No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

Osvaldo Vasquez,
Petitioner

v.

United States of America,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITION FOR WRIT OF CERTIORARI

Marie Theriault
CJA PANEL ATTORNEY
238 Robinson St., Ste. 4
Wakefield, RI 02879
401.447.4148
mariethelawyer@gmail.com

Attorney for Petitioner
OSVALDO VASQUEZ
Dated June 25, 2019

QUESTION PRESENTED

I. Whether the Petitioner was denied his fundamental constitutional right(s) to Due Process of Law and Fundamental Fairness when he was denied a meaningful opportunity to present a defense and to challenge evidence obtained via a GPS tracking warrant and the search of his home in violation of the Fourth, Fifth, and Sixth Amendments to the United States Constitution.

II. Whether the inability to present a defense, the fundamental unfairness of the proceedings below, and the overall lack of due process equates to insurmountable prejudice, which may not be cured by a post-deprivation judicial process.

III. Whether upholding the issuance of a warrant to intercept wire communications, which was obtained after GPS monitoring for well over five months, in an investigation that was abundant in success, comports with the requirements of the Fourth Amendment in these circumstances.

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Petition for Writ Of Certiorari

Osvaldo Vasquez, an inmate incarcerated at United States Penitentiary Canaan in Waymart Pennsylvania, by and through his attorney, Marie Theriault, Criminal Justice Act Panel Attorney, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The decision by the United States Court of Appeals for the First Circuit denying Mr. Vasquez's' direct appeal [without prejudice to file a petition pursuant to 28 U.S.C. § 2255 is reported as *United States v. Osvaldo Vasquez*, 920 F.3d 70 (1st Cir. 2019).

Jurisdiction

Mr. Vasquez's appeal was denied on March 29, 2019 and the formal mandate of the court entered on April 19, 2019. Mr. Vasquez invokes this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this petition for a writ of certiorari within ninety days of the United States Court of Appeal's judgment.

Constitutional Provisions Involved

United States Constitution, Amendment IV:

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.

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE[1]

Mr. Vasquez is a United States Citizen of Puerto Rican Descent and his primary language is Spanish. He was born in 1968 in Puerto Rico, moved to New York in 1982, and began working full-time as a cab driver at the age of sixteen. In 1990, Mr. Vasquez, Elizabeth Santos, and her son Christopher moved from New York to Worcester, Massachusetts in an effort to provide a better environment in which to raise Christopher.

GPS Warrant (September 25, 2014 until June of 2015)

The events leading up to the indictment began in August of 2014. The government gathered its evidence against Mr. Vasquez by using two confidential sources (hereinafter CS-1 and CS-2); and secured a warrant to install a tracking device to his jeep vehicle after two controlled purchases of narcotics on August 22, 2014 and September 19, 2014. The GPS tracking warrant issued on September 25, 2014 for forty-five (45) days and extended on at least five (5) occasions (November 2014; January, 2015; March 2015; April 2015; and June 2015). The United States Court of Appeals opinion below did not address Petitioner's claims in his opening and reply briefs that the record was void of a return of service and/or re-authorizations to extend the tracking warrant as required pursuant to 18 U.S.C. §3103.

[1] Citations to the record supporting the factual summary are provided in the briefs

Wiretap Warrant (April 23, 2015)

After tracking Mr. Vasquez's vehicle for over five months, on April 23, 2015, the government obtained a warrant to intercept wire communications for 30 days for a cellular telephone thought to belong to Mr. Vasquez. This order was extended on May 22, 2015 and again on June 26, 2015.

Search Warrant/Arrest (August 6, 2015)

As a result of the compilation of these law enforcement tactics (GPS monitoring, the interception of wire communications, and controlled purchases of narcotics via CS-1 and CS-2), the government secured a search warrant and seized narcotics and a firearm from Mr. Vasquez's home and found nothing in his son Christopher's home. The search and arrest warrants were executed on August 7, 2015.

Indictment – September 25, 2015 (Attorney #1)

On September 16, 2015, Mr. Vasquez and his four co-defendants were charged in a nine-count indictment with various narcotics offenses relating to the distribution of heroin and cocaine in the District of Massachusetts. On September 25, 2015, Mr. Vasquez appeared for arraignment but prior to arraignment, Mr. Vasquez requested new counsel and the government was excused from the courtroom. During this hearing, Mr. Vasquez expressed great concern with the

unlawful search of his home and the conflicts in communicating with his federal defender. The oral motion to withdraw was granted and the court advised Mr. Vasquez that he could not move to suppress the evidence "today" and that his new lawyer could proceed to file motions challenging the execution of the search warrant.[2] Mr. Vasquez accepted these instructions from the court and new counsel was appointed on the same day (hereinafter "Attorney #2A").

Arraignment (September 28, 2015) (Attorneys #2A & #2B)

On September 28, 2015, Mr. Vasquez was presented for arraignment, entered a not guilty plea, and was represented by his new attorney during these proceedings ("Attorney #2A"). After several months of interim status conferences, District Judge Timothy S. Hillman allowed motions to suppress to be filed on July 11, 2016. Attorneys 2A, 2B, and 3 failed to file motions to suppress the tracking warrant and the search warrant.

Motion to Suppress Wire Communications – July 15, 2016

[2] On September 25, 2015 during this proceeding, Magistrate Judge Hennessy informed Mr. Vasquez that:

> [r]egardless of who your lawyer is, the [process] is going to be the same. So, for instance, if you want to challenge whether the police could have come into your house to execute a search warrant, there's going to come a time when your lawyer makes that motion. The Rules do not permit your lawyer just to walk into court and say, "I want, I want to make that motion today. I want a hearing on it right now." It does not happen that way….

On July 15, 2016, Mr. Vasquez, joined by his co-defendants, filed a Motion to Suppress evidence obtained from the interception of wire communications upon telephone number (267) 686-1359, allegedly used by Mr. Vasquez. On September 6, 2016, the district court heard arguments on the Motion to Suppress and took the matter under advisement. Two days later, on September 8, 2016, another attorney, associated with Attorney #2A, entered his appearance on behalf of Mr. Vasquez ("Attorney #2B"). On October 11, 2016, a Finding and Order entered denying the motions to suppress evidence. Eight days later, on October 19, 2016, Attorneys 2A and 2B filed a joint motion to withdraw alleging an irreconcilable breakdown in the attorney client relationship.

Pro se Interlocutory Appeal and Attorney #3

Within two weeks of Attorneys 2A and 2B filing a motion to withdraw, on October 31, 2016, Mr. Vasquez filed a *pro se* Interlocutory Notice of Appeal.[3] On November 15, 2016, a hearing was held on the joint Motion to Withdraw filed by Attorneys #2A and #2B; the government was excused from the courtroom and the transcript of this hearing was sealed.[4] At this hearing, Attorney #2A represented that he could "not provide constitutionally adequate representation" due to a breakdown in the attorney client relationship, and that it would be best for a

[3] This appeal was dismissed on March 26, 2017.

[4] This transcript was unsealed by the District Court on August 3, 2018.

subsequent attorney to address Mr. Vasquez's concerns "fresh". During this hearing, Mr. Vasquez expressed grave concerns to the court that Attorneys 2A and 2B would not address his requests to challenge the unconstitutional search of his home. The district court agreed to appoint a new lawyer since the trial date was tentatively scheduled for February of 2017, and advised Mr. Vasquez that he should express his concerns to his new lawyer and that a status conference would be scheduled in December to address these issues. *Id*.

On November 15, 2016, a new attorney was appointed and entered his appearance on behalf of Mr. Vasquez ("Attorney #3"). Less than three weeks later, on December 5, 2016, Attorney #3 filed a motion to withdraw due to a conflict of interest. Attorney #3 proffered in his motion that "… after meeting with the defendant he became aware that counsel for a co-defendant had been employed by his firm during a substantial period of his representation of the co-defendant. Additionally, counsel had communicated with the co-defendant's family about potentially representing the co-defendant." The motion to withdraw was granted on December 7, 2016.[5]

[5] On December 5, 2016, Mr. Vasquez wrote to the Clerk of the United States Court of Appeals asking for help due to the:

> "ergency *[sic]*of his appeal" and "to get help trying to have my lawyer assist me" because "this [appeal] and other matters were'nt *[sic]* being addressed properly. So my current situation is to get help trying to have my lawyer assist me. I have numerous and ligitamate *[sic]* reasons for this appeal[.] I am still trying to figure out why my lawyer is being

Enlargement of Time to Raise Constitutional Claims –Attorney #4

On December 8, 2016, Attorney #4 entered his appearance, and on January 3, 2017, he filed a motion for an enlargement of time requesting ninety days to file several pre-trial motions, which motions involved the violation of Mr. Vasquez's fundamental constitutional rights regarding the GPS tracking warrant and ensuing search of his home. Attorney #4 also proffered that even though discovery was missing which hindered his review of a voluminous file; that he would expedite his review of the file and prepare to go forward on these motions within thirty (30) days. On January 24, 2017, an electronic order entered denying the motion for an extension of time and, on that same day, counsel for Mr. Vasquez filed a motion for reconsideration of the court's denial.

A hearing was held on the motion for reconsideration on February 1, 2017, and Attorney #4 argued in his filings and during this hearing for reconsideration that Mr. Vasquez had asked him from "day one" to file a motion to suppress the tracking warrant, which was significant because "but for the tracking warrant" the government never would have discovered Mr. Vasquez's home and that significant constitutional deficiencies were completely overlooked by prior counsel – the

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> reluctant to help me with this matter and has not already done what I've aksked *[sic]*of him….

failure to challenge the unconstitutional search of his home, and the failure to challenge the constitutionality of the GPS tracking warrant. The next day, on February, 2017, the district court denied the motion for reconsideration *via* an electronic order, as "untimely and lacking a showing of good cause". On February 28, 2017, Mr. Vasquez wrote to the Clerk of the United States Court of Appeals again, asking the court to inspect various documents and complaining that he had repeatedly asked his prior attorneys to challenge the search warrants and his pleas were ignored. Once again, Mr. Vasquez pled with the court, via this personal letter, for the opportunity to be heard on his *pro se* interlocutory appeal, and requested that his attorney (#4) be allowed to argue and submit the motions to suppress the GPS warrant and search of his home prior to trial. Judgment entered dismissing the *pro se* interlocutory appeal on March 26, 2017.

Conditional Plea – Sentencing

On May 2, 2017, Mr. Vasquez entered into a conditional plea agreement with the government, specifically reserving the right to appeal "the denial of Defendant's Motion to suppress the wiretap evidence seized in this case; the denial of Defendant's motion for leave to file untimely motions to suppress; and the denial of the Defendant's request for reconsideration of that motion" pursuant to Fed. R. Crim. P. 11(a)(2). On May 8, 2017, Mr. Vasquez entered pleas of guilty to Counts 1-3, 6, and 7 and on November 3, 2017, Mr. Vasquez was committed to the

custody of the United States Bureau of Prisons for a term of 125 months, with four years supervised release.

REASONS FOR GRANTING THE PETITION

In lieu of remanding this case to afford the Petitioner an opportunity to challenge the evidence obtained from the tracking warrant and the search of his home, the United States Court of Appeals for the First Circuit denied these claims, *without prejudice*, to allow the Petitioner to file a petition for ineffective assistance of counsel pursuant to 28 U.S.C. § 2255. This potential post-deprivation judicial process is not sufficient to remedy the insurmountable prejudice and the denial of fundamental constitutional rights guaranteed under the Fourth and Fifth amendments to the United States Constitution.

The Due Process Clause of the Fifth Amendment guarantees the right to present a defense, a meaningful opportunity to be heard, and the overall fundamental fairness of the proceedings. In this case, Mr. Vasquez was denied a meaningful opportunity to challenge evidence obtained from the search of his home and from monitoring his movements, via a GPS tracking device, which issued upon a run-of-the-mill affidavit after two controlled purchases of narcotics. After tracking the Petitioners movements for over five months, the government procured a warrant to intercept wire communications in an investigation that was abundant in success and lacking in necessity. These warrants led to the issuance of

an unchallenged search warrant of Mr. Vasquez's home, lacking a sufficient nexus to the alleged criminal activities.

Fundamental fairness is the foundation upon which the United States Constitution rests and when a person is accused of a serious crime, especially in a case such as this where discovery is voluminous and the legal issues are complex, an opportunity to be heard, through the assistance of counsel, is critical to the fundamental fairness of the proceedings.[6] Here, the Petitioner was denied a meaningful opportunity to challenge the evidence obtained against him in violation of the Fourth Amendment.

I. MR. VASQUEZ WAS DENIED HIS CONSTITUTIONAL RIGHT(S) TO DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS BECAUSE HE WAS DENIED A MEANINGFUL OPPORTUNITY TO BE HEARD AND TO PRESENT A DEFENSE BY CHALLENGING THE EVIDENCE OBTAINED AFTER EXTENSIVE GPS MONITORING OF HIS MOVEMENTS AND THE SEARCH OF HIS HOME IN VIOLATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS.

[6] In reviewing the historical significance of the due process clause in the context of the Fifth Amendment, legal scholars conclude that the due process guarantee and the protection of physical liberty "is the oldest and most widely recognized part of the guarantee." *Nowak, Rotunda, Young Constitutional Law, at pg. 459 (3rd ed. 1986) See, Hough, Due Process of Law – To-Day*, 32 Harv.L.Rev. 218 (1918); *Shattuck, The True Meaning of the Term "Liberty" in Those Clauses In the Federal and State Constitutions which Protect "Life, Liberty or Property*," 4 Harv.L.Rev. 365 (1891); *Williams, "Liberty in the Due Process Clause of the Fifth and Fourteenth Amendments*. 53 Colo.L.Rev. 117 (1981).

From the date of presentment on these charges, September 25, 2015, up to and including, December 5, 2016, Mr. Vasquez was pleading with the district court and his attorney(s) to challenge the extensive GPS monitoring and the search of his home. Three of his four attorneys failed to move to suppress the evidence obtained from the GPS tracking warrant, which led to the issuance of a wiretap warrant, and they failed to challenge the search warrant(s) issued to search Mr. Vasquez's home and Christopher's home. When the fourth attorney – as well as the appellant *pro se* – attempted to do so, they were not permitted to proceed.[7] The warrant to intercept wire transmissions was procured primarily upon evidence obtained from the extensive and unlawful tracking of the Petitioner's movements for well over five (5) months. Without this tracking evidence, the government could not demonstrate either probable cause nor could it establish necessity to obtain an order to intercept wire transmissions.

[7] On December 8, 2016, when Attorney #4 was appointed, he expedited his review of a partial voluminous file and on January 3, 2017 he filed several motions and memoranda seeking additional time to file motions to suppress the search of Petitioner's home and the extensive GPS monitoring. Attorney #4 proffered that: (1) Significant constitutional issues were missed by predecessor counsel; (2) The file was voluminous and Discovery appeared to be missing; and (3) When the government finally responded to a request for missing discovery and sent an encrypted thumb drive "of all materials previously produced", the thumb drive could not be accessed, and the government acknowledged on January 10, 2017 that the files were not copied correctly.

Mr. Vasquez was denied the opportunity to be heard on significant suppression issues, namely, the propriety and validity of a tracking warrant, issued upon the basis of a run-of-the-mill affidavit, extended for well over five months without produced documentation authorizing this extended tracking of Petitioners movements. A Global Positioning System (GPS) or mobile tracking device is defined as "an electronic or mechanical device which permits the tracking of the movement of a person or object." 18 U.S.C. § 3117(b); *United States v. Jones*, 565 U.S. 400, 404-405 (2012)[8] Here, the GPS monitoring also formed the basis, in part, to obtain a warrant to intercept wire communications of Mr. Vasquez's phone. The only suppression motion filed and denied, challenged this wiretap based upon the government's failure to demonstrate necessity in an investigation that was abundant in success.

Pursuant to Fed. R. Crim. P. 12, Attorney #4 filed a motion for an enlargement of time, pre-trial, to file a motion to suppress the tracking warrant and the search of Petitioner's home.[9] From the onset of these proceedings, Mr.

[8] In *Jones*, the government obtained a warrant permitting the installation of a GPS device, within 10 days, on a vehicle registered to Jones's wife, but the government failed to install the device until the 11th day, and all evidence obtained from the data accumulated after 28 days of monitoring the vehicles movements was therefore suppressed. *Jones*, 400 U.S. at 413.

[9] When Fed. R. Crim. P. 12 was amended in 2014, waiver was no longer the standard and if a Rule 12(b)(3) motion was filed after the deadline, the motion was deemed to be untimely. Fed. R. Crim. P. 12(c)(3). The Advisory Committee's notes

Vasquez was pleading with Attorney(s) 2A and 2B, the district court, and the Clerk of this Court, for the opportunity to challenge the search of his home and the tracking of his vehicle. Mr. Vasquez's pleas were essentially ignored until Attorney #4 demonstrated that these significant constitutional errors had to be challenged and he filed detailed pleadings seeking a reasonable extension of time to present these challenges. In refusing to allow Mr. Vasquez's fourth attorney to file these motions to suppress the tracking evidence and the search of his home as being untimely, the Court of Appeals clearly overlooked the grave violation of due process in this case. *Snyder v. Massachusetts*, 291 U.S. 97, 116-117 (1934) ("Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept.... [and] what is fair in one set of circumstances may be an act of tyranny in others." [internal citations omitted]) *Id.*; *Herring v. New York*, 422 U.S. 853, 866-67 (1975) (J. Rehnquist dissenting) (In interpreting the requirements of fundamental fairness in the Fourteenth Amendment context, this Court reasoned

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to the 2014 amendment instructs that this ([n]ew paragraph (12(c)(3)) "[r]etains the existing standard for untimely claims; that the party seeking relief must show 'good cause' for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case.") (emphasis supplied). In *United States v. Burroughs,* 810 F.3d 833 (D.C. Cir. 2016) the court outlined some of the conflicts within the Circuit courts of applying this new and flexible standard of review in an effort to consider whether a plain error analysis is proper as opposed to a showing of good cause. *Id*. at 47 (fn 7) ("This change in wording has prompted some Circuits to conclude that plain error review is proper even in the absence of good cause, while others have opted to review unpreserved Rule 12 issues only upon a showing of good cause.") *Id*.

that "[T]he Due Process Clause of the Fourteenth Amendment has long been recognized as assuring "fundamental fairness" in state criminal proceedings. [internal citations omitted] Throughout the history of the Clause, we have generally considered the question of fairness on a case-by-case basis, reflecting the fact that the elements of fairness vary with the circumstances of particular proceedings.") *Id.* [10]

Alternatively, the Petitioner argued below in his briefs, that the failure of previous counsel to file these suppression motions rendered these proceedings to be in violation of the Sixth Amendment and fundamentally unfair. The right to counsel at all stages of the proceeding is a fundamental component of the criminal

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[10] In *United States v. Raddatz*, 447 U.S. 667 (1980) this Court reminded us that the Due Process Clause is derived from "… the notion that, as a matter of basic fairness, a person facing the prospect of grievous loss is entitled to relate his version of the facts to the official entrusted with judging its accuracy. The Due Process Clause "promot[es] participation and dialogue. . . in the decisionmaking process … [internal citation omitted] by ensuring that individuals adversely affected by governmental action may confront the ultimate decisionmaker, and thus play some part in formulating the ultimate decision. [internal citations omitted] In this respect, the requirement that a finder of facts must hear the testimony offered by those whose liberty is at stake derives from deep-seated notions of fairness and human dignity. *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123,170 (1951) (Frankfurter, J., concurring). A rule that would allow a criminal defendant to face a jail sentence on the basis of factual findings made by one who has not heard the evidence is, in my view, foreign to notions of fair adjudicative procedure embodied in the Due Process Clause." *Id*. 447 U.S. 695-698.

justice system and counsel's "presence is essential because they are the means through which the other rights of the person on trial are secured." *United States v. Cronic*, 466 U.S. 648, 653 (1984) (footnote 7 omitted).[11] Mr. Vasquez was denied fundamental fairness and the opportunity to be heard when his attorney was not permitted to file motions to suppress, *pre-trial*, the evidence obtained from the extensive GPS tracking and the search of his home. In sum, the totality of these proceedings amounted to the denial of fundamental rights secured by the Fourth, Fifth, and Sixth, Amendments to the United States Constitution.

II. THE INABILITY TO PRESENT A DEFENSE, THE FUNAMEMENTAL UNFAIRNESS OF THE PROCEEDINGS BELOW, AND THE OVERALL LACK OF DUE PROCESS IS EQUIVALENT TO INSURMOUNTABLE PREJUDICE WHICH MAY NOT BE CURED BY A POST-DEPRIVATION JUDICIAL PROCESS

The United States Court of Appeals denied Mr. Vasquez's appeal without prejudice in order to allow him to proceed with filing a petition for ineffective

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[11] Moreover, the Petitioner argued on appeal that from as early as October 19, 2016 (the date Attorneys #2A and #2B filed a joint motion to withdraw; and just one week after the motion to suppress the interception of wire communications was denied) that he was without meaningful representation until Attorney #4 was appointed on December 8, 2016. During Attorney #3's brief period as "counsel of record", this time frame clearly amounted to a constructive denial of counsel, and severely impaired Mr. Vasquez's right to press suppression motions he himself had raised with the court as early as his arraignment. This is not a "he said-she said" where counsel can deny that Mr. Vasquez did not want to pursue these motions. The record below is replete with this Petitioner raising Fourth amendment challenges to these very issues, which were also deemed critical and significant, at first glance, upon Attorney #4's appointment as counsel.

assistance of counsel, pursuant to 28 U.S.C. § 2255. In these circumstances, a post-deprivation judicial process is insufficient to cure the aforementioned constitutional violations. For example, there was no evidence below that a conscious decision was made to forego filing a motion to suppress the tracking warrant or the search of Mr. Vasquez's home. To the contrary, instead we have Attorney #4 expressing great concern that these motions were not filed and significant constitutional challenges were overlooked and the failure to file these motions was indeed ineffective. Not only did the Appellant demonstrate prejudice below, he also demonstrated that his suppression claims were "[m]eritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence…." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *see also United States v. Mercedes-de la Cruz*, 787 F.3d 61, 67 (1st Cir. 2015) (This prejudice inquiry *does not* require a showing that the "unlawfully obtained evidence was unreliable, or that its admission created a risk of convicting an innocent person.") *Mercedes-de la Cruz* at 71 (fn 6). The requisite showing is that an individual would have "[h]ad a good shot at acquittal, had one been competently represented." *Id*.; quoting *Owens v. United States*, 387 F.3d 607, 610 (7th Cir. 2004) (Posner, J.).

In *Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017)[12] this Court recognized that categories of structural errors "are not rigid" and that more than one rationale "… may be part of the explanation for why an error is deemed to be structural …" which does not always amount to "fundamental unfairness in every case." *Weaver* at 1908. (internal citation omitted)[13] In subjecting Weaver's claim to a traditional *Strickland*[14] analysis, the Court stated that the "concept of prejudice is defined in different ways depending on the context in which it appears. In the ordinary *Strickland* case, prejudice means "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." But the *Strickland* Court also cautioned that the prejudice inquiry is not meant to be applied in a "mechanical" fashion. For when a court is evaluating an ineffective-assistance claim, the ultimate inquiry must concentrate on " the

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[12] *Weaver* involved a post-conviction appeal based upon an ineffective assistance claim because trial counsel failed to object and failed to raise on direct review, that the courtroom was closed during *voir dire*.

[13] The Petitioner respectfully submitted below that the errors here may be categorized as structural errors that fall into the category of automatic reversal and "… where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to " automatic reversal" regardless of the error's actual " effect on the outcome." *Neder v. United States*, 527 U.S. 1, 7 (1999) (internal citations omitted)." Citing from *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1910 (2017).

[14] *Strickland v. Washington*, 466 U.S. 668 (1984).

fundamental fairness of the proceeding." *Weaver at 1911. (internal citations omitted).*

If the evidence derived from this unlawful search were suppressed, as it should be, the outcome of this proceeding is much different because a firearm was discovered during this unlawful search of his home, and pursuant to 18 U.S.C. § 924(c), Mr. Vasquez was sentenced to a *consecutive* term of 5 years imprisonment. Here, counsel's unprofessional errors resulted in a complete failure to subject the prosecution's case to adversarial testing and in these circumstances; the proceedings were both fundamentally unfair and resulted in prejudice to Mr. Vasquez. A post-deprivation remedy in this case will not and cannot cure the significant constitutional violations.

III. UPHOLDING THE ISSUANCE OF A WARRANT TO INTERCEPT WIRE COMMUNICATIONS WHICH WAS OBTAINED PRIMARILY FROM GPS TRACKING FOR OVER FIVE MONTHS IN AN INVESTIGATION THAT WAS ABUNDANT IN SUCCESS DOES NOT SATISFY THE FOURTH AMENDMENT IN THIS CASE.

The Petitioner also argued below that the district court committed clear error in denying the motion to suppress the evidence derived from the wire transmissions, because the traditional investigative procedures were an on-going success in all respects and the alleged demonstration of "necessity" amounted to a façade. Furthermore, the warrant to intercept communications, relied primarily

upon evidence obtained from the unlawful tracking of Mr. Vasquez's vehicle. The combination of these unlawful searches, audio and video surveillance and a handful of controlled narcotic sales ultimately led to the issuance of an unlawful search warrant of Mr. Vasquez's home; and, this affidavit was void of a nexus between drug trafficking activities and his home. Thus, the Petitioner argued below that his conviction should be vacated and the case remanded so that he could challenge the GPS monitoring, the search of his home, and seek reconsideration on the denial of the motion to suppress the interception of wire communications.

CONCLUSION

For all of the foregoing reasons, Mr. Vasquez respectfully submits that this Petition for Writ of Certiorari should be granted, his conviction and sentence should be vacated, and the case should be remanded to the district court for the opportunity to present and litigate the motion to suppress the unlawful tracking of his vehicle as well as the unlawful search of his home, which also mandates the opportunity to seek reconsideration on the denial of the motion to suppress evidence obtained from the unlawful interception of wire communications.

Respectfully submitted,

/s/ Marie Theriault
MARIE THERIAULT
CJA Panel Attorney

Attorney for Petitioner
OSVALDO VASQUEZ

Marie Theriault, Attorney at Law
238 Robinson St., Ste. 4
Wakefield, RI 02879
401.447.4148 (mobile)
mariethelawyer@gmail.com
RI Bar # 4426
Federal Bar # 21022

DATED: June 25, 2019

No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

Osvaldo Vasquez,
Petitioner
v.
United States of America,
Respondent

CERTIFICATION AND DECLARATION

I hereby certify and declare on penalty of perjury, as required by Supreme Court Rule 29, that the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ of Certiorari were sent to the Clerk of the United States Supreme Court in Washington, D.C., and the parties listed below, through the United States Postal Service by first-class mail, postage prepaid, on June 25, 2019, which is timely pursuant to the rules of this Court. This filing pursuant to Rule 29.2 was contemporaneous with the electronic filing.

Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

Alexia R. De Vincentis
United States Attorney Office
1 Courthouse Way, Suite 9200
Boston, MA 02210

/s/Marie Theriault
MARIE THERIAULT
CJA Panel Attorney
Dated: June 25, 2019

United States Court of Appeals
For the First Circuit

No. 17-1930

UNITED STATES OF AMERICA,

Appellee,

v.

HUGO SANTANA-DONES, t/n Rafael Jose Ventura, a/k/a Raffi, a/k/a Rafael Ventura, a/k/a Hugo Santana, a/k/a Wilthron Flores,

Defendant, Appellant.

No. 17-1970

UNITED STATES OF AMERICA,

Appellee,

v.

ELVIS GENAO, a/k/a Cocolo,

Defendant, Appellant.

No. 17-2103

UNITED STATES OF AMERICA,

Appellee,

v.

FELIX MELENDEZ, a/k/a Felo, a/k/a Felito,

Defendant, Appellant.

No. 17-2113

UNITED STATES OF AMERICA,

Appellee,

v.

OSVALDO VASQUEZ, a/k/a Chu Chu, a/k/a Anthony Christopher,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Timothy S. Hillman, U.S. District Judge]

Before

Lynch, Selya, and Boudin,
Circuit Judges.

Karen A. Pickett and Pickett Law Offices, P.C. on brief for appellant Santana-Dones.
Leslie W. O'Brien on brief for appellant Genao.
Alan Jay Black on brief for appellant Melendez.
Marie Theriault on brief for appellant Vasquez.
Andrew E. Lelling, United States Attorney, and Alexia R. De Vincentis, Assistant United States Attorney, on brief for appellee.

March 29, 2019

SELYA, Circuit Judge. For the most part, these consolidated appeals turn on a single issue: whether the district court erred in concluding that the court which issued the wiretap warrant could have found the facts in the application to be at least minimally adequate to support the issuance of the warrant. We resolve that issue favorably to the government, conclude that the defendants' unified challenge to the wiretap is unavailing, determine that the separate claims of error mounted by one of the defendants are meritless, and affirm the judgments below.

I. BACKGROUND.

We rehearse here only those facts necessary to place these appeals in perspective. In the summer of 2014, the Drug Enforcement Administration (DEA), assisted by local law enforcement officers, began investigating the drug-trafficking activities of defendant-appellant Osvaldo Vasquez and his cohorts, including defendants-appellants Hugo Santana-Dones, Elvis Genao, and Felix Melendez. During the next year, the investigators relied heavily on two confidential sources, who were buyers, to gather evidence of the defendants' drug-trafficking activities. All told, these confidential sources carried out controlled purchases of nearly 500 grams of heroin and heroin laced with fentanyl and methamphetamine. They also arranged to purchase at least one kilogram of cocaine.

DEA agents supplemented the efforts of these confidential sources through traditional investigative techniques such as physical surveillance and the use of a pen register. In September of 2014, the agents obtained a warrant from a federal magistrate judge, pursuant to 18 U.S.C. § 3117 and Federal Rule of Criminal Procedure 41(e)(2)(C), authorizing the installation of a GPS tracking device on a vehicle driven by Vasquez during certain observed drug sales. The agents then went a step further and, from April to July of 2015, made use of a wiretap of Vasquez's cellular telephone, which had been authorized and periodically renewed by a federal district judge pursuant to 18 U.S.C. § 2518.

Matters came to a head in August of 2015 when DEA agents, accompanied by local officers, executed search warrants at six locations linked to the defendants (five in Massachusetts and one in Rhode Island). Arrest warrants had also been obtained and all four defendants were arrested at that time. Large quantities of heroin and cocaine, as well as drug paraphernalia and a firearm, were recovered in the process.

The next month, a federal grand jury sitting in the District of Massachusetts handed up an indictment charging all four defendants with conspiracy to distribute and to possess with intent to distribute heroin and cocaine and distribution and possession with intent to distribute heroin and/or cocaine. See 21 U.S.C. §§ 841(a)(1), 846. Vasquez alone was charged with

possession of a firearm in furtherance of a drug-trafficking crime. See 18 U.S.C. § 924(c). All the defendants initially maintained their innocence and moved to suppress any and all evidence garnered, directly or indirectly, through the use of the wiretap. The defendants argued that the affidavit in support of the application for the wiretap failed to satisfy the statutory requirement that the government demonstrate necessity. See 18 U.S.C. § 2518 (1)(c). The government opposed the motion. Following a non-evidentiary hearing, the district court took the matter under advisement and, on October 11, 2016, found the showing of necessity sufficient and denied the motion.

Starting around this time, Vasquez experienced a number of changes in his legal representation. Counsel 2A and 2B, appointed just before Vasquez's arraignment, withdrew shortly after the denial of the motion to suppress, citing a breakdown in the attorney-client relationship. Vasquez's next attorney (Counsel 3) represented him for less than a month before withdrawing on December 5 due to a conflict. His successor (Counsel 4) was appointed on December 8, 2016.

Less than one month later, Vasquez moved for a 90-day extension of time to file additional motions to suppress. The government opposed the motion, and the district court denied it on January 24, 2017. The court subsequently rejected Vasquez's motion for reconsideration.

In due course, the four defendants pleaded guilty to all the charges, reserving the right to challenge the district court's suppression-related rulings and to claim ineffective assistance of counsel. See Fed. R. Crim. P. 11(a)(2). After accepting the quartet of pleas, the district court sentenced Santana-Dones to serve an 80-month term of immurement; sentenced Genao to serve 37 months; sentenced Melendez to serve 70 months; and sentenced Vasquez (whom both the government and the court regarded as the ring leader) to serve 125 months. These timely appeals followed, and we consolidated them for briefing and oral arguments. On appeal, all of the defendants pursue their challenges to the suppression-related rulings but only Vasquez attempts to pursue an ineffective assistance of counsel claim.

II. THE WIRETAP EVIDENCE.

"When assaying a district court's ruling on a motion to suppress wiretap evidence, we review its factual findings for clear error and its legal conclusions de novo." United States v. Gordon, 871 F.3d 35, 43 (1st Cir. 2017). Applying this standard, the pivotal question is whether "the facts set forth in the application were minimally adequate to support the determination that was made." United States v. Villarman-Oviedo, 325 F.3d 1, 9 (1st Cir. 2003) (quoting United States v. Ashley, 876 F.2d 1069, 1074 (1st

Cir. 1989)).[1] The district court answered this question in the affirmative and, to find clear error, we "must form a strong, unyielding belief, based on the whole of the record, that a mistake has been made." United States v. Rodrigues, 850 F.3d 1, 6 (1st Cir. 2017) (quoting United States v. Siciliano, 578 F.3d 61, 67 (1st Cir. 2009)). Put another way, we will "affirm under the clear error standard 'if any reasonable view of the evidence supports' the district court's finding." Id. (quoting Siciliano, 578 F.3d at 68).

In this instance, "[o]ur inquiry is guided by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522, which governs the rules for federal telephone wiretaps." United States v. Rose, 802 F.3d 114, 118 (1st Cir. 2015). "Title III provides a comprehensive scheme for the regulation of electronic surveillance, prohibiting all secret interception of communications except as authorized by certain state and federal judges in response to applications from specified federal and state law enforcement officials." Rodrigues, 850 F.3d at 6 (quoting Dalia v. United States, 441 U.S. 238, 249 (1979)).

[1] Santana-Dones acknowledges that this is the correct standard of review under our circuit precedent, but "wishes to preserve for the record [the argument] that such a standard does not comport with statutory requirements or with due process under the Fifth Amendment because it relieves the Government of its burden of proof." Given his concession, we need not dwell upon the argument that he wishes to preserve.

Congress has made pellucid the law's main purposes: "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." Gelbard v. United States, 408 U.S. 41, 48 (1972) (quoting S. Rep. No. 90-1097, at 66 (1968), as reprinted in 1968 U.S.C.C.A.N. 2153)). It follows, then, that "wiretapping is to be distinctly the exception — not the rule." United States v. Hoffman, 832 F.2d 1299, 1307 (1st Cir. 1987).

To ensure that the exception does not swallow the rule, the law "imposes a set of statutory requirements on top of the constitutional requirements applicable to ordinary search warrants." United States v. Burgos-Montes, 786 F.3d 92, 101 (1st Cir. 2015). Of particular pertinence for present purposes, the wiretap application must contain (in addition to the foundational showing of probable cause) "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." United States v. Nelson-Rodriguez, 319 F.3d 12, 32 (1st Cir. 2003) (quoting 18 U.S.C. § 2518(1)). "This aptly-named 'necessity' prong requires the government to have 'made a reasonable, good faith effort to run the gamut of normal investigative procedures before resorting to means so intrusive as electronic interception of telephone calls.'" Rose,

802 F.3d at 118 (quoting United States v. Cartagena, 593 F.3d 104, 109 (1st Cir. 2010)).

Of course, necessity is "a relative term – and it is context-specific." Gordon, 871 F.3d at 46. Necessity must, therefore, "be viewed through the lens of what is pragmatic and achievable in the real world." Id. at 45. This is particularly true in cases – like this one – that involve large, complex drug-trafficking networks: "[b]ecause drug trafficking is inherently difficult to detect and presents formidable problems in pinning down the participants and defining their roles, investigative personnel must be accorded some latitude in choosing their approaches." United States v. David, 940 F.2d 722, 728 (1st Cir. 1991).

In the case at hand, the government pinned its hopes for a wiretap authorization on an affidavit executed by Michael P. Boyle, a DEA special agent.[2] The defendants challenge the adequacy of this affidavit as a means of demonstrating necessity. Although their challenge is multi-dimensional, their central thesis is that the government gave short shrift to traditional investigative procedures and sought to resort to wiretap surveillance with

[2] At the time he submitted the affidavit, Boyle had been a DEA special agent for over twenty-four years and had served as the case agent for numerous high-priority drug and gang cases. In his own words, he had received "hundreds of hours of additional specialized training in narcotics law enforcement, including courses in drug trafficking, criminal enterprises and gangs."

precipitous haste. The district court rejected this thesis, determining that the government "made a reasonably good faith effort to run the gam[ut] of normal investigative procedures before resorting to electronic surveillance."

We begin with bedrock: the Supreme Court has warned that a wiretap is "not to be routinely employed as the initial step in criminal investigation." United States v. Giordano, 416 U.S. 505, 515 (1974). Even so, "the government need not demonstrate that it exhausted all investigative procedures" before turning to a wiretap. Santana, 342 F.3d at 65. To strike this balance, a reviewing court must examine whether reasonable procedures were attempted (or at least thoroughly considered) prior to seeking a wiretap. See United States v. Lopez, 300 F.3d 46, 52 (1st Cir. 2002). Relatedly, the court must examine the need for a wiretap in light of what those procedures yielded. See United States v. Delima, 886 F.3d 64, 70 (1st Cir. 2018).

The defendants counter that the government made a gadarene rush to employ electronic surveillance and that, as a result, its attempt to show necessity is unconvincing. Here, however, the district court supportably determined that Boyle's affidavit was sufficient to allay any reasonable concern that the wiretap was being sought prematurely. The affidavit demonstrated that the government had employed (and exhausted) a number of traditional investigative measures over the course of more than

six months, which included obtaining information from confidential sources and informants; conducting protracted physical surveillance; participating in controlled drug buys; issuing administrative subpoenas for telephone, rental car, and travel records; and analyzing telephone records and pen register data. The district court found that nothing in Boyle's affidavit, fairly read, suggested an effort on the government's part to shortcut normal procedures. This finding easily passes muster under clear error review.

Next, the defendants assert that the affidavit demonstrated the opposite of what the government intended. Rather than showing that the procedures employed to that point had failed to achieve the goals of the investigation, the affidavit — as Santana-Dones says in his brief — is a testament to the government's "great investigative success by traditional investigative means." He adds that the government "had more than enough 'goods' to pursue criminal prosecution but instead wanted to get to bigger fish." Seen in this light, the defendants contend, the more intrusive wiretap procedure was not necessary.

The district court rejected this contention, and so do we. The inquiry into whether the government has sufficiently demonstrated necessity does not hinge on whether it already has garnered enough goods to pursue criminal prosecution. After all, an application for a wiretap will always have to disclose some

meaningful level of previous success in order to satisfy the probable cause requirement and justify further investigation. See Rose, 802 F.3d at 119 n. 1; Nelson-Rodriguez, 319 F.3d at 32. Thus, the inquiry must be directed to whether traditional investigative procedures already have succeeded or would be likely to succeed in laying bare the full reach of the crimes that are under investigation. See Delima, 886 F.3d at 70; Villarman-Oviedo, 325 F.3d at 10. If not, the government may be able – as here – to show the need for a wiretap in order to complete its investigation. See Rose, 802 F.3d at 119 (holding that some level of success in investigation did not foreclose a finding of necessity when "the government was still seeking a wealth of information at the time that it submitted the wiretap applications").

To be sure, the level of success achieved through a given procedure will vary in relation to the scope of the investigation as established by the government. It follows that, in seeking a wiretap, the government cannot be permitted to set out goals that are either unrealistic or overly expansive. See Delima, 886 F.3d at 70. Placing a judicial imprimatur on such a tactic would allow the government to characterize any level of success as incomplete and, thus, to portray a wiretap as necessary in virtually every circumstance. See United States v. Blackmon, 273 F.3d 1204, 1211 (9th Cir. 2001) ("The government may not cast its investigative

net so far and so wide as to manufacture necessity in all circumstances.").

Here, however, the government's stated investigatory goals mirror those that we have sanctioned in earlier wiretap cases. The government's brief summarizes those goals as including "discovering the sources, delivery means, storage locations, and distribution methods for the narcotics; locating resources used to finance the trafficking; and determining how the conspiracy invested and laundered their drug proceeds." The district court implicitly found these goals, which focused on locating distribution sources and tracking funds, both reasonable and attainable.

Information such as the government sought by means of the proposed wiretap is meat and potatoes in a drug-trafficking investigation, not pie in the sky. This helps to explain both why the stated goals of the investigation appear reasonable and attainable and why we conclude that the district court's implicit finding was not clearly erroneous. And in so concluding, we do not write on a pristine page. For instance, we held in Delima that the government's investigatory goals were not overly broad when the government sought to "(1) identify the conspiracy's leaders; (2) ascertain the names, phone numbers, and addresses of associates of the conspiracy, including drug suppliers, distributors, and customers; (3) determine the manner in which

drugs were trafficked [] and stored . . . ; and (4) discover the methods used by the organization to funnel proceeds back to individual participants." 886 F.3d at 70. So, too, in United States v. Martinez, we identified as "discrete and realistic goals for a criminal drug investigation" the government's stated objectives of identifying drug suppliers, discerning the manner in which the organization transported drugs, establishing how payments were made, pinpointing storage locations, and understanding how the coconspirators laundered and invested drug proceeds. 452 F.3d 1, 6 (1st Cir. 2006).

The district court also found that the government's affidavit described a level of success through traditional procedures that fell short of meeting these "legitimate and attainable" goals. Id. at 7. This finding, too, passes muster under clear error review. We hold, therefore, that the government's successful use of traditional investigative tools up to the date of Boyle's affidavit does not defenestrate its showing of necessity. See United States v. Cao, 471 F.3d 1, 3 (1st Cir. 2006) ("Plainly the partial success of the investigation did not mean that there was nothing more to be done." (emphasis in original)).

The defendants launch yet another attack on the government's showing of necessity. They say that the government did not sufficiently demonstrate the failure, futility, or danger

of traditional investigative procedures. Their argument rests heavily on the fact that one of the government's confidential sources, who previously had engaged only in controlled drug buys, was invited to work directly for the drug-trafficking organization but refused on the government's instructions. Building on this foundation, the defendants maintain that Boyle's affidavit "never establishe[d] with any logic" why the DEA failed to avail itself of this opportunity to penetrate the drug ring. Moreover, the defendants insist that the government presented no evidence of any likely danger.

Like the district court, we review the government's assessment that a specific investigative opportunity is overly dangerous or unlikely to be productive in a "practical and commonsense manner." Hoffman, 832 F.2d at 1307 (quoting United States v. Scibelli, 549 F.2d 222, 226 (1st Cir. 1977)). Here, some of the statements contained in Boyle's affidavit are based, at least in part, upon his experience as a specially trained agent. "We have regularly upheld affidavits in support of wiretap applications where the agents assert a well-founded belief" that traditional investigative procedures had run their course and that further use of them would likely prove futile in achieving the goals of the investigation. Rodrigues, 850 F.3d at 10. So, too, where the agents assert a well-founded belief that traveling down

a particular investigative avenue would be too dangerous. See, e.g., Ashley, 876 F.2d at 1075.

Viewed against this backdrop, it is evident that the mere existence of an opportunity for a government cooperator to take a more prominent position in the targeted enterprise does not automatically render a wiretap unnecessary. United States v. Woods, 544 F.2d 242 (6th Cir. 1976), illustrates this point. There, a government informant had declined an invitation to become a "lieutenant" in the enterprise under investigation. Id. at 257. The defendant moved to suppress subsequently gathered wiretap evidence on the basis that the government turned down this invitation. The district court denied the motion, and the Sixth Circuit affirmed, stating that the informant's opportunity to "penetrate deeper into a criminal organization under investigation" did not in any way undermine the government's showing of necessity. Id.

Boyle's affidavit struck a similar tone. In it, he highlighted several potential pitfalls. He first reasoned that even if the confidential source became a member of the drug-trafficking organization, she was unlikely to gain access to needed "information such as the identity of the source of supply, the methods of delivery or the intended transportation route, or the larger distribution network." In support, Boyle noted the high degree of compartmentalization that characterized the drug-

trafficking organization and what would be the source's entry-level status. Based on these representations — which comprise appreciably more than "conclusory statements that normal techniques would be unproductive," Ashley, 876 F.2d at 1022 — the district court concluded that the government sufficiently showed that the proposed infiltration would in all probability be futile as a means of achieving certain goals of the investigation and, thus, did not obviate the necessity for a wiretap. This finding is not clearly erroneous.

If more were needed — and we doubt that it is — the district court also gave weight to Boyle's expressed concern that an attempt to infiltrate the organization could backfire and jeopardize the entire investigation. Boyle's affidavit persuasively predicted a greater likelihood of exposure should an infiltration be attempted, emphasizing the wariness of members of the drug ring and the fact that the government's other confidential source had already been compromised. Given these concerns, we discern no clear error in the district court's determination that the risk of exposure reinforced the government's decision not to try the infiltration gambit before seeking a wiretap.[3]

[3] In a related vein, the district court concluded that pursuing infiltration of the drug-trafficking organization was apt to be too dangerous. The court based its conclusion on the inherent perils of asking a government cooperator to work undercover for a large drug-trafficking organization and the risk of discovery. Even though Boyle's affidavit was not specific on

In sum, the limited prospect of advancing the investigation's goals, the potential jeopardy to the confidential source, and the risk of exposing the investigation coalesced to provide a firm basis for the district court's conclusion that the game was not worth the candle. It follows inexorably, as night follows day, that the opportunity to infiltrate did not render the proposed wiretap unnecessary.

That ends this aspect of the matter. We hold that the district court did not err in concluding that the wiretap application, read in tandem with its supporting affidavit, was more than minimally adequate to justify the authorization of a wiretap. Consequently, we reject the defendants' unified claim of error.

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this score — it stated, in conclusory terms, only that the government feared that an attempt to infiltrate the organization would "pose a serious risk to the personal safety" of the confidential source — the status and circumstances of the investigation justified a reasoned belief that the proposed infiltration was fraught with danger. See Gonzalez, 412 F.3d at 1115 ("Quite sensibly, the necessity requirement for a wiretap order does not compel law enforcement officers to use traditional investigative strategies at the risk of danger to themselves or others."); United States v. Smith, 31 F.3d 1294, 1300 (4th Cir. 1994) (affirming district court's finding that infiltration was "too dangerous to be a reasonable option"); see also United States v. Mills, 710 F.3d 5, 13 (1st Cir. 2013) (stating that "snitching is dangerous work, and informants literally put their lives on the line by doing what they do").

III. THE REMAINING CLAIMS.

Vasquez — who is represented in this court by yet another counsel — advances two more claims of error. First, he submits that the district court erred in denying his motion for an extension of time within which to file additional motions to suppress. Second, he submits that certain of his prior lawyers (Counsel 2A, 2B, and 3) abridged his Sixth Amendment right to effective assistance of counsel. We discuss these claims of error sequentially.

A. Extension of Time.

Court-imposed deadlines are often used to ensure the orderly administration of justice — and quite properly so. In federal criminal cases, district courts typically set such deadlines for the filing of pretrial motions. This practice is memorialized in Federal Rule of Criminal Procedure 12(c)(1), which provides in pertinent part that a district court may, in its discretion, "set a deadline for the parties to make pretrial motions." The court may enlarge or revise such a deadline at any time before trial. See Fed. R. Crim. P. 12(c)(2).

When a party seeks to file a pretrial motion out of time, the district court may, upon a showing of "good cause," grant such a motion. Fed. R. Crim. P. 12(c)(3). This good cause standard gives Rule 12(c) some bite, underscoring the district court's authority to set and enforce motion-filing deadlines. Cf. United

States ex. rel. D'Agostino v. EV3, Inc., 802 F.3d 188, 194 (1st Cir. 2015) (discussing civil analogue to Rule 12(c)). We review a district court's decision to deny relief under Rule 12(c)(3) solely for abuse of discretion. See United States v. Arias, 848 F.3d 504, 513 (1st Cir. 2017); United States v. Santos Batista, 239 F.3d 16, 20 (1st Cir. 2001).

We move now from the general to the specific. Early on, the parties in this case filed a joint memorandum, see D. Mass. R. 116.5(c), setting a June 13, 2016, deadline for filing pretrial motions to suppress. The district court acquiesced in this deadline, and the defendants twice obtained judicial extensions of it. The latest version of the deadline expired on July 18, 2016. By then, the defendants had filed their joint motion to suppress the wiretap evidence. See supra Part II.

The district court denied the joint suppression motion on October 11, 2016. Vasquez's lawyers (Counsel 2A and 2B) withdrew shortly thereafter. They were succeeded by Counsel 3, who served in that capacity for less than a month and withdrew on December 5, 2016. Three days later, the district court appointed Counsel 4 to represent Vasquez.

On January 3, 2017, Counsel 4 moved for a 90-day extension of time within which to file a motion to suppress. Counsel 4 indicated that Vasquez wished to file a motion to suppress evidence obtained from the search of his home and

"possibly" another motion to suppress wire communications. In a hearing on the motion to extend, Counsel 4 doubled down, stating that Vasquez also wished to move to suppress the fruits of the GPS tracking warrant.

Because Vasquez's motion for an extension effectively sought leave to file untimely motions, it directly implicated Rule 12(c)(3)'s good cause standard. See United States v. Sweeney, 887 F.3d 529, 534 (1st Cir.), cert. denied, 139 S. Ct. 322 (2018). We have interpreted the good cause standard to require a showing of both cause (that is, a good reason for failing to file a motion on time) and prejudice (that is, some colorable prospect of cognizable harm resulting from a failure to allow the late filing). See Arias, 848 F.3d at 513; Santos Batista, 239 F.3d at 19. "Such a showing is, by its very nature, fact-specific." United States v. Ayer, 857 F.2d 881, 885 (1st Cir. 1988).

In the court below, Vasquez's attempt to show good cause consisted of characterizing his prior lawyers as either too busy to file timely motions or simply guilty of dereliction of duty. For example, he suggested that Counsel 2A and 2B "surely spent the bulk of [their] time reviewing the voluminous related discovery and preparing the very well-crafted motion and memorandum" on the wiretap suppression motion and, thus, did not have enough time to file other motions to suppress. He surmised that Counsel 2A and 2B would have filed these additional motions if they had more time,

and that their failure to file these motions indicated some irredeemable flaw in their representation.

The district court rejected Vasquez's speculative arguments, finding that Counsel 2A and 2B had "ample opportunity to prepare and present the issues," especially since the relevant deadline had been suggested by the defendants and twice extended by the court. The district court further found that Vasquez had been represented by "experienced, able and qualified" attorneys and that he could not "avail himself of a 'do over' [simply] because he ha[d] successor counsel."

We detect nothing resembling an abuse of discretion in the district court's conclusion that Vasquez failed to demonstrate good cause for reopening the motion-filing deadline over five months after it had expired. Good cause for allowing a defendant to file motions out of time demands more than the appearance of new counsel seeking to second-guess the decisions of prior counsel. See United States v. Trancheff, 633 F.3d 696, 698 (8th Cir. 2011). After all, allowing new counsel to reopen an expired deadline in order to pursue strategic options forgone by prior counsel would put a premium on changing counsel and unfairly advantage the defendant.

Nor is there any basis for a claim that Vasquez was subjected to unreasonable temporal constraints. His then-counsel participated in the setting of the original deadline for filing

motions to suppress, and the district court twice obliged the defendants (including Vasquez) when they sought to enlarge this deadline. All told, Vasquez had a total of 297 days from the date of his arraignment until the expiration of the extended deadline within which to file pretrial motions. That was ample time for his counsel to prepare and file any strain of suppression motion.

To say more about this claim of error would be pointless. We conclude, without serious question, that the district court acted well within the wide encincture of its discretion in denying Vasquez's motion to extend.

B. Ineffective Assistance of Counsel.

Vasquez also argues that several of his prior lawyers (namely, Counsel 2A, 2B, and 3) were constitutionally ineffective in representing him. See U.S. Const. amend. VI; see also Strickland v. Washington, 466 U.S. 668, 687 (1984). This claim of error, though, was not adjudicated in the district court. While Vasquez's motion to extend alleged that ineffective assistance of counsel was one of the reasons explaining the untimeliness of the motion, he did not make a Sixth Amendment claim at that time. Consequently, no attempt was made to develop a record that might be suitable for the adjudication of such a claim.

"We have held with a regularity bordering on the monotonous that fact-specific claims of ineffective assistance cannot make their debut on direct review of criminal convictions,

but, rather, must originally be presented to, and acted upon by, the trial court." United States v. Mala, 7 F.3d 1058, 1063 (1st Cir. 1993). In adopting this prudential praxis, we have reasoned that "such claims typically require the resolution of factual issues that cannot efficaciously be addressed in the first instance by an appellate tribunal." Id. More particularly, "'why counsel acted as he did [is] information rarely developed in the existing record,' and this information is crucial to resolve an ineffective assistance claim." United States v. Vázquez-Larrauri, 778 F.3d 276, 294 (1st Cir. 2015) (emphasis and alteration in original) (quoting United States v. Torres-Rosario, 447 F.3d 61, 64 (1st Cir. 2006)). Unless "the critical facts are not genuinely in dispute and the record is sufficiently developed to allow reasoned consideration" of a claim of ineffective assistance, a criminal defendant who wishes to pursue such a claim must do so in a collateral proceeding. United States v. Natanel, 938 F.2d 302, 309 (1st Cir. 1991).

Apparently mindful that, over the years, we have resolutely hewed to this principle, see, e.g., United States v. Miller, 911 F.3d 638, 642, 646 (1st Cir. 2018); United States v. Kifwa, 868 F.3d 55, 63-64 (1st Cir. 2017); United States v. Torres-Estrada, 817 F.3d 376, 379 (1st Cir. 2016), Vasquez struggles to bring his case within the narrow confines of the Natanel exception. He suggests, based primarily on the assessment of Counsel 4, that

the additional motions to suppress had such obvious merit that the failure to file them within the allotted time frame was unquestionably a grave mistake. The premise on which this suggestion rests is sound: the Natanel exception might apply if the record was sufficiently developed to demand a conclusion that the failure to file the additional suppression motions was "objectively unreasonable 'under prevailing professional norms.'" United States v. Mercedes-De La Cruz, 787 F.3d 61, 67 (1st Cir. 2015) (quoting Strickland, 466 U.S. at 688). But this is not such a case.

The searches at issue here were conducted pursuant to duly issued warrants, so that a court, in each instance, had made a preliminary determination of probable cause. Moreover, we have no way of telling, on this incomplete record, why Vasquez's prior counsel did not file such motions. The rule of Occam's Razor teaches that the simplest of competing theories should often be preferred and, here, the obvious reason — that counsel simply did not believe that the motions would succeed — is entirely plausible. In a nutshell, the record simply does not justify a finding that counsel's failure to file additional motions to suppress was objectively unreasonable under prevailing professional norms.

The short of it is that the relevant facts have not been adequately developed. And, thus, Vasquez's ineffective assistance

of counsel claim falls squarely within the Mala rule. We therefore dismiss this claim of error without prejudice.

IV. CONCLUSION.

We need go no further. For the reasons elucidated above, we affirm the judgments of the district court; without prejudice, however, to Vasquez's right to raise his ineffective assistance of counsel claim, should he so elect, in a collateral proceeding pursuant to 28 U.S.C. § 2255.

So Ordered.

United States Court of Appeals
For the First Circuit

No. 17-2113

UNITED STATES OF AMERICA,

Appellee,

v.

OSVALDO VASQUEZ, a/k/a Chu Chu, a/k/a Anthony Christopher,

Defendant, Appellant.

JUDGMENT

Entered: March 29, 2019

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Massachusetts.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed without prejudice to the filing of an ineffectiveness of counsel claim in a collateral proceeding pursuant 28 U.S.C. § 2255.

By the Court:

Maria R. Hamilton, Clerk

cc:
Osvaldo Vasquez
Marie Theriault
Cynthia A. Young
Mark Jon Grady
Alexia R. De Vincentis