESI from the telephones to the investigating agents without excluding a single piece of information. Out of the enormous amounts of ESI produced, the

³ Actually, two search warrants for Mr. Aguilera's devices were executed in 2010 because of a misidentification of one of the telephones at issue in the first warrant. Because this fact does not alter the analysis here, going forward we will refer to the two warrants as "the search warrant".

government focused on a handful of photographs that it believed inculpated Mr. Aguilera on the distribution charge.

Mr. Aguilera filed several pretrial motions, including a motion to suppress the ESI obtained from the cellular telephones and repeatedly requested a corresponding evidentiary hearing. (Dkt. 210, 233, 238). This motion was denied from the bench without an evidentiary hearing. (RT, Dec. 20, 2011, p. 42:14-16.).

At trial the government relied heavily on a series of photographs obtained from Mr. Aguilera's cellular telephone that it contends depicts one of the kilograms of cocaine at issue in the case. The photographs were introduced into evidence through the testimony of cellular telephone forensic analyst Ronald Posadas. During Det. Posadas's testimony, he admitted that he failed to create a "mirror image" or "exact duplicate" of the cellular telephones, but instead, had performed a data "extraction" that modified the file images. (4 RT 624-625:14-4.) He also testified that he extracted the data from the cellular telephones on August 27, 2010 (4 RT 628:12-17), and claimed this "examination" was performed under the authority of a search warrant. (4 RT 612:1-12.) However, the search warrant for the cellular telephones was not issued until approximately 10 days later, on September 7, 2010. The only search warrant in existence when Posadas examined the phones was the November 3, 2009 warrant, which specifically forbade any search or examination of the phones until a further warrant was obtained.

B. Proceedings in the Ninth Circuit on the Initial Appeal

Mr. Aguilera challenged the procedure used by Det. Posadas on appeal, claiming that the procedure employed amounted to an unlawful warrantless search of his cellular telephone, which failed to abide by the agreement of the parties for the imaging of the telephone [In reversing the denial of the motion to suppress evidence and remanding the issue to the District Court for an evidentiary hearing, the Ninth Circuit noted that though the parties had an agreement that the phone could be mirror imaged in the absence of a warrant, Detective Posadas testified that he did not make a mirror image and the device he used to copy the cell phone's data was in fact not capable of making a mirror image. The Court further stated that “. . . perhaps most concerning, Posadas testified that he reviewed the contents of the phone while copying the data.” (App. B, Ninth Circuit Dec. 1/27/2015, p. 5). The Court instructed that at an evidentiary hearing the parties were to address “whether the government's actions prior to obtaining the warrant violated the parties' agreement and amounted to an unconstitutional search, in particular whether the method of copying the data was substantively different from making a “mirror image” of the data and the impact and scope of Posadas's viewing the contents of the cell phone as a copy was being made.” (Id., p. 6).

C. The Evidentiary Hearing

On August 19, 2016, the parties came back before the District Court for the evidentiary hearing ordered by the Ninth Circuit, at which Detective Posadas testified.⁴ He explained that on August 27, 2010, he performed an examination of Mr. Aguilera's cell phone, using a Cellebrite UFED device. (App. 2, Evid. Hearing Trans., p. 15). He explained that the cell phone is connected by a cable to the Cellebrite device, and the device then downloads the data from the telephone and saves it on a thumb drive. (*Id.*, pp. 18:23-19:1). After the extraction, the data is taken off of the thumb drive and burned onto a CD or DVD. (*Id.*, p.19). The Cellebrite device used was not capable of making a mirror image or exact duplicate of the contents of the telephone. (*Id.*, p.19). Moreover, Posadas testified that licensing had not been obtained to conduct mirror imaging. (*Id.*, p.19). Detective Posadas explained that mirror imaging, a method now in use by the laboratory, is more comprehensive than the Cellebrite device used here, which would not have captured all of the data available on the telephone. (*Id.*, pp. 20-21).

Once the extraction was performed, Detective Posadas viewed one or more of the photographs copied by bringing them up on a computer screen and

⁴ The evidentiary hearing was delayed because Mr. Aguilera filed a petition for writ of certiorari in the United States Supreme Court to review this Court's rejection, with Judge Nelson dissenting, of his argument that the government constructively amended the Indictment in presenting its case at trial. Therefore, this Court's mandate did not issue until the Supreme Court denied the petition for writ of certiorari. (Dkt. 362).

comparing them to the photographs on the telephone – he referred to this examination as “spot checking” and stated that he did this to ensure they were copying correctly. (App. 2, pp. 21; 44-45). He could not say how many photographs he reviewed in this way. (*Id.*, p. 45).

Det. Posadas further confirmed that he took 113 screenshot photographs of text messages from Mr. Aguilera’s telephone. He explained that since the Cellebrite device did not have the capability of copying text messages, he physically opened Appellant’s telephone, and took a photograph of each text message in the phone. (*Id.*, pp. 51-52).

Det. Posadas does not recall ever telling Special Agent Hughes that the equipment he had available at the laboratory was not capable of performing the mirror image requested, and was not capable of copying text messages. (*Id.*, pp. 52-53). Posadas could not recall to what extent he communicated with Special Agent Hughes between the time of the extraction and the September 7, 2010 search warrant. (*Id.*, p. 53).

Consistent with his trial testimony, Det. Posadas initially maintained that the examination he conducted on August 27, 2010 was authorized by the search warrant for the telephones that was not issued until September 7, 2010. When this anomaly was pointed out to him, he conceded that the only warrant in existence when he examined the phones was the November 3, 2009 warrant, which

specifically precluded examination or search of the phones until a warrant expressly authorizing this was obtained. (App. 2, Evid. Hearing Trans., pp. 47-50). He opined that the letter-agreement of the parties somehow enlarged the scope of a permissible examination. (*Id.*, p. 50). In fact, the letter agreement, like the November 3, 2009 warrant, expressly prohibited such an examination.

Appellant argued that Det. Posadas's actions in reviewing photos and taking photographs (screenshots) of text messages constituted a warrantless search of the phone, contrary to the November 2009 warrant and the letter agreement between the parties. (*Id.*, pp. 65-68). Appellant argued the District Court should determine, pursuant to the mandate of this Court, that an unlawful search of the phone had taken place, and should proceed to determine whether the later September 2010 warrant authorizing the search of the phone was tainted as a result. (*Id.*, p. 72).

In denying Mr. Aguilera's motion to suppress, the District Court began by acknowledging that the agreement of the parties was to mirror image the telephone, and that was not done. So, that agreement was literally violated. (*Id.*, p. 63). The District Court went on, however, to explain its view that the agreement, as a whole, was not violated, because use of the Cellebrite device did not alter or destroy the contents of the telephone and the intact telephone was returned to Appellant. (*Id.*, p. 62). Thus, the Court found essentially that the failure to abide by the express

terms of the parties' agreement as to the copying of this telephone was not material or prejudicial. (App. 2, Evid. Hearing Transcript, p. 63).

The District Court next addressed the question of whether an examination of the contents of the telephone took place. On this question, the judge found that "though I could be wrong" he does not believe an "examination" was conducted. (*Id.*, p.63). Instead, Posadas's action in viewing the photographs to compare the copy made with the original telephone, and the screen shots taken of 113 text messages was done simply to verify that the process of copying of the telephone's data was successful. (*Id.*, p.63). Again stating that the court could be wrong about whether the detective's actions constituted an examination, the court went on to find that no prejudice to Appellant had been shown, because there was no evidence that observations of the photographs by Posadas was communicated outside of the laboratory. (*Id.*, p. 64). On the basis of these findings, the District Court again denied Mr. Aguilera's motion to suppress , and petitioner appealed.

D. THE NINTH CIRCUIT'S DECISION

In the September 18, 2017 decision challenged in this petition the Court of appeals upheld the district court's ruling that Agent Posada's entry into the contents of petitioner's cell phone on August 27, 2017 did not exceed the authority granted in the letter agreement. That agreement, according to the Ninth Circuit,

was susceptible to two interpretations, one that it authorized only what it termed “a blind extraction” method whereby a mirror image or its equivalent was obtained, and the other what the Court believed was done here, utilizing “a forensic analyst who was walled off from the investigative team.” (Appendix A, p. 4) Finding that the latter is one of two permissible views of the evidence concerning the meaning of the letter agreement, the Court affirmed the district court’s denial of petitioner’s motion to suppress. (Id)

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Erred in Affirming the District Court’s Holding that Detective Posadas’s Entry into the Phone Prior to the Obtaining of a Warrant Did Not Constitute an Examination or Search Violative of the Letter Agreement and the Fourth Amendment.

The District Court erred in finding that Detective Posadas did not conduct an examination or search of Appellant’s cellular telephone before a warrant was obtained, and the Ninth Circuit erred in affirming this holding. Because a search was indeed conducted, the case should be remanded for a full hearing to determine whether, if at all, Posadas’s search tainted the later search warrant obtained. The government must bear the burden in such a subsequent hearing. *Murray v. United States*, 487 U.S. 533, 538, 542-544 (1988); *United States v. Duran-Orozco*, 192 F.3d 1277, 1281 (9th Cir. 1999).

A. The Relevant Warrant and Letter-Agreement of the Parties Prohibited *Any Search* of Mr. Aguilera's Cell Phones until a Subsequent Warrant Specifically Authorizing Such a Search Was Obtained

The initial search warrants in this case were sought and obtained on November 3, 2009, for the purpose of searching various residential structures associated with the named defendants in Count One. Each of those search warrants expressly precluded any contemporaneous search of cellular telephones, PDAs, computers, or electronic storage devices. Instead, the agents executing those search warrants were commanded, in relevant part, as follows:

...no search or seizure shall occur of any devices or media that store data electronically.... In executing the search warrant authorized by this Court's order, the following protocols will apply:

1. The agents to seize cellular telephones, PDAs, computers and electronic storage devices that are within the scope of this warrant at any of the locations for which a search has been authorized.
2. *No search of any seized cellular telephones, PDAs, computers and electronic storage devices shall be conduct absent further order issued by this Court.*
3. Once any computers and other digital media have been seized and preserved under the terms of this warrant, *the government must return to this Court for a further warrant permitting search of those digital media, such warrant to be issued (or denied) only after due consideration of the search protocols set forth in United States v. Comprehensive Drug Testing Inc., 579 F.3d 989 (9th Cir. 2009).*

(Dkt. 210, Ex. B) (emphasis added.)

On July 19, 2010, Mr. Aguilera entered a written agreement with the government in order to secure the return of certain electronic devices, including his cellular telephones. That agreement states in relevant part:

2. Mauricio Aguilera consents to the FBI making an *exact duplicate, or mirror image*, of the data in the devices listed in Attachment A and to the FBI maintaining this copy of the data in its files pending further orders by the United States District Court for the Northern District of California (the Court).

3. The Government *will not examine or search the copy of the data* made pursuant to this agreement *unless specifically authorized by the Court in a future order*. Mauricio Aguilera reserves any objections to an examination or search of the data, including any rights to move to suppress evidence uncovered in any such search.

(Dkt 210, Ex. I) (emphasis added.)

B. The Examination Process Used Was Not Substantially the Same as the Mirror Imaging Agreed to by the Parties and Constituted a Search Under the Fourth Amendment

There is no dispute that the procedure used by Detective Posadas did not constitute making a mirror-image or exact duplicate of Mr. Aguilera's cell phone. The District Court recognized that the letter agreement between the parties contemplated that one of those specific techniques, and only one of those specific techniques, would be performed in the absence of a further search warrant, and thus the agreement of the parties was violated. (App. 2, Evid. Hearing Trans. p. 63).

As became evident during the evidentiary hearing, the procedure used by the detective was not *substantially the same* as mirror imaging. These techniques differed in important respects, chief among them being that the Cellebrite UFED is not capable of producing an exact duplicate of Appellant's cell phone. (App. 2, *Id.*, pp. 20-21). Instead, the machine extracts data from the cell phone but is not able to capture all of the data in this way. Due to the shortcomings of this technology, Det. Posadas was required to make a substantial visual intrusion into the telephone and its contents ostensibly to monitor the success of the extraction.

Det. Posadas further explained that the Cellebrite device did not capture text messages at all, so he went into the phone and photographed (took screen shots of) each of 113 text messages. (App. 2, *Id.*, p. 52). He further testified that he "spot checked" one or more photographs, and likely one or more of each category of data on the telephone by pulling up the copy made on a computer and comparing it to the contents of the telephone. (App. 2; *Id.* p. 44). He did not keep contemporaneous notes of what he was doing in this regard, and he was vague about what he did. (*Id.* pp. 44-45). How many pictures did he look at? How many other categories of data, and how many items within such categories did he review? He could not answer these questions, and yet these actions are materially indistinguishable from a search.

The Ninth Circuit opinion effectively sidesteps the question of whether the actions in question constituted a search for Fourth Amendment purposes by engaging in a tortured interpretation of the letter agreement under which petitioner supposedly authorized even an intrusive examination of his phone before a warrant was obtained, as long as the examiner was “walled off from the investigative team.” Nothing in the letter agreement justifies this creation as a “reasonable” construction of the letter agreement, and the Ninth Circuit opinion offers no analysis to support its opinion. Like the November 4, 2009 search warrant under which the cell phones were seized, the letter agreement forbade any search of the phones until a warrant was obtained, “walled off” or otherwise.

The Fourth Amendment protects legitimate expectations of privacy from intrusions under governmental authority. In determining whether such an intrusion constitutes a search, for Fourth Amendment purposes, the Court must engage in the analysis of Justice Harlan in the seminal case of *Katz v. United States*, 389 U.S. 347 (1967). The inquiry, as Justice Harlan noted in his *Katz* concurrence embraces two distinct questions. The first is whether the individual, by his conduct, has “exhibited an actual (subjective) expectation of privacy,” *id.*, at 361, and the second question is whether the individual’s subjective expectation of privacy is “one that society is prepared to recognize as ‘reasonable.’” *Id.* See *Illinois v.*

Andreas, 463 U.S. 765 (1983); *Walter v. United States*, 447 U.S. 649, 663-665 (1980); *United States v. Hibbitt*, 208 F. Supp. 2d 1026 (D. Alaska 2010).

In the present case, Mr. Aguilera clearly exhibited a subjective expectation that the privacy of his cell phone contents would be completely protected from government intrusion until a valid warrant was obtained. He did not enter into an agreement that allowed the government to intrude into the contents of his cell phone, looking at photographs and making screen shots of text messages, if it found it convenient or even necessary to do so in order to monitor the success of an extraction based on technology the government chose. Appellant would not have entered into such an agreement because his goal was to prevent *any* examination of possibly incriminating contents of his phone.

The government, by joining in this agreement, manifestly agreed that Mr. Aguilera's expectation of privacy in this sense was a reasonable one that the government, and society in general, recognizes and is bound to respect. Recent court decisions have reinforced the reasonableness of this expectation, emphasizing that these ubiquitous devices hold the most basic, private and personal information – deserving of full Fourth Amendment protection. In *Riley v. California*, 134 S. Ct. 2473 (2014) the Supreme Court unanimously concluded that warrantless searches and seizures of the digital contents of cell phones is

unconstitutional. Writing for the Court, Chief Justice Roberts clearly explained this result:

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’ The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protections for which the founders fought.

Id. 134 S. Ct. at 2494-95.

In granting the government permission to mirror-image his cell phone data in order to obtain release of the phones to him, Mr. Aguilera was invoking this significant and widely recognized this expectation of privacy, receiving from the government its promise not to conduct any search or examination of his phones until a warrant for that purpose was obtained. The government broke this promise and violated Appellant’s Fourth Amendment rights when, rather than mirror imaging the phone, it elected to extract the data using this very different technology that required the examining agent to view the contents of the device before a warrant was obtained. The Ninth Circuit’s opinion justifying this intrusion by way of a tortured and patently unreasonable interpretation of the letter agreement should be firmly rejected by this Court.

The warrantless examination of Appellant’s cell phone was an unconstitutional search and the court below erred in its contrary ruling.

C. This Case Should Be Remanded to the District Court with

**Directions to Conduct a Hearing to Determine the Impact
of Detective Posadas's Unconstitutional Search of the
Contents of Appellant's Cell Phone**

In view of the District Court's erroneous conclusion that Detective Posadas did not conduct an examination (search) of Appellant's phone, the court did not convene a hearing to consider the final question posed by this Court in its remand Order – the “impact and scope” of Detective Posadas's viewing the data. With respect to the scope of Det. Posadas's intrusion, it is likely that there is little or no further evidence to be had, because Posadas could simple not remember precisely what he did while examining the contents of Appellant's phone aside from his admission that he photographed all of the text messages and looked at an undetermined number of photographs. However, the impact of Det. Posadas's unconstitutional search has yet to be determined. This is essentially a question of taint – was the decision to seek and obtain the September 7, 2010 warrant authorizing search of the cell phones affected by Det. Posadas's unconstitutional observations. See *Murray, supra*, 487 U.S. at 534. The government should bear the burden at such a hearing at which it may present the Affiant Agent Hughes, or any other material witnesses or evidence. *Murray, supra*, 487 U.S. at 538, 542-544; *Duran-Orozco, supra*, 192 F.3d at 1281.

CONCLUSION

Based on the foregoing, this Court should grant the Petition for Writ of Certiorari and order full briefing.

Date: December 11, 2017

Respectfully submitted,



PETITIONER MAURICIO AGUILERA