No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 2018

_____◆_____

MARK ANTHONY RIOS,
ERNIE LEO ESTRADA,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

_____◆_____

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

_____◆_____

JOINT PETITION FOR A WRIT OF CERTIORARI

_____◆_____

William S. Harris*
LAW OFFICES OF WM. S. HARRIS
1499 Huntington Drive, Suite 403
South Pasadena, California 91030
Telephone: (626) 441-9300
BillHarrisEsq.@aol.com

Attorney for Petitioner
MARK ANTHONY RIOS
*Counsel of Record

Jay L. Lichtman**
LAW OFFICES OF JAY L. LICHTMAN
137 N. Larchmont Blvd., #538
Los Angeles, California 90004
Telephone: (213) 568-0984
jaylawla@aol.com

Attorney for Petitioner
ERNIE LEO ESTRADA
**Counsel of Record

QUESTION PRESENTED

Is the availability of less-intrusive state wiretaps a material consideration for federal judges when evaluating Title III necessity under 18 U.S.C. §§ 2518(1)(c) and (3)(c)?

A. Are less-intrusive state wiretaps "other investigative procedures" under 18 U.S.C.§ 2518(1)(c)?

B. Are less-intrusive state wiretaps "normal investigative procedures" under 18 U.S.C. § 2518(3)(c)?

C. Where less-intrusive state wiretaps can fully expose the crime, are more-intrusive federal wiretaps still necessary?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Mark Anthony Rios is serving a term of imprisonment imposed by the district court in the underlying case. Petitioner Ernie Leo Estrada is serving a term of supervised release imposed by the district court in the underlying case. Respondent is the executive branch of the federal government.

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PETITION FOR A WRIT OF CERTIORARI

To the Hon. John G. Roberts, Jr., Chief Justice of the United States, and to the Hon. Associate Justices of the United States Supreme Court:

Petitioners, Mark Anthony Rios and Ernie Leo Estrada, respectfully pray that a writ of certiorari be issued to review the judgment below.

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INTRODUCTION

Title III says that federal wiretaps are unavailable to law enforcement officers if "other" or "normal" investigative procedures are available to expose the crime. This Title III "necessity" requirement limits the use of federal wiretaps and thereby protects the privacy rights of individuals who engage in wire communications.

In the decision below, the Ninth Circuit misinterpreted and weakened this important Title III privacy safeguard. It did so by holding that the availability of less-intrusive state wiretaps is not a material consideration for federal judges when evaluating necessity, even if less-intrusive state wiretaps are enough to expose the crime. This Court should take the case to correct the Ninth Circuit's error of interpretation regarding this important Fourth Amendment question.

OPINION BELOW

The opinion of the court of appeals is reported as *United States v. Estrada*, 904 F.3d 854 (9th Cir. 2018). It is included as A1 of the Appendix.

JURISDICTION

The court of appeals entered judgment on September 18, 2018. A1. It denied Rios's and Estrada's joint petition for panel rehearing on October 22, 2018. A12. Its mandate issued on October 30, 2018. A13. This Court has certiorari jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 18 U.S.C. § 2518 provides in relevant part:

> (1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> * * *
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why

they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

* * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications … if the judge determines on the basis of the facts submitted by the applicant that –

* * *

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

Section 2518 further provides:

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that –

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Title 18 U.S.C. § 2516(2) provides:

The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such

attorney is authorized by a statute of that State to make application to a State Court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, human trafficking, child sexual exploitation, child pornography production, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marijuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

California Penal Code § 629.50 provides in relevant part:

> (a) Each application for an order authorizing the interception of a wire or electronic communication shall be made in writing upon the personal oath or affirmation of the Attorney General, Chief Deputy Attorney General, or Chief Assistant Attorney General, Criminal Law Division, or of a district attorney, or the person designated to act as district attorney in the district attorney's absence, to the presiding judge of the superior court or one other judge designated by the presiding judge.

California Penal Code § 629.52 provides in relevant part:

Upon application made under Section 629.50, the judge may enter an ex parte order, as requested or modified, authorizing interception of wire or electronic communications initially intercepted within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by

the applicant, all of the following:

* * *

(d) Normal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous.

Title 18 U.S.C. § 2511 provides in relevant part:

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

California Penal Code § 631 provides in relevant part:

(a) Any person who, by means of any machine, instrument, or contrivance, or in any other manner, intentionally taps, or makes any unauthorized connection, whether physically, electronically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument, including the wire, line, cable, or instrument of any internal telephonic communication system, or who willfully and without the consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any wire, line, or cable, or is being sent from, or received at any place within this state; or who uses, or attempts to use, in any manner, or for any

purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by both a fine and imprisonment in the county jail or pursuant to subdivision (h) of Section 1170. If the person has previously been convicted of a violation of this section or Section 632, 632.5, 632.6, 632.7, or 636, he or she is punishable by a fine not exceeding ten thousand dollars ($10,000), or by imprisonment in the county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170, or by both that fine and imprisonment.

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STATEMENT OF THE CASE

A. LEGAL FRAMEWORK

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 through 2520 ("Title III"), permits federal law enforcement officials to install a wiretap if specified privacy safeguards are observed. Congress enacted Title III to meet the Fourth Amendment procedural restrictions imposed on the use of wiretaps by this Court's decisions in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967). The purpose of Title III is to equip law enforcement officials with powerful surveillance tools thought necessary to combat crime without unnecessarily infringing upon individual privacy rights. *United States v. Carneiro*, 861 F.2d 1171, 1176 (9th Cir. 1988), quoting *Scott v. United States*, 436 U.S. 128, 130 (1978).

There is a statutory presumption against authorizing the use of federal wiretaps because that surveillance tool is highly invasive of privacy. *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1112 (9th Cir. 2005). To address this privacy concern, therefore, a federal district court may authorize a wiretap only in cases where the government has established that the request is (1) supported by probable cause and (2) necessary because there are no viable alternative law enforcement techniques. *United States v. Garcia-Villalba*, 585 F.3d 1223, 1227 (9th Cir. 2009).

To demonstrate this Title III "necessity," the government must include a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(1)(c). The Title III necessity requirement is important to "limit the use of wiretaps, which are highly intrusive." *United States v. Bennett*, 219 F.3d 1117, 1121 (9th Cir. 2000). The necessity requirement ensures "that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001), citing dictum in *United States v. Kahn*, 415 U.S. 143, 153 n. 12 (1974). To satisfy the Title III necessity requirement, a federal court must "determine that ordinary investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time." *United States v. Bennett*, 219 F.3d at 1122.

Title III does not preempt state wiretaps provided that certain minimum privacy safeguards are contained in the state procedure. 18 U.S.C. § 2516(2). California has consequently adopted its own set of statutes governing state wiretap procedures. California Penal Code §§ 629.50 through 629.98. Section 629.50 governs the approval of state wiretap applications. Section 629.52 specifies substantive and procedural requirements for the installation of state wiretaps. Significant to this petition, California's own wiretap procedures are not preempted since they impose "more stringent requirements" than those imposed by Title III, thus complying with 18 U.S.C. § 2516(2). *See Villa v. Maricopa County,* 865 F.3d 1224, 1230 (9th Cir. 2017). California wiretap procedures "cannot be less protective of privacy" than Title III. *People v. Otto*, 2 Cal.4th 1088, 1098 (1992).

The respective legal powers of the federal and state governments to regulate wiretaps derive from different sources. Federal power derives from the commerce clause. U.S. Const. art. I, § 8. *See Benanti v. United States*, 355 U.S. 96, 104 (1957) (upholding Section 605 of the Federal Communications Act, the Title III predecessor statute). State power derives from the police power reserved under the Tenth Amendment to the respective states and citizens thereof. *See People v. Conklin*, 12 Cal.3d 259, 263 (1974). Federal wiretaps and state wiretaps, in other words, are separate law enforcement tools which derive from separate sources of legal authority. Separate state wiretaps are "specifically contemplated" under Title

III. *United States v. Smith*, 726 F.2d 852, 856 (1st Cir. 1984).

B. FACTS

A multi-agency joint task force targeted the West Side Verdugo (WSV) drug trafficking organization which operated in San Bernardino County, California. In the early stages of the investigation, the joint task force applied for and obtained authorization to install a state wiretap on the cellular telephone of one member of the target drug trafficking organization, CS-1. From that state intercept, the joint task force was able to identify the cellular phone number and the identity of the kingpin of the entire WSV drug trafficking organization.

That state wiretap on the cellular telephone of CS-1 expired after 30 days, and the joint task force sought no further state wiretaps. Instead, the joint task force then applied for and obtained federal wiretap authorization on 14 separate target telephones. The kingpin's cellular telephone, identified through that first state wiretap on CS-1, was the first of the 14 federal target telephones intercepted.

In the federal wiretap applications, the FBI affiant did not address why the joint task force never applied for any more state wiretaps despite the early success of that first tap on CS-1. The only explanation the FBI affiant gave to the issuing federal judge on this point was that CS-1 had now been arrested.

The joint task force then proceeded to intercept hundreds and hundreds of calls by members and associates of the WSV drug trafficking organization over the

next five months from August 26, 2010 through January 27, 2011. Rios and Estrada are intercepted parties.

C. PROCEEDINGS BELOW

Based on whole or large part on those federal intercepts, a grand jury in the Central District of California returned an indictment charging Rios, Estrada and 50 co-defendants with narcotics conspiracy in violation of 21 U.S.C. § 846 and narcotics possession with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The district court had subject matter jurisdiction under 18 U.S.C. § 3231.

Rios filed a motion to suppress the federal wiretap intercepts. Estrada joined in the motion. Relevant to this petition, Rios argued that the FBI affiant did not provide the issuing federal judge with the required "full and complete statement" since he had failed to disclose that the objectives of the joint task force investigation could have been fully accomplished through the further use of less-intrusive state wiretaps without any federal wiretaps. In opposition, the government argued that state wiretaps are not "other" or "normal" investigative procedures for purposes of Title III. The district court denied the suppression motion for the reasons asserted by the government.

Rios and Estrada then entered into conditional plea agreements, reserving their rights to appeal the adverse ruling on their suppression motion. The district court sentenced Rios to 12 months and 1 day in BOP custody, and sentenced

Estrada to 30 months in BOP custody.

Rios and Estrada each appealed to the U.S. Court of Appeals for the Ninth Circuit. Their appeals were consolidated for purposes of briefing and argument. The Ninth Circuit (in an opinion by Judge N.R. Smith) affirmed. *United States v. Estrada*, 904 F.3d 854, 865 (9th Cir. 2018). Relevant to this petition, the Ninth Circuit stated:

> Defendants first argue that the affidavits improperly omitted information regarding the availability of state wiretaps. We disagree.
>
> An application for a federal wiretap need not discuss the availability of state wiretaps, because "[t]he purpose of the necessity requirement is to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *Garcia-Villalba*, 585 F.3d at 1227 (quoting *United States v. Carneiro*, 861 F.2d 1171, 1176 (9th Cir. 1988)). A wiretap authorized by a state court is not a traditional investigative technique any more than a wiretap authorized by a federal court is a traditional investigative technique. Although the procedures for obtaining a federal and state wiretap may differ, *Villa v. Maricopa County*, 865 F.3d 1224, 1230 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1696 (2018), there is no meaningful difference in the level of intrusiveness. Indeed, because both methods are equally intrusive, they are subject to the same minimum requirements under federal law. *See id.*: 18 U.S.C. §§ 2516, 2518. Thus, failing to discuss the availability of state wiretaps was not a material omission. A7-8.

The Ninth Circuit thereafter denied Rios's and Estrada's joint motion for panel rehearing on October 22, 2018. A12. The circuit mandate issued on October 30, 2018. A13.

REASONS FOR GRANTING THE PETITION

I. This Case Raises an Important Question Regarding the Necessity Requirement of Title III.

A. The crime could have been fully exposed through the continued use of less-intrusive state wiretaps.

The government has never disputed that the goals of this joint task force investigation could have been fully accomplished through the continued use of state wiretaps, without any federal wiretaps. Nor *could* the government colorably dispute that. The single state wiretap which the joint task force did install on the cellular telephone of CS-1 led straight to the kingpin of the WSV drug trafficking organization. But rather than obtaining a state wiretap on that kingpin's own cellular telephone, the joint task force asked for federal wiretaps to build its case.

The FBI affiant's stated excuse – that CS-1 had been arrested – did not explain why the joint task force did not seek any more state wiretaps on the cellular telephones of others in the WSV drug trafficking organization.

It necessarily follows that the federal wiretaps were not necessary if state wiretaps qualify as "other" or "normal" non-Title III investigative procedures under 18 U.S.C. § 2518. As explained below, they do so qualify.

B. Less-intrusive state wiretaps in fact constitute non-Title III "other" or "normal" investigative procedures under § 2518.

The term "other" in 18 U.S.C. § 2518(1)(c) plainly denotes *non-Title III* investigative procedures. State wiretaps are non-Title III investigative procedures. The state wiretap installed on CS-1's cellular telephone at the beginning of the joint task force investigation was governed by California Penal Code §§ 629.50 through 629.98. While Title III sets federal standards which are binding on the states, it does not preempt California's wiretap legislation which – to repeat – imposes more restrictive rules and for that reason does not impair federal supremacy. *See* 4 Witkin, *California Criminal Law* (4th ed. 2012), Illegally Obtained Evidence, Section 420, Page 1326; *People v. Conklin*, 12 Cal.3d at 271 (Congress intended that the states be allowed to enact more restrictive laws). The California wiretap rules are materially more restrictive. California, for example, has an all-party consent rule while Title III requires the consent of only one party. *See* California Penal Code § 631(a), versus 18 U.S.C. § 2511(2)(c) and (d). And unlike Title III, California criminalizes attempted interceptions and covers internal communication systems. 12 Cal.3d at 270 n. 10. As a further example, California expands the set of parties with standing to file a wiretap suppression motions, extending beyond Title III standing which is limited to "aggrieved" targets and intercepted parties. *See* California Penal Code § 629.72, versus 18 U.S.C. § 2510(11). The Ninth Circuit panel, therefore, was wrong when it stated that "there is no meaningful difference in the level of intrusiveness" between California and

federal wiretap procedures. A8. California imposes more stringent requirements and so California wiretaps are materially less intrusive.

Consequently, a less-intrusive state wiretap is a non-Title III "other" law enforcement tool.

C. The sufficiency of less-intrusive state wiretaps to expose the crime negates Title III necessity.

State wiretaps are non-Title III "other" investigative procedures, so – contrary to the Ninth Circuit – failing to disclose the availability of less-intrusive state wiretaps to the issuing federal judge was a material omission by the FBI affiant. A8.

In *United States v. Reed*, 575 F.3d 900 (9th Cir. 2009), the Ninth circuit previously rejected a defendant's argument that correlative state procedures are not material in evaluating Title III necessity. The *Reed* panel observed that, "… if a local agency has employed a certain investigative technique in a particular case, federal agencies can rely on the ineffectiveness of that technique for purposes of showing necessity in the federal investigation of the same case." *United States v. Reed*, 575 F.3d at 910 n. 4. If a federal agency can rely on the ineffectiveness of correlative state procedures, then a federal agency can be bound by the effectiveness of correlative state procedures. Failure to discuss the availability of less-intrusive state wiretaps was a material omission by the FBI affiant.

The crime could have been fully exposed had the joint task simply continued

to use less-intrusive state wiretaps. The state wiretap installed on CS-1's cellular telephone snared the kingpin of the WSV drug trafficking organization. State wiretaps had been used before with success to penetrate and dismantle the Arellano-Felix drug trafficking organization. *People v. Leon*, 40 Cal. 4th 207, 208 (2007). Accord, *United States v. Smith*, 726 F.2d at 855 (state wiretaps used to infiltrate and dismantle illegal heroin distribution network). There was no need for the joint task force to abandon less-intrusive state wiretaps in favor of more-intrusive federal wiretaps. Necessity under 18 U.S.C. §§ 2518(1)(c) and 3(c) is absent where, as here, a less-intrusive state law enforcement procedure is available to expose the crime but is deliberately not used.

II. The Ninth Circuit Seriously Erred.

This Court should grant review so that it can correct the Ninth Circuit's plain error. Failure to discuss "other" state wiretap procedures was a material omission by the FBI affiant. The Ninth Circuit's contrary conclusion at A8 warrants correction because it misinterprets the term "other" in 18 U.S.C. § 2518(1)(c), encroaches on state sovereignty, increases the practical burdens on overworked federal judges, and erodes Title III privacy protections.

A. The decision below is wrongly decided.

The Ninth Circuit's decision is plainly incorrect. First, the Ninth Circuit interprets the term "other" in 18 U.S.C. § 2518(1)(c) to mean "traditional"

investigative procedures. A7 and A8. There is some support for that interpretation in dictum in *United States v. Kahn*, 415 U.S. at 153 n. 12. Yet the plain meaning of "other" in the statutory language is *non-Title III*. What controls is "the precise wording chosen by Congress in enacting Title III." 415 U.S. at 151. And non-Title III procedures plainly include state wiretaps which have more stringent requirements, and which derive from a different source of legal authority.

Second, the Ninth Circuit's reasoning threatens to encroach on state sovereignty. The terms "other" and "normal" should be interpreted to preserve the states' arrangements for conducting their own law enforcement operations. *See Nixon v. Missouri Municipal League*, 541 U.S. 125, 138 (2004) (interpreting the term "any entity" in 47 U.S.C. § 253 to accommodate federalism considerations). The Ninth Circuit's misinterpretation subverts the distinction between state and federal wiretaps, contrary to such federalism considerations. A8.

Third, federal wiretaps were plainly not necessary here. The joint task force first used less-intrusive state wiretaps with considerable success. They penetrated the WSV drug trafficking organization through state wiretaps right up to the kingpin. The FBI affiant gave the issuing federal judge no colorable excuse for not seeking any more state wiretaps. By abandoning state wiretaps, the joint task force loaded the issuing federal judge with an unnecessary burden to process and later to review wiretap applications on 14 separate target telephones. This abandonment

was contrary to 18 U.S.C. § 2518 which instructs law enforcement officers to use "other" investigative procedures first, before asking a federal judge to authorize wiretaps.

Finally, the Ninth Circuit's decision empowers law enforcement officials to bypass less-intrusive state wiretaps in favor of more intrusive federal wiretaps. This dilutes congressionally established privacy safeguards of individuals engaging in wire communications.

B. The decision below warrants correction.

This error warrants correction. The Ninth Circuit has misinterpreted 18 U.S.C. §§ 2518(1)(c) and (3)(c). The Ninth Circuit's misinterpretation, beyond weakening individual privacy safeguards, intrudes into the heartland of state sovereignty preserved by the Tenth Amendment. This Court has observed that "a State is entitled to order the processes of its own governance…" *Alden v. Maine*, 527 U.S. 706, 752 (1999). That includes a State ordering the processes of its own wiretaps. And the Ninth Circuit's decision consequently imposes unwarranted burdens on federal judges called upon to issue and later to review unnecessary wiretap applications.

III. Resolving this Title III Ambiguity Presents a Sufficiently Important Privacy and Federalism Issue to Warrant this Court's Review.

Federal wiretaps are highly invasive of privacy. *United States v. Gonzalez, Inc.*, 412 F.3d at 1112. The Title III necessity requirement mitigates this privacy

concern. State wiretaps are less invasive of privacy, contrary to the Ninth Circuit. A8. The Ninth Circuit's misinterpretation of 18 U.S.C. §§ 2518(1)(c) and (3)(c) materially weakens Title III privacy protections of individuals like Rios and Estrada who engage in wire communications. This is a sufficiently-important Fourth Amendment question to merit review.

◆

CONCLUSION

The Court should grant this petition for a writ of certiorari.

DATED: November 8, 2018

Respectfully submitted,

LAW OFFICES OF WM. S. HARRIS

By ***/s/ William S. Harris***

Attorney for Petitioner
MARK ANTHONY RIOS

LAW OFFICES OF JAY L. LICHTMAN

By ***/s/ Jay L. Lichtman***

Attorney for Petitioner
ERNIE LEO ESTRADA

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