No. ____ - _____

In the Supreme Court of the United States

CHARLES ROLAND CHEATHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal government investigated an alleged drug trafficking conspiracy involving dozens of individuals, and then obtained judicial authorization to wiretap certain telephones. On one of those wiretaps, the government intercepted a single, brief telephone call involving Petitioner Charles Cheatham, whom the government had not previously identified as a subject of its investigation. The government then investigated Mr. Cheatham, but failed to establish any further active links between Mr. Cheatham and the alleged conspiracy. Nevertheless, the government sought and obtained a wiretap against Mr. Cheatham. In order to establish necessity and probable cause for that wiretap, the government's affidavit relied in part on evidence derived from other persons allegedly involved in the conspiracy.

This petition presents the following questions:

1. May the government obtain a wiretap to investigate *whether* an individual is a member of an alleged conspiracy, by relying in part upon evidence *from the conspiracy* and not pertaining to the individual in question, when the government otherwise would fail to establish necessity and probable cause to wiretap that individual?

2. Was the government's confusing organization of its wiretap affidavit, which obscured the lack of necessity and probable cause for a wiretap of Petitioner, a "material misstatement or omission" in the affidavit, and/or did it effect an impermissible "transfer" of a showing of necessity from one telephone to another?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Cheatham respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (Pet. Appendix A) is unreported but is available at 857 Fed. Appx. 946. The order denying the petition for rehearing *en banc* (Pet. Appendix B) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 3, 2021. A timely petition for rehearing *en banc* was denied on October 18, 2021. Petitioner timely submits this Petition for a Writ of Certiorari within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 2518(1), part of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, *codified at* 18 U.S.C. §§ 2510-2521, provides in relevant part that:

> (1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction… [and] shall include the following information:
>
> …
>
> (c) 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.

Id. Under 18 U.S.C. § 2518(3), a judge may authorize such interception if "(b) there is probable cause for belief that particular communications concerning [the] offense will be obtained through such interception," and "(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[.]" *Id*.

INTRODUCTION

This case concerns whether the government may obtain and use a wiretap to investigate whether an individual is part of an alleged conspiracy, based upon evidence derived from the conspiracy itself, when the government's evidence as to the individual target otherwise would not justify the wiretap. In this case, the government asserted it needed to wiretap Petitioner Charles Cheatham as part of its lengthy investigation into an alleged drug trafficking conspiracy, the "Morgan Drug Trafficking Organization," involving dozens of individuals.

On an existing wiretap of investigative target Michael Morgan, the government intercepted a single, brief telephone call with Mr. Cheatham, of unclear and ambiguous content. Mr. Cheatham at that time had not been part of the government's investigation. The government then spent six weeks investigating Mr. Cheatham, including through a tracking warrant, but identified no additional active links between Mr. Cheatham and Mr. Morgan, or any of the dozens of other alleged members of the "Morgan DTO." The government had no apparent difficulty using "normal investigative procedures," such as in-person surveillance and a telephone pen register, as to Mr. Cheatham; those "traditional techniques" simply failed to

further indicate Mr. Cheatham was part of the "Morgan DTO," or even that he was interacting with its alleged members.

Nevertheless, the government then sought a wiretap against Mr. Cheatham. With little to no basis to claim it could not successfully use traditional non-wiretap investigative techniques against Mr. Cheatham, the government relied on evidence from *other* members of the conspiracy to demonstrate necessity to wiretap Mr. Cheatham. For example, the government claimed it was necessary to wiretap Mr. Cheatham because other "target subjects" of the Morgan DTO, such as Morgan himself, "have shown themselves to be surveillance conscious." But the government submitted no evidence that *Mr. Cheatham* was aware of its surveillance of *him* so as to frustrate its non-wiretap investigation.

Before citing evidence from other alleged conspirators against Mr. Cheatham, the government failed to adequately establish Mr. Cheatham was sufficiently linked to the conspiracy so as to impute conspiracy evidence against him. If the government is allowed to wiretap an individual based on mere suspicion of membership in a conspiracy, while premising its necessity showing for that wiretap on evidence from other alleged conspirators, it effectively bootstraps "necessity" into a free-ranging license to wiretap anyone with the barest alleged connection to a conspiracy. This Court's review is necessary to correct the Ninth Circuit's opinions regarding the scope of permissible wiretaps in a conspiracy investigation, and to reaffirm appropriate limits on the government's ability to use them.

Separately, the Court also should grant certiorari to decide how clearly a wiretap affidavit must identify the evidence as to a particular individual in order to satisfy the standards of Title III. Here, the information regarding Petitioner contained in the wiretap affidavit was presented piecemeal, mixed together with information regarding several other individuals, in a manner that made it difficult to discern the total evidentiary showing as to Petitioner (or any subject individual in particular). This confusing presentation of evidence effected an impermissible "transfer" of a showing of necessity from one telephone to another, and/or amounted to material misstatements and omissions that should render the wiretap application invalid. The panel's implicit approval of the wiretap affidavit's confusing format conflicted with the Ninth Circuit's own decisions in *United States v. Carneiro*, 861 F.2d 1171 (9th Cir. 1988), *United States v. Gonzalez, Inc.*, 412 F.3d 1102 (9th Cir. 2005), and *United States v. Rodriguez*, 851 F.3d 931 (9th Cir. 2017), and should be reversed by this Court.

STATEMENT OF THE CASE

I. Background Facts

In October of 2014, the government began investigating what it later called the "Michael Morgan Drug Trafficking Organization" or "Morgan DTO," in the Seattle/King County area of the Western District of Washington. ER 254, 262, 273.[1]

[1] Citations to the Excerpts of Record before the Court of Appeals are included here for clarity and for documentation of the factual bases for Petitioner's assertions.

For almost three years, the government investigated Michael Morgan and dozens of individuals alleged to be his co-conspirators, until September 6, 2017, when the government applied to wiretap Morgan's telephone ("Target Telephone 1" or "TT1") and another phone. The government's first wiretap affidavit identified 43 individuals besides Morgan as "Target Subjects" of its application. ER 262-73. This list, notably, did not include Petitioner Charles Cheatham.

The government first began investigating Mr. Cheatham as part of this case on September 10, 2017, based on a single intercepted telephone call between Morgan's TT1 and a phone number (TT14) later determined to be Mr. Cheatham's. This call was by far the most important part of the government's argument for a tracking warrant and subsequent wiretap against Mr. Cheatham.

In the September 10 telephone call, Mr. Cheatham's TT14 called Morgan's TT1. The government's affidavit alleged the following conversation was intercepted on the wiretap of TT1 (reproduced here in its entirety):

MORGAN:	"Little Charles."
CHEATHAM:	"What's up little Mikey?"
MORGAN:	"Man, I was trying to call you fool, but why you don't answer the phone, man? I needed you bad."
CHEATHAM:	"Uh, you know, this phone be the family phone. Sometimes I don't even be having it with me. Alright, text. You gotta..."
MORGAN:	"I gotta link up with you so you can give me the other one. Sooner than later. But uh..."
CHEATHAM:	"Say it again bro."
MORGAN:	"I was just trying to uh, I was trying to catch up with you and talk to you about this stuff. [NAME REDACTED] told me to call you."

CHEATHAM:	"Yeah"
MORGAN:	"I was trying to uh, holler at you and shit. I can't get up with you til a little bit later."
CHEATHAM:	"OK."
MORGAN:	"So should I call [UNINTELLIGIBLE] or what should I do?"
CHEATHAM:	"Uh, here. Take this one down too, just in case I don't answer."
MORGAN:	"Hold on. Just text it to me."
CHEATHAM:	"Alright I'll text it to you right now."

Mr. Cheatham then texted Morgan the number for TT15. ER 402-03.

The government's affiant argued "[b]ased on my training and experience, and in context with other intercepted calls discussed in this affidavit, I believe that Morgan contacted Cheatham to collect drug proceeds." ER 403. The affidavit also alleged Mr. Cheatham's use of two telephones – characterized as a "family phone" and another – was consistent with drug trafficking. The affiant declared "I believe that this intercepted call indicates that Charles Cheatham uses *both* TT14 and TT15 for drug trafficking," although mainly TT15. ER 404-05 (emphasis added).

Petitioner contends, and argued below, there are plentiful reasons to doubt the government's argumentative interpretation of this telephone call. These include that the government failed to establish that Mr. Cheatham's only substantive statement during the conversation, about a "family phone," constituted sufficient evidence of drug trafficking; failed to establish that phrases used by Morgan were even *understood* by Mr. Cheatham, much less that they constituted drug-related "code"; and that the affidavit's theory of the purpose of the call, for Morgan to "collect drug *proceeds*" from Mr. Cheatham, was internally inconsistent with other

evidence the government alleged and submitted *in the same affidavit*, supposedly indicating Mr. Cheatham was a *supplier* of drugs to Morgan.

Regardless, the government's subsequent investigation of Mr. Cheatham conspicuously *failed* to establish any further active links between Mr. Cheatham and the "Morgan DTO." Investigators obtained tracking warrants for TT14 and TT15. ER 403. The only result from the tracking warrants described in the second wiretap affidavit was from September 29, 2017. Investigators followed Mr. Cheatham, who left a funeral service in a green Mercedes, along with several other cars, and drove to "a post office parking lot a few blocks away." ER 404. The affidavit alleged: "Investigators saw another male get into the passenger seat of the green Mercedes. A few minutes later, another male approached the green Mercedes and talk [sic] with the occupants of the open window. I know, based on my training and experience, that *these types* of short interactions in a parking lot *can* be indicative of drug transactions." ER 404 (emphasis added). No further evidence of a drug transaction was offered, and this "interaction" was not alleged to involve any other members of the "Morgan DTO." Moreover, the affidavit made no claims that during September or October of 2017, the tracking warrant revealed any additional actual or suspected drug activity or any additional association between Mr. Cheatham and Morgan, or any of the 43 other previously alleged Target Subjects of the Morgan DTO.

The affidavit also reported the government obtained "subpoenaed toll records" for TT15, which showed "[b]etween September 25, 2017 and October 30,

2017, TT15 has a total of 2511 records for wire (voice) communications, of which 952 are outgoing and 1559 are incoming." ER 420. The affidavit did not identify *a single one* of these 2511 voice communications or 347 text messages from TT15 as involving Morgan or any of the 43 other "Target Subjects" of the Morgan investigation. ER 421-23. Instead, the affidavit contended several of TT15's calls were with three other identified persons, who in turn were alleged by law enforcement confidential sources as themselves being involved with drugs in some capacity *other than* with the Morgan DTO. *Id*.

With the government's post-September 10 investigation of Mr. Cheatham having utterly failed to further corroborate any active links between Mr. Cheatham and the "Morgan DTO," the affidavit went on to describe a few *past* contacts between Mr. Cheatham and confidential sources who alleged uncorroborated drug activity at stale and/or unspecified times. For example, according to the affidavit, CS1 alleged "Over a year ago, CS1 ran into Cheatham at a grocery store. Cheatham offered to sell CS1 ounce level amounts of cocaine[.]" ER 445-46. CS6 claimed they "bought an eighth of an ounce of cocaine from Cheatham within the last two years." ER 449.

Finally, the government described Source of Information 1, who was "seeking consideration for potential drug charges" after "law enforcement seized… kilograms of cocaine from SOI1[.]" ER 478. SOI1 allegedly stated "Cheatham and SOI1 purchased cocaine together" in California, and when law enforcement seized kilograms of cocaine from SOI1 in California, "Cheatham was also in California…

pursuing his own source of narcotics[.]" SOI1 also alleged "Cheatham also obtains and provides cocaine *to* Michael Morgan," and "[o]n one occasion, Cheatham requested, *on behalf of Morgan*, kilogram amounts of cocaine from SOI1." ER 478-80 (emphasis added). Notably, this is inconsistent with the affidavit's theory that on September 10, Morgan was trying to *collect* drug *proceeds* from Mr. Cheatham. However, according to the affidavit, Mr. Cheatham allegedly had become aware of SOI1's encounter with law enforcement and "distanced himself from SOI1." ER 479-80.

Thus, by November 3, when the government applied for a wiretap against Mr. Cheatham's TT15, it had identified only a single, brief, ambiguous telephone conversation between Mr. Cheatham and Morgan, no further contact between the two, and no confirmation of contact between Mr. Cheatham and any of the 43 other prior targets. The affidavit described Mr. Cheatham talking to an unidentified third party in a Mercedes in a manner that supposedly *could* have been a drug transaction. It cited one unnamed Source of Information, themselves caught by law enforcement with kilograms of cocaine, who claimed to be involved with Mr. Cheatham in drug trafficking at unspecified times in the past. The SOI claimed Mr. Cheatham provided cocaine *to* Morgan, which was inconsistent with the affidavit's own assertion as to why Morgan called Cheatham on September 10. And the affidavit alleged contact between Mr. Cheatham and a handful of other persons who were claimed to be involved in drug activity other than with the Morgan DTO, but identified no actual drug evidence such as controlled purchases.

Most importantly, the affidavit revealed that the government had been able to effectively use a variety of "traditional" investigative techniques against Mr. Cheatham. The government was able to follow Mr. Cheatham, observe where he was going, observe his actions, and track who he was calling. The government obtained allegedly relevant statements about Mr. Cheatham from several confidential informants and sources of information. All these "normal investigative procedures" simply failed to demonstrate any additional connection between Mr. Cheatham and the "Morgan DTO."

Nevertheless, the government requested a wiretap of Mr. Cheatham's telephone, as an explicit part of its investigation into the "Morgan DTO," and based on evidence pertaining to the "Morgan DTO." The district court approved that wiretap. After several more months of investigation into Mr. Cheatham and others using that wiretap, Mr. Cheatham eventually was indicted – albeit separately from Morgan.

II. Proceedings Below

A. Trial Court

Counsel for Petitioner filed a Motion to Suppress Tracking Warrant Evidence (Dist. Ct. Docket #776) and a Motion to Suppress Evidence Obtained by Unlawful Interception of Telephonic Communications (Docket #779). The district court denied both of Mr. Cheatham's motions by oral ruling. *Id.*, ER 128-34. Mr. Cheatham subsequently entered a conditional plea of guilty, reserving his rights under Fed. R.

Crim. P. 11(a)(2) to have the appellate court review the district court's denial of his suppression motions.

B. Court of Appeals

Petitioner argued to the Ninth Circuit that the district court erred when it denied Mr. Cheatham's motions to suppress. Petitioner contended that the affidavit failed to demonstrate necessity for a wiretap, that the affidavit failed to contain a full and complete statement of facts justifying a wiretap, and that the government failed to establish probable cause for either the wiretap or the tracking warrant. Petitioner also contended that the confusing organization of the affidavit obscured the government's lack of evidence as to Mr. Cheatham individually, and amounted to either a failure to contain a full and complete statement of facts or a material misstatement that had the effect of improperly "transferring" justification from other "target telephones" to Petitioner's.

The Ninth Circuit rejected Petitioner's arguments, including the argument that the government had not sufficiently linked Petitioner to the alleged conspiracy so as to rely on evidence from the conspiracy to justify the wiretap against Petitioner. It held "[t]he affidavit both sufficiently detailed the other investigative techniques law enforcement had already employed to investigate Cheatham and the Morgan DTO, to which Cheatham was linked, and sufficiently explained why those investigative techniques were ineffective, unlikely to succeed, or too dangerous to accomplish the investigation's objectives." Mem. Op. at 3-4 (Pet. Appendix A), 857 Fed. Appx. 946 (emphasis added) (citing *United States v. Estrada*, 904 F.3d 854,

862–65 (9th Cir. 2018)). However, the Ninth Circuit's opinion failed to specify why the government's showing was sufficient despite the deficiencies articulated by Petitioner. And the Ninth Circuit did not explicitly address Petitioner's argument that the organization of the wiretap affidavit was impermissibly confusing.

Mr. Cheatham then filed a petition for rehearing *en banc*, which was denied on October 18, 2021. Pet. Appendix B. This timely petition follows.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Improperly Approved the Government's Use of Conspiracy Evidence to Establish Necessity and Probable Cause to Wiretap Mr. Cheatham.

This Court's intervention is necessary because the Ninth Circuit's opinion improperly affirmed the wiretap of Petitioner's telephone, and the denial of Petitioner's motion to suppress, based on circuit authority that is erroneous, internally inconsistent, and premised on inapposite authority from this Court. In several opinions, the Ninth Circuit has correctly held the government *must demonstrate individualized necessity* to obtain a wiretap. But, inconsistently, the Ninth Circuit also has held the government has greater "leeway" to use wiretaps in order to investigate the scope of an alleged conspiracy, including *identifying* its members. In Petitioner's case, the Ninth Circuit panel cited the line of circuit authority permitting the government "leeway" to wiretap suspected members of a conspiracy. The panel thus affirmed the district court's approval of the wiretap, even though the government failed to sufficiently demonstrate Petitioner's

connection to the alleged Morgan conspiracy before it used Morgan conspiracy evidence to establish the necessity and probable cause to wiretap Petitioner.

In several cases, the Ninth Circuit has correctly held that the government must make an individualized showing of necessity to obtain a wiretap, even when a target is allegedly a member of a conspiracy. For example, in *United States v. Carneiro*, the Ninth Circuit rejected the government's attempt to wiretap a particular target. The *Carneiro* court observed "it appears that the DEA sought the wiretap simply because [target] Harty was believed to be a member of the conspiracy under investigation." Rejecting this, the *Carneiro* court held "*[a] suspicion that a person is a member of a conspiracy, however, is not a sufficient reason to obtain a wiretap*." *Carneiro*, 861 F.2d at 1181 (emphasis added). Instead, "there must be a showing of necessity with respect to *each* telephone *and* conspirator." *Id*. at 1181-82 (emphasis added). "[T]he government may not dispense with the necessity showing with regard to one conspirator simply because it has proved necessity in the case of another[.]" *Id*. at 1181 (citing *United States v. Brone*, 792 F.2d 1504, 1506 (9th Cir. 1986)). Similarly, in *United States v. Abascal*, 564 F.2d 821 (9th Cir. 1977), the Ninth Circuit held "the government must do more than show that the telephone subscribers they wish to tap are all part of one conspiracy[.]" *Id*. at 826.

In affirming the wiretap of Petitioner, the unpublished panel opinion relied upon different authority, in particular the Ninth Circuit's opinion in *Estrada*. *Estrada* held "[t]he necessity for the wiretap is evaluated in light of the

government's need not merely to collect some evidence, but to develop an effective case against those involved in the conspiracy." *Estrada*, 904 F.3d at 862-63 (citing *United States v. Decoud*, 456 F.3d 996, 1007 (9th Cir. 2006), quoting *Brone*, 792 F.2d at 1507). However, in *Brone*, the Ninth Circuit held (as in *Carneiro*) that "the government may not dispense with the statutorily mandated showing of necessity to obtain a wiretap of [a target's] telephone, despite the validity of the wiretap of his coconspirators' telephone[.]" *Id*. at 1507.

Estrada also cited *United States v. McGuire*, 307 F.3d 1192 (9th Cir. 2002), holding "we have consistently upheld findings of necessity where traditional investigative techniques lead only to apprehension and prosecution of the main conspirators, but not to apprehension and prosecution of ... other satellite conspirators." *Estrada*, 904 F.3d at 863 (citing *McGuire*, 307 F.3d at 1198). *McGuire* in turn cited *Scott v. United States*, 436 U.S. 128, 98 S. Ct. 1717 (1978), for the proposition that "when the investigation is focusing on what is thought to be a widespread conspiracy more extensive surveillance may be justified in an attempt to determine the precise scope of the enterprise." *Scott*, 436 U.S. at 140, 98 S. Ct. at 1725. *McGuire* cited *Scott* to affirm a broad scope of wiretaps of the conspiracy in question, an insurrectionist anti-government group, based on the conclusion that traditional, non-wire investigative methods would not be effective in revealing the conspiracy's members. *See, e.g., McGuire*, 307 F.3d at 1197-98 (holding that "[l]ike the Hydra of Greek mythology, the conspiracy may survive the destruction of its parts unless the conspiracy is completely destroyed").

But the holding of *McGuire*, and the scope of wiretaps it authorizes, exceeds the authority described by this Court in *Scott*. *Scott* concerned the minimization of surveillance of calls on an *existing* wiretap, not the extent to which a wiretap might be *granted* to explore the scope of a conspiracy. The "more extensive surveillance" discussed in *Scott* involved greater latitude for the government in judging which already-wiretapped conversations to listen to. *Scott* does not hold, as the Ninth Circuit purported to state in *McGuire*, that the government establishes "necessity" for a *new* wiretap any time it asserts a need to "determine the scope" or members of an alleged conspiracy. Further distinguishing *McGuire* from Petitioner's case, the government's "traditional" methods of surveillance were succeeding as to Mr. Cheatham, whereas they were failing (or reasonably predicted to fail) in *McGuire*.

For these reasons, the government's wiretap affidavit as to Petitioner was deficient in exactly the ways warned against by the Ninth Circuit's correct analysis from *Carneiro*, *Brone*, and *Abascal*. After the lone, cursory, ambiguous telephone call between Mr. Cheatham and Morgan, the government's pre-wiretap investigation of Mr. Cheatham failed to show any further active links between Mr. Cheatham and the "Morgan DTO." So the government simply *assumed* Mr. Cheatham was a co-conspirator, and "established" the remaining necessity to wiretap him through evidence of the alleged difficulty of using traditional investigative techniques as to "other members" of the DTO. But the government's assumption that Mr. Cheatham was part of the conspiracy begged the question. If *McGuire* and *Estrada* are construed to authorize a wiretap based on this scant

evidence of association with an alleged conspiracy, they are in conflict with the holdings of *Carneiro*, *Brone*, and *Abascal*, and exceed the authority approved by this Court in *Scott*.

This Court should grant certiorari to resolve the question of whether, based on nothing more than this slim a record of contact with an alleged conspiracy, the government can use evidence from the conspiracy to achieve the requisite showing of necessity and probable cause for a wiretap.

II. Intervention by This Court Is Necessary to Affirm the Government's Minimum Responsibility to Clearly State Its Evidence Regarding Each Individual Wiretap Target.

The Court of Appeals failed to explicitly address or resolve Petitioner's argument that the government's affidavit improperly mixed together evidence as to multiple targets and telephones, in such a way as to obscure the lack of justification as to Petitioner individually. This amounted to either an improper transfer of a statutory showing of necessity from one application to another, or a material misstatement or omission in the affidavit.

As Petitioner argued below, the wiretap affidavit thoroughly mixed and interpolated its evidence as to each of the six Target Telephones, scattering different targets' individual information throughout. As to Mr. Cheatham, the affidavit described evidence derived from his surveillance and the September 10 telephone call at paragraphs 59 through 69. ER 402-04. It then jumped to paragraphs 138 to 149 for evidence from his telephone toll records. ER 420-24. It scattered alleged evidence from sources and informants throughout paragraphs 230,

246, 254, and 362-370. ER 445-46, ER 449, ER 478-80. In amongst each of these segments of evidence as to Petitioner, the wiretap affidavit conveyed information as to multiple other persons allegedly linked to the conspiracy. These persons' links to the "Morgan DTO" generally were much closer than Petitioner's, and the evidence justifying their wiretaps more substantial. *Id*.

The affidavit's jumbled organization obscured, rather than illuminated, the evidence as to each individual target. Under Title III and construing caselaw, "[e]ach wiretap application must *separately* satisfy the necessity requirement[.]" *Gonzalez, Inc.*, 412 F.3d at 1115 (emphasis added). Similarly, in *United States v. Rodriguez*, the Ninth Circuit held "the government is not free to transfer a statutory showing of necessity from one [wiretap] application to another – even within the same investigation[.]" *Rodriguez*, 851 F.3d at 940 (citing *Gonzalez, Inc.*).

Even an experienced district judge could not reasonably be expected to track and discretely assimilate each target's information through multiple atomized sections of this affidavit, and then make a reliable individualized determination as to whether the government had established necessity and probable cause to wiretap each telephone. By presenting the evidence as to Petitioner within a mass of evidence as to other, more culpable individuals, the government's affidavit effected an impermissible transfer of necessity from those other individuals to Petitioner. Had the affidavit presented the evidence as to Petitioner in a unified, plain, and coherent manner, it would have been clear to the reviewing judge that the

government had not satisfied its burden to demonstrate necessity and probable cause for a wiretap of Petitioner's telephone.

Alternatively, the government's obscurantist organization of its affidavit should be deemed to amount to a material misstatement or omission in the affidavit. *See Carneiro*, 861 F.2d at 1181 (the affidavit "contains material omissions and misstatements. If these defects had been revealed, a reasonable district court judge could have denied the wiretap application for lack of necessity."). The failure to clearly present the evidence as to Petitioner amounted to an omission or misstatement of the government's lack of evidence establishing any ongoing connection between Petitioner and the conspiracy.

Whether the affidavit amounted to an impermissible transfer of necessity or a material misstatement or omission, the Ninth Circuit panel's *sub silentio* approval of this deficiently organized affidavit was improper. On this basis as well, this Court should grant this petition.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case.

Date: January 15, 2022.

Goldfarb & Huck Roth Riojas, PLLC

/s/ Darwin P. Roberts
Darwin P. Roberts

Attorney for Petitioner Charles Cheatham

CERTIFICATE OF MEMBERSHIP IN BAR

I, Darwin P. Roberts, hereby certify that I am a member of the Bar of the Supreme Court of the United States.

/s/ Darwin P. Roberts
Darwin P. Roberts