No.

IN THE

Supreme Court of the United States

ARTURO FERNANDO SHAW GUTIERREZ,
Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Petition For Writ Of Certiorari
To The California Court of Appeals,
Fourth District Division Three

PETITION FOR A WRIT OF CERTIORARI

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The police searched email, stored on a commercial internet service provider's servers, without warrant or consent and in violation of federal law. The facts and issues raised herein, relate to this Court's question, posed in *Carpenter v. United States*, 138 S.Ct. 2206, 2222 (2018), "leaving open the question whether the warrant requirement applies 'when the Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party.'"

QUESTIONS PRESENTED

Does the Fourth Amendment protect individuals who send or receive stored electronic communications (emails) as provided under federal law through the Stored Communications Act, 18 U.S.C. § 2701, et seq.?

Was the sender's Fourth Amendment right violated when law enforcement warrantlessly viewed the sender's private electronic communications (emails), while stored in the recipient's account on a commercial internet service provider's servers, without consent from either the sender or recipient, in violation of federal law?

STATE COURT PROCEEDINGS

People of the State of California v. Arturo Fernando Shaw Gutierrez, No. 13CF2368, Superior Court of Orange County California. Judgment entered Dec. 29, 2014 and Jan. 5, 2015.

People of the State of California v. Arturo Fernando Shaw Gutierrez, No. G052552, California Court of Appeals, District Four Division Three. Judgment entered Jan. 9, 2018.

People of the State of California v. Arturo Fernando Shaw Gutierrez, No. S247111, California Supreme Court. Review denied Apr. 25, 2018.

In re Arturo Fernando Shaw Gutierrez, No. M-17501-XA, Superior Court of Orange County California. Denied June 14, 2018.

Arturo Fernando Shaw Gutierrez on Discipline, No. 12-C-17847, State Bar Court of California. Judgment entered Jan. 3, 2019.

In re Arturo Fernando Shaw Gutierrez on Discipline, No. S254277, California Supreme Court. Judgment entered Apr. 24, 2019.

In re Arturo Fernando Shaw Gutierrez, No. G056821, California Court of Appeals, District Four Division Three. Denied June 13, 2019.

In re Arturo Fernando Shaw Gutierrez, No. S257074, California Supreme Court; Petition for the Writ of Habeas Corpus and the Motion to Order the Court of Appeals to Recall the Remittitur and Reassert Appellate Jurisdiction for a Rehearing. Discretionary review denied Feb. 11, 2020.

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JURISDICTION

Arturo Fernando Shaw Gutierrez (Gutierrez) petitions for a writ of certiorari to review the judgment of the Court of Appeals of the State of California, Fourth District Division Three (the "Court of Appeals"), pertaining to the Fourth Amendment issues raised.

The Court of Appeals issued its Opinion and Judgment on January 9, 2018 (G052552). Petitioner timely petitioned the California Supreme Court for review; which was denied on April 25, 2018 (S247111). A Motion to Recall the Remittitur and Order to Reinstate the Appeal (i.e., a rehearing) (see Appendix F p. 49a) as a part of the Petition for the Writ of Habeas Corpus was filed with the Court of Appeals (G056821) and later with the California Supreme Court (S257074), which exercised its discretion and issued a denial of the motion for rehearing **on February 11, 2020**.

To be clear, Petitioner is not seeking a petition for a writ of certiorari for the denial of the habeas petition, only of the Court of Appeals' ruling preserved through the subsequent denials of motions for rehearing pursuant to Rules of the Supreme Court of the United States, Rule 13.3[1] that are required by state procedure to be made through habeas corpus[2] because of evidence dehors the record being

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[1] Rule 13.3 ("But if a petition for rehearing is timely filed in the lower court by any party, ... the time to file the petition for a writ of certiorari for all parties ... runs from the date of the denial of rehearing....")

[2] *In re Martin* 58 Cal.2d 133, 138-139 (1962) (reinstate criminal appeal when result was product of fraud or incomplete knowledge of all the facts)

introduced.[3] Therefore, this court has jurisdiction pursuant to both Rules 13.1 and 13.3, (see e.g., *Hibbs v. Winn*, 542 U.S. 88, 99 (2004); 28 U.S.C. § 2101(d); *Holland v. Florida*, 560 U.S. 631 (2010)) because the California Supreme Court **exercised discretion** in denying the motion and order to reinstate the appeal for a **rehearing[4] on February 11, 2020.**

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

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[3] *In re Bower*, 38 Cal. 3d 865, 872 (1985) (Habeas is required to introduce facts outside the record) see also e.g., *Marino v. Ragen*, 332 U.S. 561, 562 (1947), *United States ex rel. McCann v. Adams*, 320 U.S. 220, 221-222 (1943), *Waley v. Johnston*, 316 U.S. 101, 104-105 (1942), *Dakota County v. Glidden*, 113 U.S. 222, 225 (1885).

[4] See Habeas Corpus Prayer Appendix F p. 49a.

TEXT OF AUTHORITIES USED

Fourth Amendment to the Constitution of the United States:

> "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."

United States Code

18 U.S.C. § 2701(a)

> (a) Offense.– Except as provided in subsection (c) of this section whoever—
>
> (1) intentionally accesses without authorization a facility through which an electronic communication service is provided;
>
> (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2701(b)(1)(B)

> (b) Punishment.— The punishment for an offense under subsection (a) of this section is—
>
> (1) if the offense is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain, or in furtherance of any criminal or tortious act in violation of the Constitution or laws of the United States or any State—

(B) a fine under this title or imprisonment for not more than 10 years, or both, for any subsequent offense under this subparagraph;

18 U.S.C. § 2701(c)(2)

(2) by a user of that service with respect to a communication of or intended for that user; or

18 U.S.C. § 2701(c)(3)

(3) in section 2703, 2704 or 2518 of this title.

18 U.S.C. § 2702(b)(3)

(b) Exceptions for disclosure of communications.— A provider described in subsection (a) may divulge the contents of a communication—

(3) with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service;

18 U.S.C. § 2703(a)

(a) Contents of Wire or Electronic Communications in Electronic Storage.— A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than

one hundred and eighty days by the means available under subsection (b) of this section.

18 U.S.C. § 2708

The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.

28 U.S.C. § 1254(1)

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 2101(d)

The time for appeal or application for a writ of certiorari to review the judgment of a State court in a criminal case shall be as prescribed by rules of the Supreme Court.

Federal Rules of Civil Procedure Rule 5.2(a)(3)

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

(3) the minor's initials;

California Codes

California Business and Professions Code § 6068

It is the duty of an attorney to do all of the following:

(e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

California Penal Code § 288.3(a) (From the year 2012)

Every person who contacts or communicates with a minor, or attempts to contact or communicate with a minor, who knows or reasonably should know that the person is a minor, with intent to commit an offense specified in Section 207, 209, 261, 264.1, 273a, 286, 288, 288a, 288.2, 289, 311.1, 311.2, 311.4 or 311.11 involving the minor shall be punished by imprisonment in the state prison for the term prescribed for an attempt to commit the intended offense.

California Penal Code § 1538.5

(See Appendix C)

STATEMENT OF THE CASE

FACTS

The facts prove that the police, without warrant or consent, committed federal felony searches of private online electronic communications (e-mails) on the servers of Facebook, Inc. (Facebook) in violation of 18 U.S.C. § 2701(a)(1) and the Fourth Amendment and illegally read e-mails sent from Gutierrez to the intended recipient, M.P.

Both Gutierrez and M.P. had their security settings set to the highest level of protection and both had password protected accounts. At all times, said communications were directed through a private format using Facebook Messenger and were not publicly displayed. The police admitted to these nonconsensual and warrantless searches in their police reports but omitted these illegal searches from the affidavits. The Internet Protocol (IP) address history from the recipient's account proves that the police were illegally surveilling the e-mails from the police station as of 10/16/12.

Only after the affiant, Detective Jacob Sorensen (Sorensen) of the Los Alamitos Police Department in Orange County, California, illegally read attorney-client privileged emails pertaining to himself, wherein M.P. requested legal advice on 10/20/12 (Appendix G p. 65sa) from Gutierrez regarding the police having illegally commandeered her other e-mail account without warrant or consent and Gutierrez's legal advice to sue the police and obtain an injunction, did Sorensen begin to research and investigate Gutierrez on 10/24/12, proven by the dates on the RAP sheet (police background check) and DMV print out (Appendix H pp. 73sa-77sa). Sorensen

further perjured himself in the affidavits regarding the date the investigation began, stating that a request for information was obtained on 10/7/12 and 10/30/12 (Appendix G pp. 56sa-57sa). However, the only documents in discovery state that this information was obtained on 10/24/12, a date completely omitted in the police reports and affidavits (Appendix G pp. 56sa-57sa; Appendix H pp. 69sa-70sa). From its inception, this case has been born of federally felonious searches and an intent to retaliate, subjecting Gutierrez to "unconstitutional animus" *Butz v. Economou*, 438 U.S. 478, 512 (1978).

The police interviewed M.P. for nearly five hours on 10/30/12 and inquired about numerous adult men that were exchanging naked photos with her and exchanging thousands of sexually vulgar communications with her; the evidence proves Gutierrez had **not** engaged in this criminal conduct with M.P.

The police only briefly inquired about Gutierrez four times on 10/30/12 regarding his capacity as an attorney and said this at the end of the interview:

> October 30, 2012:
>
> Walsvick[1]: "Stop chatting with guys who claim to be attorneys and listening to their advice. And stick to his –"
>
> M.P.: "Are you saying he's not an attorney, Art?"
>
> Walsvick: "– and mine. No, but most attorneys are bottom –"
>
> Sorensen: "Scumbags."
>
> Walsvick: "– bottom-dwelling scumbags."

[1] Investigator Wade Walsvick of the Orange County Sheriff's Department.

M.P.: "Okay, I don't care."
Walsvick: "You should."
M.P.: "They're attorneys, isn't it like their job?"
Walsvick: "No."
M.P.: "No? Oh well okay. I didn't talk to him much."
(Appendix G p. 64sa)

Earlier in the interview, law enforcement requested numerous times for consent from M.P. to use her Facebook account to communicate with an unrelated male named "Steve Ross," M.P. repeatedly denied this request but after substantial pressure finally acquiesced. They requested her login information and password and then gained control of her Facebook account.

This was the exchange on October 30, 2012:

Walsvick: "Obviously. [M.P.]sGotMade@gmail. What's your password?"
M.P.: "Google."
Walsvick: "The word 'Google?' You went all out for that one."
Sorensen: "You know – You know –"
M.P.: "A capital 'G.'"
Walsvick: "That's funny."
M.P.: "Why, did you try?"
Sorensen: "No."
M.P.: "I-I – "
Walsvick: "Why would we try?"
M.P.: "You didn't try to get in to my – "
Sorensen: "What, your Facebook?"
M.P.: "Yeah."
Sorensen: "No."
Walsvick: "No." (Appendix G p. 58sa)

After the password was tendered, it was clear that M.P. was unaware of any prior access by law enforcement, and both detectives deny doing so.

Conclusively, M.P. at no time prior to that moment, had consented away from the audio recording.

> Sorensen: "You know I-I'm changing your password for a couple of days."
> M.P.: "Ugh." (Appendix G p. 60sa)

This is the IP address history from M.P.'s Facebook account (Appendix H pp. 67sa-68sa):

10/30/12	23:38	UTC[2]	24.199.19.10	Password Change
10/30/12	23:33	UTC	24.199.19.10	Login
10/16/12	19:48	UTC	24.199.19.10	Session updated

The Police IP address, 24.199.19.10, was evidenced as accessing M.P.'s account, from the Los Alamitos Police Station **on 10/16/12** (Appendix H p. 67sa), a full two weeks prior to the "Password Change" (Appendix H p. 68sa) and the limited consent to only speak with Steve Ross on 10/30/12.

> Sorensen: "Like-like we told you, we're not gonna talk to anybody but Steve."
> M.P.: "Okay. But Steve. All right. Okay." (Appendix G p. 59sa)

Subsequently, searching beyond the scope of limited consent, the affiant then claimed to have read all of the Facebook messages between Gutierrez and M.P. after 10/30/12 (Appendix G p. 57sa).

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[2] Facebook reports all times in UTC time zone, i.e., Greenwich Mean Time.

On 11/6/12, the police requested consent five times from M.P. to use her Facebook account to communicate with Gutierrez. Each time M.P. denied consent and demanded the return of her Facebook account. The police disregarded the denials of consent and began to use her Facebook account to speak to Gutierrez without warrant or consent. "On November 6, 2012, the Detective interviewed [M.P.][3] again. [M.P.] denied police further access to her Facebook account." (*People v. Gutierrez* G052552 (2018) Appendix A p. 6a).

November 6, 2012:

M.P.: "Hm. Um really don't know which one you're gonna do next?

Sorensen: "No." ... "Something could pop up quicker with another person and put somebody else in front of the line, so." (Appendix G p. 61sa)

Sorensen: "Why won't you let me try and go get Art?"

M.P: "... It's a waste of your time."

Sorensen: "If this- No. It's not a waste of my time." (Appendix G p. 62sa)

M.P: "Anything else? Nothing? Not gonna tell me what your next move is?"

Sorensen: "Nope. Art was my next move."

M.P: "Yeah? Sorry about that. Did you change my password back?" (Appendix G p. 63sa)

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[3] The Court of Appeals referred to M.P. as "Doe" but in compliance with Federal Rules of Civil Procedure, Rule 5.2(a)(3) the initials "M.P." are used to replace "Doe".

Gutierrez had committed no crime but was moved to the "front of the line."

M.P. complained to law enforcement on 11/13/12 about their continued use of her account without consent (Appendix H p. 72sa) and the police again unlawfully disregarded her.

On 11/29/12, warrants were prepared based on these illegal searches and contained extensive fabricated evidence, perjury, material misrepresentations and omissions of direct exculpatory evidence of *mens rea*. Gutierrez was arrested on 12/1/12.

There is evidence to prove every statement above, but because of the affiant's perjury and omissions, as well as California's refusal to allow for an evidentiary hearing, an evidentiary record was precluded from being made.[4]

TRIAL COURT

Gutierrez filed motions, under seal, to suppress evidence pursuant to California Penal Code § 1538.5 for violations of the Fourth Amendment regarding

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[4] Because Gutierrez was denied his Fourteenth Amendment right to a full and fair hearing, cf. *Stone v. Powell,* 428 U.S. 465, 481-482 (1976) (constitution requires "an opportunity for full and fair litigation of a Fourth Amendment claim"), see also *Speiser v. Randall,* 357 U.S. 513, 520-521 (1958) ("procedural safeguards surrounding those rights"); see also *People v. Johnson,* 38 Cal.4th 717 (2006) (mandating live testimony at the hearing, pursuant to California Penal Code §1538.5); the record consists of documents attached to the motion to suppress and those provided to the state court via habeas corpus so that the appeal could be reinstated and decided on the facts. "It is equally well established, however, that when reference to matters outside the record is necessary to establish that a defendant has been denied a fundamental constitutional right resort to habeas corpus is not only appropriate, but required." *In re Bower,* 38 Cal. 3d 865, 872 (1985).

warrantless searches in violation of the SCA and for warrants that contained multiple acts of perjury and concealment of exculpatory evidence.

The People did not refute or deny the perjury but argued that multiple acts of perjury was permissible under *Franks v. Delaware* 438 U.S. 154 (1978) and that there was no expectation of privacy in e-mail pursuant to *Miller v. United States,* 425 U.S. 435 (1976). Yet, Congress expressly made *Miller* inapplicable to the SCA.

The trial court entertained oral arguments and then found there was no expectation of privacy in e-mail once sent (Appendix D pp. 42a-43a). No evidence was received and no witnesses were called to the stand (Appendix D pp. 39a-41a).

Then the Court heard arguments on the motion to quash and traverse the warrants based on perjury. During this argument, the court admitted that it was **previously unaware** of the perjury regarding denial of consent and then acknowledged that the police were not forthcoming about consent being denied in the affidavits (Appendix D pp. 44a-45a).

The court then found that the exculpatory statement should have been included in the affidavits for warrant and that it was reckless for the affiant to have omitted them (Appendix A pp. 10a; 23a), then found probable cause on a statute that violated Void for Vagueness[5] and summarily denied the motion.

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[5] While not raised in this Petition, California Penal Code §288.3(a) has no defined conduct related to a speech offense: "The only time the communication is criminal is if it is motivated by a specific intent to commit an enumerated sex crime." *People v. Keister*, 198 Cal.App.4th 442, 449 (2011). The detective omitted from police reports and affidavits that he had to **resort to begging** just to get Gutierrez to respond to their questions, proving no

Again, without allowing witnesses or evidence to be received.

Two weeks prior to filing charges based on perjury and fabricated evidence, the prosecutor called a meeting with Gutierrez's attorney and threatened multiple years in prison if the case was fought at trial, then after the motion to suppress was denied, Gutierrez was offered house arrest; unable to defend himself without revealing exculpatory attorney-client privilege because of California Business and Professions Code § 6068(e)(1), and the jury pool having been willfully destroyed by the police through the dissemination of lies to the media, Gutierrez accepted the deal and plead guilty.

COURT OF APPEALS

"The court reasoned that 'once the send button is pushed, whether it is e-mail, or text or, in this case, [a] message from one Facebook account to another, that Fourth Amendment expectation of privacy is gone.'" [Brackets in original.] (*People v. Gutierrez* G052552 Appendix A pp. 8a-9a)

The perjury by the police, followed by the misrepresentations by the Attorney General in the briefing process were numerous. "Police did **not** access appellant's messages through the Facebook company." [Emphasis added.] (Attorney General Brief,

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motivation by Gutierrez. Then alleged the act as "lewd" which the California Supreme Court has expressly refused to define, see *People v. Scott* 9 Cal.4th 331, 344 at n.7 (1994). "A vague law impermissibly delegates basic policy matters to policemen, ... the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford* 408 U.S. 104, 108-109 at n.5 (1972). "That conduct must be specifically defined by the applicable state law, as written or authoritatively construed." *Miller v. California*, 413 U.S. 15, 24 (1973).

Appendix E p. 47a n.3).[6] Which were relied on by the Court of Appeals: "There is no evidence the Detective infiltrated Facebook's servers surreptitiously to view Gutierrez's Messages to [M.P.]" (*People v. Gutierrez* G052552 Appendix A p. 14a).

There has always been evidence that Sorensen "infiltrated Facebook's servers surreptitiously". The IP address history proves illegal access from the police department, corroborated by the admissions in the police reports that Sorensen read Gutierrez's Facebook messages prior to 10/30/12 (Appendix H pp. 69sa-70sa) and admissions by police in the 10/30/12 audio (told M.P. to disregard legal advice to sue them) which prove that the affiant, Sorensen, "view[ed] Gutierrez's Messages to [M.P.]" after "the Detective infiltrated Facebook's servers surreptitiously" (*ibid*).

This perjury and misrepresentation regarding police concealment of their federally felonious searches (18 U.S.C. § 2701(a)(1)) in the affidavit, caused the Court of Appeals to disregard the mandate set forth by this Court "nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law" *Lee v. Florida,* 392 U.S. 378, 385-386 (1968).

"In his affidavit the Detective wrote, 'On October 30, 2012[,] [M.P.] gave me access to her Facebook and allowed me to assume her profile.' The

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[6] See "Prosecutors, especially, are expected, even required, to be truthful and to seek justice, not a conviction at any cost. (E.g., *Berger v. United States* (1935) 295 U.S. 78, 88 [].)" *People v. Hardy*, 5 Cal.5th 56, 81 (2018). See also, *Mooney v. Holohan,* U.S. 103 (1935) (prosecutor's known use of perjury); *Alcorta v. Texas,* 355 U.S. 28 (1953) and *Giglio v. United States,* 405 U.S. 150 (1972) (prosecutor's unknowing use of perjury), *Napue v. Illinois,* 360 U.S. 264 (1959) (perjury not pertaining to elements of offense).

interview transcript from that day demonstrates the Officer and Detective indicated they were not going to send Messages to anyone but a different adult male. They did not state they would not view Messages from other people." (*People v. Gutierrez* G052552 Appendix A p. 20a). However, that finding directly condones police federal felonious conduct pursuant to 18 U.S.C. § 2701(a)(2) (felony to exceed scope of authorization) and violated the Fourth Amendment. Again, directly disregarding this Court's holding "nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law" *Lee v. Florida,* 392 U.S. at 385-386.

"We agree with the trial court that the Detective should have included in the affidavit Gutierrez's statement on November 20 declining to do anything other than meet 15-year-old [M.P.]" (*People v. Gutierrez* G052552 Appendix A p. 23a).

The Court of Appeals affirmed the trial court ruling on January 9, 2018. Review was sought with the California Supreme Court (S247111) and was denied on April 25, 2018. The Court of Appeals issued the remittitur April 26, 2018 (G052552).

CONTINUED DILIGENCE

During the appeal, Gutierrez discovered evidence proving the police requested from Facebook the attorney-client privileged communications[7] with a third party, whom Gutierrez had filed an internal affairs complaint on behalf of, because a seven month

[7] This was a violation of the "State warrant procedures" (18 U.S.C. § 2703(a)) because "materials protected by the attorney-client privilege are not subject to disclosure pursuant to a search warrant. [citations]" *People v. Superior Court (Laff)* 703, 717 (2001).

pregnant woman was strangled and beaten and the police subsequent refusal to execute her demand for a citizen's arrest in Orange County four months prior to the perjury ridden warrants being issued. Additionally there was proof of retaliation for speech, fabricated and altered evidence, concealed exculpatory documents, and proof that Gutierrez is innocent of the charges.

A Petition for the Writ of Habeas Corpus was filed with the Superior Court on April 3, 2018 and was denied on June 14, 2018.

REINSTATEMENT OF APPEAL

A Petition for the Writ of Habeas Corpus and a Motion to Recall the Remittitur and Reinstate the Appeal (i.e., a rehearing) on the Fourth Amendment issue was filed with the Court of Appeals, based on this newly discovered evidence and the proof that the Attorney General had misrepresented the facts and proof of the police perjury regarding illegal searches,[8] but over eight months later was denied on June 13, 2019. On July 23, 2019 the same was filed with the California Supreme Court, which exercised their discretion in denying the petition and motion on February 11, 2020 (Appendix B p. 26a).

Since before the first denial by the California Supreme Court, Gutierrez has been actively diligent in establishing a record pertaining to the Fourth Amendment rights and issues raised in the appeal, so that this Court may have a record based in fact supported by documents, not on police perjury.

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[8] See e.g., *In re Martin* 58 Cal.2d 133, 138-139 (1962) (reinstate criminal appeal when result was product of fraud or incomplete knowledge of all the facts.)

Numerous issues were raised in the Petition for the Writ of Habeas Corpus,[9] however the issue raised on appeal and the Motion to Reinstate the Appeal specifically pertained to illegal searches of e-mail in violation of the Fourth Amendment and thus, this Petition shall be directed at this specific issue only.

LEGAL ARGUMENT

Almost a century later, the prediction of Mr. Justice Brandeis is brought before this Court.

> "The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. ... 'That places the liberty of every man in the hands of every petty officer' was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusions seemed 'subversive of all the comforts of society.' Can it be that the Constitution affords no protection against such invasions of individual security?" [Footnotes omitted.] *Olmstead v. United States*, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

This Court's recent question in *Carpenter v. United States*, 138 S.Ct. 2206, 2222 (2018), is now before the Court to be answered.

> "[L]eaving open the question whether the warrant requirement applies 'when the

[9] See Habeas Corpus Prayer, Appendix F p. 49a-53a.

Government obtains the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party.' ... If the third-party doctrine does not apply to the 'modern-day equivalents of an individual's own 'papers' or 'effects," then the clear implication is that the documents should receive full Fourth Amendment protection."

FOURTH AMENDMENT:
ELECTRONIC SURVEILLANCE;
STORED COMMUNICATIONS ACT

"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." Fourth Amendment

REASONABLE EXPECTATION OF PRIVACY

The initial aspect to be addressed by this Court is if a party to an illegally searched and seized communication has the right to object under the Fourth Amendment. The Court of Appeals concluded that Gutierrez could not object to his private conversations that were illegally searched (Appendix A p. 12a).

A party to a conversation that was illegally electronically surveilled without a warrant has the right to object to the government's use of this evidence, because the parties to an electronic communication have long since been protected by the Fourth Amendment. cf. *Alderman v. United States*,

394 U.S. 165, 171 (1968) citing *Silverman v. United States,* 365 U.S. 505 (1961) and *Katz v. United States,* 389 U.S. 347, 357 (1967).

"The rule is stated in *Jones v. United States,* 362 U.S. 257, 362 U.S. 261 (1960):[¶] In order to qualify as a 'person aggrieved by an unlawful search and seizure,' one must have been a victim of a search or seizure, one against whom the search was directed..." *Alderman v. United States,* 173.[10]

The facts of this case, coupled with an Act of Congress, expressly granted Gutierrez the right to object to the Fourth Amendment violation pursuant to *Katz*, *Jones* and *Alderman*, because the warrantless searches were clearly directed at Gutierrez, as his communications with M.P. were illegally read, reported on and misused against him.

In *Rakas v. Illinois*, 439 U.S. 128, 148 (1978) this Court expressly acknowledged that those petitioners did not have an expectation of privacy in the area searched. Then clearly distinguished *Rakas* from the aforementioned precedent, "*Jones* v. *United States,* 362 U.S. 257 (1960) and *Katz* v. *United States,* 389 U.S. 347 (1967), involved significantly different factual circumstances.... Katz and Jones could legitimately expect privacy in the areas which were the subject of the search and seizure each sought to contest." *Rakas v. Illinois*, 439 U.S. at 149. Because "the Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon

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[10] Compare, *Goldstein v. United States*, 316 U.S. 114 (1942) held that the federal wiretapping statute should not be interpreted as forbidding the use of wire-tap evidence against a person not a party to the conversation.

whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. [*Katz*] 389 U. S., at 353" *Rakas v. Illinois*, 439 U.S. at 143. The *Rakas* Court refocused the legal argument away from one of standing in favor of a reasonable expectation of privacy (*ibid*).

Consistent with the *Rakas* Court approach, Congress expressly created an expectation of privacy for the parties to an e-mail transmission, in the private email sent on Facebook's servers.

> "[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; *i.e.*, one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas v. Illinois*, 439 U.S. at 143-144, and 163 n. 12).

The Stored Communications Act (SCA) 18 U.S.C. § 2701 et. seq., as Title II of the Electronic Communications Privacy Act (ECPA)[11] provides Fourth Amendment protection for sent e-mails[12] as "recognized and permitted by society" through Congress, (*Rakas v. Illinois,*
of the Act clearly imparts an intention of privacy for electronic communications. The **Attorney General**

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[11] For an excellent discussion regarding the complexities of the SCA made very simple, please see *Microsoft v. United States,* 829 F.3d 197, 205-208, 211-213, 216-220 (2nd Cir. 2016).

[12] See *Facebook, Inc. v. Superior Court (Hunter),*
1262-1270 (2018) (SCA applies to Facebook).

absolutely agrees with this position, yet argued to the Court of Appeals that Gutierrez does not retain the same protection that the Attorney General claimed in their own e-mails sent to Gutierrez's attorney.

From the Attorney's General sent e-mail:

> "CONFIDENTIALITY NOTICE: This communication with its contents may contain confidential and/or privileged information. It is solely for the use of the **intended recipient**(s). **Unauthorized** interception, **review**, **use** or **disclosure** **is prohibited** and may violate applicable laws, including the **Electronic Communications Privacy Act**. If you are **not the intended recipient**, please contact the **sender** and destroy all copies of the communication." [Emphasis added.] (Appendix H p. 71sa)

The Court of Appeals ruled in Gutierrez's appeal that the Stored Communication Act protects only the service provider. "Second, he contends the SCA creates an expectation of privacy in stored electronic messages. The SCA applies to service providers of stored electronic communications and not to individuals who receive such stored electronic communications." (*People v. Gutierrez* G052552 Appendix A p. 15a). However, the legislative intent shows the opposite.

> *"But most important, if Congress does not act to* ***protect the privacy of our citizens****, we may see the gradual erosion of a precious right. Privacy cannot be left to depend solely on physical protection, or it will gradually erode as technology advances. Additional legal protection is necessary to ensure the continued vitality of* ***the Fourth Amendment****."* [Emphasis added.]

House of Representatives Report 99-647 (1986) p. 19 (hereafter "H.R. 99-647")

"Any discussion of the application of current law governing interception of e-mail or the ***use of e-mail surveillance begins with the Fourth Amendment, which protects our reasonable expectation of privacy.***" [Emphasis added.] (H.R. 99-647 p. 22)

"It appears likely, however, that the courts would find that ***the parties to an e-mail transmission have a 'reasonable expectation of privacy' and that a warrant of some kind is required.***" [Emphasis added.] (*Ibid.*)

The trial court, when denying Gutierrez's right to an evidentiary hearing, stated that when the "send button is pushed", the expectation of privacy is lost (Appendix D pp. 42a-43a). That interpretation disregards an Act of Congress, for the Stored Communications Act *only begins*, once the "send button is pushed". The parties to that electronic communication have an expectation of privacy protected by an Act of Congress. When one speaks into a phone, one does not lose the expectation of privacy. To declare clicking send loses the expectation of privacy is to revert back to *Olmstead v. United States*, which was overruled by *Katz v. United States,* 389 U.S. at 353 (rejecting a new exception to the warrant requirement for electronic surveillance, (*id.* at 358)).

See also *Quon v. Arch Wireless Operating Co., Inc.,* 529 F.3d 892 (9th Cir. 2008) (finding an expectation of privacy in electronic communications was violated by the service provider that divulged the communications. "Nevertheless, the OPD [Ontario Police Department] surreptitiously reviewed messages that all parties reasonably believed were

free from third-party review. As a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the Department would not review their messages **absent consent from either a sender or recipient** of the text messages." [Emphasis added] *id.* at 906).[13]

Furthermore, this Court acknowledged in *City of Ontario v. Quon,* 130 S.Ct. at 2629-2630, that there was a factual dispute in the record, but assumed the facts in favor of constitutional protection and then applied the work place exception to the warrant requirement, thus finding that an expectation of privacy was recognized and that a warrant was required.

See also *United States v. Warshak,* 631 F.3d 266, 288 (6th Cir. 2010) ("Accordingly, we hold that a subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or **sent** or received through, a commercial ISP [Internet Service Provider].' *Warshak I,* 490 F.3d at 473; ... The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause. Therefore, because they did not obtain a warrant, the government agents violated the Fourth Amendment when they obtained the contents of Warshak's emails." [Emphasis added.])

Congress was express in its intention to afford all parties to an e-mail transmission a reasonable expectation of privacy. To further ensure said protection and expectation of privacy, Congress made it a serious criminal offense to breach the communi-

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[13] Overruled on other non-SCA grounds in *City of Ontario v. Quon* 130 S.Ct. 2619, 2627 (2010).

cations without warrant or consent. See 18 U.S.C. §§ 2701(a)(1);(2), felonies punishable pursuant to 18 U.S.C. § 2701(b)(1)(B) up to "10 years" per violation if done "in furtherance of any criminal .. act in violation of the Constitution or laws of the United States or any State."

"The security of persons and property remains a fundamental value which law enforcement officers must respect. Nor should those who flout the rules escape unscathed. In this respect we are mindful that there is now a comprehensive statute making unauthorized electronic surveillance a serious crime." [Footnote omitted.] *Alderman v. United States,* U.S. at 175.

The parties demonstrated their expectation of privacy in the messages sent and received by choosing to use Facebook's private messaging system instead of the public messaging system.

Congress spoke with due authority as the great voice of society as the "source outside the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (*Rakas v. Illinois*, 439 U.S. at 163 n. 12) when it declared that society has a reasonable expectation of privacy in email and took substantial steps to ensure our privacy by enacting criminal sanctions and requiring a warrant to access content.

WARRANTLESS SEARCHES

Prior to 12/1/12 (date of arrest) no warrants were used to review the private e-mail messages on Facebook's servers.

This Court "has never sustained a search upon the sole ground that officers reasonably expected to

find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." *Katz v. United States,* 389 U.S. at 356-357.

"'The Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government,' without regard to whether the government actor is investigating crime or performing another function. *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 613–614 (1989)." *City of Ontario v. Quon,* 130 S.Ct. at 2628-2629.

In the present case there was no probable cause to search Gutierrez and M.P.'s messages on Facebook. The police were illegally engaged in a fishing expedition, and only after feloniously reading attorney-client privilege pertaining to the affiant, did Gutierrez become the target.

EXCEPTIONS TO WARRANTLESS SEARCHES

"In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California,* 134 S.Ct. 2473, 2482 (2014).

The evidence unambiguously proves that no consent was ever granted prior to 10/30/12, confirmed in the audio recordings and the police reports. The IP address history from M.P.'s Facebook account proves the police had accessed her Facebook account from the police station prior to 10/30/12 and surreptitiously reviewed the private Facebook messages stored on Facebook's servers. This was a federal felony pursuant to 18 U.S.C. § 2701(a)(1).

"That said, where the facts indisputably present a case of an individual logging onto another's

e-mail account without permission and reviewing the material therein, a summary judgment finding of an SCA violation is appropriate. *See Wyatt Tech. Corp. v. Smithson,* No. 05-1309, 2006 WL 5668246, **9-10 (C.D.Cal.2006). n.2" *Cardinal Health Inc., v. Adams* 582 F Supp 2d 967, A (U.S. Dist. Ct. M.D. Tenn. 2008).

Regarding searches after 10/30/12, the Court of Appeals found that law enforcement "did not state they would not view Messages from other people" (*People v. Gutierrez* G052552 Appendix A p. 20a) after acknowledging the scope of consent was only for Steve Ross' messages. This reasoning directly condones federal felony searches in violation of 18 U.S.C. § 2701(a)(2) (felony to exceed scope of authorization).

There was no consent given by M.P. after 11/6/12 to use her Facebook account for any purpose. "On November 6, 2012, the Detective interviewed M.P. again. [M.P.] denied police further access to her Facebook account." (*People v. Gutierrez* G052552 Appendix A p. 6a). The Court of Appeals went on to speculate that M.P. might have consented away from the audio recording, shifted the burden of proof[14] to Gutierrez (Appendix A pp. 20a-21a), but then denied him the right to an evidentiary hearing.

However, on 11/13/12, M.P. once again reiterated her refusal to allow the continued use of her account. In an angry tone of voice, M.P. begins the 11/13/12 interview by declaring, "So I am kinda curious how we had a talk about you weren't gonna use my Facebook and then you turn around and use my Facebook!" (Appendix H p. 72sa) The police disregarded her and continued to commit federal

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[14] See *Badillo v. Superior Court* 46 Cal. 2d 269, 272 (1956) (the burden of establishing consent is on the State).

felonies and warrantless searches of email and the home, by warrantlessly sending electronic messages into Gutierrez's home.

Independently and collectively, each of the three above referenced stages renders all searches illegal and use of the evidence after each point as *fruit of the poisonous tree* cf. *Wong Sun v. United States,* 371 U.S. 471 (1963) because of this Court's holding "nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law" *Lee v. Florida,* 392 U.S. at 385-386.

CONGRESS DID NOT PERMIT CONSENT TO SEARCHES OF CONTENT OF ELECTRONIC COMMUNICATIONS

Congress did not provide an exception to governmental access to the contents of e-mail via consent under 18 U.S.C. § 2703. Rather, Congress mandated the only procedure for access to content of an electronic communication by a governmental entity was via a warrant.

> 18 U.S.C. §2703(a): "**Contents** of Wire or Electronic Communications in Electronic Storage.— A **governmental entity** may require the disclosure by a provider of **electronic communication service** of the **contents** of a wire or **electronic communication**, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, **only pursuant to a warrant** issued using the procedures described in the Federal Rules of Criminal Procedure (or, in the case of a State court, issued using State warrant procedures) by a court of competent jurisdiction. ..." [Emphasis added.]

"Proposed section 2703 contains the procedural requirements for the government to obtain access to electronic communications in storage and transactional records relating thereto. Proposed section 2703 contains four subsections." (H.R. 99-647 p. 67)

"Subsection (a) sets forth the requirements which must be met ***before*** *the government may obtain access to the contents of a non-voice wire communication or an electronic communication in storage. As a general rule the government must obtain a search warrant."* [Emphasis added.] (H.R. 99-647 p. 67)

"The Committee required the government to obtain a search warrant because it concluded that the contents of a message in storage were protected by the Fourth Amendment." (H.R. 99-647 p. 68)

"The SCA has already provided the owners of the electronic communications at issue the highest protection available under the Fourth Amendment, the requirement that the government obtain a warrant based on probable cause." *In Matter of US,* 665 F Supp 2d 1210 (D. Or. 2009).

"Section 2703(a) of the SCA details the procedures law enforcement must follow to access the contents of stored electronic communications," *Konop v. Hawaiian Airlines, Inc.,* 302 F.3d 868, 879 (9th Cir. 2002). The language of 18 U.S.C. § 2703(a) mandates "the contents" of an "electronic communication" may be obtained "only pursuant to a warrant" by a "governmental entity".

Under 18 U.S.C. § 2703, **there is no exception for consent**, by either the user or sender regarding searching for content by the government.

There is an exception to the criminal sanction when authorized by the sender or receiver 18 U.S.C. § 2701(c)(2) ("by a user of that service with respect to a

communication of or intended for that user"). See also *Konop v. Hawaiian Airlines, Inc.,* 302 F.3d at 880, "Nevertheless, the plain language of § 2701(c)(2) indicates that only a 'user' of the service can authorize a third party's access to the communication. The statute defines 'user' as one who 1) uses the service and 2) is duly authorized to do so." See also *Facebook Inc. v. Superior Court (Hunter),* 4 Cal.5th at 1269-1271.

There is also an exception for criminal sanctions if a warrant is used, 18 U.S.C. § 2701(c)(3) ("in section 2703, 2704 or 2518 of this title.")

As well as an exception on the prohibitions for disclosure by the service provider regarding content if authorized by the sender or receiver, 18 U.S.C. §2702(b)(3) ("with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service").

> "That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another. *Russello v. United States*, 464 U.S. 16, 23 (1983)[].[¶] The interpretive canon that Congress acts intentionally when it omits language included elsewhere applies with particular force here...." *Department of Homeland Security v. MacLean*, 135 S.Ct. 913, 919 (2015).

In overturning a conviction that violated the Communications Act, this Court stated: "[M]eaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated." *Nardone v. United States,* 308 U.S. 338, 340 (1939).

Congress mandated that the access to content information was only through a lawful warrant if the content is stored on a commercial ISP. The reason for doing so was because consent is easy to claim and hard to disprove, especially when the government is committing perjury and the courts deny due process of law.

As stated in *Riley v. California,* 134 S.Ct. at 2489 and *United States v. Warshak,* 631 F.3d at 284, the sheer volume of electronic information available through our digital lives is beyond the normal scope of a traditional search and thus a warrant is required to avoid "bypassing a neutral predetermination of the *scope* of a search [and] leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.' [*Beck v. Ohio,* 379 U.S. 89,] 97 [(1964)]" *Katz v. United States,* 389 U.S. at 358-359.

Congress expressly provided that governmental access to the content of an electronic communication has but one means, that is, via a lawful warrant served on a service provider. "Rules governing compelled disclosure by a service provider to a governmental entity: Section 2703 [¶] As alluded to above, section 2703 governs compelled disclosure by covered providers to a 'governmental entity.' It sets forth the rules under which law enforcement entities may compel ECS and RCS providers to disclose private as well as public communications made by users and stored by covered service providers." [Footnote omitted.] *Facebook, Inc. v. Superior Court (Hunter),* 4 Cal.5th at 1266. "Moreover, to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional." *United States v. Warshak,* 631 F.3d at 288.

Thus, Congress has declared that consent is only a defense to violations of 18 U.S.C. § 2701(a)(1);(2), but has mandated that a warrant must be obtained before the government may lawfully search content of e-mail stored on a commercial internet service provider's servers under the Fourth Amendment.

The evidence proves law enforcement viewed and accessed the Facebook servers without a warrant prior to 12/1/12, in violation of the Fourth Amendment (*Lee v. Florida, Katz* and *Alderman*).

MILLER IS INAPPLICABLE TO THE SCA

The Third Party Doctrine resulting from this Court's decision in *Miller v. United States,* 425 U.S. 435 (1976) was expressly made not applicable to the SCA by Congress.

After directly discussing *Miller* (at H.R. 99-647 pp. 72-73) Congress went on to say:

> *"These cases were studied extensively by the United States Privacy Protection Study Commission and by the Congress. ... That statute in overruling Miller requires federal government agencies to use legal process to obtain bank records...* [¶] *Moreover, the legislation, like the Right to Financial Privacy Act,* ***requires the government to obtain records only through a court order or legal process*** *with an opportunity to the subscriber to appear and contest the disclosure of the information.* [¶] *This Committee is convinced that the subscribers and customers of remote computing services should be afforded a level of confidence that the contents of records maintained on their behalf for the purpose of providing remote computing*

services will not be disclosed ***or obtained by the government, unless*** *certain exceptions apply* ***or if*** *the government has used appropriate legal process with the subscribers or customers being given an* ***opportunity to protect their rights.***" [Emphasis added.] (H.R. 99-647 p. 73)

The Court of Appeals disregarded this Act of Congress. "The Supreme Court has reasoned that, by 'revealing his affairs to another,' an individual 'takes the risk . . . the information will be conveyed by that person to the Government.' (United States v. Miller (1976) 425 U.S. 435, 443.)" (*People v. Gutierrez* G052552 Appendix A p. 13a). Yet, M.P. did not "reveal" information to law enforcement, and furthermore the Court of Appeals directly defied the Congressional intent in enacting the SCA, as *Miller* is expressly inapplicable.

> "Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of *Smith* and *Miller,* few doubt that e-mail should be treated much like the traditional mail it has largely supplanted— as a bailment in which the owner retains a vital and protected legal interest." *Carpenter v. United States,* 138 S.Ct. at 2269, (Gorsuch, J., dissenting).

Miller and *Smith v. Maryland,* 442 U.S. 735 (1979) were decided before email was invented and are simply "ill suited to the digital age." *United States v. Jones,* 565 U.S. 400, 417 (2012), (Sotomayor, J., concurring opinion). Which is why this Court should

acknowledge the intent of Congress and hold the Third Party Doctrine inapplicable to the SCA.

SUPPRESSION

As the searches were without consent and warrantless, and were in fact federal felonies, suppression is mandated. There is no good faith exception available to law enforcement when they willfully committed federal felonies and concealed their criminal conduct and constitutional violations with perjury. Suppression is mandated when the police demonstrate "reckless disregard of constitutional requirements" *Herring v. United States*, 129 S.Ct. 695, 704 (2009).

"'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' *United States v. Lee*, 106 U.S., at 220." *Butz v. Economou*, 438 U.S. at 507.

Congress mandated that suppression be the remedy for constitutional violations, see 18 U.S.C. § 2708.

"Proposed section 2708 provides that the remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter. See discussion of section 101(e) of the bill, supra." (H.R. 99-647 p. 75)

The section referenced is:

"[101] Subsection (e) ... In the event that there is a violation of law of a constitutional magnitude the court involved in a subsequent criminal trial ***will apply the existing***

constitutional law with respect to the exclusionary rule. *Mapp v. Ohio, 367 U.S. 643, 652 (1961); Massachusetts v. Shepperd, 104 S.Ct. 3424 (1984); United States v. Leon, 104 S.Ct. 3405 (1984).*" [Emphasis added.] (H.R. 99-647 p. 48)

Twice, suppression has been ordered regarding e-mail, one expressly involved the SCA and a violation of the Fourth Amendment by the service provider giving information to the government that was not in the warrant (see *United States v. Maxwell* 45 M.J. 406 (C.A.A.F. 1996)), and the second only addressed the Fourth Amendment (see *United States v. Long*, No. 05-5002/MC (2006)). While both were military court decisions, they both applied civilian case law from the Supreme Court of the United States as well as the Constitution of the United States.

> "To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co. v. United States,* 251 U.S. 385, 392, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.' ... A decent respect for the policy of Congress must save us from imputing to it a self-defeating, if not disingenuous purpose." *Nardone v. United States,* 308 U.S. at 340-341.

Suppression is mandated pursuant to a ruling directly on point by the Supreme Court of the United States:

> "A State could not adopt rules of evidence calculated to permit the invasion of rights protected by federal organic law. In the present case, the federal law itself explicitly protects intercepted communications from divulgence, in a court or any other place....[¶]... Under our Constitution no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State are bound . . . .'" [Brackets in original omitted.] *Lee v. Florida,* 392 U.S. at 385-386 (quoting *Elkins* v. *United States,* 364 U.S. 206, 222 (1960)).
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> "Finally, our decision today is counseled by experience. The hope was expressed in *Schwartz* v. *Texas* that '[e]nforcement of the statutory prohibition in § 605 can be achieved under the penal provisions', of the **Communications Act.** 344 U.S., at 201. That has proved to be a vain hope. Research has failed to uncover a single reported prosecution of a law enforcement officer for violation of § 605 since the statute was enacted. We conclude, as we concluded in *Elkins* and in *Mapp,* that **nothing short of mandatory exclusion of the illegal evidence will compel respect for the federal law** 'in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States,* 364 U.S., at 217.[¶] *Reversed.*" [Emphasis added.] *Lee v. Florida,* 392 U.S. at 386-387.

These apostate law men demonstrated a consciousness of guilt by lying about when the searches

began in the affidavits and lying about the denials of consent, all done to conceal their federal felony conduct to effectuate retaliation for First Amendment advocacy. Suppression of all evidence, tangible and intangible must be ordered.

CONCLUSION

Is it permissible for the government to violate the rights of citizens and disregard an Act of Congress and read our e-mails with impunity from federal law and the Constitution of the United States?

The late Chief Justice sided with privacy concerning electronic surveillance, and its union with the First Amendment. "No longer is it possible, in short, for each man to retreat into his home and be left alone." *Bartnicki v. Vopper*, 532 U.S. 514, 543 (2001) (dissenting opinion of Rehnquist, C.J., Scalia, J., and Thomas, J., joined)

> "Technology now permits millions of important and confidential conversations to occur through a vast system of electronic networks. These advances, however, raise significant privacy concerns. We are placed in the uncomfortable position of not knowing who might have access to our personal and business e-mails," (*id.* at 542).

The initial speech that caused Sorensen to focus all efforts on Gutierrez, was due to the fact that in response to M.P.'s request for legal advice, Gutierrez advised legal action be taken against the affiant Sorensen for the federal felonies committed on M.P. by Sorensen.[15] And the subsequent motivation

[15] See e.g., "A public employee might, for instance, use the courts to pursue personal vendettas or to harass members of the general public. That behavior could cause a serious breakdown

by police to gain access to the attorney-client privileged communications with the internal affair's complainant.

Law enforcement acted with criminal intent and consciousness of guilt of their felony conduct because they concealed their acts with perjury to deceive the courts but then claimed that Gutierrez acted with criminal intent "[b]ecause a state of mind is 'easy to allege and hard to disprove,' *Crawford-El*, 523 U. S., at 585," *Nieves v. Bartlett,* 587 U.S. 1715, 1725 (2019). All done to retaliate against a member of "the criminal defense bar, which has the professional mission to challenge actions of the State." *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1051 (1991).

The holding in *Lee v. Florida* needs to be applied to the SCA so that society can remain secure in their electronic communications, to ensure the free flow of ideas in this digital age, without fear of retaliation by the government, cf. *Hartman v. Moore,* 547 U.S. 250, 256 (2006)[16]; *Speiser v. Randall*, 357 U.S. at 535[17]; *Menna v. New York*, 423 U.S. 61, 62-63 (1975) (per curiam).[18]

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in public confidence in the government and its employees." *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2496 (2011)

[16] "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out".

[17] "If the aim is to apprehend those who have lifted a hand against the Government, the procedure is unconstitutional."

[18] "Where the State is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty. *Blackledge v. Perry*, 417 U.S. 21, 30 (1974)."

"The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Houston v. Hill*, 482 U.S. 451, 463 (1987). Because "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment." *Gentile v. State Bar of Nevada*, 501 U.S. at 1034.

"Can it be that the Constitution affords no protection against such invasions of individual security?" *Olmstead v. United States*, 277 U.S. at 474 (Brandeis, J., dissenting).

Our e-mails need constitutional protection and this case demonstrates the danger of leaving society unprotected in a digital age.

The present case answers this Court's recent question "whether the warrant requirement applies" (*Carpenter v. United States*, 138 S.Ct. at 2222) in the affirmative, because Congress has declared it does.

The Court should grant review to declare this important Fourth Amendment protection for all, and to give guidance to legitimate law enforcement officers as to how to conduct lawful investigations.

Respectfully submitted,

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