# 16-4296-cr

# United States Court of Appeals

*for the*

# Second Circuit

UNITED STATES OF AMERICA,

*Plaintiff-Appellant,*

– v. –

SHAVONA TRAPPIER, AKA Bobby, SHAKEEM POWELL, AKA Sha, TYRAN TROTTER, AKA Ty, AKA Terry, AKA Terror, SEAN BRABRAM,

*(For Continuation of Caption See Inside Cover)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS-APPELLEES**


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*Defendants,*

KAMEL LAMBUS, AKA Kamel Angevine, AKA K, AKA Kamel Angenevine, STANLEY FULLER, AKA Wardy, AKA Webo,

*Defendants-Appellees.*

## CORPORATE DISCLOSURE STATEMENT

*Amici curiae* are not owned by a parent corporation. No publicly held corporation owns more than ten percent of stock in *amici.*

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## INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The New York State Association of Criminal Defense Lawyers ("NYSACDL") is a not-for-profit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) and Rule 29.1 of this Court's Local Rules, *amici* state that no party's counsel authored this brief in whole or in part, and that no party or person other than *amici* or their counsel contributed money towards the preparation or filing of this brief.

crimes. Founded in 1986, NYSACDL comprises some 800 public defenders and private practitioners throughout New York. Many of NYSACDL's members have held positions of prominence in the National Association of Criminal Defense Lawyers. NYSACDL's legislative committee continues an ongoing dialogue on issues of importance to the criminal defense bar with elected officials in Albany and in local governments around the state. NYSACDL has actively lobbied for the reform of the Rockefeller Drug Laws and the discovery statutes, and has sought increases both in funding for indigent defense organizations and for fees paid to assigned counsel in the state and federal courts. NYSACDL's magazine, *Atticus*, provides current information and helpful insights to criminal defense lawyers. NYSACDL's continuing legal education committee provides high quality criminal defense programs across New York. NYSACDL's *amicus curiae* committee is proactive, and regularly files *amicus curiae* briefs in important state and federal cases.

All parties have consented to the filing of this amicus brief.[2]

## INTRODUCTION

The Government's brief on appeal presents a striking dichotomy. On one side is the Government's view of the rights of parolees and the Court. According to the

[2] Accordingly, this brief may be filed without leave of court, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

Government, parolees have no right to privacy and the judiciary has no authority to police an intentional lie by the Government in a wiretap application. On the other side is the Government's view of its own authority. According to the Government, it may monitor and investigate parolees without limitation and may freely ignore statutory wiretap application requirements with impunity. The Government is wrong on each count. This Court should affirm the decision below, which properly balanced the rights of parolees, the Court, and the Government when it suppressed the warrantless GPS monitoring of Defendant Lambus and the wiretapping of Defendants Lambus and Fuller.

First, the Court should affirm the suppression of the GPS monitoring of Lambus. While Lambus authorized the New York State Department of Corrections and Community Supervision ("DOCCS") to search his person, residence, and property as a condition of his parole, the New York Court of Appeals recognized in 1977 that parolees like Lambus retain privacy rights and that any warrantless search must be rationally and reasonably related to a parole objective. *People v. Huntley*, 43 N.Y.2d 175 (N.Y. 1977).

The Government violated this rule when it co-opted parole to monitor Lambus for over two years, without a warrant, in order to gather evidence for a federal prosecution. Holding otherwise would upset 40 years of settled law and the controlling decision of the New York Court of Appeals on an issue of New York

law. It would also have significant deleterious policy implications and invite Government abuse.

Second, the Court should affirm the suppression of the wiretapping of Lambus and Fuller. The District Court found that the wiretap application knowingly failed to disclose prior wiretap applications as required. That failure justified suppression both under *Franks*—because the knowing violation found here should be considered *per se* material—and under the Court's inherent authority to police misconduct before it. Holding to the contrary, as the Government urges, would make this Court the first to conclude that a knowing violation of statutory wiretapping requirements does not warrant suppression under *Franks* or the Court's inherent authority.

## ARGUMENT

### I. THE GPS MONITORING REQUIRED A WARRANT

The District Court correctly ruled that the GPS monitoring here required a warrant. First, New York parolees retain a reasonable expectation of privacy under the Fourth Amendment. Second, parolees' privacy rights are violated when the federal government subjects them to invasive warrantless searches to further general law enforcement purposes, rather than legitimate parole functions. Third, the GPS monitoring here violated this principle. Finally, a reversal could lead to disastrous

policy results, allowing federal law enforcement agents to monitor any parolee to any extent for practically any reason and undermining non-parolees' privacy.

### A. New York Parolees Have Privacy Rights.

In 1977, the New York Court of Appeals recognized in *People v. Huntley* that New York parolees have a legitimate expectation of privacy. 43 N.Y.2d 175, 179 (N.Y. 1977). There, the Court of Appeals addressed the expectation of privacy of a state parolee who, like Lambus, had authorized his parole officer to search his person, residence, and property. *Id.* at 182. It concluded, notwithstanding this authorization, that a parolee does "not surrender his constitutional rights against unreasonable searches and seizures." *Id.* Rather, a search warrant is required outside of a limited exception for searches "by the parolee's own parole officer," which are "rationally and reasonably related to the performance of the parole officer's duty." *Id.* "[S]ome rational connection" is not enough; "the particular conduct must also have been substantially related to the performance of duty in the particular circumstances." *Id.* New York state and federal courts faithfully applied this principle in the years thereafter. *See People v. Mackie*, 430 N.Y.S.2d 733, 734-35 (4th Dep't 1980); *People v. Hill*, No. 01-188, 2002 WL 88977, at *1 (1st Dep't Jan. 10, 2002); *Tchirkova v. Kelly*, No. 96 CV 1157, 1998 WL 125542, at *7 (E.D.N.Y. Mar. 16, 1998); *United States v. Jelks*, 273 F. Supp. 2d 280, 288-89 (W.D.N.Y. 2003).

Nearly 30 years after *Huntley*, in 2006, the U.S. Supreme Court examined parolee privacy rights in *Samson v. California*. *See* 547 U.S. 843, 850 (2006). There, the Supreme Court examined the expectation of privacy of a parolee who signed a very different authorization. *Id.* at 851. That parolee "agree[d] in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, with or without a search warrant and with or without cause." *Id.* at 846 (quoting Cal. Penal Code Ann. § 3067(a) (2000)) (emphasis added). Under these circumstances, the Supreme Court concluded that that the parolee had no reasonable expectation of privacy. *Id*. at 852.

Following *Samson*, New York state courts have continued to apply *Huntley*. *See People v. Bermudez*, 11 N.Y.S.3d 827, 832 (N.Y. Cty Ct. 2015); *People, ex rel. Vasquez v. Warden*, 958 N.Y.S.2d 62 (N.Y. Sup. Ct. 2010) (Table) (collecting cases). Federal courts have generally declined to decide whether *Samson* supplants *Huntley* because the difference between the two standards was not material to the cases before them. *See United States v. Watts*, 301 F. App'x 39, 42 n.2 (2d Cir. 2008); *Alvarado v. City of New York*, 482 F. Supp. 2d 332, 336 (S.D.N.Y. 2007); *United States v. Justiniano*, No. 07-CR-6024L, 2008 WL 919626, at *5 (W.D.N.Y. Mar. 20, 2008).

This Court should conclude that *Huntley* remains good law in New York for three reasons. First, this court is bound by the decision of the New York Court of

Appeals in *Huntley*. The privacy rights of a New York state parolee turn on an issue of New York law and this Court must defer to the New York Court of Appeals on decisions of New York law. *Reddington v. Staten Island University Hosp.*, 511 F.3d 126, 133 (2d Cir. 2007). Second, the Second Circuit has recognized that the New York and California parole regimes are fundamentally different. The New York authorization "did not explicitly authorize 'anytime, anywhere' searches" and "unlike California, New York requires that parole searches conducted under New York's sentencing regimes be 'rationally and substantially related to the performance of [the parole officer's] duty.'" *Watts*, 301 F. App'x at 42 n.2. These critical distinctions between the parameters of parole in New York and California support both *Huntley's* continued applicability and the general rule that New York parolees retain some expectation of privacy while on parole. Third, as discussed below, holding otherwise would create significant public policy issues.

### B. New York Parolees' Privacy Rights Are Violated When They Are Subject to Warrantless Searches for General Law Enforcement and Not Parole Purposes.

As discussed above, under *Huntley*, searches must be "rationally and reasonably related to the performance of the parole officer's duty." 43 N.Y.2d at 181. This duty includes "prevent[ing] parole violations for the protection of the public from the commission of further crimes;" and "assist[ing] [the parolee] to a proper reintegration into his community." *Id.*

In assessing whether a search is rationally and reasonably related to these duties, courts have recognized that the duties of parole and other law enforcement officers may frequently be "intertwined" and have permitted searches that are coordinated between parole and other law enforcement. *United States v. Reyes*, 283 F.3d 446, 463 (2d Cir. 2002); *United States v. Newton*, 369 F.3d 659, 667 (2d Cir. 2004). For instance, the Second Circuit has approved coordinated efforts between parole officers and law enforcement agents when parole officers are conducting home visits. *See Reyes*, 283 F.3d at 464; *Newton*, 369 F.3d at 667.

The Second Circuit, however, has also recognized that, in some cases, a coordinated search "may become so attenuated from the parole officers' duties so as not to satisfy the *Huntley* rule." *United States v. Barner*, 666 F.3d 79, 86 (2d Cir. 2012). Indeed, warrantless searches carried out solely or primarily for general law enforcement purposes violate the *Huntley* standard. *See, e.g.*, *Alvarado*, 482 F. Supp. 2d at 336; *Bermudez*, 11 N.Y.S.3d at 834 (prohibiting warrantless searches by "police officers to obtain evidence in furtherance of a criminal investigation.").

### C. The Warrantless GPS Tracking Here Violated Lambus' Privacy Rights.

The District Court correctly recognized that the GPS monitoring of Lambus was not rationally and reasonably related to a parole objective as required by *Huntley*.

First, the GPS tracking was not used for parolee supervision after installation. Instead, "[t]he state supervisory parole officers . . . were instructed not to alter his conditions of parole" and "the location data was ignored by New York's DOCCS supervisory bureau." SPA50.[3] DOCCS officers never made an attempt to violate Lambus. *See* SPA47. In fact, the federal investigation actually interfered with the parole system, as indications that other investigation targets were New York state parolees were affirmatively hidden from those parolees' supervising officers. *See* SPA33.

Second, the GPS monitoring continued long after DOCCS had sufficient evidence to initiate violation proceedings. The Government concedes that its investigation "uncovered numerous indications that Lambus was engaged in drug trafficking," "that he was tampering with his GPS device," "violating his curfew," "possessing a large amount of unexplained cash," "wearing gang colors," "frequenting known stash houses," and that Lambus attempted to purchase an Uzi submachine gun. Appellant Br. at 57; SPA35.

Third, the GPS monitoring data was "used exclusively by the federal law enforcement authorities in determining if federal criminal laws were being violated, not for searching out parole violations the investigation was uncovering." SPA50. A parole officer's desire for "more severe penalties in the federal system," Appellant

[3] The Special Appendix to Appellant's Brief is cited as "SPA" by page number.

Br. at 72, is not a legitimate parole objective. It neither "guide[s] the parolee into constructive development" nor prevents "behavior that is deemed dangerous to the restoration of the individual into normal society." *United States v. Thomas*, 729 F.2d 120, 123 (2d Cir. 1984).

Under these circumstances, the GPS monitoring was not rationally and reasonably related to parole objectives and instead required a search warrant. A contrary holding would render the limiting "rationally and reasonably related" language meaningless and effectively overrule *Huntley*.

### D. A Reversal Would Have Disastrous Policy Implications.

Holding otherwise would critically undermine *Huntley*'s distinction between general law enforcement and parole supervisory searches and have grave implications, both in New York and across the nation.

First, it would unjustifiably diminish the privacy rights of a huge numbers of parolees. As of 2015, there were roughly 870,500 individuals on parole nationwide.[4] Roughly 44,000 of this total were New York parolees. *Id.* In 2015, New York released 2,265 parolees back into their communities.[5] Only 8.6% of

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[4] Danielle Kaeble and Thomas P. Bonczar, Bureau of Justice Statistics, U.S. Department of Justice, *Probation and Parole in the United States, 2015*, Feb. 2, 2017, available at https://www.bjs.gov/content/pub/pdf/ppus15.pdf.

[5] New York Corrections and Community Supervision, *Parole Board and Presumptive Release Dispositions, Calendar Year 2015*, available at

parolees returned to incarceration within three years of their release for a new felony offense.[6]

Under the Government's theory, these parolees may be subject to a host of invasive surveillance techniques including warrantless searches, GPS monitoring, wiretaps, and Stingray phone trackers. The Supreme Court and the New York Court of Appeals have both recognized that GPS monitoring in particular is highly invasive because it "generates a precise, comprehensive record of a person's public movements that reflect a wealth of detail about her familial, political, professional, religious, and sexual associations" and discloses "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on." *United States v. Jones*, 565 U.S. 400, 415 (2012) (citing to New York Court of Appeals' decision in *People v. Weaver*, 12 N.Y.3d 433, 441-442 (N.Y. 2009)).

Second, that decision would invite law enforcement to monitor other citizens.

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http://www.doccs.ny.gov/Research/Reports/2016/Parole_Board_Dispositions_2015.pdf.

[6] Committee on Correction, New York State Assembly, *2016 Annual Report*, December 15, 2016, available at http://nyassembly.gov/comm/Correct/2016Annual/index.pdf ("Committee Annual Report") at 15 ("Viewed in terms of total statewide arrests, parolees represent less than 5% of all felony arrests and just 2.5% of all misdemeanor arrests per year statewide.").

Any law enforcement officer wishing to monitor someone would need only to find a parolee associated with that person in order to do so.[7] The law enforcement officer could then, without obtaining a warrant, use any of the techniques referenced above to surveil the parolee's associate. Even more problematically, the true target of the monitoring would likely have no standing to assert a claim because, technically, the parolee would be the subject of any monitoring. GPS monitoring is particularly subject to this type of abuse because it is "cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously." *Jones*, 565 U.S. at 415-16.

Third, the impact of these measures is likely to fall disproportionately on already-vulnerable minority groups and sow further distrust of law enforcement in their communities. Almost half (48%) of New York parolees are black[8]—a far larger fraction than their representation in the state's population (17.7%)[9]—and polls show significant disparity between white and nonwhite confidence in the

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[7] The notion that the Government would wish to monitor broad groups of people is not an abstract threat. *See* American Civil Liberties Union, *Factsheet: The NYPD Muslim Surveillance Program*, available at https://www.aclu.org/other/factsheet-nypd-muslim-surveillance-program (describing the New York City Police Department's efforts to surveil Muslim citizens across New York, Pennsylvania, Connecticut, and New Jersey).

[8] Committee Annual Report at 2.

[9] United States Census Bureau, *QuickFacts: New York*, July 1, 2016, available at https://www.census.gov/quickfacts/NY.

police.[10] Authorizing the surveillance at issue here will only widen both the existing gulf between black and white perceptions of the justice system and the racial disparity in treatment within it.

Finally, the Government's warning that this decision will chill cooperation between law enforcement and parole officers should be rejected. *See* Appellant Br. at 79-81. The decision merely requires that the Government obtain a warrant for criminal law enforcement investigations like this one—by no means a heavy burden or one that should have a chilling effect. *See, infra*, at 17-18.

## II. THE DISTRICT COURT PROPERLY SUPPRESSED THE WIRETAP EVIDENCE

The District Court properly suppressed the Title III wiretap evidence at issue here. First, that decision was proper under the Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978). Second, that decision was a proper exercise of the District Court's inherent authority.

### A. *Franks* Requires Suppression of the Wiretap Evidence.

As described below: (1) *Franks* should be ready to be consistent with Title III; and (2) under *Franks*, the knowing violation found here warrants suppression.

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[10] Frank Newport, Gallup News, *U.S. Confidence in Police Recovers from Last Year's Low*, June 14, 2016, available at http://news.gallup.com/poll/192701/confidence-police-recovers-last-year-low.aspx. (noting that nonwhite confidence in the police remains low (39%) versus white confidence (62%)).

### 1. *Franks* Should Be Read To Be Consistent With Title III.

In 1968, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968. Title III of that Act sets out the procedures the Government must follow when making wiretap applications to the court. *See* 18 U.S.C. §§ 2510-2520. It includes a provision requiring the exclusion of unlawfully intercepted communications. 18 U.S.C. § 2515.

Nearly a decade later, in *United States v. Donovan*, the Supreme Court concluded that an inadvertent failure to satisfy the Title III statutory requirement of identifying "all those likely to be overheard in incriminating conversations" did not warrant suppression. *United States v. Donovan*, 429 U.S. 413, 435-36 (1977). It warned, however, that a knowing failure to do so, "for the purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking[,]" would be "a different case." *Id.* at 436 n.23.

The next year, in *Franks v. Delaware*, the Supreme Court further clarified the standard for suppression of communications obtained pursuant to warrants containing false information. 438 U.S. 154, 155-56 (1978). It held that suppression was required where: (1) the false statement or omission was knowing or intentional; and (2) the excluded or false information was material to the reviewing judge's probable cause determination. *Id.*

In 1993, in *United States v. Bianco*, this Court examined the interplay between *Franks* and Title III's statutory exclusion provision. *United States v. Bianco*, 998 F.2d 1112, 1125-26 (2d Cir. 1993). It concluded that *Franks* was "consistent with the purposes of [the statute]" which was to "protect the privacy of communications," "to ensure that the courts do not become partners to illegal conduct," and to "protect the integrity of court and administrative proceedings." *Id.* at 1126. This Court emphasized that "[n]othing in the *Franks* standard goes against the grain of these purposes" and "[i]f anything, *Franks* enhances the protection of the defendants." *Id.*

### 2. *Franks* Requires Suppression of the Knowing Violation Found Here.

For the reasons set forth herein, this Court should conclude that the knowing violation of Section 2518(1)(e) found here requires suppression under *Franks.*

First, the violation of section 2518(1)(e) fits squarely within the framework of *Franks.* Because the violation was found to be knowing, it satisfies *Franks*' *mens rea* requirement. The knowing violation should also be considered *per se* material because:

- While Circuits disagree whether the provision at issue, § 2518(1)(e), is "central" to Title III[11], it is a required element of

[11] *Compare Bianco,* 998 F.2d at 1128 (concluding provision was not central) *with United States v. Bellosi*, 501 F.2d 833, 841 (D.C. Cir. 1974) (holding the opposite).

the statute and plays an important role in determining the necessity of the application. *See Bellosi*, 501 F.2d at 841.

- Courts regularly recognize the interplay between intent and materiality. An intent to deceive may support an inference of materiality. *See Regeneron Pharm., Inc. v. Merus B.V.*, 144 F. Supp. 3d 530, 562 (S.D.N.Y. 2015) (stating in the patent context that "[t]he submission of an unmistakably false affidavit has been deemed material misconduct"). As the Government itself has argued in many criminal cases, if the information was not important, why did the Government knowingly omit it?

- Courts have deemed conduct like this to be *per se* significant in other analogous contexts. Courts have recognized in the *per se* negligence context that the violation of a statute, as is the case here, is sufficient to satisfy a required element. *See Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 733 (2d Cir. 1979). Similarly, in the antitrust context, courts have recognized that certain conduct is generally so problematic that it is deemed *per se* anticompetitive. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 100 (1984). The same logic can be applied here given the seriousness of an intentional abuse of the wiretap application process. Finally, courts have recognized that certain constitutional violations that impact the integrity of the overall process warrant "a *per se* rule of reversal." *Peck v. United States*, 106 F.3d 450, 454 (2d Cir. 1997). So too here where the Government's misconduct impacted the overall integrity of the process.

In addition, to conclude otherwise would be inconsistent with the Supreme Court's decision in *Donovan*, prior Circuit case law, and decisions outside this Circuit. *Donovan* recognized that the situation here, a knowing misrepresentation of

a statutory requirement, would be a "different case" than an inadvertent omission. 429 U.S. at 436 n.23.[12]

Notably, this Court has only previously considered inadvertent violations of Section 2518(1)(e) and, in each instance, the fact that the violation at issue was inadvertent rather than intentional was a significant factor in this Court's decision. *United States v. Barnes*, 411 F. App'x 365, 368 (2d Cir. 2011); *Bianco*, 998 F.2d at 1127-28.

The two Circuits to have considered the issue of an *intentional* violation of § 2518(1)(e), however, have both concluded that such a violation requires suppression. *United States v. Callum*, 410 F.3d 571, 578 (9th Cir. 2005) (Kozinski, J.) (considering the omission of fact that two surveillance subjects had been targeted by a prior wiretap, and finding that "[s]uch an omission, if intentional, would violate section 2518(e) and require suppression."); *Bellosi*, 501 F.2d at 841 (suppressing evidence where government intentionally violated disclosure requirement of § 2518(1)(e)). Indeed, the Government has not cited a single case in which an intentional violation of Title III has been excused.

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[12] *Donovan* described the scenario as a knowing violation for "purpose of keeping relevant information from the District Court that might have prompted the court to conclude that probable cause was lacking." *Id.* This language should not be read as suggesting additional proof beyond a knowing violation as to "purpose" is necessary. There is no rational purpose behind a knowing violation aside from keeping relevant information from the issuing judge.

Moreover, holding that the violation of § 2158(1)(e) at issue here does not warrant suppression would be inconsistent with the spirit of *Franks* and § 2518(1)(e)). *Bianco* recognized that the purpose of both *Franks* and the statutory exclusion provision was to protect courts from the precise situation that has arisen here, in which the "integrity of the court" was breached by the Government's false warrant application and the Court is now being asked to serve as a "partner[] to illegal conduct." *Bianco*, 998 F.2d at 1126.

Finally, to find that *Franks* does not require suppression in this case would run the risk of gutting Title III. *Bianco* harmonized *Franks* with the statute by concluding that, if anything, *Franks* "enhance[d]" the protection of defendants. *Id.* The Government's position would upset this construction and create a serious risk of Government abuse. It would mean that *Franks* can potentially excuse even intentional violations of the Title III wiretap authorization requirements.

### B. A District Court Has the Inherent Authority to Suppress Unlawfully Gathered Evidence In Order to Maintain the Integrity of Its Own Proceedings.

In *McNabb v. United States*, the Supreme Court recognized that "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." 318 U.S. 332, 340 (1943). It has also recognized that, while a district court cannot "substitute for Fourth Amendment jurisprudence" and exercise its supervisory

power to suppress evidence unlawfully seized from a third party, the district court has the supervisory power "to exclude evidence taken from the defendant by willful disobedience of law." *United States v. Payner*, 447 U.S. 727, 735 n.7 (1980) (citation and quotation omitted).[13] In this way, the court avoids serving as an "accomplice[] in the willful disobedience of a Constitution they are sworn to uphold" and ensures "that the waters of justice are not polluted." *Elkins v. United States*, 364 U.S. 206, 223 (1960); *Mesarosh v. United States*, 352 U.S. 1, 14 (1956).

The District Court properly exercised its supervisory power in this case. The District Court did not "substitute" its authority for Fourth Amendment jurisprudence, but properly exercised its supervisory authority to police the Government's "willful disobedience of law," *i.e.*, the intentional violation of Title III. *Payner*, 447 U.S. at 735 n.7.

The Court's supervisory power is critical in the context of assessing Title III wiretaps. Federal judges grant wiretap applications *ex parte*, relying solely on the information provided by government agents in the warrant affidavit, and public reporting demonstrates that these applications are almost never rejected. *United States v. Tortorello*, 480 F.2d 764, 783 (2d Cir. 1973) ("A judge presumably will

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[13] This Court has recognized that *Payner* "did not purport to limit the traditional scope of the supervisory power, nor did it render that power superfluous. *United States v. Ming He*, 94 F.3d 782, 792 (2d Cir. 1996) (internal quotation marks omitted).

scrutinize any application and will scrupulously impose the restrictions required by statute."). Indeed, according to the U.S. Courts 2016 Wiretap Summary, 3,194 of 3,195 applications were granted in 2010, 2,732 of 2,734 were granted in 2011, 3,395 of 3,397 were granted in 2012, 3,576 of 3,577 were granted in 2013, 3,554 of 3,555 were granted in 2014, 4,148 of 4,148 were granted in 2015, and 3,168 of 3,170 were granted in 2016.[14] In total, only nine out of 23,776 applications were rejected between 2010 and 2016.

With an *ex parte* process and nearly universal acceptance of search warrant applications on the front end, it is critical that the court retain inherent authority to police intentional misconduct on the back end. Where the court has found that a government agent perjured himself in his wiretap affidavit, suppression of the unlawfully gathered evidence is the only remedy that ensures that prior approval carries the weight that the Fourth Amendment and Title III demand.

[14] *See* Wiretap Report 2016, *available at* http://www.uscourts.gov/statistics-reports/wiretap-report-2016.

## CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court affirm the judgment of the District Court.

Respectfully submitted,

/s/ Michael C. Miller

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November 8, 2017

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), Fed. R. App. P. 32(a)(7)(B), 2d Cir. R. 29.1(c), and 2d Cir. R. 32.1(a)(4).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 4,661 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

__/s/ Jeffrey Novack__
Jeffrey Novack

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