

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-1238

CRIMINAL

UNITED STATES OF AMERICA,

Appellant,

v.

DALE ROBERT BACH,

Appellee.

Appeal from the United States District Court for the
District of Minnesota

APPELLEE'S BRIEF AND ADDENDUM

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SUMMARY AND REQUEST FOR ORAL ARGUMENT

The Ramsey County search warrant seeking the contents of electronic communications stored at Yahoo! in Santa Clara, California - - faxed to Yahoo! for execution outside the presence of Minnesota or California law enforcement by a person or program at Yahoo! yet to be determined or disclosed - - was executed in violation of the physical presence requirement of 18 U.S.C. §3105 and the Fourth Amendment.

Magistrate Judge Swearingen and Judge Magnuson perceived the fundamental flaw of the Ramsey County search warrant faxed to Yahoo! for execution outside the presence of law enforcement and determined that Minnesota law, federal law and the Fourth Amendment forbid converting the execution of search warrants into the equivalent of serving subpoenas simply because the requested evidence involved the contents of electronic communications stored in a remote computer.

Appellee respectfully requests this Court to grant oral argument of at least 20 minutes.

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STATEMENT OF THE ISSUES

I.

WHETHER THE DISTRICT COURT PROPERLY DETERMINED THAT THE RAMSEY COUNTY SEARCH WARRANT FAXED TO YAHOO! IN SANTA CLARA, CALIFORNIA FOR EXECUTION - OUTSIDE THE PRESENCE OF STATE OR FEDERAL LAW ENFORCEMENT - VIOLATED STATE LAW, FEDERAL LAW AND THE FOURTH AMENDMENT.

Ayeni v. C.B.S., Inc., 848 F.Supp. 362, 367 (E.D.N.Y. 1994)
Morris v. State, 622 So.2d 67 (Fla.App. 4 Dist. 1993)

II.

WHETHER THE PHYSICAL PRESENCE REQUIREMENT OF LAW ENFORCEMENT AT THE EXECUTION OF A SEARCH WARRANT - CODIFIED IN 18 U.S.C. §3105 - GUARANTEES FUNDAMENTAL FOURTH AMENDMENT PROTECTION AGAINST GENERAL SEARCHES THROUGH PARTICULARIZED JUDICIAL AUTHORIZATION OF THE SCOPE OF SEARCH DELEGATED TO LAW ENFORCEMENT WITH A SWORN DUTY TO UPHOLD THE CONSITUTION.

United States v. Maxwell, 45 M.J. 406, 421 (C.A.A.F. 1996)
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III.

WHETHER LAW ENFORCEMENT DELEGATION OF THE EXECUTION OF SEARCH WARRANTS FOR THE CONTENTS OF ELECTRONIC COMMUNICATIONS LIKE SUPOENAS TO INTERNET SERVICE PROVIDERS - IMMUNE FROM LIABILITY UNDER 18 U.S.C. §2703(e)(2001) - VIOLATES THE FOURTH AMENDMENT PROHIBITION AGAINST GENERAL SEARCHES.

United States v. Maxwell, 45 M.J. 406, 421 (C.A.A.F. 1996)

STATEMENT OF THE FACTS

A. THE RAMSEY COUNTY SEARCH WARRANT FAXED TO YAHOO! IN
SANTA CLARA, CALIFORNIA ON JANUARY 3, 2001

Sgt. Brooke Schaub of the St. Paul Police Department went to the home of A.M. on October 10, 2000 after A.M.'s mother viewed the words "don't you want to see me again?" on the screen of A.M.'s computer. [See Schaub Application for Search Warrant and Supporting Affidavit - - Appellant's Appendix at 2; hereafter, "App. at ___"]. A.M. told Schaub that he had met the person identified as "dlbch15" in a chat room operated by Yahoo!. A.M. denied sexual contact to Schaub and denied sexual contact at the Children's Hospital and failed to identify Dale Robert Bach by photo identification. [App. at 3].

Schaub seized A.M.'s computer for forensic examination. [App. at 3].

On October 11, 2000, Schaub sent a letter to Yahoo! requesting preservation of emails on the account of dlbch15@Yahoo!.com ". . . [p]ending the initiation and submission of a court order. . ." [App. at 7]. Between October 11, 2000 and January 3, 2001, Schaub learned that a person whose profile was "dlbch15@Yahoo!.com" had been a subscriber to Prodigy and was named Dale Robert Bach residing at 3512 Nicollet Avenue South, Minneapolis, Minnesota (612) 825-9832. Schaub also learned that

defendant had a previous conviction for criminal sexual conduct in Duluth, Minnesota from 1996. [App. at 3].

Based on the above-summarized information, Schaub sought a Ramsey County search warrant for emails between dlbch15@Yahoo!.com and possible victims of criminal sexual conduct including enticement of minors online. [App. at 5]. Schaub also sought internet protocol addresses and ISP information seeking to gain the equivalent of caller ID to place a computer at 3512 Nicollet Avenue South, Minneapolis, Minnesota.

Schaub's Affidavit in support of the Ramsey County search warrant referenced his October 11, 2000 preservation letter to Yahoo! under 18 U.S.C. §2703(f)(2001). [App. at 4] Schaub concluded his Affidavit in support of the Ramsey County search warrant to be faxed to Yahoo! with the assertion that the suspect was involved ". . .in the Solicitation of Minors for sexual purposes using the internet in violation of Minn. Stat. §609.352." [App. at 4]. Schaub did not seek child pornography as defined under Minn. Stat. §617.247 or 18 U.S.C. §2252A.

Schaub faxed the search warrant to Yahoo! for execution on January 3, 2001 and received a DHL Worldwide Express package on January 9, 2001 containing 1 zip disk with all the emails preserved by Yahoo! in A.M.'s account [bubbagum7@Yahoo!.com] and

six emails from dlbch15@Yahoo!.com including a photograph of a naked boy. [App. at 6].

B. THE HENNEPIN COUNTY SEARCH WARRANT EXECUTED ON
JANUARY 26, 2001

Sgt. Schaub supplied the Yahoo! evidence as probable cause for the Hennepin County search warrant executed at 3512 Nicollet Avenue South, Minneapolis, Minnesota at defendant's home on January 26, 2001. [App. at 28]. This search warrant was for the possession or distribution of child pornography and produced the bulk of the evidence supporting the eight counts in the August 7, 2001 Indictment. [App. at 26].

C. PRETRIAL RULINGS

Magistrate Judge Swearingen issued a Report and Recommendation on October 24, 2001 suppressing all evidence from the Ramsey County search warrant faxed to Yahoo! and the Hennepin County search warrant at defendant's home - - based on the finding that the execution of the Ramsey County search warrant faxed to Yahoo! violated the requirement of 18 U.S.C. §3105 that a search warrant be executed in person by the authorized law enforcement official. On December 14, 2001, Judge Magnuson affirmed the suppression of evidence obtained from the Ramsey County search warrant faxed to Yahoo! but found that the evidence obtained from the Hennepin County search warrant had an

independent basis apart from the Ramsey County search warrant. Judge Magnuson determined that the Ramsey County search warrant faxed to Yahoo! for execution on January 3, 2001 violated Minn. Stat. §626.13, Minn. Stat. §626A.06, subd.10, 18 U.S.C. §3105 and the Fourth Amendment.¹

¹ Judge Magnuson suppressed only the fruits of the Ramsey County search warrant faxed to Yahoo! - - and not the fruits of the Hennepin County search warrant producing most if not all of the evidence in the instant case. It has yet to be determined how many - - if any - - of the eight counts in the instant Indictment would be affected.

SUMMARY OF THE ARGUMENT

The government argues that the physical presence requirement of law enforcement at the execution of a search warrant codified in 18 U.S.C. §3105 has effectively been eliminated by the lack of such requirement in the specific provision of 18 U.S.C. §2703(a)(2001) of the Electronic Communications Privacy Act [18 U.S.C. §2701-11(2001); hereafter, "ECPA"].² The government also argues from a policy standpoint that the physical presence requirement of law enforcement at the execution of a search warrant is an inconvenient, impractical and time consuming burden on law enforcement - - especially in the post September 11, 2001 America.

Yahoo! and the Amici Curiae including the Computer and Communications Industry Association, et al., advance concerns for the privacy, First Amendment and Fourth Amendment rights of subscribers whose interests might be jeopardized should word get out that law enforcement might access their emails in search of a suspect's emails. Yahoo! purports First Amendment concern that ". . .regular on-site law enforcement presence would threaten the privacy of. . .subscribers and chill their freedom of speech." [Brief of Amici Curiae Yahoo! et al., at 3]. Yahoo! purports

² The district court held that 18 U.S.C. §2703 (2001) ". . .is not an exception to and does not provide an alternative mode of execution from section 3105." [December 14, 2001 Order at 5, n.1 - - App. at 12].

Constitutional concern to avoid “. . . abuses of the Fourth Amendment rights of millions of subscribers. . .” [Brief of Amici Curiae Yahoo! et al., at 8]. Beneath Yahoo!’s Constitutional concerns for the rights of millions of subscribers is the willingness to sacrifice the privacy, First Amendment and Fourth Amendment rights of a user in order to avoid business disruption, to extend the long arm of law enforcement and to placate the Department of Justice.

Professor Orin S. Kerr’s Amicus Curiae Brief in support of the Department of Justice - - one year ahead of publication of Orin S. Kerr, The Problem of Perspective in Internet Law, 91 GEO. L.J. (forthcoming Feb. 2003) - - advances heuristic inquiry into whether the contents of stored electronic communications (email) should warrant a reasonable expectation of privacy for the purposes of the Fourth Amendment. [Amicus Brief at 7-14]. The author’s bias is reflected in dismissing the explicit, contrary holding in United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996) as marginal authority from an Article I court and dismissing the implicit, contrary finding in the instant case as less than worthy authority from an Article III court. The author’s bias is not accidental. The author’s interest is more than academic. Infra, at 19-20.

Judge Magnuson held that a St. Paul police officer's delegation of the execution of his search warrant for the contents of stored electronic communications to Yahoo! did not pass constitutional muster. [December 14, 2001 Order at 8 - App. at 15]. The Fourth Amendment's prohibition against general searches - - whose insurance policy is the physical presence requirement of law enforcement at the execution of a search warrant codified in 18 U.S.C. §3105 - - has been violated in this case. The Fourth Amendment will of necessity be violated when law enforcement officers turn search warrants into subpoenas and delegate the execution of search warrants for the contents of electronic communications to the technicians of internet service providers immune from suit under 18 U.S.C. §2703(e)(2001).

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DETERMINED THAT THE RAMSEY COUNTY SEARCH WARRANT FAXED TO YAHOO! IN SANTA CLARA, CALIFORNIA FOR EXECUTION - OUTSIDE THE PRESENCE OF STATE OR FEDERAL LAW ENFORCEMENT - VIOLATED STATE LAW, FEDERAL LAW AND THE FOURTH AMENDMENT.

A. The Government Position

The government argues that Sgt. Schaub - - as a state court law enforcement officer - - was not required to be physically present at the execution of the Ramsey County search warrant by Yahoo! in Santa Clara, California - - under the provisions of 18 U.S.C. §3105. The district court's Order [App. at 12-17] thoroughly explained why the government's attempt [Appellant's Brief at 10-12] to substitute a Fourth Amendment reasonableness standard to offset violation of the physical presence requirement of 18 U.S.C. §3105 should be rejected. Cf., Ayeni v. C.B.S., Inc., 848 F.Supp. 362, 367 (E.D.N.Y. 1994)(dictum: 18 U.S.C. §3105 codifies Fourth Amendment protection).

B. The District Court's Findings

The district court determined that St. Paul police officer Schaub's absence from the execution of the search warrant faxed to Yahoo! violated Minn. Stat. §626.13, Minn. Stat. §626A.06,

subd. 10 and 18 U.S.C. §3105.³ The district court could have added - - in order to cauterize the government's attempts to establish no statutory violation - - California Penal Code §1530 which is the state of California codification of the physical presence requirement of law enforcement at execution of a search warrant. See also, Morris v. State, 622 So.2d 67, 68 (Fla.App. 4 Dist. 1993)(suppression ordered - - law enforcement officer delegated search and did not participate in search warrant, in violation of physical presence requirement of section 938.08, Florida Statutes (1991)).

Viewed from the standpoint of federal law or state law, Minnesota law or California law, the Ramsey County search warrant faxed to Yahoo! for execution outside the presence of Minnesota or California law enforcement violated long standing statutes codifying a Fourth Amendment right to be free from search beyond the scope of a search warrant. The district court held that this clear cut statutory violation constituted violation of the fundamental Fourth Amendment protection against general searches because:

- 1) Absence of law enforcement at the execution of a search

³ The Minnesota statutes parallel 18 U.S.C. §3105 which provides: "A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

warrant for the contents of stored electronic communications leaves - - without supervision or instruction - - the execution of the search to civilians not trained or sworn to uphold the Fourth Amendment; and

2) A citizen's Fourth Amendment protection from overbroad compliance with the scope of a search warrant is unlikely when the civilians for the internet service provider executing the search are immune from suit. 18 U.S.C. §2703(e)(2001). [December 14, 2001 Order at 6-7; App. at 13-14].

II.

THE PHYSICAL PRESENCE REQUIREMENT OF LAW ENFORCEMENT AT THE EXECUTION OF A SEARCH WARRANT - CODIFIED IN 18 U.S.C. §3105 - GUARANTEES FUNDAMENTAL FOURTH AMENDMENT PROTECTION AGAINST GENERAL SEARCHES THROUGH PARTICULARIZED JUDICIAL AUTHORIZATION OF THE SCOPE OF SEARCH DELEGATED TO LAW ENFORCEMENT WITH A SWORN DUTY TO UPHOLD THE CONSITUTION.

A. The Government Position

The government - - after attempting to explain away a violation of 18 U.S.C. §3105 as not Fourth Amendment violative - - advances a post 9/11 approach to search and seizure under the Fourth Amendment. This post 9/11 interpretation of what is reasonable under the Fourth Amendment shifts the execution of a search warrant for the contents of stored electronic communications away from law enforcement to internet service providers - - ready to expedite execution and minimize business disruption - - who run programs producing evidence and express mail it to law enforcement. The search of this seized evidence occurs later in the police department, state or jurisdiction where and when law enforcement opens the package. See Appellant's Brief at 16-17; see also, Sgt. Schaub's Receipt Inventory and Return dated January 9, 2001 - - App. at 6.

The government seeks precedent for its desire to avoid the physical presence requirement of 18 U.S.C. §3105 and to avoid the reach of the Fourth Amendment in the following two cases:

- 1) In Re Application of the United States for an Order Authorizing the Installation of a Pen Register or Touch-Tone Decoder and Terminating Trap, Bell Telephone Company of Pennsylvania, 610 F.2d 1148, 1154 (3rd. Cir. 1979) [hereinafter "Pennsylvania Bell"]; and
- 2) In Re Application of the United States for an Order Authorizing an In Progress Trace of Wire Communications over Telephone Facilities, United States v. Mountain States Telephone and Telegraph Company, 616 F.2d 1122 (9th Cir.) [hereinafter "Mountain Bell"].

These cases dealt not with the Constitutional issue of law enforcement accessing in absentia the contents of telephone calls, but with telephone companies resisting the obligation to assist law enforcement in gathering trap and trace information. Both telephone companies - - in attempt to avoid the burden of or gain compensation for compliance - - used Rule 41 and 18 U.S.C. §3105 to attack the validity of the court orders compelling compliance. The government's proffer of what is reasonable search warrant compliance under the Fourth Amendment ("reasonable" read to mean law enforcement exemption from the physical presence requirement of 18 U.S.C. §3105 when technical

expertise is in the superior hands of internet service providers) does not find support in Pennsylvania Bell or Mountain Bell. They were not ordered to retrieve, record or preserve telephone conversations. See Berger v. New York, 388 U.S. 41 (1967)(Fourth Amendment protects contents of telephone calls); see also Ex Parte Jackson, 96 U.S. (6 Otto) 727, 733 (1877)(Fourth Amendment protects contents of postal letters).

B. Fundamental Fourth Amendment Protection

The requirement of law enforcement presence at the execution of a search warrant - - codified in Minn. Stat. §626.13, Minn. Stat. §626A.06, subd. 10 and 18 U.S.C. §3105 - - guarantees fundamental Fourth Amendment protection against general searches. See Morris v. State, 622 So.2d 67 (Fla.App. 4 Dist. 1993); see United States v. Maxwell, 45 M.J. 406, 421 (C.A.A.F. 1996); see Ayeni v. Mottola, 35 F.3d 680, 684-687 (2d Cir. 1994), cert. denied, 514 U.S. 1062 (1995)(18 U.S.C. §3105 violation relevant to Fourth Amendment violation); Cf. Wilson v. Layne, 526 U.S. 603, 618-619 (1999)(Stevens, J., concurring in part and dissenting in part)(violation of 18 U.S.C. §3105 violates Constitution). Only a fundamental Fourth Amendment violation requires suppression. See United States v. Freeman, 897 F.2d 346, 350 (8th Cir. 1990)(search warrant violation not fundamental).

The district court - - although not apprised by undersigned of the holding in Morris, supra - - closely tracked the Morris elucidation of why statutory requirements of law enforcement presence at the execution of a search warrant codify a fundamental Fourth Amendment protection against general searches. Law enforcement swear an oath to uphold the Constitution and scrupulously honor the particularized judicial authorization of the scope of the search warrant. Internet service providers may uphold the Constitution or run software extraction programs with immunity. (18 U.S.C. §2703(e)(2001)).

III.

LAW ENFORCEMENT DELEGATION OF THE EXECUTION OF SEARCH WARRANTS FOR THE CONTENTS OF ELECTRONIC COMMUNICATIONS LIKE SUPOENAS TO INTERNET SERVICE PROVIDERS - IMMUNE FROM LIABILITY UNDER 18 U.S.C. §2703(e)(2001) - VIOLATES THE FOURTH AMENDMENT PROHIBITION AGAINST GENERAL SEARCHES.

A. The Government and Yahoo! Position

The government and Yahoo! argue generally that the compliance departments and technicians of internet service providers are a better bet to uphold the Fourth Amendment and to execute search warrants for the contents of stored electronic communications than the law enforcement officers with the sworn duty to execute the search warrants they obtained.

B. Fourth Amendment Violation

The scenario the Department of Justice and Yahoo! urge to this Court as reasonable under the Fourth Amendment is as follows:

1. Law enforcement may obtain a search warrant for the contents of stored electronic communications but - - under United States v. Leon, 468 U.S. 897, 921 (1994) - - suppression is not a remedy under the good faith exception if the warrant is defective.
2. Law enforcement - - whether or not the search warrant is defective - - may fax the

search warrant to civilian technicians for internet service providers immune from liability under 18 U.S.C. §2703(e)(2001).⁴

The danger that an internet service provider will over-comply with the search warrant and convert the search into a Fourth Amendment violative general search has already come to pass. In Maxwell, supra, AOL took the FBI supplied search warrant for the contents of stored electronic communications and converted it into a "legal 'green light'" to release materials in excess of the warrant produced from its own search program. Maxwell, supra at 421. In refusing to accord AOL good faith immunity, the Maxwell court noted that AOL's seizure of certain email was generated by a software extraction program and not the language of the search warrant. Maxwell, supra at 422. The danger that internet service providers have prepared and will continue to use their own software programs which may or may not comport with a particular search warrant is evident.

The record below does not confirm Yahoo!'s Constitutional or institutional quality control. Initial inquiry into the who,

⁴ The government on appeal has abandoned - - and Yahoo! et al. and Professor Kerr do not advance - - the theory that the good faith exception should extend to internet service providers. See Maxwell, supra at 422 (good faith exception not applicable to AOL's search beyond scope of search warrant). Were internet service providers executing search warrants accorded good faith protection and immune from suit, the Constitutional violation would be more unassailable.

what, when and where of the execution of the instant search warrant faxed to Yahoo! met with a Watergate stonewall. [See Docket #6: Aff. of Aaron J. Shuler re: Yahoo! Request - - Add. at A-1]. Even Yahoo!'s attempt to reassure us of Constitutional compliance illustrates the Fourth Amendment violative danger of a general search:

¶13. When accessing a user's information, pursuant to a search warrant, the Yahoo! processor does not selectively go through the user's information, but rather gathers all information in an account that is within the time frame specified in the warrant. The processor does not specifically look at the content of the user's account.

Affidavit of FBI Agent Lese quoting Yahoo! Senior Corporate Counsel Elizabeth Banker - - App. at 22. (Emphasis added).

In pretending the execution of the search warrant is free from the prying eyes of Yahoo!, Yahoo! evidences generalized - - rather than Fourth Amendment required particularized - - search warrant compliance.

The danger of search warrants for the contents of stored electronic communications turning into Fourth Amendment violative general searches also implicates the First Amendment.⁵ Yahoo! explicates First Amendment concern for the multitude of subscribers whose privacy and security of online communications

⁵ The First Amendment problems were raised below. [Docket #6 - - Bach Renewed Request for Hearing . . . at 5-7, dated October 24, 2001].

would be at First Amendment risk should law enforcement be executing search warrants. [Brief of Amici Curiae Yahoo! et al., at 3]. The First Amendment risk for the user or unintended subscriber exists with or without law enforcement. Thus it is important to limit the scope of the search for the contents of communications not only for Fourth Amendment particularity purposes but for First Amendment protected speech purposes. See United States v. Kimbrough, 69 F.3d 723, 727 (5th Cir. 1995); Marcus v. Search Warrants, 367 U.S. 617, 730 (1961); United States v. Baker, 890 F.Supp. 1375 (1995), aff'd, 104 F.3d 1492 (1997); Cf., ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); and Cf., Reno v. ACLU, 521 U.S. 844, 874-877 (1997)(difficulty of avoiding First Amendment infringement online).

The danger of Fourth Amendment and First Amendment violation by internet service providers executing search warrants also implicates the Fifth Amendment guarantee of due process of law. Law enforcement choice to serve 18 U.S.C. §2703(a)(2001) search warrants like subpoenas to internet service providers - - neither law enforcement nor the internet service provider giving 18 U.S.C. §2705(2001) notice of the search to the user or subscriber - - eliminates the fundamental due process right to immediate challenge available for traditional subpoenas or search warrants. Law enforcement retain the ease of a subpoena without being

subject to a motion to quash. Traditional search warrant remedies under Rule 41 are unavailable because the execution of the search warrant is only disclosed to the internet service provider. Cf. United States v. Gantt, 194 F.3d 987 (9th Cir. 1999)(Rule 41(d) violation warranted suppression); Cf. McVeigh v. Cohen, 983 F.Supp. 215 (D.D.C. 1998)(AOL violation of ECPA entitled naval officer to injunctive relief).

POSTSCRIPT

HOW THE DEPARTMENT OF JUSTICE CONVERTED 18 U.S.C. §2703(A)(2001) SEARCH WARRANTS INTO SUBPOENAS

The government takes the position that ECPA - - and specifically 18 U.S.C. §2703(a)(2001) - - intended search warrants for the contents of stored electronic communications to be treated like more like subpoenas for records. [Appellant's Brief at 27]. Professor Kerr echoes the government's argument and states that Congress intended a §2703(a)(2001) search warrant to be "a glorified subpoena." [Amicus Brief at 18]. Professor Kerr cites as authority a ". . .comprehensive explanation of this statutory scheme. . .in Chapter 3 of the United States Department of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations (January 2001)(available at www.cybercrime.gov/searchmanual.htm)." [Amicus Brief at 14, n.6].

The intent that search warrants under 18 U.S.C.

§2703(a)(2001) be treated like subpoenas goes back not to Congress but to the interpretation of the Department of Justice in the manual on Computer Crime and Intellectual Property Section (CCIPS) - - Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations (January 2001). Professor Kerr authored this interpretation [Add. at A-3](manual underlining added) while at the Department of Justice. [Add. at A-2] The Department of Justice interpretation of 18 U.S.C. §2703(a)(2001) search warrant execution helps explain why a St. Paul Police officer faxed a search warrant like a subpoena for the contents of stored electronic communications to Yahoo! in Santa Clara, California on January 3, 2001.

CONCLUSION

For the reasons set forth above, Appellee Dale Robert Bach respectfully requests that this Court affirm the district court's finding that law enforcement violation of the physical presence requirement of 18 U.S.C. §3105 - - turning search warrants into subpoenas - - violates the Fourth Amendment.

CERTIFICATE OF COMPLIANCE

The undersigned attorney for Appellee certifies this brief complies with the type - volume of limitations of Federal Rules of Appellate Procedure 32. The brief has 547 of lines of monospaced typed. The brief was prepared using Microsoft Word. The undersigned attorney certifies that the computer diskette containing the full text of the Brief of Appellee has been scanned for viruses and is believed to be virus free.

Dated: July 23, 2002

Respectfully submitted,

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ADDENDUM OF APPELLEE

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