No. 18-6951

IN THE

SUPREME COURT OF THE UNITED STATES

JAMAL COOPER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SUBMITTED BY:

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QUESTIONS PRESENTED

1. Is 18 U.S.C. § 2518 (1)(c) a statutory provision that reflects Congress' core concerns and does § 2518 (1)(c) require that each request for a wiretap be supported by a separate application?

2. Does 18 U.S.C. § 2518 (1)(c) authorize any person applying for a wiretap to transfer a statutory showing of necessity from one application to another and piggy-back a subsequent wiretap on necessity that was established for a previous wiretap and carryover statements from a prior application as to other suspects without making further investigation attempts?

3. Is the Fourth Amendment's particularity requirement violated by an application for a wiretap that set forth the purported need to wiretap a cellular telephone that the government knew had been disconnected almost two weeks before the application was filed, to the extent it deviates from the uniform authorizing requirements that Congress explicitly set out in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq?

4. Does Franks v. Delaware, 438 U.S. 154 (1978), require a hearing concerning a false or misleading statement that was material to the necessity showing required by 18 U.S.C. § 2518 (1)(c)?

5. Did the Sixth Circuit ignore Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018), and Molina-Martinez v. United States, 136 S.Ct. 1338 (2016), in finding that the false or misleading statement in Question 4 had been forfeited but not conducting plain-error review?

6. Is the right at stake in an exclusionary hearing to prevent admission of conversations recorded in violation of 18 U.S.C. § 2511 (2)(c) statutory or constitutional and does the Fourth Amendment require the court to determine whether a party to a communication consented to an interception within the meaning of 18 U.S.C. § 2511 (2)(c)?

7. Does the consent requirement in 18 U.S.C. § 2511 (2)(c) pose the same risk of invading the privacy interests of the person consenting under the Fourth Amendment, or a lesser risk of invading the consenting person's interests?

8. Was 18 U.S.C § 2511 (2)(c) violated by the government's failure to prove instead of alleging that it monitored and recorded conversations between the petitioner and confidential source 4 (CS-4) on December 9 and 12, 2013 and confidential source 8 (CS-8) on March 11, March 17, April 9, and April 14, 2014 with their consent and what are the legitimate means of proving consent?

9. Did the government immediately seal the optical disc containing the recorded interceptions or provide a "satisfactory explanation"--meaning why the delay occurred and why it is excusable--within the meaning of United States v. Ojeda-Rios, 495 U.S. 257 (1990)?

10. Is the decision in United States v. Carpenter, 138 S.Ct. 2206 (2018), applicable to cases on direct review pursuant to Griffith v. Kentucky, 479 U.S. 314 (1987).

11. If so, should the court remand this case for further consideration in light of Carpenter, because data was collected for a substantial time under the Stored Communications Act (SCA),

18 U.S.C. § 2703, to obtain the petitioner's cell-site location information (CSLI) and that information played a substantial role under 18 U.S.C. § 2518 (1) in setting forth the basis for a finding of probable cause and in explaining why other less intrusive methods were inadequate, failed, or were too dangerous to try.

12. When CSLI has been obtained without a warrant, in violation of the Fourth Amendment, does Illinois v. Krull, 480 U.S. 340 (1987), mean in this context that evidence obtained in good-faith reliance on a statute later ruled unconstitutional need not be excluded?

13. Does the decision in Dahda v. United States, 584 U.S. ___, 138 S.Ct. ___, 200 L.Ed.2d 842 (2018), require a remand to determine whether the communications intercepted by the government from outside "the territorial jurisdiction of the court in which the judge is sitting," 18 U.S.C. § 2518 (3), were integral to the authorizing requirements that Congress set out in 18 U.S.C. § 2518 (4)(a)-(e), given that Dahda was decided while this case was pending on direct review?

14. Does Sessions v. Dimaya, 138 S.Ct. 1204 (2018), apply to this case and require a remand for consideration in light of that decision?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner Jamal Cooper respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit which appears at Appendix A to the petition is reported at United States v. Jamal Cooper, 893 F.3d 840 (6th Cir. 2018).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on June 22, 2018. A timely petition for rehearing was denied by the Sixth Circuit on August 28, 2018, and a copy of the order denying rehearing appears at Appendix B.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

18 U.S.C. § 2511 (2)(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 ... one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2518 (1)(c):

> 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 an application. Each application shall 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 or to be too dangerous.

18 U.S.C. § 2518 (8)(a):

> Immediately upon the expiration of the period of the order, or extension thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions.

STATEMENT OF THE CASE

In the summer of 2013, a federal taskforce investigation was begun into narcotics trafficking in Nashville, Tennessee. On March 31, 2014, the government obtained a 30-day surveillance order authorizing the wiretapping of cellphones identified as "Target Telephone 1" (TT1), used by Eric Williams, and "Target Telephone 2" (TT2), used by Jamal Cooper. The government submitted one application, and the court issued a single wiretap order to cover both phones.

Cooper's calls were intercepted for the next two weeks, including a call on a Saturday evening, April 12. He made no more calls on TT2, which the government confirmed through a confidential informant on Monday, April 14, when the government terminated its TT2 surveillance. On Wednesday, April 16, the government provided the disc containing the TT2 wiretap recordings to the district court for sealing. The government did not intercept any conversations from TT1 because Williams had stopped using it prior to March 31, 2014.

On May 19, 2014, Cooper was arrested and charged with various federal firearm- and narcotics-related offenses. (ECF 1, 2-3) Initially, on May 21, 2014, he was charged in a four-count indictment with controlled substance offenses (ECF 9), but on January 27, 2016, the government filed a superseding indictment bringing additional charges against Cooper. (ECF 882)

On December 28, 2014, Cooper filed a motion to suppress the wiretap evidence which was directly and derivatively gathered from the TT2 wiretap. (ECF 464) The government filed a response

on January 15, 2015. (ECF 504) The district court did not have a hearing on the motion. Instead, on the basis of the TT2 application and the parties' submissions, the court rejected the challenge on January 16, 2015. (ECF 524) (reported at United States v. Jamal Cooper, No. 3:14-cr-00090, 2015 WL 236271 (M.D. Tenn. Jan. 16, 2015)).

Later, after Cooper exchanged attorneys (ECF 864-65, 873-74, 876, 878), his attorney filed another suppression motion on September 29, 2016, requesting a hearing based on Franks v. Delaware, 438 U.S. 154 (1978), and argued that he had made the requisite showing that the affidaivts filed in support of the wiretap applications contained material misrepresentations and omissions. (ECF 1210) On November 30, 2016, the government responded (ECF 1234), and on December 12, 2016 Cooper filed a reply. (ECF 1272) The district court denied the motion for a Franks hearing on December 21, 2016. (ECF 1309)

On January 3, 2017, Cooper pled guilty pursuant to Rule 11 (c)(1)(C) of the Federal Rules of Criminal Procedure. He entered a conditional plea to (a) conspiracy to distribute and possess with intent to distribute (i) one kilogram or more of heroin and a detectable amount of fentanyl, (ii) less than 50 kilograms of marijuana, and (iii) 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 841 (a)(1) and § 846; (b) conspiracy to possess and discharge a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924 (c)(1)(A) and § 924 (o); (c) carrying, using, and discharging a firearm

during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924 (c)(1)(A); and (d) with being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922 (g). (ECF 1358) The district court ratified the plea and deferred acceptance of the plea agreement until April 12, 2017. At bottom, Cooper pleaded guilty to Counts 1, 2, 3, 8, 10, and 12, and the government agreed to dismiss Counts 4, 5, 6, 7, and 9. (ECF 1360) Pursuant to Fed.R.Crim.P. 11 (a)(2), he "reserve[d] the right to appeal the orders issued at Docket Entry 524, 1181, 1309, and the District Court's oral order of December 30, 2016, denying defendant's Franks motion which was received by the court on December 30, 2016[,] reflected at docket entry 1334." (Id.) The court sentenced Cooper to 279 months on Count 1, 120 months on Count 2, 276 months on Count 3, 240 months on Count 8, and 180 months on Count 12, all of which were imposed concurrently. He was sentenced to 120 months on Count 10, to run consecutively, for a total of 396 months. On the government's motion, the court dismissed Counts 4-7 and 9. (ECF 1504) Cooper was sentenced to ten years' supervised release. (Id.)

On June 22, 2018, the Sixth Circuit filed a published decision affirming the district court's orders denying his motions to suppress. United States v. Cooper, 893 F.3d 840 (6th Cir. 2018) (Appendix A). The court denied Cooper's petition for rehearing with suggestion for rehearing en banc on August 28, 2018. (Appendix B)

REASONS FOR GRANTING THE PETITION

A.

In the first instance, Cooper argued "that the government cannot use one application for two wiretap orders and, therefore, the TT1 and TT2 wiretaps were improper and the evidence must be suppressed." (Appendix A, at 3) After quoting the text of 18 U.S.C. § 2518 (1)(c), the Sixth Circuit said: "Without further support or explanation, Cooper argues that this requires that 'each request for a wiretap must be supported by a separate application.'" (Id. at 3) According to the court's interpretation--which was notably absent of any of the traditional principles of statutory construction--"this statutory provision does not say anything like that." (Id. at 3) The government argued and the court held that it had "routinely endorsed the use of a single application to wiretap multiple phones." (Id. at 4) (citing United States v. Wright, 635 F. App'x 162, 164 (6th Cir. 2015); United States v. Sherrills, 432 F. App'x 476 (6th Cir. 2011)).

This issue presents an important question of statutory interpretation regarding § 2518 (1)(c). The Sixth Circuit's decisions in Wright, Sherrills, and now Cooper's case conflict with the decisions in United States v. Gonzalez, Inc., 412 F.3d 1102 (9th Cir. 2005), United States v. Carneiro, 861 F.2d 1171 (9th Cir. 1988); United States v. Ippolito, 774 F.2d 1482 (9th Cir. 1985); and United States v. Landeros-Lopez, 718 F.Supp.2d 1058 (D. Ariz. 2010). Based on the plain wording of § 2518 (1)(c) and these decisions, Cooper argues that each

request for a wiretap order must be supported by a separate application and that each application, standing alone, must satisfy the necessity requirement. Thousands of wiretap applications and orders are filed every year, so this issue is important to the members of the bench and bar, law enforcement officers, and defendants.

Applying the test in United States v. Giordano, 416 U.S. 505 (1974), § 2518 (1)(c) reflects one of Congress' core concerns. In this court's recent opinion in Dahda v. United States, 584 U.S. ___, 138 S.Ct. ___, 200 L.Ed.2d 842 (2018), the court noted that the underlying point of the Giordano limitation was to help give independent meaning to each of 18 U.S.C. § 2518 (10)(a)'s subparagraphs. Section 2518 (10)(a) provides for the suppression of the contents of any wire or oral communication that a wiretap intercepts along with any evidence derived therefrom if (1) the communication was unlawfully intercepted, (2) the order of approval under which it was intercepted is insufficient on its face; or (3) the interception was not made in conformity with the order of authorization or approval. Cooper argues that § 2518 (10)(a)(ii) requires suppression when an order is facially insufficient and that an order such as the one here which was issued on March 31, 2014 lacked the information required by § 2518 (4)(a)-(e) and thus deviated from the authorizing requirements that Congress set forth in that statute, because each wiretap must be accompanied by a separate application and surveillance order.

B.

The government's use of one application for two wiretap orders is inextricably tied to Cooper's argument that the government duped the issuing court into believing that TT1, from which the communications were to be intercepted, was still active and being used in connection with commission of the target offenses. In order to cover for a deficient necessity showing as to TT2, the government submitted just one application as to the discontinued use of TT1. On March 31, 2014, it applied for permission to wiretap two cellular phones, one assigned telephone number (615) 870-2862 and bearing electronic serial number 359785050804890 (TT1) and the other assigned telephone number (256) 284-8028 and bearing electronic serial number A0000045CDB737 (TT2). (ECF 455-1, Page ID 1167) In that application, the government stated that it believed Williams was using TT1. (Id., Page ID 1169; ECF 455-2, Page ID 2070)

On April 8, 2014, the government submitted another application and acquired a wiretap order for a cellular phone believed to be used by Williams, this one bearing electronic serial number A0000045DA1BEE and assigned telephone number (615) 598-3733 (TT3). (Id., Page ID 1025-26) The government stated that "Williams stopped using Target Telephone 1 on or about March 29 or 30, 2014." (Id., Page ID 1024) When the government applied for the TT1 wiretap, it was aware that as of March 31, 2014, TT1 was no longer active. However, the governmnet purposely omitted this material fact from the singular application for the TT1 and TT2 wiretaps.

Why did the government do this? In footnote 1, the Sixth Circuit wrote: "Cooper also claims that the government's motive for using one application for both wiretaps was to use the evidence for the wiretap of TT1 (Williams) to improperly prove necessity for the tap of TT2 (Cooper), thus also suggesting without any basis that a reviewing judge or magistrate judge would have been unable to recognize that these were two different phones." (Appendix A, at 4 n.1) His position is that the government omitted the foregoing facts from the single application for the TT1 and TT2 wiretaps as a means of compensating for a deficient necessity showing as to the wiretap for TT2. Cooper never meant to suggest that a judge could not recognize that TT1 and TT2 were two different phones. That is obvious and really does not have anything to do with the main point--the TT1/TT2 application failed to inform the issuing judge that Williams had stopped using the cellphone assigned number (615) 870-2862 on March 19 or even March 29 or 30, 2014, which in turn negated the need for the March 31, 2014 application seeking the TT1 wiretap and deceived the judge into believing that the cellular phone from which the communications were to be intercepted was being used in commission of the target offenses.

In the wiretap context, this court has held that the Fourth Amendment's specification of the place to be searched and person or things to be seized is satisfied by identifying the telephone line to be tapped and the particular communications to be seized. United States v. Donovan, 429 U.S. 413 (1977). The government made a mockery of the Fourth Amendment in this case.

It knew that TT1 had been inactive since March 19, 2014, well before it stated its purported need in the March 31, 2014 application to place a wiretap on that telephone line. All of this was done because the government could not satisfy the necessity for wiretapping TT2, that is, by seeking a wiretap for TT1, the government could justify putting all the information in the affidavit that pertained only to Williams and had nothing whatsoever to do with Cooper. Cooper's name is not mentioned in the affidavit sections dealing with undercover agents (ECF 455-1, Page ID 1210-11), interviews of witnesses and/or subjects of arrest warrants (id., Page ID 1211-12), search warrants (id., Page ID 1212), trash searches (id., Page ID 1212-13), and pole cameras (id., Page ID 1213-14). The section on the use of a grand jury and the section on the use of administrative subpoenas consists of non-specific boilerplate language. (Id., Page ID 1205-06)

Instead, Cooper is mentioned one time, albeit limitedly, in the section on physical surveillance (id., Page ID 1203) and five times in the section on controlled buys from undercover informants. (Id., Page ID 1206-09) A review of this affidavit establishes that the government's statements are not particularized to Cooper, regardless of amorphous references to "Cooper DTO."

C.

In 1967, this court held that wiretapping and electronic surveillance are subject to Fourth Amendment limitations. Berger v. N.Y., 388 U.S. 41 (1967); Katz v. United States, 389

U.S. 347 (1967). In 1968, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act. S. Rep. No. 90-1097 (1968) (reported in 1968 U.S.C.C.A.N 2112, 2153 (discussing Title III's legislative history and constitutional standards established in Berger and Katz). And in 1974, the court observed that when Congress enacted Title III, it intended to "make doubly sure that the statutory authority [for wiretaps] be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." Giordano, 416 U.S. at 513.

Yet, the core principles for which these decisions stand have become tattered, eroded, and watered-down by the passage of time. Lax enforcement of the necessity requirement in the lower courts has resulted in many cases in the impermissible use of wiretaps as the "initial step in a criminal investigation." Giordano, 416 U.S. at 515. True, agencies such as the Federal Bureau of Investigation, United States Drug Enforcement Administration, Bureau of Alcohol, Tobacco, and Firearms, and the United States Department of Justice indicate in their applications that they gave pro forma consideration and pro forma efforts at traditional investigative techniques. But in more cases than not, the explanations are boilerplate and the efforts are pro forma. This practice is entrenched and condoned. See, e.g., United States v. Alfano, 838 F.3d 158, 163-64 (6th Cir.), cert. denied, 488 U.S. 821 (1988) ("All that is required is that investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authorization and that

the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate."). Giordano recognized that this is not what Congress intended when it enacted Title III. This court has said that the necessity requirement is "to ensure that a wiretap is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153 n.12 (1974). But in many, many cases this is exactly what is happening in these wiretap cases.

Cooper's case illustrates a common tactic--produce an illusion by way of a lengthy affidavit that sets out every conceivable investigative technique but in the end, says nothing meaningful. Here, the Sixth Circuit was impressed by a "52-page affidavit" that was "prepared by a competent and knowledgeable officer" and outlined all of the techniques; arguably, the court said, "if this affidavit were found insufficient," hardly any would pass muster. (Appendix A, at 4) On closer inspection, Cooper is mentioned in one limited instance regarding physical surveillance and five controlled buys. The remaining techniques that were "attempted" relate to Williams and the "expla[nations]" on the rest of them are premised on boilerplate allegations. And the Sixth Circuit itself has said that while the prior experience of investigative officers might be important as to whether "investigative procedures are unlikely to succeed if tried, a purely conclusory affidavit unrelated to the instant case and not showing any

factual relations to the circumstances would be ... inadequate compliance with the statute." United States v. Landmesser, 553 F.2d 17, 20 (6th Cir.), cert. denied, 434 U.S. 855 (1977). In Cooper's case, stare decisis was not followed insofar as this case involves a conclusory affidavit where Cooper is concerned and 99% of the affidavit is unrelated to him. The court should take the opportunity to rein in the laxity with which lower courts are treating the necessity provisions of Title III.

D.

The federal wiretap statute plainly states that "[e]ach application" must include "a full and complete statement" regarding the efficacy of other investigative procedures. 18 U.S.C. § 2518 (1)(c). "Each wiretap, standing alone, must satisfy the necessity requirements." United States v. Carneiro, 861 F.2d at 1176. Thus, a showing of need for the Williams wiretap would not necessarily justify the need for the Cooper wiretap. This case is similar to Carneiro, where the court found the first wiretap order valid but subsequent ones tapping other suspects invalid because of the failure to satisfy the showing of particularized investigative steps taken as to each and their failure. The Carneiro court held that the subsequent applications contained misstatements and omitted material information and reversed the district court's denial of suppression. Id. at 1180-81 ("the Harty wiretap application did not satisfy the necessity requirement because it contained material omissions and misstatements. ... The principal defect with the affidavit

is that it failed to tell the issuing court that the DEA did not conduct a traditional investigation of Harty's criminal activities before applying the wiretap on his telephone line"). Here, the government's attempts to draw support from the methods employed against Williams to the effect that the normal tools of investigation were sufficiently exhausted before it sought the Cooper wiretap are unavailing. There are two problems.

First, under the restrictions in 18 U.S.C. § 2518 (1)(c), the government is required to "establish the necessity everytime it seeks a wiretap," and "[t]he fact that the government adequately exhausted traditional investigative techniques before seeking an order to tap [the first suspect's] telephone is irrelevant." Carneiro, 861 F.2d at 1180-81 (noting that a subsequent wiretap application appeared to be "a word processor copy of the allegations" set forth in the initial wiretap application for an alleged co-conspirator). It is inadequate to simply "carryover statements from prior applications as to other suspects without making further investigative attempts." Id. at 1182.

Second, the government's position that it can extrapolate from the use of traditional investigative methods as to Williams that surveillance against Cooper would be unsuccessful or dangerous is belied by the record. Arguably, the government established necessity to wiretap Williams' phone. The government's use of a single application that primarily involved Williams contained material misstatements and omissions that worked to conceal the fact that necessity had not been established

to wiretap Cooper's phone. Where Cooper is concerned, this is a case of boilerplate allegations true of any drug conspiracy. See, e.g., United States v. Broce, 792 F.2d 1504, 1507 (9th Cir. 1986) ("the government may not dispense with the statutory mandated showing of necessity to obtain a wiretap [of one conspirator's] telephone despite the validity of the wiretap of his co-conspirator's telephone."). The government attempted the same procedure in Gonzalez, Inc., 412 F.3d at 1115, which, the court rejected, explaining "the government is not free to transfer a statutory showing of necessity from one application to another--even within the same investigation. This court has held that an issuing judge may not examine various wiretap applications together when deciding whether a new application meets the statutory necessity requirement. Each application must satisfy the necessity requirement." Id. at 1115 (citing Carneiro, 861 F.2d at 1180-81; Broce, 792 F.2d at 1507).

E.

In his application before the Sixth Circuit, Cooper asserted five false or misleading statements that entitled him to a hearing under Franks v. Delaware, 438 U.S. 154, 171-72 (1978), to show that the wiretap was improper and that the evidence must be suppressed. The court found that he forfeited the second statement--where the government alleged "that he was using them (TT1 and TT2) in connection with the target offenses"--which, the court assumed, was aimed at an assertion in the affidavit "that Williams was using TT1 and TT2 for drug trafficking." (Appendix A, at 5) Concluding that Cooper did "not elaborate any further on this claim anywhere in his brief" or "raise it to

the district court," the Sixth Circuit concluded that he had "forfeited this particular claim." (Id.) In doing so, the court ignored this court's precedents in United States v. Rosales-Mireles, 138 S.Ct. 1897, 1904 (2018), and Molina-Martinez v. United States, 136 S.Ct. 1338, 1342 (2016), regarding plain-error review.

In Molina-Martinez, this court addressed plain errors in guideline calculations. The court made clear that most guideline errors, even if not raised in the district court, will satisfy the criteria for a plain error because there is a reasonable probability of a different outcome. 136 S.Ct. at 1346. This court rejected a categorical rule (applied by one circuit) that a guideline error was not plain if the actual sentence imposed was within the correct range. Id. at 1345. More recently, in Rosales-Mireles, the court applied the fourth element of the plain-error standard in a way that shows most guideline errors will require a remand. 138 S.Ct. at 1908.

Contrary to the Sixth Circuit, Cooper wrote extensively about how the government knew that the service to TT1 had been discontinued before it applied the TT1/TT2 wiretap. Yet, it alleged that Cooper "was using them in connection with the target offenses." But the government needed to keep TT1 involved in the necessity equation to compensate for a deficient necessity showing as to TT2. Cooper disputes that he forfeited this aspect of hive five-prong Franks challenge, but even if he did, the Sixth Circuit contravened this court's precedents by not conducting plain-error review to determine whether there was a

reasonable probabilty that he had made the threshold showing for a Franks hearing.

F.

Cooper argued that the government did not prove that the undercover informants voluntarily consented to the recordings of their communications with him and could not rely upon 18 U.S.C. § 2511 (2)(c) to admit them into evidence. In response to Cooper's suppression motion, the government explained in a routine response--i.e., not a sworn declaration or notarized statement--"that the informants were aware that their conversations were being recorded and therefore gave valid consent." (Appendix A, at 7) Citing United States v. Moncivais, 401 F.3d 751, 754-55 (6th Cir. 2005), the court held that "[t]his is a legitimate means of proving consent in a situation such as this." (Id.) At issue are the recorded conversations between Cooper and confidential source 4 (CS-4) on December 9 and 12, 2013 and confidential source 8 (CS-8) on March 11, March 17, April 9, and April 14, 2014.

Under 18 U.S.C. § 2511 (2)(c), the government bears the burden of proving that a party's consent was voluntary, and the lower courts have held that it may do so by showing that the party proceeded with the conversation knowing that law enforcement officials were monitoring or recording it. Some courts have held that the standard is considerably less stringent than the standard for showing consent to a physical search, see Schneckloth v. Bustamonte, 412 U.S. 218 (1973), because recording a conversation posses a lesser risk of invading the privacy

interests of the person consenting. See United States v. Scaife, 749 F.2d 338, 345 (6th Cir. 1984). On the other hand, some courts have held that although the right at stake in an exclusionary hearing to prevent admission of conversations recorded in violation of § 2511 is statutory, not constitutional, this court's Fourth Amendment caselaw determines whether a party to a communication consented to an interception within the meaning of § 2511. See, e.g., United States v. Kelly, 708 F.2d 121, 125 (3d Cir.), cert. denied, 464 U.S. 916 (1983) (citing Schneckloth, 412 U.S. 218).

This court has not addressed the proper standard for showing consent in the context of § 2511 (2)(c). Cooper argues the standard this court set out in Schneckloth should apply, not "implied consent", a concept semmingly oxymoronic. Law enforcement officials involve confidential informants virtually in all of these drug trafficking cases, so this question has importance nationally to the bench and bar, police, and defendants. And, assuming implied consent is the proper standard under § 2511 (2)(c), the court should review this issue to inform courts of the ways the government can prove this. The Sixth Circuit found that the government's mere unsworn response to the suppression motion served to satisfy the burden of proof.

Misapplying this court's consent jurisprudence, the Sixth Circuit ran afoul of both the Fourth Amendment and § 2511 (2)(c) by holding that the government's mere allegation in an unsworn pleading was enough to show that CS-4 and CS-8 voluntarily and

knowingly consented to the intercepted conversations. In the written response that the government filed opposing Cooper's motion to suppress, the government asserted only that "[t]he informants, as the recordings demonstrate, we[re] aware their conversation was being recorded and therefore legal." (ECF 1324, Page ID 5096) Assuming that this is a legitimate means of proving consent, it is not proof of consent, once Cooper placed consent in issue by filing a motion to suppress the warrantless searches and seizures. The Sixth Circuit confused these concepts and misapplied this court's precedents. The main problem with the notion of "implied consent" is that it ignores that consent is not voluntary merely because a person makes a "knowing" choice among alternatives; it must be an exercise of "free will." Schneckloth, 412 U.S. at 224-25.

G.

On June 22, 2018, the same date the Sixth Circuit filed the decision sub judice, this court held that the government's acquisition from wireless carriers of a defendant's cell-site location information (CSLI) was a search under the Fourth Amendment; a court order obtained under the Stored Communications Act (CSA) was not a permissible mechanism for accessing CSLI as a warrant was generally required. Carpenter v. United States, 138 S.Ct. 2206 (2018). Under the court's holding in Griffith v. Kentuky, 479 U.S. 314, 328 (1987), Cooper is entitled to the benefit of the decision in Carpenter.

Although this court resolved the question whether an SCA order obviates the need for the warrant, the court did not say

what should occur next. The court should grant review to answer this question.

The court has previously held that evidence obtained in good-faith reliance on a statute later declared unconstitutional need not be excluded. Illinois v. Krull, 480 U.S. 340, 349-50 (1987). Cf. Johnson v. United States, 138 S.Ct. 2676 (2018) (applying the good-faith exception to the CSLI obtained under the SCA). Cooper's situation has a twist to it, though: whereas, for example, the Krull decision might save the evidence from suppression in a straightforward case of seizure to admission into evidence, Cooper seeks to have the CSLI data that was collected excised from the March 31, 2014 application and, once recalibrated, reevaluated to determine whether it meets the probable cause requirements of 18 U.S.C. § 2518 (3)(a)-(b) and the informally dubbed necessity requirement in 18 U.S.C. § 2518 (3)(c). Here, given the scarcity of information in the application which pertains to Cooper, removing this tainted information may well upset the balance of both showings as previously made.

In summation, Cooper has established that the Fourth Amendment requires a warrant for the type of cellphone data present here and regardless whether exclusion of that information is not required because it was collected in good faith, the information must at least be removed from a warrant as misleading information that runs afoul of Franks. A remand is in order to determine the extent the CSLI in the application affected the core Giordano authorizing requirements that Congress specifically

set forth in Title III.

H.

While Cooper's appeal was in the direct review pipeline, this court also rendered its decision in Dahda v. United States, 584 U.S. ___, 138 S.Ct. ___, 200 L.Ed.2d 842 (2018). There, the court interpreted the clause that a judge may issue a wiretap order permitting the interception of communications only "within the territorial jurisdiction of the court in which the judge is sitting." 18 U.S.C. § 2518 (3). A district judge for the District of Kansas approved nine wiretaps as part of a government investigation of a suspected drug distribution ring in Kansas. Most of the communications were intercepted from a listening post within Kansas. The orders, however, also contained a sentence purporting to authorize interception outside of Kansas. In light of that authorization, the government intercepted additional communications from a listening post in Missouri. Petitioners Los and Roosevelt Dahda were indicted for participating in a drug distribution conspiracy. They moved to suppress the evidence obtained from the wiretaps under 18 U.S.C. § 2518 (10)(a)(ii) of the wiretap statute's suppression provision because the language authorizing interception beyond the district court's terriotrial jurisdiction rendered each order "insufficient on its face." § 2518 (10)(a)(ii). The government agreed not to introduce any evidence acquired from the Missouri listening post. This court ultimately ruled that § 2518 (10)(a)(ii) did not contain a Giordano core concern, but instead meant what it said--the requirement applied where an order was insufficient on its face--and the defect in the orders did not

result in an insufficiency under § 2518 (10)(a)(ii). The sentence, the court said, was surplus and without legal effect, and the orders set forth the authorizing judge's territorial jurisdiction.

Tunring back to Cooper's case, first, Griffith, allows him the benefit of the decision. Second, the government intercepted communications from a listening post from somewhere outside of Tennessee, established by the optical disc that was presented to the district court for sealing. For example, communications were intercepted from California, at a listening post outside of Tennessee. A remand also is warranted based on the decision in Dahda.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 19th day of November, 2018.

Respectfully submitted,

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