Supreme Court Docket No.
First Circuit Court of Appeals Docket No. 18-1039

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

David Wright
Petitioner-Appellant

v.

United States of America
Respondent-Appellee

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

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Whether FISA's emergency provision, 50 U.S.C. §1805(e), which allows warrantless surveillance of American citizens on America soil for up to seven days based on the unilateral and unreviewable judgment of the Attorney General, is unconstitutional.

II. Whether, in a prosecution for conspiracy to commit an act of terrorism transcending national boundaries, 18 U.S.C. §2332b, the Defendant must specifically intend that someone overseas engage in "conduct" and whether the "conduct" element can be satisfied by proof of "communication of some sort."

LIST OF PARTIES

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

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David Wright respectfully petitions this Honorable Court for a writ of certiorari to review the order of the United States Court of Appeals for the First Circuit affirming his convictions on Counts 2 through 5.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit, entered on August 28, 2019, appears at Appendix A to the petition and is

reported at 937 F.3d 8 (1st Cir. 2019). The judgment of the district court, entered on December 19, 2017, appears at Appendix B. The order of the First Circuit denying the Government's Petition for Rehearing, entered on October 25, 2019, appears at Appendix C. The opinion of the district court denying a motion for new trial and other miscellaneous matters, entered on January 22, 2018, appears at Appendix D and is reported at 285 F.Supp.3d 443 (D.Mass 2018). The opinion of the district court denying the Defendant's Motion to Suppress, entered on December 28, 2016, appears at Appendix E and is unreported.

JURISDICTION

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

50 U.S.C. §1805(e) provides as follows:

1) Notwithstanding any other provision of this subchapter, the Attorney General may authorize the emergency employment of electronic surveillance if the Attorney General--

> **(A)** reasonably determines that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained;
> **(B)** reasonably determines that the factual basis for the issuance of an order under this subchapter to approve such electronic surveillance exists;

(C) informs, either personally or through a designee, a judge having jurisdiction under section 1803 of this title at the time of such authorization that the decision has been made to employ emergency electronic surveillance; and

(D) makes an application in accordance with this subchapter to a judge having jurisdiction under section 1803 of this title as soon as practicable, but not later than 7 days after the Attorney General authorizes such surveillance.

18 U.S.C. §2332b provides, in pertinent part:

(a)Prohibited Acts.—

(1)Offenses.—Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)—

(A)

kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon

any person within the United States;…shall be punished as prescribed in subsection (c).

…

(b)Jurisdictional Bases.—

(1)Circumstances.—The circumstances referred to in subsection (a) are—

(A)

the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B)

the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

…

(d)Proof Requirements.—The following shall apply to prosecutions under this section:

(1)Knowledge.—

The prosecution is not required to prove knowledge by any defendant of a jurisdictional base alleged in the indictment.

STATEMENT OF THE CASE

Procedural History

On June 3, 2015, a criminal complaint was filed in the United States District Court in Boston charging Mr. David Wright with Conspiracy to Obstruct Justice. On June 18, 2015, Mr. Wright was charged in a three-count indictment stemming from his communications with two other men about ISIS. Initially, Mr. Wright was charged with 1) conspiracy to provide material support to ISIS, a designated foreign terrorist organization, in violation of 18 U.S.C. §2339B(a)(1) and aiding and abetting – 18 U.S.C. §2 (Count One); 2) Conspiracy to Obstruct Justice - 18 U.S.C. §371 (Count Two)[1]; and 3) Obstruction of Justice - 18 U.S.C. §1519 and Aiding and Abetting – 18 U.S.C. §2 (Count Three).[2]

On April 21, 2016, the Government superseded the indictment, charging Mr. Wright with an additional count for Conspiracy to Commit Acts of Terrorism Transcending National Boundaries – 18 U.S.C. §2332b(a)(2) & (c) (Count Four). (Doc. 60). On February 15, 2017, the Government superseded the indictment for a second time, charging Mr. Wright in a five-count indictment, adding an additional count of obstruction of justice for

[1] The Defendant was charged with count two for allegedly conspiring with Ussamah Rahim to obstruct justice by agreeing with Rahim that he (Rahim) should destroy a laptop computer and mobile phone. (Doc. 13).

[2] The Defendant was charged with count three for allegedly obstructing justice by causing Rahim to destroy his computer. (Doc. 13).

allegedly deleting data from his own computer in violation of 18 U.S.C. §1519 (Count Five). (Doc. 171).

Pretrial, the defense challenged the ex-parte nature of the Government's investigation and non-disclosure of discovery obtained pursuant to FISA and the FAA, filing motions to compel disclosure of FISA-related materials and to suppress the fruits or derivatives of FISA-related electronic surveillance. (Doc. 87). The judge denied these motions on November 14, 2016. (Doc. 146).

On October 18, 2017, after a seventeen-day trial before Judge William Young, Mr. Wright was convicted on all counts. (Doc. 353). On December 19, 2017, the judge sentenced Wright to twenty-eight years imprisonment. (Doc. 409). A timely notice of appeal from the judgement was filed on January 2, 2018 (Doc. 415), and the cases was docketed in the First Circuit Court on January 11, 2018. (Doc. 420).

On August 28, 2019, the First Circuit affirmed the convictions on Counts 2 through 5. The Court ordered a new trial on Count 1 due to an improper jury instruction. See Appendix A. The Government filed a petition for panel rehearing, which was denied on October 25, 2019. See Appendix C.

Statement of Facts

A. The Charged Crime

Beginning in about June 2014, Mr. David Wright ("Wright"), a then twenty-six-year-old American citizen and native of Everett, Massachusetts,

his co-defendant Nicholas Rovinski ("Rovinski") and Mr. Wright's twenty-six-year-old uncle, Mr. Ussamah Rahim ("Rahim"), engaged in discussions regarding their support of the Islamic State of Iraq and the Levant ("ISIL" or "ISIS"), a plot to kill a woman named Pamela Geller on behalf of ISIS[3], as well as a plan to kill unnamed Boston Police officers.

For approximately the next year, the Government monitored these communications electronically, including through surveillance conducted pursuant to the Foreign Intelligence Surveillance Act of 1978 ("FISA") and FISA Amendments Act of 2009 ("FAA"). This surveillance ended on June 2, 2015, when Boston Police and FBI Agents approached Rahim on a public street in Roslindale. Without an arrest warrant, but armed with guns, they surrounded him. When he reportedly pulled out a knife, they shot and killed him. That same day, after Rahim's death, Wright and Rovinski were arrested in their homes.

FISA surveillance

Prior to trial, the Government notified the defense of its intent to use FISA-derived evidence, though it did not identify the specific information that it obtained pursuant to FISA nor did it disclose the contents of any application (or whether there was one).

[3] ISIS had publicly called for her death because it believed she had insulted the Prophet Mohammed.

The defense challenged the ex-parte nature of the Government's investigation and non-disclosure of discovery obtained pursuant to FISA and the FAA, filing motions to compel disclosure of FISA-related materials and to suppress the fruits or derivatives of FISA-related electronic surveillance, as well as fruits of "emergency" surveillance. (Doc. 87). The judge denied these motions. The Government did not disclose the basis for surveillance, nor whether the evidence was seized pursuant to a FISA warrant.

Erroneous Jury Instructions

The Defendant submitted detailed requests for jury instructions on all counts. As to Count 4, the court refused to instruct that the Defendant must specifically intend that someone overseas engage in criminal conduct related to the plot. It instead, over objection, instructed as follows:

> Well, the first two steps are exactly the same, the government has to prove that Mr. Wright was part of a conspiracy, as I have defined that to you. Second, they have to prove -- and the specific intent here, the specific intent is different, but they've got to prove specific intent, they've got to prove it beyond a reasonable doubt. Here the specific intent has got to be to commit acts of terrorism transcending national boundaries.
>
> Now the government has additional things to prove in this Number 2 (Count 4) and here's what they are. It's not just some general crime that could perhaps help ISIS, it's specific crimes and here they are. Under the law the plan has got to be, um, it punishes someone who kills, kidnaps, maims, commits an assault resulting in serious bodily injury or assaults with a dangerous weapon to any person within the United States, those are the crimes. Now of course conspiracy doesn't mean that the people did those things, the conspiracy means that they've got to be planning to do one or more of those specific crimes.

> Second, because it requires, um, transcending national boundaries, in this one there has to be conduct that they're planning within the United States, the conspirators, and there also has to be conduct outside the United States, somewhere, anywhere outside the national boundaries of the United States. The conduct? Now the conduct can be communication of some sort, encouragement, direction, but it's got to be conduct outside the United States. Third -- and so you see for this one somebody in connection with ISIS has got to know something about these three folks or this cell and there has to be some sort of connection there, the government's got to prove, because, as Congress used the language, this has to be the type of terrorism that transcends national boundaries.
>
> Now one or more members of the conspiracy, and the government says the conspiracy is at least Wright, Rahim, and Rovinski, they've got to know about the foreign, um, communication, or direction, or encouragement, or the foreign conduct related to what they're doing, and it doesn't mean that Wright has to know specifically because you see if one is a conspirator, not every conspirator has to know everything every other conspirator is doing. Conspiracy is like a partnership and if one of the -- once they're a partnership, the things that the partners do in furtherance of the conspiracy is attributed to all the partners.
>
> But at least they've got to show that Wright was -- that Wright himself, the person who's on trial here, that he reasonably understood that he was engaged in a conspiracy to do conduct that transcends national boundaries, that has this terrorist connection as I've just defined it to you. And then lastly for this one, not for Question 1, which only requires the conspiracy, the plotting, but for Question 2, the government has to prove that one of the conspirators, at least one of the conspirators, actually did something, did something to make the conspiracy come about. We call it the "overt act," but that's legal talk. You don't need that. You just need to know it's not enough that they plot it, it's not enough that they conspired in all the manner that I've described, but then one of the conspirators, at least one has to do something to make the conspiracy come about. That's Question 2.

(Trial Tr. vol.1, 30-32, October 17, 2017).

REASONS FOR GRANTING THE WRIT

This case presents two issues of national significance for which there is little to no caselaw either at the district court or circuit court level. The first issue is if, and under what circumstances, the FISA emergency provision is constitutional. That provision, 50 U.S.C. §1805(e), purports to allow warrantless monitoring of American citizens on American soil for up to seven days, without a warrant, based on the unreviewable determination by the Attorney General that "an emergency" exists. Because of the risks inherent in allowing agents of the executive branch to unilaterally and without oversight determine when to initiate surveillance of Americans on American soil, this Court ought to set clear guidelines.

The second issue is the definition and proof requirements for the "transcending national boundaries" element of 18 U.S.C. §2332b. That statute punishes an offender with a consecutive sentence of up to life in prison if, *inter alia*, he conspires to commit murder "involving conduct transcending national boundaries." *Id.* The lower courts ruled that conduct which transcends national boundaries could include "communication of some sort" and refused to clarify whether Wright had to specifically intend that someone overseas would be involved in the plan. Because this statute is infrequently, if ever, put to trial, this Court ought to take advantage of the rare opportunity to define its elements and the required proof.

I. FISA's emergency provision, which allows for the electronic surveillance of U.S. citizens on domestic soil for up to seven days without a warrant, is unconstitutional; in the alternative, it should be narrowly construed

The Court erred in denying the Defendant's motions to suppress the evidence obtained under FISA's emergency provision because that portion of the statute is unconstitutional or, in the alternative[4], must be construed narrowly. FISA's emergency provision, 50 U.S.C. §1805(e), purports to authorize electronic surveillance of U.S. Citizens on domestic soil for up to seven days without a warrant. The statute on its face violates the Constitution for two reasons.

First, in contrast to the similar provisions in Title III, 18 U.S.C. §2518(7), the emergency section of FISA fails to delineate the circumstances under which the Attorney General can invoke it. Second, because the statute does not require the Attorney General to disclose the nature of the emergency to the Foreign Intelligence Surveillance Court (or any other court), judicial review over the use of this power is non-existent.[5]

If the emergency provision is deemed facially constitutional, it should be narrowly construed. The Government should only be entitled to rely upon

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[4] Contrary to the First Circuit's ruling, the Defendant did not concede that the statute was facially constitutional. Instead, he pressed an as-applied challenge as an alternative argument.

[5] The First Circuit determined erroneously that the Defendant did not challenge the "ex parte" nature of a FISA motion to suppress. See Argument I(B) *infra*, which was also included in the brief below.

it when there is an immediate threat to human life that necessitates its invocation. The mere "evanescence" of the foreign intelligence itself should not justify its use. Because of FISA disclosure rules, the Defendant is not in a position to argue whether the proposed standard was met in this case nor whether any error was prejudicial.[6]

A. FISA's emergency provision is unconstitutional because it lacks protections comparable to those in Title III

The FISA emergency provision is unconstitutional because it vests unfettered discretion in the Executive Branch, in violation of the Fourth Amendment and the Separation of Powers. Other federal laws, such as Title III, 18 U.S.C. §2518(7), specifically delineate what constitutes an emergency justifying warrantless wiretapping. Yet FISA contains no such definition. *In re Sealed Case*, 310 F.3d 717, 737 (Foreign Int. Surv. Ct. Rev. 2002) ("Obviously, the closer those FISA procedures are to Title III procedures, the lesser are our constitutional concerns.") Instead, under FISA, so long as the Attorney General determines that an "emergency" exists, informs the FISC that he is invoking this emergency provision, and determines that the factual basis for a FISA warrant exists, then the Government may intercept the

[6] The First Circuit deemed this failure a "waiver." This ruling is absurd given that the terms of the statute prohibit the defense from discovering the basis of a FISA authorization and from uncovering the fruits of its use. 50 U.S. Code § 1806(f) (authorizing the trial court to "review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted" and restricting discovery to situations "only where such disclosure is necessary to make an accurate determination of the legality of the surveillance.") *Id*.

communications of U.S. Citizens on domestic soil for up to seven days without a warrant:

> **(1)** Notwithstanding any other provision of this subchapter, the Attorney General may authorize the emergency employment of electronic surveillance if the Attorney General--
>
> **(A)** reasonably determines that an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained;
>
> **(B)** reasonably determines that the factual basis for the issuance of an order under this subchapter to approve such electronic surveillance exists;
>
> **(C)** informs, either personally or through a designee, a judge having jurisdiction under section 1803 of this title at the time of such authorization that the decision has been made to employ emergency electronic surveillance; and
>
> **(D)** makes an application in accordance with this subchapter to a judge having jurisdiction under section 1803 of this title as soon as practicable, but not later than 7 days after the Attorney General authorizes such surveillance.

50 U.S.C. §1805. FISA nowhere defines what constitutes an "emergency" within the meaning of the statute.

Title III on the other hand, defines exactly what constitutes an emergency:

> **a)** an emergency situation exists that involves--
>
> **(i)** immediate danger of death or serious physical injury to any person,
>
> **(ii)** conspiratorial activities threatening the national security interest, or
>
> **(iii)** conspiratorial activities characteristic of organized crime,

18 U.S.C. §2518(7). Moreover, Title III only authorizes warrantless surveillance for up to forty-eight hours, as opposed to seven days. The FISA

emergency provision, on the other hand, gives unfettered discretion to the executive branch to initiate longer-term, warrantless wiretapping of U.S. Citizens on domestic soil, without judicial review. *See Mistretta v. United States*, 488 U.S. 361, 409 (1989) ("…[W]e agree with petitioner that the independence of the Judicial Branch must be "jealously guarded" against outside interference…and that, as Madison admonished at the founding, 'neither of [the Branches] ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers'") (internal citation omitted); *Noriega-Perez v. United States*, 179 F.3d 1166, 1187 (9th Cir. 1999) (Ferguson, J., dissenting) ("When one branch of government removes powers from another branch and places those powers in the control of the third branch, it is for the judiciary to place a stop to the mischief.").

Additionally, under Title III, in the event that emergency surveillance is initiated and an application for a warrant later denied, the prosecuting authority is required to send "an inventory" to the person surveilled, which shall include "(**1)** the fact of the entry of the order or the application; **(2)** the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and **(3)** the fact that during the period wire, oral, or electronic communications were or were not intercepted." 18 U.S.C. § 2518(d). Although for good cause, service of the inventory may be

"postponed," it must eventually be provided. FISA, on the other hand, permits the Government to forgo an inventory altogether:

> On an ex parte showing of good cause to the judge the serving of the notice required by this subsection may be postponed or suspended for a period not to exceed ninety days. Thereafter, on a further ex parte showing of good cause, the court shall forego ordering the serving of the notice required under this subsection.

50 U.S.C. §1805(j).

Finally, under Title III, where emergency surveillance is initiated and a warrant application later rejected, the evidence gleaned is treated as if it had been obtained in violation of the statute. In this circumstance, the Government is prohibited from using the interceptions in any trial or other proceeding. 18 U.S.C. § 2515. On the contrary, FISA permits the Government to use emergency interceptions, even when an application is later denied, "with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person." 50 U.S.C. § 1805(e)(5).

The end result of this provision is that the Government may electronically surveil an American citizen on American soil for seven days, submit an application to the FISA court for continued surveillance which is rejected, decline to notify the subject of the surveillance, and then use that information to prosecute the subject, without any adversarial proceeding and based solely on the judgment of a politically-appointed member of the Executive Branch.

B. The absence of judicial scrutiny over the employment of FISA's emergency provisions render it unconstitutional

Not only does the executive have complete discretion over what constitutes an "emergency," but it is also permitted to keep its rationale a secret from its targets, the public, and even the courts. While the Attorney General is required to report to Congress "the total number of emergency employments," 50 U.S.C. §1808, he is not required to supply the rationale, nor required to disclose these statistics to the public. This is likewise unconstitutional because surveillance decisions left solely in the hands of the Executive Branch infringes on the Fourth Amendment rights of citizens:

> Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates… [T]hose charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div., 407 U.S. 297, 316–17 (1972).

The combination of both unfettered discretion to invoke the emergency provision, along with unfettered secrecy as to why, is constitutionally impermissible. Because the effect of this provision is to divest the courts of

judicial review over the use of the FISA emergency authority, it violates the Fourth Amendment and the Separation of Powers.

C. If it is lawful at all, the emergency provision must be construed narrowly to comply with the Fourth Amendment

Even if the Court determines that the emergency provision is not per se unlawful, then it should order the Government to disclose its reasons for invoking the exception and rule that the power can be employed only in narrow circumstances. The mere loss, or potential loss, of foreign intelligence, cannot alone justify warrantless surveillance of U.S. Citizens on domestic soil. Otherwise, the exception would swallow the rule. Instead, the Attorney General should only be entitled to utilize this power when he has evidence that there is an imminent threat to life, where the surveillance would assist in the protection of that life, and where a warrant cannot be obtained in time to stop this imminent threat to life.[7]

1. Similar provisions in other federal statutes are narrowly-construed

No case has ever addressed the applicability of the FISA emergency provision. Just a few cases have discussed emergency provisions in other statutes. For example, in the context of Title III, the court in *Nabozny v. Marshall*, 781 F.2d 83, 85 (6th Cir. 1986), ruled that an emergency applied where the defendant took a bank manager hostage and was demanding

[7] Again, because of FISA's disclosure rules, the Defendant has no idea whether this standard was satisfied in this case.

money for his safe return. *See also United States v. Duffey*, 2009 WL 2356156, at *5 (N.D. Tex. July 30, 2009) (imminent violent armed bank robbery justifies warrantless wiretap under Title III). Likewise, in *State v. Hausner*, 230 Ariz. 60, 72 (2012), which analyzed the issue under a similar state law, the court ruled that "the police needed the emergency intercept in order to prevent another random shooting…[which] establish[es] that there was an immediate danger of death or serious physical injury."

On the other hand, in *United States v. Crouch*, 666 F. Supp. 1414, 1417–18 (N.D. Cal. 1987), the court ruled that mere evidence of a future violent crime is not enough to justify warrantless surveillance. In that case, police had evidence that the defendant--an escaped convict and one of the FBI's "Most Wanted"--was planning an armed bank robbery with several co-conspirators. Yet because the robbery was not imminent, the court ruled that the warrantless eavesdropping was unlawful:

> At no point did the situation rise to the level of an imminent danger of serious injury or death. The intercepted conversations revealed that the bank robbery was still in the planning stage…Congress, when it enacted the Omnibus Crime Control and Safe Streets Act of 1968, provided for what it perceived to be adequate safeguards of the right of the people to be free from unreasonable governmental intrusions into legitimate expectations of privacy. It carefully spelled out the judicial function of prior approval of electronic eavesdropping, except in certain narrowly defined emergency situations. An emergency must arise quickly and before there is time to seek judicial approval. The government's argument that an emergency exists any time that serious criminal activity is planned for some unspecified date in the future circumvents the narrow exception to the general requirement of prior judicial approval carved out in section 2518(7).

Id.; see also United States v. Capra, 501 F.2d 267, 277 (2d Cir. 1974), citing Senate Rpt. No. 1097, 1968 U.S. Code Cong. and Admin. News, pp. 2112, 2193 ("Congress had in mind by use of the term 'emergency' an important event, limited in duration, which was likely to occur before a warrant could be obtained.").

Another federal statute authorizes warrantless searches in time sensitive, life threatening situations: the Stored Communications Act ("SCA"). *See* 18 U.S.C. §2702. That law's emergency provision allows a company to turn over the records of one of its customers without a court order "if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency." *Id.*; *see also In re Application of U.S. For a Nunc Pro Tunc Order For Disclosure of Telecommunications Records*, 352 F. Supp. 2d 45, 47 (D. Mass. 2005) ("The law grants authority to providers to disclose records in emergency situations such as this one in which time is of the essence and requiring that a court order be obtained would cause delay which could result in severe jeopardy for a victim of crime.").

Courts have found that a valid emergency existed under the SCA existed when (1) a missing child's mother told police that her daughter telephoned and said that she had been kidnapped, taken across state lines, and was being forced to work as a prostitute, *United States v. Gilliam,* 2012

WL 4044632, at *1–2 (S.D.N.Y. Sept. 12, 2012); (2) a kidnapping involving a ransom request had occurred, *In re Application of United States for a Nunc Pro Tunc Order for Disclosure of Telecomm. Records,* 352 F.Supp.2d 45, 47 (D. Mass. 2005); (3) police were investigating a suspected retaliation murder by someone known to be armed and dangerous, who had committed criminal assault in the past, and who likely knew the identities and potential whereabouts of law enforcement's confidential informants, *United States v. Caraballo,* 963 F.Supp.2d 341, 362–63 (D. Vt. 2013); (4) a store clerk had been shot during a suspected gang-related robbery that fit the description of prior robberies and the detective believed another robbery was forthcoming, *United States. v. Takai,* 943 F.Supp.2d 1315, 1323 (D.Utah 2013); and (5) police were investigating a double homicide and had written to the provider that the suspect "presents an immediate danger to any law enforcement officer who may come into contact with this person," *Registe v. State,* 734 S.E.2d 19, 20–21 (Ga. 2012).

In contrast, one court has held that an emergency did not exist for police to obtain a "ping" of a suspect's cell phone when the police had already located the suspect. *People v. Moorer*, 39 Misc. 3d 603, 610, 959 N.Y.S.2d 868, 875 (Co. Ct. 2013). Another held that it was not an emergency under the SCA where "officers were investigating a homicide caused by a bullet wound to the head, officers had probable cause for appellee's arrest, and appellee could

have killed someone else. *State v. Harrison*, 2014 WL 2466369, at *5 (Tex. App. May 30, 2014).

The above cases demonstrate that courts have narrowly construed the term "emergency" when the Government invokes it to avoid compliance with a law's other requirements. This Court should thus be judicious in its application of FISA's emergency provision.

2. Had Congress wished to broadly define "emergency," it could have done so

Had Congress wanted to broadly define the term "emergency," it could have done so. For example, if it wished to define "emergency" to include any of the well-known common law exceptions to the Fourth Amendment, it could have used the term "exigent circumstances" instead. *See e.g. Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751, 2772 (2014) ("[w]hen Congress wants to link the meaning of a statutory provision to a body of [the Supreme] Court's case law, it knows how to do so.") Moreover, it could have incorporated the definition of emergency from another federal law, such as Title III.

Because FISA already operates as an exception to the Fourth Amendment operating at the law's outer limits, courts must ensure literal and strict compliance. Therefore, Congress' failure to define "emergency" either suggests that it meant the term to be narrowly construed or compels this Court to treat it as such. Thus, the mere loss, or potential loss, of foreign

intelligence, cannot alone justify warrantless electronic surveillance of Americans. Rather, the emergency provision should only be used when there is an immediate threat to life which the surveillance is necessary to prevent.

II. The Court's instructions on Count 4, 18 U.S.C. § 2332b, relieved the Government of its burden of proof and erroneously defined a key element

The court's instructions on Count 4, conspiracy to commit an act of terrorism transcending national boundaries, violated the Fifth Amendment's guarantee of Due Process, which requires the government to prove beyond a reasonable doubt every element of the offense. Jury instructions violate a defendant's constitutional right to Due Process if they relieve the government of its obligation to meet that requirement. *Middleton v. McNeil*, 541 U.S. 433, 437 (2004); *United States v. Latorre-Cacho*, 874 F.3d 299, 302 (1st Cir. 2017). Specifically, the court relieved the Government of its obligation to prove that the Defendant intended the objective of the charged conspiracy and failed to properly define "overseas conduct."

The court's instruction on Count 4 was as follows:

> Well, the first two steps are exactly the same, the government has to prove that Mr. Wright was part of a conspiracy, as I have defined that to you. Second, they have to prove -- and the specific intent here, the specific intent is different, but they've got to prove specific intent, they've got to prove it beyond a reasonable doubt. Here the specific intent has got to be to commit acts of terrorism transcending national boundaries.
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Under the law the plan has got to be, um, it punishes someone who kills, kidnaps, maims, commits an assault resulting in serious bodily injury or assaults with a dangerous weapon to any person within the United States, those are the crimes. Now of course conspiracy doesn't mean that the people did those things, the conspiracy means that they've got to be planning to do one or more of those specific crimes.

Second, because it requires, um, transcending national boundaries, in this one there has to be conduct that they're planning within the United States, the conspirators, and there also has to be conduct outside the United States, somewhere, anywhere outside the national boundaries of the United States. The conduct? Now the conduct can be communication of some sort, encouragement, direction, but it's got to be conduct outside the United States. Third -- and so you see for this one somebody in connection with ISIS has got to know something about these three folks or this cell and there has to be some sort of connection there, the government's got to prove, because, as Congress used the language, this has to be the type of terrorism that transcends national boundaries.

Now one or more members of the conspiracy, and the government says the conspiracy is at least Wright, Rahim, and Rovinski, they've got to know about the foreign, um, communication, or direction, or encouragement, or the foreign conduct related to what they're doing, and it doesn't mean that Wright has to know specifically because you see if one is a conspirator, not every conspirator has to know everything every other conspirator is doing. Conspiracy is like a partnership and if one of the -- once they're a partnership, the things that the partners do in furtherance of the conspiracy is attributed to all the partners.

But at least they've got to show that Wright was -- that Wright himself, the person who's on trial here, that he reasonably understood that he was engaged in a conspiracy to do conduct that transcends national boundaries, that has this terrorist connection as I've just defined it to you. And then lastly for this one, not for Question 1, which only requires the conspiracy, the plotting, but for Question 2, the government has to prove that one of the conspirators, at least one of the conspirators, actually did something, did something to make the conspiracy come about. We call it the "overt act," but that's legal talk. You don't need that. You just need to know it's not enough that they plot it, it's not enough that they conspired in all the manner that I've

> described, but then one of the conspirators, at least one has to do something to make the conspiracy come about. That's Question 2.

(Trial Tr. vol.1,30-32, October 17, 2017). This instruction was incorrect.

The relevant statute, 18 U.S.C. §2332b(g), provides a general definition of what type of overseas involvement is required: **"**Conduct transcending national boundaries means conduct occurring outside of the United States in addition to the conduct occurring in the United States." *Id*. Therefore, it is not sufficient to show "communication of some sort," as the court put it, but rather someone overseas must have, at the very least, actively communicated to the Defendant or a co-conspirator about the substance of the plan to kill in the United States. Indeed, the only fair reading of the statute is that the overseas conduct must be, in some way, criminal. In other words, the conduct must be significant enough that it would subject the actor to accomplice or co-conspirator liability if he were in the United States, since the intent of Congress appears to be the prevention of transnational terrorist plots.

Further, because Count 4 is charged as a conspiracy, the Government has an additional hurdle to overcome. To prove this offense, the Government must show beyond a reasonable doubt that the Defendant intended that the agreed-upon killing would involve conduct transcending national boundaries. See *United States v. Gonzalez*, 570 F.3d 16, 24 (1st Cir. 2009) (defining elements of conspiracy). Yet the court refused to tell the jury that specific intent was required on this element.

The Court did instruct that "the specific intent has got to be to commit acts of terrorism transcending national boundaries." (Trial Tr. vol.1,30-32, October 17, 2017). But the Defendant requested, and the Court declined, to clarify that the "intent" applied not only to the "act of terrorism" itself, but that the Defendant also had to intend that someone overseas would engage in conduct related to the terrorist plot. This was a critical distinction because failing to instruct that Wright had to intend overseas involvement risked rendering that element jurisdictional, as the Government successfully argued below. See Appendix D.

The plain language of the statute belies the Government's position and the lower court's ruling. Title 18 U.S.C. §2332(b) contains one section on "prohibited acts," part "a," which includes a prohibition against murder "involving conduct transcending national boundaries." *Id*. The statute further requires that the Government establish one of the "jurisdictional bases" in part "b" (such as the use of mail or telephone). Part "d," which outlines the proof requirements, states that: "The prosecution is not required to prove knowledge by any defendant of a jurisdictional basis alleged in the indictment," a clear reference to part "b." *Id*. Thus, the plain language of the statute shows that the defendant need not know that, for example, "the mail or any facility of interstate or foreign commerce is used in furtherance of the offense." *Id*.

Nothing in the statute, however, suggests that the other traditional elements of conspiracy law, which require a specific intent to commit the underlying crime, in this case part "a", should be set aside. Neither the Government nor the court cited any case law for its rewriting of the statute. In argument, the Government relied on "The Conference Report on the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)" to suggest that the element is jurisdictional. Yet if Congress wanted to make it so, it could have included the "overseas" element in section "b" of the statute, rather than "a." One off-hand remark in a piece of legislative history should not be sufficient to redefine the Government's burden. Therefore, the court should have instructed as Wright requested. It should have required the Government to prove that the Defendant himself specifically intended that someone overseas would be involved in the terrorist act.

The court's failure to do so was prejudicial because the evidence of Wright's intent on this point was minimal. In fact, the only evidence in the case of potential overseas conduct involved his deceased accomplice Rahim, who had online contact with ISIS members in the Middle East. Yet when the Defendant was first told by Rahim of a supposed ISIS recruiter "Mr. Hussain" one week before his arrest, he responded "who is that?" See Exhibit 57. Further, there was no evidence that he communicated with anyone else overseas. Since the Government's proof on this element was weak, the Court's error likely affected the jury's verdict.

CONCLUSION

Because this case presents two issues of national significance, the deployment of warrantless, electronic surveillance and the definition and proof requirements of a rarely-tried life felony, this Court should grant the Petition for Certiorari.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

David Wright
Petitioner-Appellant

v.

United States of America
Respondent-Appellee

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

PROOF OF SERVICE

I, Michael Tumposky, do swear or declare that on this the 23rd day of January, 2020, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class

postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The name and address of the person served is as follows:

Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W., Room 5616
Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.
Executed on

/s/ Michael Tumposky
Michael Tumposky

As required by Supreme Court Rule 33.1(h), I certify that the document contains 6185 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 23, 2020

/s/ Michael Tumposky
Michael Tumposky