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

APPENDIX
TO THE
PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Appendix A

Filed 1/9/18 P. v. Gutierrez CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARTURO FERNANDO SHAW GUTIERREZ III, Defendant and Appellant.	G052552 (Super. Ct. No. 13CF2368) O P I N I ON

Appeal from a judgment of the Superior Court of Orange County, Robert F. Fitzgerald, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Wendy C. Lascher for Defendant and Appellant.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Arturo Fernando Shaw Gutierrez III, now a suspended criminal defense attorney, appeals from a judgment after the trial court denied his motion to suppress evidence and traverse the search warrant and he pleaded guilty to numerous counts involving a minor. Gutierrez argued the court erred by denying his motions. None of his contentions have merit, and we affirm the judgment.

FACTS

Factual History[1]

In October 2012, police were investigating allegations a teacher had sexual intercourse with 15-year-old Jane Doe. On October 10, 2012, Doe voluntarily provided the investigating detective (Detective) her cell phone to view its contents; he discovered Gutierrez's name in her contacts. The same day, Doe's father gave Doe's cell phone records to the Detective, and later he gave her text message records to him. Two days later, Doe's father gave the Detective permission to search Doe's bedroom, and the Detective confiscated Doe's iPod touch, which had many social media applications, including Facebook. During the investigation, the Detective learned Doe had engaged in risky online

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[1] Because Gutierrez pleaded guilty, the facts are taken from the police affidavits and exhibits to the motion to suppress evidence and traverse the search warrant.

behavior with several adult men, met some of them, and engaged in sexual conduct with them.

On October 30, 2012, the Detective and another officer (Officer) interviewed Doe. Doe granted police access to her Facebook account to communicate with another adult male by providing them with her username and password. When reviewing Doe's account, police discovered she communicated regularly with

35-year-old Gutierrez via Facebook's messaging system (Messages). Police learned then 14-year-old Doe first contacted Gutierrez in the summer of 2011. On a different dating site, Doe had represented she was 19 years old. In August 2011, Gutierrez Messaged Doe, who he thought was an adult. Doe told Gutierrez that she was 14 years old, and Gutierrez replied, "no worries," and suggested they could meet and practice sports. During that month, their conversations ranged from the mundane to the suggestive. Communication stopped in August 2011 and resumed in February 2012 when Gutierrez

contacted Doe. Communication stopped again in early March and resumed briefly in July. Gutierrez contacted Doe again the end of September and he quickly initiated a sexual conversation. In early October, Doe contacted Gutierrez and suggested meeting. When Gutierrez contacted Doe a few weeks later, Doe told him that she had been hospitalized for five days and had a lawyer, and police and her father had control of her social media accounts.

On November 6, 2012, the Detective interviewed Doe again. Doe denied police further access to her Facebook account.

The next day, the Detective began using Doe's Facebook account to communicate with Gutierrez. Gutierrez, who believed he was communicating with Doe, attempted to arrange various meetings with her. He spoke with her about sexual matters.

On November 29, 2012, police obtained a warrant to search Gutierrez, including his cell phone and its records, and his residence, including his

computer. Police later obtained search warrants to place a tracker on his car and to search his car.

Gutierrez eventually arranged to meet a person who he thought was Doe on December 1, 2012. On that day, Gutierrez arrived at the designated meeting place and was met by police, who arrested him.

Procedural History

An information charged Gutierrez with the following: attempted lewd act upon a child (Pen. Code, §§ 664, subd. (a), 288, subd. (c)(1)), all further statutory references are to the Penal Code) (count 1); contacting a child with the intent to commit a lewd act (§ 288.3, subd. (a)) (count 2); misdemeanor arranging to meet a minor for lewd purpose (§ 288.4, subd. (a)(1)) (count 3); and meeting a minor with the intent to engage in lewd conduct (§ 288.4, subd. (b)) (count 4).

Gutierrez filed a motion to suppress evidence and traverse the search warrant. The motion was supported by a declaration from Gutierrez's counsel and exhibits, including the search

warrant, transcripts of law enforcement interviews with Doe, and transcripts of Gutierrez's Messages with Doe. These documents were filed under seal. The prosecution opposed the motion. Gutierrez replied. The day before the hearing, Gutierrez filed an extensive offer of proof.

At the hearing, the trial court stated it had reviewed everything. Gutierrez's counsel argued the officer searched Facebook's server and not Doe's cell phone or Gutierrez's computer. Counsel asserted Gutierrez had a privacy interest pursuant to The Stored Communications Act (SCA) (18 U.S.C. § 2701 et seq.), and thus there was a Fourth Amendment violation. The prosecutor contended Gutierrez did not have a reasonable expectation of privacy in electronic communications he sent to Doe. The trial court recessed to conduct further research.

At the next hearing, the trial court denied the motion to suppress. 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." When Gutierrez's counsel inquired about the motion to traverse the search warrant, including witness testimony, the court initially stated it contemplated its ruling resolved all issues but ultimately concluded he would continue the matter to again read the moving papers.

The following week, the trial court indicated it had read the moving papers and conducted additional research. The court requested counsel address the following two issues during argument: the omission from the search warrant affidavit of one of Gutierrez's Messages to Doe on November 20, 2012[2]; and whether there was probable cause to search for pornographic material.[3]

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[2] The trial court stated the Message in question was on November 19, 2012, but the record demonstrates the Message the trial court referenced was on November 20, 2012, at 5:32 a.m.

[3] The latter issue is not before us on appeal.

With regard to the November 20, 2012, Message, Gutierrez wrote Doe the following: "that's ok, honestly I am thinking we cant do anything more than meet. I have to much to lose. it scars me. I like you but think its best to wait for everything, and just meet and hang out when we get a chance[.]"[4] Gutierrez's counsel argued the Detective's intentional omission of this statement damaged his credibility and undermined the affidavit's content. The prosecution contended the omission was negligent and even when the statement was added to the affidavit, there was still probable cause because Gutierrez's statements prior to that date were evidence of a violation of count 2, *contacting* a child with the intent to commit a specified crime (§ 288.3, subd. (a)).

The trial court stated it was "troubled" by the "reckless" omission of the November 20 statement, which was exculpatory and important.

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[4] We quote the messages verbatim.

The court explained that when it evaluated the affidavit with the omitted statement, the court concluded there was probable cause. The court explained the search warrant stated the affiant was searching for evidence of two crimes, *arranging* to meet a minor for lewd purpose (§ 288.4, subd. (a)(1)) (count 3), and *contacting* a child with the intent to commit a specified crime
(§ 288.3, subd. (a)) (count 2). The court opined "there was more than sufficient probable cause to issue a search warrant for the violation of" count 2. The court denied the motion to traverse the search warrant.

Gutierrez withdrew his not guilty pleas and pleaded guilty to all four counts. The trial court suspended imposition of sentence and placed him on three years of formal probation.

DISCUSSION

I. Motion to Suppress Evidence

Gutierrez argues the trial court erred by denying his motion to suppress. We disagree.

The Fourth Amendment generally requires police to secure a warrant before conducting a search. (U.S. Const., 4th Amend.) It is well settled an individual cannot challenge the introduction of evidence obtained in an allegedly unlawful search unless that individual had a reasonable expectation of privacy in the object seized or the place searched. (*Rakas v. Illinois* (1978) 439 U.S. 128, 143, 148 (*Rakas*); *People v. Jenkins* (2000) 22 Cal.4th 900, 972 (*Jenkins*).) "'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicarious asserted.' [Citations.] A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed. [Citation.]" (*Rakas, supra,* 439 U.S. at pp. 133-134.) The defendant bears the burden of establishing a legitimate expectation of privacy in the area searched or the object seized. (*Id.* at pp. 130-131, fn. 1; *Jenkins, supra,* 22 Cal.4th at p. 972.)

Under the third-party doctrine, an individual can claim "no legitimate expectation of privacy" in information he has voluntarily turned over to a third party. (*Smith v. Maryland* (1979) 442 U.S. 735, 743-744 (*Smith*).) 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.) The Fourth Amendment does not protect information voluntarily disclosed to a third party because even a subjective expectation of privacy in such information is "not 'one that society is prepared to recognize as "reasonable."' [Citation.]" (*Smith, supra,*

the government does not engage in a Fourth Amendment "search" when it acquires information from a third party.

Here, Gutierrez frames the issue as one about his privacy rights and not Doe's. Saying it doesn't make it so. If anyone's privacy rights were implicated it was Doe's, and Gutierrez cannot assert

those rights. Gutierrez sent Messages to Doe's Facebook account, over which he had no control. When Gutierrez sent the Messages to Doe, he risked whomever had access to Doe's account, Doe, Doe's parents, or the police, would see Gutierrez's Messages. There is no evidence the Detective infiltrated Facebook's servers surreptitiously to view Gutierrez's Messages to Doe. The Detective logged on to Facebook with Doe's credentials and viewed the Messages stored in her Facebook account. The Fourth Amendment does not protect Gutierrez's mistaken belief his Messages to Doe would only be viewed by Doe. (*United States v. Lifshitz* (2d Cir. 2004) 369 F.3d 173, 190 [individuals possess reasonable expectation of privacy in their home computers but they may not possess an expectation of privacy in transmissions over Internet or e-mail that have already reached recipient]); *Guest v. Leis* (6th Cir. 2001) 255 F.3d 325, 333 [individuals lose legitimate expectation of privacy in e-mail that reached recipient]; see also *United States v. Mohamud* (9th Cir. 2016) 843 F.3d 420, 443

[defendant reduced expectation of privacy in electronics communications with overseas foreign national].)

Gutierrez raises a number of additional arguments. First, Gutierrez argues he was entitled to an evidentiary hearing and the prosecution did not establish its burden of justifying the warrantless search. However, it was Gutierrez who bore the burden of establishing he had a reasonable expectation of privacy in Doe's Messages. (*Minnesota v. Carter* (1998) 525 U.S. 83, 88 [defendant has the burden of proof regarding reasonable expectation of privacy in place searched or items seized and that burden exists whether or not there was a search warrant].) Gutierrez failed to meet this burden.

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. (*In re Malik J.* (2015) 240 Cal.App.4th 896, 903, *O'Grady v.*

Superior Court (2006) 139 Cal.App.4th 1423, 1440; 18 U.S.C. §§ 2510(15), 2703(a); *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, 282.) Here, law enforcement did not obtain Gutierrez's Messages from Facebook, but from Doe while logged in to her account. The SCA does not apply. Gutierrez's reliance on *Theofel v. Farey-Jones* (9th Cir. 2004) 359 F.3d 1066, 1071, 1075, is misplaced, because in that case defendant obtained e-mails from the service provider, unlike here where the Detective obtained the Messages from the recipient, Doe.

Third, in a related argument, he cites to the SCA's "lawful consent" exception (18 U.S.C. § 2702(b)(3)), and he spends much time discussing the scope of Doe's consent. Again, the SCA is inapplicable here. And as we explain above, Gutierrez does not have a legitimate privacy interest in Doe's Facebook account and consequently cannot rely on the scope of Doe's consent, or lack thereof, as a basis to assert an unlawful search. Thus, the trial court properly denied Gutierrez's motion to suppress.

II. Motion to Traverse the Search Warrant

Gutierrez asserts the trial court erred by denying his motion to traverse the search warrant pursuant to *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*). Not so.

Pursuant to *Franks*, "a defendant has a limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant. When presented with such a challenge, the lower court must conduct an evidentiary hearing *if* a defendant makes a substantial showing that

(1) the affidavit contains statements that are deliberately false or were made in reckless disregard of the truth, and (2) the affidavit's remaining contents, after the false statements are excised, are insufficient to support a finding of probable cause. The defendant must establish the statements are false or reckless by a preponderance of the evidence. [Citations.] Innocent or negligent misrepresentations will not defeat a warrant. [Citation.] 'Moreover,

"there is a presumption of validity with respect to the affidavit. To merit an evidentiary hearing[,] the defendant['s] attack on the affidavit must be more than conclusory and must be supported by more than a mere desire to cross-examine. . . . The motion for an evidentiary hearing must be 'accompanied by an offer of proof . . . [and] should be accompanied by a statement of supporting reasons. Affidavits or otherwise reliable statements of witnesses should be furnished,' or an explanation of their absence given.'" [Citations.]" (*People v. Panah* (2005) 35 Cal.4th 395, 456.)

Additionally, under *Franks*, "A defendant can challenge a search warrant by showing that the affiant deliberately or recklessly omitted material facts that negate probable cause when added to the affidavit. [Citations.] 'A defendant who challenges a search warrant based upon an affidavit containing omissions bears the burden of showing that the omissions were material to the determination of probable cause." (*People v. Eubanks* (2011) 53

Cal.4th 110, 136.) "'[F]acts are "material" and hence must be disclosed if their omission would make the affidavit *substantially misleading*. On review under section 1538.5, facts must be deemed material for this purpose if, because of their inherent probative force, there is a substantial possibility they would have altered a reasonable magistrate's probable cause determination.' [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 410.) Our review is de novo. (*Ibid.*)

First, Gutierrez claims the Detective's search warrant affidavit misstated the following material facts: Doe consented to the Detective accessing Gutierrez's Messages to her when in fact she consented only to accessing another adult male's Messages to Doe; Doe consented to the Detective accessing her profile to communicate with Gutierrez when in fact she denied consent; the meeting place was a pier when instead it was a restaurant on a pier; and the conversation remained sexual when in fact Gutierrez stated they could only meet.

With respect to the alleged material misstatements, Gutierrez has not overcome the presumption the affidavit was valid. In his affidavit the Detective wrote, "On October 30, 2012[,] Doe gave me access to her Facebook and allowed me to assume her profile." The 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. Doe knew that when she gave the Detective her username and password he would have full access to her account. The Detective also told Doe he was going to change her password, essentially locking her out of her profile.

On November 6, 2012, Doe refused the Detective further access to her Facebook account. Setting aside for the moment Gutierrez is once again improperly invoking Doe's privacy rights, Gutierrez offered no evidence as to what transpired after that interview. During the interview, the Detective told

Doe that he would speak to her mother that day and tell her about the other adult male and "some stuff." The Detective accessed Doe's Facebook account and spoke with Gutierrez from November 7 to November 29. This is evidence Doe, either independently or with her mother's influence, consented to the Detective accessing her Facebook account. We conclude Gutierrez did not demonstrate the Detective's statements in the probable cause affidavit were false or reckless by a preponderance of the evidence.

Gutierrez's claim concerning the meeting place was imprecise but not a material misstatement. The last material fact he relies on, the nature of their conversation and their meeting, is more of an omission than a misstatement, and we will address his contention in that context.

Gutierrez contends the Detective's search warrant affidavit omitted the following material facts: On November 20, 2012, while the Detective was posing as Doe on Facebook, Gutierrez told Doe he was scared and all they could do was meet;

and Doe's statement to the Detective on November 6, 2012, that Gutierrez declined to send her nude photographs.

After not talking for a couple months during the summer of 2012, Gutierrez Messaged Doe on September 29, 2012. Apparently, Doe had changed her profile to married. Early in the conversation, Gutierrez asked and Doe confirmed she had a boyfriend. Gutierrez asked 15-year-old Doe if she was still a "virgin," and he counseled her on birth control and protecting herself. A little later, Gutierrez said that when Doe turned 18 years old he would "take good care of [her]." Later, he added that he loved her and he fantasized about taking her to Las Vegas and getting married after she turned 18 years old. The following week Doe contacted Gutierrez and suggested meeting; Gutierrez agreed to meet.

On November 7, 2012, the Detective, posing as Doe, contacted Gutierrez. Over the course of the next three weeks, Gutierrez suggested meeting Doe and made numerous sexually suggestive

comments to her. On November 20, 2012, Doe sent Gutierrez a Message apologizing for not being able to meet that weekend. Gutierrez answered Doe the following: "that's ok, honestly I am thinking we cant do anything more than meet. I have to much to lose. it scars me. I like you but think its best to wait for everything, and just meet and hang out when we get a chance[.]"

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 Doe. This was relevant to the crime of *arranging* to meet a minor for lewd purpose (§ 288.4, subd. (a)(1)). However, the Detective was also investigating the crime of *contacting* a child with the intent to commit a lewd act (§ 288.3, subd. (a)), and the affidavit included facts demonstrating that crime was complete before November 20. Had the Detective included the omitted statement, the affidavit still established there was probable cause to search for evidence Gutierrez

contacted Doe with the intent to commit a lewd act. The affidavit included facts demonstrating Gutierrez knew Doe was a minor, communicated with her about sexual matters, fantasized about her, and agreed to meet her all before November 20. Thus, even had the Detective included the omitted statement, there was not a substantial possibility it would have altered the trial court's probable cause determination.

Finally, that Gutierrez refused to send Doe explicit photographs had no bearing on whether there was probable cause to investigate the crime of contacting a child with the intent to commit a specified crime. Thus, even with the omitted material included, the search warrant affidavit demonstrated sufficient probable cause to search Gutierrez and his home. (*People v. Scott* (2011) 52 Cal.4th 452, 483 [sufficient probable cause requires showing fair probability contraband or evidence of crime found in particular place].) The trial court did not err by denying Gutierrez an evidentiary hearing on the *Franks* motion.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.

Appendix B

S257074

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re ARTURO FERNANDO SHAW GUTIERREZ on Habeas Corpus

The request for judicial notice is granted. The petition for writ of habeas corpus is denied. (See *People v. Duvall* (1995) 9 Cal.4th 464, 474 [a petition for writ of habeas corpus must include copies of reasonably available documentary evidence]; *In re Lessard* (1965) 62 Cal.2d 497, 503 [courts will not entertain habeas corpus claims that raise Fourth Amendment violations]; *In re Waltreus* (1965) 62 Cal.2d 218, 225 [courts will not entertain habeas corpus claims that were rejected on appeal]; *In re Dixon* (1953) 41 Cal.2d 756, 759 [courts will not entertain habeas corpus claims that could have been, but were not, raised on appeal]; *In re Swain* (1949) 34 Cal.2d 300, 304 [a petition for writ of habeas corpus must allege sufficient facts with particularity].)

CANTIL-SAKAUYE

Chief Justice

Appendix C

California Penal Code § 1538.5

(a) (1) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(A) The search or seizure without a warrant was unreasonable.

(B) The search or seizure with a warrant was unreasonable because any of the following apply:

(i) The warrant is insufficient on its face.

(ii) The property or evidence obtained is not that described in the warrant.

(iii) There was not probable cause for the issuance of the warrant.

(iv) The method of execution of the warrant violated federal or state constitutional standards.

(v) There was any other violation of federal or state constitutional standards.

(2) A motion pursuant to paragraph (1) shall be made in writing and accompanied by a memorandum of points and authorities and proof of service. The memorandum shall list the specific items of property or evidence sought to be returned or suppressed and shall set forth the factual basis and the legal authorities that demonstrate why the motion should be granted.

(b) When consistent with the procedures set forth in this section and subject to the provisions of Sections 170 to 170.6, inclusive, of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) (1) Whenever a search or seizure motion is made in the superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(2) While a witness is under examination during a hearing pursuant to a search or seizure motion, the judge or magistrate shall, upon motion of either party, do any of the following:

(A) Exclude all potential and actual witnesses who have not been examined.

(B) Order the witnesses not to converse with each other until they are all examined.

(C) Order, where feasible, that the witnesses be kept separated from each other until they are all examined.

(D) Hold a hearing, on the record, to determine if the person sought to be excluded is, in fact, a person excludable under this section.

(3) Either party may challenge the exclusion of any person under paragraph (2).

(4) Paragraph (2) does not apply to the investigating officer or the investigator for the defendant, nor does it apply to officers having custody of persons brought before the court.

(d) If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section, Section 871.5, 1238, or 1466 are utilized by the people.

(e) If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the

property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section, Section 1238 or 1466, the property is not subject to lawful detention or if the time for initiating the proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of the court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5 or 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of the proceedings, the property is no longer subject to lawful detention.

(f) (1) If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made only upon filing of an information, except that the defendant may make the motion at the preliminary hearing, but the motion shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

(2) The motion may be made at the preliminary examination only if, at least five court days before the date set for the preliminary examination, the defendant has filed and personally served on the people a written motion accompanied by a memorandum of points and authorities as required by paragraph (2) of subdivision (a). At the preliminary examination, the magistrate may grant the defendant a continuance for the purpose of filing the motion and serving the motion upon the people, at least five court days before resumption of the examination, upon a showing that the defendant or his or her attorney of record was not aware of the

evidence or was not aware of the grounds for suppression before the preliminary examination.
(3) Any written response by the people to the motion described in paragraph (2) shall be filed with the court and personally served on the defendant or his or her attorney of record at least two court days prior to the hearing at which the motion is to be made.

(g) If the property or evidence relates to a misdemeanor complaint, the motion shall be made before trial and heard prior to trial at a special hearing relating to the validity of the search or seizure. If the property or evidence relates to a misdemeanor filed together with a felony, the procedure provided for a felony in this section and Sections 1238 and 1539 shall be applicable.

(h) If, prior to the trial of a felony or misdemeanor, opportunity for this motion did not exist or the defendant was not aware of the grounds for the motion, the defendant shall have the right to make this motion during the course of trial.

(i) If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion at a special hearing relating to the validity of the search or seizure which shall be heard prior to trial and at least 10 court days after notice to the people, unless the people are willing to waive a portion of this time. Any written response by the people to the motion shall be filed with the court and personally served on the defendant or his or her attorney of record at least two court days prior to the hearing, unless the defendant

is willing to waive a portion of this time. If the offense was initiated by indictment or if the offense was initiated by complaint and no motion was made at the preliminary hearing, the defendant shall have the right to fully litigate the validity of a search or seizure on the basis of the evidence presented at a special hearing. If the motion was made at the preliminary hearing, unless otherwise agreed to by all parties, evidence presented at the special hearing shall be limited to the transcript of the preliminary hearing and to evidence that could not reasonably have been presented at the preliminary hearing, except that the people may recall witnesses who testified at the preliminary hearing. If the people object to the presentation of evidence at the special hearing on the grounds that the evidence could reasonably have been presented at the preliminary hearing, the defendant shall be entitled to an in camera hearing to determine that issue. The court shall base its ruling on all evidence presented at the special hearing and on the transcript of the preliminary hearing, and the findings of the magistrate shall be binding on the court as to evidence or property not affected by evidence presented at the special hearing. After the special hearing is held, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his or her motion at the special hearing.

(j) If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new

complaint or seek an indictment after the preliminary hearing, and the ruling at the prior hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people, within 15 days after the preliminary hearing, request a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the special hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special hearing for a period of time up to 30 days. The people may not request relitigation of the motion at a special hearing if the defendant's motion has been granted twice. If the defendant's motion is granted at a special hearing, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why the evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court, prior to the time the review is sought, has dismissed the case pursuant to

Section 1385. If the case has been dismissed pursuant to Section 1385, either on the court's own motion or the motion of the people after the special hearing, the people may file a new complaint or seek an indictment after the special hearing, and the ruling at the special hearing shall not be binding in any subsequent proceeding, except as limited by subdivision (p). If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the superior court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the appellate division, in accordance with the California Rules of Court provisions governing appeals to the appellate division in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

(k) If the defendant's motion to return property or suppress evidence is granted and the case is dismissed pursuant to Section 1385, or the people appeal in a misdemeanor case pursuant to subdivision (j), the defendant shall be released pursuant to Section 1318 if he or she is in custody and not returned to custody unless the proceedings are resumed in the trial court and he or she is lawfully ordered by the court to be returned to custody.

If the defendant's motion to return property or suppress evidence is granted and the people file a petition for writ of mandate or prohibition pursuant to subdivision (o) or a notice of intention to file a petition, the defendant shall be released pursuant to Section 1318, unless (1) he or she is charged with a capital offense in a case where the proof is evident and

the presumption great, or (2) he or she is charged with a noncapital offense defined in Chapter 1 (commencing with Section 187) of Title 8 of Part 1, and the court orders that the defendant be discharged from actual custody upon bail.

(l) If the defendant's motion to return property or suppress evidence is granted, the trial of a criminal case shall be stayed to a specified date pending the termination in the appellate courts of this state of the proceedings provided for in this section, Section 871.5, 1238, or 1466 and, except upon stipulation of the parties, pending the time for the initiation of these proceedings. Upon the termination of these proceedings, the defendant shall be brought to trial as provided by Section 1382, and, subject to the provisions of Section 1382, whenever the people have sought and been denied appellate review pursuant to subdivision (o), the defendant shall be entitled to have the action dismissed if he or she is not brought to trial within 30 days of the date of the order that is the last denial of the petition. Nothing contained in this subdivision shall prohibit a court, at the same time as it rules upon the search and seizure motion, from dismissing a case pursuant to Section 1385 when the dismissal is upon the court's own motion and is based upon an order at the special hearing granting the defendant's motion to return property or suppress evidence. In a misdemeanor case, the defendant shall be entitled to a continuance of up to 30 days if he or she intends to file a motion to return property or suppress evidence and needs this time to prepare for the special hearing on the motion. In case of an appeal by the defendant in a misdemeanor case from the denial of the motion, he or she shall be entitled to bail as a matter of right, and, in the discretion of the trial

or appellate court, may be released on his or her own recognizance pursuant to Section 1318. In the case of an appeal by the defendant in a misdemeanor case from the denial of the motion, the trial court may, in its discretion, order or deny a stay of further proceedings pending disposition of the appeal.

(m) The proceedings provided for in this section, and Sections 871.5, 995, 1238, and 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him or her. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. Review on appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence.

(n) This section establishes only the procedure for suppression of evidence and return of property, and does not establish or alter any substantive ground for suppression of evidence or return of property. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the United States and California Constitutions. Nothing in this section shall be construed as altering (1) the law of standing to raise

the issue of an unreasonable search or seizure; (2) the law relating to the status of the person conducting the search or seizure; (3) the law relating to the burden of proof regarding the search or seizure; (4) the law relating to the reasonableness of a search or seizure regardless of any warrant that may have been utilized; or (5) the procedure and law relating to a motion made pursuant to Section 871.5 or 995, or the procedures that may be initiated after the granting or denial of a motion.

(o) Within 30 days after a defendant's motion is granted at a special hearing in a felony case, the people may file a petition for writ of mandate or prohibition in the court of appeal, seeking appellate review of the ruling regarding the search or seizure motion. If the trial of a criminal case is set for a date that is less than 30 days from the granting of a defendant's motion at a special hearing in a felony case, the people, if they have not filed a petition and wish to preserve their right to file a petition, shall file in the superior court on or before the trial date or within 10 days after the special hearing, whichever occurs last, a notice of intention to file a petition and shall serve a copy of the notice upon the defendant.

(p) If a defendant's motion to return property or suppress evidence in a felony matter has been granted twice, the people may not file a new complaint or seek an indictment in order to relitigate the motion or relitigate the matter de novo at a special hearing as otherwise provided by subdivision (j), unless the people discover additional evidence relating to the motion that was not reasonably discoverable at the time of the second suppression hearing. Relitigation of the motion shall be heard by the same judge who

granted the motion at the first hearing if the judge is available.

(q) The amendments to this section enacted in the 1997 portion of the 1997–98 Regular Session of the Legislature shall apply to all criminal proceedings conducted on or after January 1, 1998.

Appendix D

Excerpts from the Reporter's Transcript
Orange County Superior Court
Docket Number 13CF2368

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ORANGE - CENTRAL JUSTICE CENTER
DEPARTMENT C36

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, VS. ARTURO FERNANDO SHAW GUTIERREZ, III, DEFENDANT.	CASE NO. 13CF2368

HONORABLE DANIEL BARRETT MC NERNEY, JUDGE PRESIDING
REPORTER'S TRANSCRIPT OF PROCEEDINGS
FRIDAY, DECEMBER 19, 2014

BRIAN FITZPATRICK, DEPUTY DISTRICT ATTORNEY, APPEARED AS COUNSEL FOR THE PEOPLE

JOHN BARNETT, ATTORNEY AT LAW, APPEARED AS COUNSEL FOR THE DEFENDANT

LA VETTE HENNINGHAM, CSR NO. 8955, RPR, OFFICIAL COURT REPORTER ORIGINAL

I N D E X

PEOPLE'S WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
(NONE)				

DEFENSE WITNESSES:	DIRECT	CROSS	REDIRECT	RECROSS
(NONE)				

E X H I B I T S

PEOPLE'S EXHIBITS:	FOR IDENTIFICATION	IN EVIDENCE
(NONE)		

DEFENSE EXHIBITS:	FOR IDENTIFICATION	IN EVIDENCE
(NONE)		

APPLIED TO E-MAIL. UNITED STATES VERSUS LIFSHITZ, L-I-F-S-H-I-T-Z, AT 369 FED 3D 173 AND GUEST VERSUS LEIS, L-E-I-S, AT 255 FED 3D, 325, AND THEN GOES ON TO CITE PROFESSOR LAFAYE AT LENGTH IN HIS COMMENTARY ON THE FOURTH AMENDMENT. "JUST AS A LETTER, EXPECTATION OF PRIVACY ORDINARILY TERMINATES UPON DELIVERY OF THE LETTER, ONCE AN E-MAIL -- ONCE AN E-MAIL TRANSITION -- ONCE E-MAIL TRANSMISSIONS ARE RECEIVED BY ANOTHER PERSON, THE TRANSMITTER NO LONGER CONTROLS ITS DESTINY."

I FIND THAT ANALYSIS PARTICULARLY APPLICABLE IN THIS CASE WHERE NOTWITHSTANDING THE DEFENDANT'S ARGUMENT THAT HE AND THE ALLEGED VICTIM IN THIS CASE BOTH HAVE A SINGLE ROOM IN THE HOUSE THAT IS CALLED FACEBOOK, FACEBOOK REQUIRES BOTH THE SENDER AND RECEIVER TO HAVE THEIR OWN ACCOUNTS. EVEN IN ORDER TO CONTACT -- FOR ONE PARTY TO CONTACT ANOTHER THROUGH THE PRIVATE MESSAGE OPTION, ONCE THAT MESSAGE IS PREPARED, IN ORDER FOR THE OTHER PARTY TO RECEIVE IT, THE SENDER HAS TO HIT THE SEND BUTTON. ONCE THAT SEND BUTTON IS SET -- HIT, THAT MESSAGE, JUST LIKE A LETTER OR E-MAIL OR TEXT, IS THEN DELIVERED TO THE OTHER PARTY, AND ONCE IT IS DELIVERED, OPENED OR NOT, THE SENDER NO LONGER RETAINS AN EXPECTATION OF PRIVACY IN THAT COMMUNICATION.

SO I AGREE WITH WARSHAK WITH RESPECT TO THE REASONABLE EXPECTATION OF PRIVACY THAT A PERSON HOLDS IN THE MESSAGE ITSELF, BUT ONCE IT IS SENT, ONCE THE SEND BUTTON IS

PUSHED, WHETHER IT IS E-MAIL OR TEXT OR, IN THIS CASE, MESSAGE FROM ONE FACEBOOK ACCOUNT TO ANOTHER, THAT FORTH AMENDMENT EXPECTATION OF PRIVACY IS GONE.

FOR THAT REASON I DON'T FIND THAT THE DEFENDANT HAS AN EXPECTATION OF PRIVACY IN THE MESSAGES THAT WERE RECEIVED BY THE ACCOUNT OF THE ALLEGED VICTIM, AND THE MOTION TO SUPPRESS IS DENIED.

NOW THAT -- WHERE DOES THAT LEAVE US IN TERMS OF FURTHER PROCEEDINGS IN THIS CASE, GENTLEMEN?

MR. BARNETT: IF WE COULD JUST HAVE A MINUTE BECAUSE --

THE COURT: OF COURSE. LET ME KNOW WHENEVER YOU'RE READY.

(BRIEF RECESS.)

THE COURT: ALL RIGHT. WE ARE BACK ON THE RECORD. COUNSEL?

MR. BARNETT: YOUR HONOR, I'M ASSUMING BY THE COURT'S RULING THAT THE COURT IS ALSO DENYING THE FRANKS MOTION AS WELL AS THE 1538. IS THAT -- BECAUSE THERE WERE TWO -- THERE'S THE 1538 AND THEN THERE WAS THE FRANKS MOTION, WHICH WAS ALSO RAISED AND IT'S RAISED IN THE MOVING PAPERS, AND IT IS IN PART -- AND I'M NOT TRYING TO REARGUMENT.

THE COURT: NO, NO, NO. I UNDERSTAND, MR. BARNETT.

MR. BARNETT: IT WAS RAISED IN THE MOVING PAPERS AND IT RELIED IN PART ON THE COURT'S RULING ON THE -- WHAT

GAVE ME FULL ACCESS TO HER FACEBOOK."

THE COURT: WHERE DOES IT SAY THAT?

MR. BARNETT: ON PAGE 18 -- EXCUSE ME, PAGE 5 OF 14. HE SAYS ON OCTOBER 30TH --

THE COURT: I SEE IT. I SEE IT.

MR. BARNETT: AND WE HAVE CITED THE PASSAGES. THAT'S JUST NOT SO.

THE COURT: OKAY.

MR. BARNETT: AND I THINK THAT THE COURT --

THE COURT: I'M SORRY. I'M SORRY TO INTERRUPT YOU, AGAIN, MR. BARNETT. BUT I KNOW THAT THERE ARE LENGTHY TRANSCRIPTS OF THE INTERVIEW WITH JANE DOE BY DETECTIVE SORENSEN. THERE ARE AT LEAST TWO OF THOSE. CAN YOU POINT TO ME THE LOCATION WHERE THERE'S THE DISCUSSION ABOUT DETECTIVE SORENSEN USING JANE DOE'S FACEBOOK ACCOUNT OR IDENTITY TO COMMUNICATE WITH YOUR CLIENT?

MR. BARNETT: YES. IF I CAN JUST HAVE A MINUTE --

THE COURT: SURE.

MR. BARNETT: -- AND REFER THE COURT TO PAGE 2 OF THE PROBABLE CAUSE AFFIDAVIT WHICH IS WHERE HE SAID HE HAD THIS COMPLETE ACCESS. YOUR HONOR, IF I CAN REFER YOU TO THE -- MY BRIEF AT PAGE 47. AND I GIVE THE PAGE -- THE EXHIBIT IS EXHIBIT E, BUT I REFER TO IT -- I QUOTE IT -- THOSE PASSAGES AND I GIVE YOU THE CITATION.

THE COURT: OKAY. I SEE THAT. OKAY. THANK YOU. YOU CAN CONTINUE.

MR. BARNETT: WELL, YOUR HONOR, I THINK --

THE COURT: I GET IT. LET ME JUST SAY, I UNDERSTAND WHAT YOU HAVE POINTED OUT FROM THE TRANSCRIPT REGARDING THE DIFFERENCE BETWEEN HIS REPRESENTATIONS IN THE AFFIDAVIT AND JANE DOE'S STATEMENT TO OFFICER SORENSEN APPEAR CONTRARY TO WHAT HE STATES IN THE AFFIDAVIT.

MR. BARNETT: AND IF I CAN MAKE THIS FINAL POINT. WHEN THE -- WHEN THE OFFICER SAYS THAT THE CONVERSATION REMAINS SEXUAL, THAT WAS NOT TRUE. FROM THE TIME THAT THE -- FROM NOVEMBER 13TH TO THE TIME OF THE AFFIDAVIT AND THE ISSUANCE THAT IS ON THE 29TH OF NOVEMBER, IT -- IT DIDN'T REMAIN SEXUAL. IT CONTINUED WITH THE POLICE OFFICER POSING AS DOE TRYING TO GET HIM TO SAY SOMETHING INCRIMINATING.

THE COURT: WELL, LET ME ASK YOU THIS, MR. BARNETT. THE LAST QUOTED PORTION OF THE CONVERSATION BETWEEN DOE AND YOUR CLIENT IS CONTAINED ON PAGES 6 AND 7 OF THE AFFIDAVIT REGARDING A CONVERSATION OF NOVEMBER 13TH. BETWEEN NOVEMBER 13TH AND NOVEMBER 19TH WHEN THE -- AS YOU ARGUE, THE WITHDRAWAL, IF YOU WILL, FROM THE PLANNED SEXUAL ENCOUNTER IS MADE, ARE THERE OTHER CONVERSATIONS BETWEEN THE 13TH AND THE 19TH, SEXUAL OR NOT? BECAUSE IT'S MY UNDERSTANDING ON THE 14TH THEY CONFIRM THEIR MEETING WITH SEXUAL INTENT. THEN ON THE 16TH, THERE WAS A -- JUST A NOTICE THEY WERE GOING TO DELAY THE MEETING BECAUSE YOUR CLIENT WAS SICK; AND THEN ON THE 19TH HIS WHAT I WILL REFER

Appendix E

Excerpt from Attorney's General Brief

exclusionary rule and routinely employed it to suppress evidence seized in violation of a third party's rights. (*In re Lance* (1985) 37 Cal.3d 873, 879, 883-884.) However, passage of Proposition 8 in 1982 added section 28, subdivision (d), to Article I of the state constitution. This provision limited exclusion of evidence to that compelled by the federal Constitution. And as stated, the United States Supreme Court has explained that the exclusionary rule applies only to evidence seized in violation of the defendant's personal rights. (*Id.* at pp. 881-883, 887.)

Thus, appellant has no viable Fourth Amendment claim as to the Facebook messages.[3]

II. APPELLANT HAS NOT SHOWN THAT THE SEARCH WARRANTS WERE DEFICIENT FOR LACK OF PROBABLE CAUSE

Police obtained search warrants authorizing search of appellant's residence, computer, social media, and car. (1 SCT 154-159, 175-177, 188-189, 198-203.) As he did in the trial court, appellant asserts that police misstated and omitted material facts from the affidavits they submitted to the magistrate in support of probable cause for the search warrants. (See *Franks v. Delaware* (1978) 438 U.S. 154, 171-172 (*Franks*).) He urges that police misrepresented getting Doe's permission to use her Facebook account to contact him. He also insists that police failed to include

[3] To the extent appellant asserts he had an expectation of privacy based on the Stored Communications Act, his claim fails. The Stored Communications Act would have barred police from having the Facebook company access the messages and handing them over to them without a warrant. (See *United States v. Warshak* (6th Cir. 2010) 631 F.3d 266, 282-283, 285-286, 288.) Police did not access appellant's messages through the Facebook company. Instead, they accessed appellant's messages through Doe, the recipient of those messages. Thus appellant had no reasonable expectation of privacy in the messages even under the Stored Communications Act. (See *id.* at p. 288.)

Appendix F

Prayer from Petition for Writ of Habeas Corpus

PRAYER

Because of the State's conduct, Gutierrez was denied his Fourteenth Amendment right a full and fair hearing on the Fourth Amendment issues and his right to an appeal on the merits of the Fourth Amendment issues and therefore justice requires that this Court order the Court of Appeals Fourth District Division Three to recall the remittitur (case # G052552), vacate its order of affirmance and reinstate the appeal (*In re Martin*, at p. 142) so that this Court can grant review, as it almost did once before (case #S247111), and adjudicate the merits of the issues using the actual facts of this case and to incorporate the issues and facts presented in this Petition for the Writ of Habeas Corpus into the appeal.

Petitioner also prays for any other legal theory or any other remedy this Court deems necessary and just under law or equity.

These were the questions posed by Ms. Lascher when this Court almost granted review once before (case #S247111):

"The Court should grant review to resolve these important questions of electronic privacy and Fourth Amendment law:

> 1. Does the Stored Communications Act, 18 U.S.C. § 2701, et seq., protect individuals who send or receive stored electronic communications, in addition to protecting internet service providers?
>
> 2. Does the act of sending an electronic message eliminate the sender's reasonable expectation of privacy in the sender's stored electronic messages, even though neither the sender nor the recipient has consented to a search of the sender's messages?
>
> 3. In requesting a search warrant based on electronic information, are police required to disclose that the information underlying the request was obtained in violation of the Stored Communications Act?" (Appellant's Petition for Review, at p. 7, case #S247111 and see also the Conclusion at pp. 26-27)
>
> And now also:
>
> 4. Does a warrantless search of a home via electronic means, through the use of electronic communications, violate the Fourth Amendment?

Furthermore, as the evidence proves that the police illegally gained access to privilege and willfully

failed to utilize the special master and are still presently possessing this privilege, this Court should issue a Writ of Mandate (Code of Civil Procedure § 1086) ordering the Superior Court of Orange County to seal the materials unlawfully taken from Gutierrez's home, person, vehicle and from Facebook in case number 13CF2368.

Evidence of innocence was concealed from the defense and perjury was employed to conceal the truth, the truth established by a preponderance of the evidence (Penal Code § 1473) proves that Gutierrez is innocent, and a declaration of factual innocence is requested from this Court.

The Supreme Court is requested to issue the order to show cause as to why the court should not issue the writ of habeas corpus because:

1) The Fourth Amendment was violated through: the federal felony violations of the SCA; warrantless searches of the home; the use of illegally obtained evidence to obtain warrants; maintaining possession of the originals warrants and affidavits; and failure to service the warrants on Gutierrez; per federal and state law suppression is mandated; and

denying Gutierrez his right to a full and fair hearing under the Fourteenth Amendment as to a live witness testimony Penal Code § 1538.5 hearing.

2) The Fourth Amendment was violated through: the violation of the State warrant procedure by illegally accessing attorney-client privilege and the willful failure to use the special master to conduct searches of an attorney's: cell phones, computers, office and Facebook communications resulted in the warrants being voided and thus, violating the Fourth Amendment.
3) The First, Ninth and Fourteenth Amendments were violated by retaliating for exercising constitutional rights, the constitution demands the charges be dismissed.
4) Perjury in an affidavit for a warrant and/or material exculpatory evidence being omitted mandates quashing the warrant.
5) The fraud on the court by fabricating evidence in violation of the Fourteenth Amendment and the Fifth Amendment mandates dismissal of the charges.
6) California's presumption of guilt under the Victim's Bill of Rights, violates the federal constitution and therefore Cal. Const. art. I, §28 in so far as it addresses pre-conviction issues is unconstitutional.
7) The Sixth Amendment right to a jury trial was denied by California when the State ordered Gutierrez to preserve privilege at every peril, then lied to the media to destroy the jury pool and the People threatened Gutierrez with multiple years in prison if he exercised his jury trial rights.

8) The denial of assistance of counsel through the willful concealment of material exculpatory and impeachment evidence deprived Gutierrez of his Sixth Amendment right to counsel and therefore renders the proceedings void.
9) The charges against Gutierrez were founded on perjury and felony conduct by the State and the convictions must be overturned.

"Protecting the confidentiality of communications between attorney and client is **fundamental to our legal system** ...[and]... **vital to the effective administration of justice**" *Laff* at p. 716. Because "[t]he paramount concern must be to **preserve public trust in the scrupulous administration of justice and the integrity of the bar** ... that affect **the fundamental principles of our judicial process.**" *People v. SpeeDee Oil Change Systems, Inc.,* (1999) 86 Cal.Rptr.2d 816, 823. [Emphasis added to all above.]

It is so respectfully prayed and submitted.