

No. 21-410

In The
Supreme Court of the United States

GREGORIO GIGLIOTTI
and ANGELO GIGLIOTTI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

PETITION FOR REHEARING

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PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 44.2, Angelo Gigliotti and Gregorio Gigliotti respectfully petition for rehearing of the Court’s October 12, 2021, order denying certiorari in this case.

GROUNDS FOR REHEARING

The original Petition for a Writ of Certiorari presented the related and important questions of whether the Fourth Amendment is violated when foreign law enforcement officials engage in wiretapping at the behest of United States officials pursuant to a joint investigation, in order to further the United States criminal investigation, and whether, in reviewing whether foreign wiretapping violated the Fourth Amendment, courts should apply the “joint venture” doctrine used by most federal circuits, or the less protective “virtual agent” standard used by the Second Circuit. This question is of critical importance with respect to the ever-expanding cooperation between United States and foreign law enforcement.

Rule 44.2 authorizes petitions for rehearing from the denial of certiorari under the following circumstances: (1) if a petition can demonstrate “intervening circumstances of a substantial or controlling effect”; or (2) if a petitioner raises “other substantial grounds not previously presented.” *Id.* Here, Petitioners draw the Court’s attention to the failures on the part of either the district court or the Second Circuit to remand the

case to allow for additional translation of Italian language documents pertaining directly to the central factual and legal issue, most notably the decision of an Italian appellate court vacating the convictions of the defendants in a companion case to this one, and transcripts of the trial in that Italian case. This substantial and significant ground was raised in the courts below, but was not previously presented in this Court due solely to space limitations in the Petition for a Writ of Certiorari. Petitioners submit that this information augments the previously filed Petition and highlights the need to address the question of whether United States law enforcement should be able to circumvent the Constitution by relying on a joint investigation involving foreign law enforcement.

This Court Should Grant Rehearing To Clarify The Correct Standard For Reviewing Whether The Fourth Amendment Is Violated When Foreign Wiretapping Is Used As Part Of A Joint Investigation With The United States, In Light Of Grounds Not Previously Presented.

Although the initial Petition for Certiorari was limited by space constraints to making only a brief mention of the criminal prosecution in Italy that arose from the same joint investigation between Italian and United States authorities, it is important to alert the Court that, at the time the district court denied Petitioners' motion to vacate by order of May 15, 2019, the Court of Appeals in Reggio, Calabria, had issued a

summary order several weeks earlier, in which it vacated the convictions of the defendants in that case.¹ Although the principal basis for the reversal of the convictions was based on a jurisdictional defect, the Italian appellate court's subsequent 28-page opinion also discussed the genesis of the investigation. (*In re Criminal Proceedings against Berlingeri, et al.*, La Corte di Appello di Reggio Calabria, Sezione Penale, No. 469/19 (June 3, 2019)) At the time the Italian court issued a summary order reversing the convictions, it indicated that a detailed opinion would follow in 30-60 days. Petitioners alerted the district court of this development and asked the court to delay any decision on the motion to vacate until the full opinion issued, but the district court declined to do so. The information from the Italian trial was, of course, critical to the central issue raised in this Petition with respect to whether the joint United States-Italian investigation violated the Fourth Amendment, and whether that question should be answered by applying the "joint venture" standard or the "virtual agent" standard.

Despite the importance of this Italian language information—which contained the most comprehensive, albeit untranslated, information regarding the interactions between United States and Italian law enforcement at the commencement of the joint investigation—the district court declined to consider it. Instead, by Order of May 6, 2019, the district court instructed

¹ Both Petitioners were named as defendants in the Italian prosecution, although neither of them was ever brought to Italy to face the charges. (Second Circuit Brief at 16-17)

Angelo Gigliotti “not to submit additional Italian court documents without first seeking leave of court and providing a basis as to why any additional documentation is different, rather than cumulative, from [sic] has already been submitted.” (Second Circuit Appendix at 25) At that time, while the motion to vacate was pending in the district court, Angelo Gigliotti had provided the district court with a supplemental disc containing the Italian language transcripts of Italian Nation Police Inspector Muroni’s trial testimony—which had only recently been obtained—and a separate document containing selected translations from the first day of Inspector Muroni’s testimony, in which he described the start of the Italian investigation. (Second Circuit Appendix at 272)

The disc contained lengthy discussion on cross-examination of the technical and legal aspects of the monitoring of calls originating in both Italy and the United States, some of which suggests that there had been interceptions on American phones even prior to the issuance of the Italian wiretap authorization in April, 2014, as well as more detailed cross-examination of Muroni in which he talks about his interactions with American investigators. (Second Circuit Brief at 48). Had the district court properly ordered a hearing at that point, this information would likely have been an important subject, and Petitioners submit it would have compelled the district court to recognize the central role of the United States investigators in initiating

the Italian wiretap that formed the basis of the United States prosecution.

Although the Second Circuit briefly mentioned that “[w]hile Angelo argues that the district court overlooked testimony provided by Inspector Giampietro Muroni, that testimony does not call into question the independent nature of the Italian law enforcement effort” (Summary Order at 9), the Second Circuit evidently failed to take into account Petitioners’ argument that they were prevented from making a complete record due to the inability to translate much of the Italian language documents. *See United States v. Djibo*, 730 Fed. Appx. 52, 56 (2d Cir. 2018) (emphasizing necessity of proper translation being provided to understand import of newly obtained or late disclosed documents and granting remand); *cf. Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 579 (2012) (“The purpose of translation, after all, is to make relevant foreign-language communication accessible to the litigants and the court.”).

Here, the difficulty of translating the copious Italian-language documents at the heart of the case and of this legal issue was brought to the district court’s attention early on in the case, and Angelo Gigliotti notified this Court shortly after the appeal process had started that, despite his numerous efforts to obtain legal assistance through the Bureau of Prisons, he and the defense were handicapped by the difficulty in obtaining translation of the documents. (Second Circuit Brief at 20) Compounding this was his inability to coordinate with his own father, who did speak Italian

and may have been able to assist and work together in translation of the newly obtained documents. Ultimately, his requests were rejected by the Bureau of Prisons (Second Circuit Brief at 20), and not addressed by the courts.

Moreover, and of crucial importance, as a result of the Government's failure to disclose the documents regarding Inspector Muroni, Petitioners did not even obtain those documents, or even know of Inspector Muroni's existence, until after the Rule 33 motion had been filed, and much of the information could only be furnished to the district court at the reply stage or in supplemental filings. Unfortunately, this very likely explains the district court's near complete omission of Inspector Muroni from its Rule 33 decision, as well as the Second Circuit's conclusion that no hearing was necessary. (App. 12) A hearing at the district court level would have permitted the Petitioners the opportunity to use the translated Italian language documents to question Muroni and LaMarca—neither of whom had been cross-examined with respect to this prosecution—regarding Muroni's involvement in the United States investigation, which pointedly included an active role in the searches in the United States for use in the instant prosecution.

Petitioners note that to this day that majority of the newly obtained material—initially made up principally of thousands of pages of Italian wiretap applications, and subsequently of Italian court documents reflecting the proceedings and decisions from the Italian court, including the testimony of the two main

investigators in the case—have not been translated. This is the case despite the fact that the Petitioners were requesting assistance from the district court from virtually the first appearance in the case (Second Circuit Appendix at 107-11), and once it became clear that Petitioners’ fears had come to fruition in connection with the motion to vacate, Petitioners urgently requested assistance with translation at every level, finally retaining the services of an Italian attorney to assist in reviewing and translating some of the documents. (Second Circuit Appendix at 258)

Probably most significantly, for the purposes of addressing whether the “joint venture” or “virtual agent” standards were satisfied, the large majority of the transcripts of the trial testimony of the lead Italian investigator and United States investigator LaMarca were never translated, although very limited excerpts were provided to the district court. Most notable were Italian language transcripts reflecting six days of inspector Muroni’s testimony.

Ultimately, the Petitioners were forced at the district court level to rely principally on portions of the newly discovered materials that had already been translated into English when provided. Although the Petitioners brought to the district court’s attention references to “International Wiretapping” of a landline telephone in the United States, including testimony that Italian investigators intercepted an outgoing call to Costa Rica on May 23, 2014 (Second Circuit Appendix at 276), the district court failed to address whether the Italian investigators engaged in conduct

that violated the Petitioners' constitutional and statutory rights.

CONCLUSION

Based on the grounds stated above, which were not previously presented to the Court, rehearing of the denial of a Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
November 5, 2021

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I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

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