

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JESUS RAMIREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Whether the district court erred in authorizing a wiretap of Petitioner's communications under Title III and in failing to suppress the evidence intercepted?

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Petitioner, Jesus Ramirez, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The unpublished memorandum disposition of the United States Court of Appeals for the Ninth Circuit is reproduced in the appendix. *See* Appendix.

JURISDICTION

Petitioner was convicted of violating of 21 U.S.C. §§ 841 and 846 in the United States District Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291, and

affirmed his conviction and sentence on August 16, 2021. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

18 U.S.C. § 2518

21 U.S.C. § 2518 provides:

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception or wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting, ... if the judge determines on the basis of the facts submitted by the applicant that —

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

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

STATEMENT OF THE CASE

- I. **Federal agents used three wiretaps to gather a substantial amount of information about a methamphetamine distribution conspiracy long before they suspected that Petitioner was involved as the supplier.**

The FBI and other federal and state agencies engaged in a long-term investigation into a methamphetamine-distribution conspiracy in San Diego. After observing a confidential informant complete a controlled buy of methamphetamine from someone alleged to be a gang member and aligned with the Mexican Mafia, law enforcement sought and obtained a Title III wiretap, under 18 U.S.C. § 2518. The wiretap affidavit alleged that traditional investigative procedures would be insufficient to identify the source of the methamphetamine.

After about a month, the government sought authorization for another Title III wiretap. The authorization added nine targets, asked to continue the interception of the initial target, and sought to authorize the interception of another telephone. Notably, the affidavit detailed a substantial amount of evidence already uncovered by the wiretap as well as the traditional investigative techniques law enforcement claimed would be insufficient. For instance, through traditional surveillance agents had observed members of the conspiracy complete a drug sale and then attempt to mail the package to themselves across the country. Agents had intercepted the package at the post office. Law enforcement had intercepted dozens of calls about this transaction, and others, that had helped identify other individuals involved in the conspiracy. Based on this evidence, a district judge authorized the wiretap.

Two months later, law enforcement returned to court to seek another wiretap, seeking to add three more targets. Since the last wiretap, agents had confirmed the identity of one of the members of the conspiracy, as well as that he was distributing pound levels of methamphetamine, and arrested him.

However, law enforcement now suspected that Petitioner was involved in the drug conspiracy as the supplier, and sought to intercept his telephone communications. Though it had uncovered significant evidence about the conspiracy to date, law enforcement averred in its wiretap affidavit that traditional law enforcement investigative techniques had failed or were unlikely to be successful in achieving the investigation's goals, including confirming Petitioner's identity as the supplier, and proving the entire "extent and scope of the narcotics business." The district court authorized the wiretap, and Petitioner's communications were intercepted.

II. After his motion to suppress the wiretap evidence was denied, Petitioner was convicted at trial and sentenced to twenty years in custody.

Petitioner was charged with conspiring to distribute over 50 grams of methamphetamine, in violation of 21 U.S.C. §§ 841 and 846. Before trial, he moved to suppress the evidence intercepted by the last authorized wiretap. He argued that the wiretap affidavit had failed to establish the necessity required by the statute, 18 U.S.C. § 2518(1)(c), because it didn't show that traditional investigative techniques were unsuccessful or likely to fail, and because it had relied on overly broad goals to claim that traditional techniques would be ineffective.

The district court disagreed, finding that the investigative goals were not overly broad, and that the government had properly established necessity for the wiretap.

At trial, the government introduced Petitioner's wiretapped conversations, including those where he was recorded discussing what the prosecution alleged was evidence of methamphetamine distribution. He was convicted, and later sentenced to twenty years in custody.

III. The Ninth Circuit affirmed Petitioner's conviction, affirming the district court's decision to admit the wiretap evidence.

Petitioner argued on appeal the district court erred when it denied his motion to suppress the wiretap evidence because, among other reasons, it abused its discretion in concluding that the wiretap was necessary to the investigation. 18 U.S.C. § 2518(3)(c) permits a district court to grant a wiretap intercept after it examines an affidavit submitted by law enforcement and then determines that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." Only if the court finds the affidavit meets this standard, and that a wiretap is necessary, may the district court authorize the wiretap. *See, e.g., United States v. Rodriguez*, 851 F.3d 931, 937 (9th Cir. 2017).

Petitioner argued that instead of proffering case-specific details to establish necessity, the government had instead relied on generic assertions that were true of any narcotics investigation. He also argued that the government cast its investigative

net extremely wide in order to argue that only a wiretap could satisfy its investigative needs.

However, the Ninth Circuit disagreed, holding in a memorandum that the district court did not “abuse its discretion in concluding that § 2518(3)(c) was satisfied because the wiretap was essential to the investigation.” *See App.* at 3. Law enforcement employed alternative techniques for several months, and then sought a wiretap, and explained “in case-specific terms, why those techniques had not produced information needed to ‘develop an effective case against those involved in the conspiracy.’” *See id.* (citation omitted). Accordingly, the court affirmed Petitioner’s conviction.

REASONS FOR GRANTING THE PETITION

The district court reversibly erred when it failed to suppress the evidence intercepted pursuant to the wiretap. Law enforcement relied on overly-broad investigatory goals and proffered generic assertions—true of any large drug-conspiracy investigation—to justify seeking the wiretap authorization and in making its necessity argument. Still, the court of appeals rejected Petitioner’s argument and affirmed his conviction. Given the effect of the error on Petitioner’s conviction—it all but guaranteed his conviction, since it meant the jury heard Petitioner engaging in what the prosecution alleged were drug transactions, and resulted in his conviction and 20-year-sentence—this is the rare case in which this Court should grant review for error-correction purposes.

I. The district court failed to recognize that the affidavits relied on generic assumptions that applied to most, if not all, investigations of large drug conspiracies.

Before a district court may authorize the interception of a wiretap, it must review the government's application and affidavit and determine whether the wiretap is necessary, meaning that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." *See* 18 U.S.C. § 2518(3)(c).

To meet this necessity showing in the Ninth Circuit, specifically, the government may not rely on the "inherent limitations of normal investigative procedures" to establish necessity. *See, e.g., United States v. Blackmon*, 273 F.3d 1204, 1210 (9th Cir. 2001). For instance, law enforcement cannot fall back on generic assertions about the inherent limitations of investigative techniques; it may not claim that "pen registers do not reveal the identity of callers;" that informants typically possess only limited knowledge about the scope of the criminal enterprise; or that search warrants will produce only limited information rather than reveal the entire conspiracy. *See id.* at 1210-11.

But here, the district court authorized a wiretap intercepting Petitioner's communications by relying on an affidavit that primarily made generic assertions about the limitations of investigative law enforcement techniques. For instance, the affidavit submitted with the wiretap application asserted that "physical surveillance cannot be done unless the agents know the time and place of an activity." It also averred that "surveillance will not provide sufficient and complete evidence of

criminal activity, as it will not reveal the purpose and content of conspiratorial meetings and activities.” Similarly, the affidavit stated that “prolonged or regular surveillance of the movements of the suspects would most likely be noticed,” and the suspects would become more cautious and perhaps engage in counter-surveillance.

Yet these are inherent limitations surveillance: surveilling a target is almost impossible unless the police know when a suspect will conduct a meeting, and following a target around town will never reveal the purpose or content of meetings. That is true of any investigation, not just Petitioner’s. Further, tipping off the targets of an investigation is an inherent risk of using surveillance in *any* investigation—it is precisely the reason law enforcement uses undercover agents or confidential informants instead. That is not a case-specific reason applicable to Petitioner’s case.

The affidavit presented similar generalized statements about the inherent limitations of law enforcement investigative techniques when it argued that search warrants would be ineffective. The affidavit averred that any search would only uncover evidence of narcotics activities at the location searched but would not produce leads to other locations; that executing a search warrant could reveal the investigation and cause the targets to move their stashes; and that the search would likely tip off other targets who were not present at the location searched, which would allow them to avoid detection. Not only are these risks true of any investigation utilizing search warrants, but these potential risks were based on the affiant’s knowledge of how “large-scale narcotics distributors, manufacturers, and smugglers *often*” operate, meaning this generalized assertion was applicable to most narcotics

investigations. It was explicitly not tailored to Petitioner's case, and did not rely on specific facts from his case to argue that inadequacies in *his* particular investigation meant that a wiretap was necessary.

Further, regarding confidential informants and undercover officers, the wiretap affidavit claimed that their use would be insufficient because they "can only assume the role of customers for the Target Subjects." In other words, they could not infiltrate the upper levels of the distribution scheme or conspiracy, and provide law enforcement with detailed information. But, again, this is an inherent limitation of using informants in a large narcotics investigation involving more than one person, and is not specific to Petitioner's case.

The affidavit relied on general assertions to claim that the majority of other law enforcement investigative techniques would be unlikely to succeed, as well. It asserted that "Fourth-waiver" searches would "likely result in merely the seizure of narcotics" rather than information about the overall scheme; that grand jury subpoenas "may serve to alert [targets] to the existence of this investigation" and that target subjects "would most likely be uncooperative and invoke their Fifth Amendment privilege not to testify;" and that interviews of witnesses are "generally not productive because of the individual's fear for physical safety or because of their own culpability." Again, these do not provide case-specific details about Petitioner's investigation—the assertions rely on the inherent limitations of law-enforcement techniques generally.

These general assertions failed to proffer sufficient case-specific details about Petitioner's case, and therefore didn't meet the standard set out for authorizing a wiretap. There was not enough detailed information about Petitioner's case to show why investigative procedures would be unlikely to succeed *in his particular case*, rather than just generally unsuccessful due to their inherent limitations in any narcotics investigation. Given this, the affidavit didn't meet the necessity requirement of Title III, *see* 18 U.S.C. § 2518(3)(c), and the district court erred in authorizing the wiretap that intercepted Petitioner's communications. The intercepted communications should have been suppressed before trial. *See* 18 U.S.C. § 2515.

II. The district court also erred by authorizing the wiretap even though the affidavit relied on overly broad investigative goals that could only be satisfied by a wiretap to claim that a wiretap was necessary.

The other problem with the district court's analysis in granting the wiretap authorization is that the affidavit claimed a wiretap was necessary because that was the only investigative tool that could satisfy law enforcement's broad investigatory goals. The affidavit stated that law enforcement's first goal of the wiretaps was to gather sufficient evidence to prove "the extent and scope of the narcotics business of the Target Subjects and others as yet unknown." This very broad goal—uncovering the entire scope of a conspiracy that law enforcement claimed had international ties to the Mexican Mafia—informed the claims about why certain investigative techniques were insufficient and a wiretap was necessary.

For example, executing a “Fourth waiver” search on the targets would be insufficient—and a wiretap was therefore necessary—because the search would “result in merely the seizure of narcotics.” In a similar vein, the affidavit claimed that search warrants “could not reasonably be expected to produce incriminating evidence of the full scope of the narcotic trafficking activities of this cocaine distribution network, the identities of all co-conspirators, or accomplish the other goals of the investigation.” Likewise, while physical surveillance had yielded some success, it hadn’t uncovered “evidence of the whole scope of the criminal activity under investigation,” so the affidavit discounted it as not as effective as a wiretap.

Essentially, what the government was arguing was that nothing but a wiretap could uncover all of the evidence it sought to uncover. Only a wiretap could identify *all* of the co-conspirators and determine the full scope of their criminal activities. While traditional law enforcement investigative techniques might uncover bits and pieces, a wiretap would be quicker and easier; it would unearth more information all at once. And this is what law enforcement sought to do—it wanted to investigate the entire “extent and scope” of an international drug conspiracy. Only a powerful tool like a wiretap could accomplish that.

However, by authorizing the wiretap under these circumstances, the district court erred in finding necessity. The court did not properly determine that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.” *See* 18 U.S.C. § 2518(3)(c). Rather, the affidavit essentially argued, and the district court agreed, that a wiretap is always

necessary any time law enforcement sets its investigative goals so broad that normal law enforcement techniques can't possibly meet its goals. This analysis was flawed because it relied on manufactured necessity, rather than case-specific facts demonstrating that normal investigative procedures were insufficient in Petitioner's case, so a wiretap was necessary. The district court accordingly abused its discretion in authorizing the wiretap. Further, Petitioner's intercepted communications should have been suppressed. *See* 18 U.S.C. § 2515.

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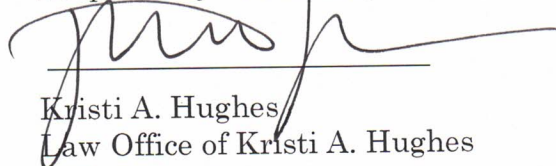
In sum, the court of appeals erred by affirming Petitioner's conviction, and he asks that this Court grant review to correct that error. This is the rare case in which this Court should grant review for purposes of error correction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Date: November 12, 2021

Respectfully submitted,



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