No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DOUGLAS EMMANUEL CAREY, III – PETITIONER

v.

UNITED STATES OF AMERICA – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Numerous lay witnesses were allowed to "identify" Mr. Carey's voice on recorded telephone calls despite a lack of reliability in the identification process and their testimony. Did the district court improperly allow the admission of this evidence and did the appellate court improperly affirm the district court?

II. An agent was allowed to testify as an opinion witness and interpret telephone calls despite not knowing anything about the geographic area the drug distribution supposedly occurred in. Did the district court improperly allow the admission of this testimony and did the appellate court improperly affirm the district court?

III. The government secured an order for a wiretap under Title III despite that the necessity requirement was not met. Did the district court improperly deny the motion to suppress and did the appellate court improperly affirm the district court?

IV. The district court improperly gave a constructive possession jury instruction when evidence did not support this instruction. Did the district court improperly give this instruction to the jury and did the appellate court improperly affirm the district court?

V. The district court found Mr. Carey responsible for five kilograms or more of cocaine, but there was insufficient evidence presented to warrant this drug quantity level. Did the trial court improperly determine this drug quantity when sentencing Mr. Carey and did the appellate court improperly affirm the district court?

LIST OF PARTIES

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

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unpublished.

JURISDICTION

The date on which the United States Court of Appeals for the Sixth Circuit decided Mr. Carey's case was April 25, 2022. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment of the United States Constitution

STATEMENT OF THE CASE

Mr. Carey was charged with one count of conspiracy to distribute cocaine and crack cocaine and two counts of possession with intent to distribute cocaine, each subject to up to thirty years in prison. (Superseding Indictment, RE 818, Page ID # 4821, 4826, 4831; Superseding Indictment Penalty Sheet, RE 819, Page ID # 4848.)

Before trial, there was a motion hearing regarding suppression of the wiretap evidence. (Transcript, RE 1157, Page ID # 10068.) The defendants argued that the extraordinary step of requesting a wiretap was not justified at the point in the investigation when it was made and granted. (Transcript, RE 1157, Page ID # 10069.) Instead of pursuing the investigation through more conventional means, there was a rush to get access to the target phones when it was not yet necessary—or justified—to do so. (Transcript, RE 1157, Page ID # 10069-10070.) In short, law enforcement went too fast, and the evidence should have been suppressed. (Transcript, RE 1157, Page ID # 10070.) But the court denied the motion. (Transcript, RE 1157, Page ID # 10088-10089.)

At trial, evidence was presented that the investigation into Mr. Mayfield had been ongoing since 2017, and multiple agencies—including the Michigan State Police, Drug Enforcement Administration, Grand Rapids Police Department, Kent County Sheriff's Department, and the Kentwood Police Department—were involved in the investigation of Mr. Mayfield's drug trafficking organization. (Transcript, RE 1245, Page ID # 12046-12047, 12109.) The government had been authorized to wiretap three of Mr. Mayfield's telephone numbers. (Transcript, RE 1245, Page ID # 12059.)

And the investigation also involved numerous other mechanisms, such as physical surveillance, GPS surveillance, helicopter surveillance, and pole cameras. (Transcript, RE 1245, Page ID # 12071-12072, 12074, 12104.) Additionally, telephones were seized, and the contents were examined. (Transcript, RE 1245, Page ID # 12078-12079.) Law enforcement engaged in undercover purchases. (Transcript, RE 1245, Page ID # 12100.) And when law enforcement was purchasing the drugs, the government sought corroboration through the use of prerecorded funds. (Transcript, RE 1245, Page ID # 12103-12104.) The government also used informants in this case. (Transcript, RE 1245, Page ID # 12104.)

Thomas Mize was called to testify at Mr. Carey's trial by the government. (Transcript, RE 1245, Page ID # 12209-12210.) Mr. Mize was a court employee whose job brought him into contact with Mr. Carey. (Transcript, RE 1245, Page ID # 12210-12211.) He provided Mr. Carey's "approved" address on Philadelphia Avenue and said he had visited Mr. Carey there about six times and had spoken with Mr. Carey on the phone approximately six times. (Transcript, RE 1245, Page ID # 12211-12213.) Mr. Mize was asked by the government to identify Mr. Carey's voice in audio recordings of phone calls. (Transcript, RE 1245, Page ID # 12214-12216.) Several recordings were played, and Mr. Mize stated that he thought it was Mr. Carey's voice he heard. (Transcript, RE 2145, Page ID # 12214-12216.) Mr. Mize stated that he had lost contact with Mr. Carey on April 17, 2018. (Transcript, RE 1245, Page ID # 12216.)

At the time of trial, it had been a year and a half since Mr. Mize had spoken with Mr. Carey. (Transcript, RE 1245, Page ID # 12217.) Of note, Mr. Mize stated

that he came into contact with and spoke to about 100 people each month through the course of his job. (Transcript, RE 1245, Page ID # 12217.) Mr. Mize was not sure if the government had asked him if he could identify Mr. Carey in some phone calls or if they instead played the phone calls and asked if he recognized any voices without mentioning Mr. Carey's name. (Transcript, RE 1245, Page ID # 12217.) It was also pointed out that Mr. Carey's sister and his adult son lived in the home with Mr. Carey and that Mr. Mize did not know who may have visited the home or what they may have done while there. (Transcript, RE 1245, Page ID # 12217-12218.) Mr. Mize was not trained in voice analysis and he did not use any voice analysis software. (Transcript, RE 1245, Page ID # 12218.) In fact, Mr. Mize was unaware that there was actually a certifying body related to voice analysis, so it was no surprise that the "methodology" used by him was considered unreliable by that certifying body. (Transcript, RE 1245, Page ID # 12218-12219.)

Officer Danny Wills also testified at trial and claimed to have reviewed line sheets of the text messages that were allegedly exchanged between Mr. Carey and Mr. Mayfield that had been intercepted, made a chart of those texts, and reviewed line reports and transcripts of phone calls that the government alleged were between Mr. Mayfield and Mr. Carey. (Transcript, RE 1246, Page ID # 12327-12328, 12348.) Those phone calls and texts were interpreted by Officer Wills as allegedly referring to cocaine, marijuana, and drug dealing. (Transcript, RE 1246, Page ID # 12355-12366.) But Officer Wills was not physically present with Mr. Mayfield nor Mr. Carey

when these communications were supposedly made. (Transcript, RE 1246, Page ID # 12348-12349.)

Wilbert Gentry, a former co-defendant of Mr. Carey's, cooperated with the government and testified at Mr. Carey's trial. (Transcript, RE 1246, Page ID # 12491-12493.) Despite never meeting or speaking with Mr. Carey until they were at the Newaygo County Jail together, Mr. Gentry was asked to identify Mr. Carey's voice in recorded phone conversations that took place before they ever met. (Transcript, RE 1246, Page ID # 12540.) Over defense counsel's objection, Mr. Gentry was allowed to "identify" those voices—even though the names of those the government believed to be involved in the phone call were published on a screen in the courtroom while the recording played—and those names were *in view* while Mr. Gentry was testifying. (Transcript, RE 1246, Page ID # 12542.)

Special Agent Christopher Labno also testified, again over objection by defense counsel, as an opinion witness. (Transcript, RE 1247, Page ID # 12717-12718, 12752.) He offered basic information on cocaine forms, use amounts, and terminology. (Transcript, RE 1247, Page ID # 12719-12725.) But his only true qualifications were related to his own investigations in Chicago. (Transcript, RE 1247, Page ID #12727.) His testimony in relation to this matter and the Grand Rapids area in general was based solely on what he had been told by other agents. (Transcript, RE 1247, Page ID # 12714.)

Officer Alcala testified, also over objection, and claimed to have had several phone conversations with Mr. Carey within a 20- to 25-minute period. (Transcript,

RE 1250, Page ID # 13263.) Of note, these phone calls took place over one and a half years before he took the witness stand. (Transcript, RE 1250, Page ID # 13263.) Officer Alcala also stated that he had short conversations with Mr. Carey after he came out of his house on the day in question. (Transcript, RE 1250, Page ID # 13266.) Officer Alcala said he could identify Mr. Carey, even though he was not an expert in voice identification and spoke to over one hundred people per day through the course of his job. (Transcript, RE 1250, Page ID # 13271-13273.)

There were various defense objections to the jury instructions, including the giving of the constructive possession instruction, but these objections were overruled by the court. (Transcript, RE 1252, Page ID # 13508-13509.) The jury found Mr. Carey guilty of conspiracy to distribute and possess with intent to distribute cocaine and cocaine base as well as two charges of possession with intent to distribute cocaine. (Transcript, RE 1252, Page ID # 13552-13553.)

At his sentencing hearing, Mr. Carey objected to the five kilograms or more of cocaine that were attributed to him. (Transcript, RE 1253, Page ID # 13565-13571.) The court overruled the defense's objection to the amount because the court believed that Mr. Carey was well aware of Mr. Mayfield's drug activity. (Transcript, RE 1253, Page ID # 13576.) The court sentenced Mr. Carey to 150 months on each of the three counts of convictions, followed by six years of supervision after his release. (Transcript, RE 1253, Page ID # 13594.) The sentences were to run concurrently. (Transcript, RE 1253, Page ID # 13594.) Mr. Carey filed an appeal with the United

States Court of Appeals for the Sixth Circuit, and his conviction was affirmed. (Appendix A, Opinion, RE 48-2, Page ID # 34.)

REASONS FOR GRANTING THE PETITION

I. It was improper to allow lay witnesses to "identify" Mr. Carey's voice on telephone calls during trial.

Researchers have warned "that the caution and suspicion currently accorded to visual identification must be extended also to voice identification." Clifford, B.R., *Voice identification by human listeners: On earwitness reliability*, APA Pysch. Art., 374, 392 (1980). Indeed, auditory memory is "associated with poorer performance than visual memory and is subject to distinctive sources of unreliability." McGorrery, *et al.*, *A fair 'hearing': Earwitness identifications and voice identification parades*, Int. Journ. Evidence & Proof, 262, 262 (February 2017). In this case, numerous lay witnesses were allowed to testify and "identify" Mr. Carey's voice in telephone call recordings despite their ability to do so being unreliable at best.

A. Probation Officer Thomas Mize

Before trial, the government indicated it was calling a probation officer to testify about the identity, voice identification, residence, and family members of Mr. Carey. (Transcript, RE 1257, Page ID # 13720.) Counsel objected to the probation officer testifying about his position as Mr. Carey's probation officer. (Transcript, RE 1257, Page ID # 13721-13722.) The court overruled counsel's objection and only stated that the officer would not be allowed to testify *why* Mr. Carey was on probation. (Transcript, RE 1257, Page ID # 13722-13273.)

Counsel renewed the objection to Mr. Mize being able to testify about the "voice" identification of Mr. Carey. (Transcript, RE 1245, Page ID # 12035-12036.) One of the reasons that the court allowed Mr. Mize to testify was because he was the "only" witness who could identify Mr. Carey's voice. (Transcript, RE 1245, Page ID # 12035-12036.) But then the government identified another law enforcement officer who would also be testifying as to a "voice" identification. (Transcript, RE 1245, Page ID # 12036.) Counsel renewed her objection because voice identification is a true science, and the lay witnesses were not experts in voice identification. (Transcript, RE 1245, Page ID # 12036.) The court again held that the government could present its witnesses on voice identification. (Transcript, RE 1245, Page ID # 12038.) Also, over objection, Mr. Mize was allowed to testify that Mr. Carey's "approved" residence was 1427 Philadelphia Street. (Transcript, RE 1245, Page ID #12040-12041.)

At trial, Mr. Mize testified that he was a court employee whose job brought him into contact with Mr. Carey. (Transcript, RE 1245, Page ID # 12210-12211.) He said he had visited Mr. Carey at his home about six times. (Transcript, RE 1245, Page ID # 12211-12213.) Mr. Mize was asked by the government to identify Mr. Carey's voice in an audio recording of a phone call. (Transcript, RE 1245, Page ID # 12214.) In that recording, Mr. Carey allegedly responded to a comment about a price going up to $1,100. (Transcript, RE 1245, Page ID # 12214.) There was another recording of a phone call played in which Mr. Carey allegedly stated that "it was a seven and then it bounced to an eight." (Transcript, RE 1245, Page ID # 12215.) In a third phone recording, Mr. Carey was identified as allegedly saying that he may have to go out

and get a job. (Transcript, RE 1245, Page ID # 12216.) Mr. Mize stated that he lost contact with Mr. Carey on April 17, 2018. (Transcript, RE 1245, Page ID # 12216.)

At the time of trial, it had been a year and a half since Mr. Mize had last spoken with Mr. Carey. (Transcript, RE 1245, Page ID # 12217.) It should be noted here that Mr. Mize came into contact with and spoke to about 100 people a month through the course of his job. (Transcript, RE 1245, Page ID # 12217.) Mr. Mize was not able to recall whether the government had asked him if he could identify Mr. Carey in some phone calls or if they instead played the phone calls and asked if he recognized any voices without mentioning Mr. Carey's name. (Transcript, RE 1245, Page ID # 12217.) It was also determined that Mr. Carey's sister and his adult son lived in the home with Mr. Carey and that Mr. Mize did not know who may have visited the home. (Transcript, RE 1245, Page ID # 12217-12218.)

Significantly, Mr. Mize did not have any training in voice analysis, did not use any voice analysis software, did not know that people went to school for voice analysis, or that there was a certifying body for people to identify voices. (Transcript, RE 1245, Page ID # 12218-12219.) In fact, Mr. Mize did not know that the "methodology" used by him and law enforcement to "identify" Mr. Carey's voice is considered unreliable by that certifying body. (Transcript, RE 1245, Page ID # 12218.) And he himself had not done any research as to the rules for analyzing and identifying voices and had never received any training in that regard. (Transcript, RE 1245, Page ID # 12219.) Yet Mr. Mize still testified that all the calls had what he identified as Mr. Carey's voice in them. (Transcript, RE 1245, Page ID # 12219.)

The method used by Mr. Mize to "identify" Mr. Carey's voice was flawed. Two weeks before trial, Mr. Mize was played three to four recorded calls that allegedly all contained Mr. Carey's voice. (Transcript, RE 1245, Page ID # 12219.) He was then asked if he heard Mr. Carey's voice, which he allegedly confirmed. (Transcript, RE 1245, Page ID # 12219.) Yet research has shown that the proper way to attempt voice identification should always include a voice "lineup" and also that single-person identification should only be used as an investigative tool—not as an evidential tool. Broeders, Ton., *Forensic Speech and Audio Analysis, Forensic Linguistics—A Review: 2001-2004*, 171, 174 (2004).

Voice "lineups" are used instead of single-person identification because voice lineups—much like photo lineups—enable investigators to detect a vast majority of false identifications. *Id.* at 174-175. This is because, in a proper lineup, each member of the lineup should have an equal chance of being identified, which in turn reduces the risk of falsely identifying someone who is just an innocent suspect. *Id.* at 175. "By contrast, there is of course no way in which false-positive identifications can be distinguished from correct identifications if only a single speaker is presented to the witness: both correct and incorrect identifications amount to selection of the suspect." *Id.* To allow this type of identification during a trial is extremely problematic as it is prejudicial, unreliable, and very likely to result in a violation of defendants' rights to a fair trial.

Estimator variables all impact the reliability of an identification, and these variables include the amount of speech heard by the witness, telephone recording

quality, the delay between exposure to the voice of the unknown speaker and that of the suspect, differences in age and gender, the nature of the speech, and the voice quality of the speaker. *Id.* Notably, Mr. Mize testified that he had not spoken with Mr. Carey since April 17, 2018—roughly a year and a half before Mr. Carey's trial even began and he was asked to identify his voice. (Transcript, RE 1245, Page ID # 12217.) And Mr. Mize had spoken to hundreds, if not thousands, of other people in the course of his job since then; yet he still purported he was able to identify Mr. Carey's voice. (Transcript, RE 1245, Page ID #, 12217.)

Indeed, finding reliable methods for proper voice identification is still in a stage of infancy. Researchers have even warned of the dangers of using "state-of-the-art" automatic speaker recognition systems—highly intelligent software specifically designed for voice identification—that are supposedly better than voice identification by a human. Broeders, Ton., *Forensic Speech and Audio Analysis, Forensic Linguistics—A Review: 2001-2004*, 1 (2004). In a 2004 study, researchers concluded that "[a]lthough the development of state-of-the-art automatic speaker recognition systems continues to show considerable progress, performance levels of these systems do not as yet seem to warrant large-scale introduction in anything other than relatively low-risk, investigative applications." *Id.*

A federal trial, where Mr. Carey's life and liberty were on the line, was *not* a "low-risk, investigative application"—especially when intelligent software was not even used in this case. Instead, a probation officer with no formal voice identification training was asked to identify Mr. Carey on the recorded calls. And that officer, it

should be noted, had not spoken with Mr. Carey in a year and a half *and* he had spoken with well over a thousand other people since his last conversation with Mr. Carey and the alleged identification of his voice.

Of interest here, the Innocence Project has exonerated 375 people.[1] Sixty-nine percent of these exonerations involved eyewitness identification. *Id.* Eleven percent of these wrongful identifications involved voice identifications. *Id.* Thus, the issue of wrongful voice identifications leading to wrongful convictions is not theoretical, it has actually happened in our country. And now Mr. Carey is serving a considerable prison sentence partially due to improper and unreliable methods of identification.

B. Police Sergeant Gregory Alcala

The government added two additional voice identification witnesses—Gregory Alcala and Mark Morrison—who are law enforcement officers with the Grand Rapids Police Department. (Transcript, RE 1249, Page ID # 12979-12980.) Counsel objected to their testimony as it was irrelevant, it was cumulative, and the witnesses were not experts in voice identification. (Transcript, RE 1250, Page ID # 13174.) Counsel argued that the government was attempting to salvage its case at the last minute by introducing new witnesses related to voice identification. (Transcript, RE 1248, Page ID # 12788-12791.) Counsel argued the following:

> In the government's trial brief, which was filed on October 11th, they said in a footnote they had no cooperating witness who would identify Mr. Carey's voice, and the only witness who would be able to identify it was Mr. Mize, although they used the term probation officer. Then I think they also said in the footnote they had an officer who would be

[1] DNA Exonerations in the United States (last accessed July 22, 2022) https://innocenceproject.org/dna-exonerations-in-the-united-states/.

> able to—a law enforcement officer who would I.D. it based on jail calls and the wire calls, and that's Mr. Wills. They put on Mr. Mize, they put on Mr. Wills, they also had Mr. Gentry as a last-minute witness who suddenly I.D.'d the voice, and then to pop up and say hey, now we went back to two other officers who are going to I.D. the voice or say that he was at Philadelphia a year and a half ago is again unfairly prejudicial. This issue didn't come up at the pretrial, it's coming up on October 30. [Transcript, RE 1248, Page ID # 12791.]

The government sought to admit telephone calls in which Mr. Carey was arrested on another charge. (Transcript, RE 1246, Page ID # 12304.) Defense counsel argued against these calls because they were prejudicial and involved hearsay on the part of the person on the call who was not purported to be Mr. Carey. (Transcript, RE 1246, Page ID # 12311.)

Ultimately, the government indicated that it was only calling one of the witnesses. (Transcript, RE 1250, Page ID # 13174.) Counsel further objected to police testimony that Mr. Carey was arrested at his house on Philadelphia as a way to "authenticate" his voice. (Transcript, RE 1248, Page ID # 12784.) Counsel argued it was unfairly prejudicial for the jury to hear about an arrest at the home on Philadelphia. (Transcript, RE 1248, Page ID # 12784-12785, 12787-12790.) The court read a transcript of the call and ruled that if the last two lines were taken out, then it would allow the rest of the call in. (Transcript, RE 1248, Page ID # 12915-12919.) The court reasoned that it eliminated the reference to the county jail and the rest seemed neutral enough. (Transcript, RE 1248, Page ID # 12919.)

The government selected Grand Rapids Police Sergeant Refugio Gregory Alcala to testify, and he stated that on April 11, 2018, he went to 1427 Philadelphia Southeast. (Transcript, RE 1250, Page ID # 13261, 13262.) He arrived at 9:41 a.m.

and made telephone contact with Mr. Carey. (Transcript, RE 1250, Page ID # 13262-13263.) He stated he had several telephone calls with him over a 20- to 25-minute time period. (Transcript, RE 1250, Page ID # 13263.) He could not remember how many calls. (Transcript, RE 1250, Page ID # 13263.) He said that he was able to recognize Mr. Carey's voice on the recording of the call that was played in the courtroom. (Transcript, RE 1250, Page ID # 13266.)

Officer Alcala admitted that the government played the calls for him that morning in a meeting before they played them in the courtroom. (Transcript, RE 1250, Page ID # 13268-13269.) He also admitted that even though he is a police officer, he is not an expert in many areas that are related to his duties as a police officer, such as analyzing drugs, fingerprint analysis, DNA analysis, ballistics analysis, cellular telephone extraction, computer extraction and analysis, cellular telephone triangulation, arson investigation, and forensic interviewing. (Transcript, RE 1250, Page ID # 13270-13271.) Notably, he also admitted that he is not a voice identification expert. (Transcript, RE 1250, Page ID # 13271, 13273.) Additionally, he stated that he had been a police officer for 21 years, he worked roughly 5 days a week, and he interacted with about 100 people a day in the course of his employment. (Transcript, RE 1250, Page ID # 13271-13272.) Just as with Mr. Mize, Officer Alcala's "identification" was unreliable and never should have been admitted in a court of law.

C. Wilbert Gentry

Wilbert Gentry—a former co-defendant in this matter—cooperated with the government and testified at trial. (Transcript, RE 1246, Page ID # 12492-12493.)

Despite never meeting or speaking with Mr. Carey until they were at the Newaygo County Jail together, Mr. Gentry was asked to identify Mr. Carey's voice in recorded telephone conversations that happened before they ever met. (Transcript, RE 1246, Page ID # 12540.) Over defense counsel's objection, Mr. Gentry was allowed to "identify" voices, even though the names of those the government believed to be involved in the phone call *were published on a screen in the courtroom while the recording was playing and Mr. Gentry was testifying*—yet he was still asked to "identify" the speakers for the jury. (Transcript, RE 1246, Page ID # 12542.) With the answers the government was hoping to get visible right on the screen, it was difficult for Mr. Gentry to get the answer "wrong."

After he testified the first day, Mr. Gentry talked with the government, Trooper Young, and Officer Wills that evening and again before re-taking the stand the next morning. (Transcript, RE 1247, Page ID # 12620-12621.) That evening—after his testimony—the government again played phone calls for him when they met with him. (Transcript, RE 1247, Page ID # 12622.) Mr. Gentry claimed that he did not see the names on the screen associated with the phone calls the day before while he was testifying and that he was able to identify Mr. Carey's voice, even though he had never spoken with Mr. Carey on the phone. (Transcript, RE 1247, Page ID # 12622.) But this is not surprising. After all, what else would he say to the jury when he was hoping to garner favor from the government.

Another point of significance in Mr. Gentry's testimony is that he did not ever mention that Mr. Carey went by the name "Sosa" at any time when he proffered,

when he met with the government before he testified in front of the grand jury, when he signed his statement for the government, when he testified in front of the grand jury, or in his plea agreement. (Transcript, RE 1247, Page ID # 12623-12627.) In fact, Mr. Gentry never mentioned that Mr. Carey went by the name "Sosa" at all until *after* the witness preparation meetings that took place a week to a week and a half before trial started. (Transcript, RE 1247, Page ID # 12627.) It was only then that Mr. Gentry suddenly said that he also knew Mr. Carey as "Sosa." (Transcript, RE 1246, Page ID # 12541-12542.) This, of course, fit nicely in the argument the government was trying to make, but the timing is certainly suspicious.

Mr. Gentry's motivation to lie was clear—he said he certainly was not going to turn down a reduction in his sentence if the government sought one. (Transcript, RE 1247, Page ID # 12607.) Mr. Gentry highlights, yet again, the problem with lay person voice identification—he had never spoken with Mr. Carey on the telephone and had only heard him speak a handful of times in a crowded jail, yet he purported to be able to identify his voice in a telephone recording.

Mr. Gentry's testimony was as unreliable as it was confusing. He claimed he knew Mr. Carey as "Sosa" from the holding cell, but he did not initially tell the government Mr. Carey's name despite jail officials using Mr. Carey's government name when calling him out of the cell. (Transcript, RE 1247, Page ID # 12624-12626.) He also only used the name "Sosa" in the grand jury, and he did not say that "Sosa" was Mr. Carey. (Transcript, RE 1247, Page ID # 12626.) This is a critical and important point. A witness would provide the real name of the person he was

referring to in a grand jury proceeding, yet Mr. Gentry did not. This is because his testimony was incredible and his "voice identification" of a voice on a telephone when he never spoke to Mr. Carey on the telephone never should have been allowed in a court of law.

D. Officer Danny Wills

Officer Wills purported to identify Mr. Carey's voice by listening to jail calls of Mr. Carey and then supposedly being able to identify Mr. Carey on the recorded calls. (Transcript, RE 1245, Page ID # 12273.) But he had to admit that on one of the line sheets, Mr. Carey is identified as a "possible" user of the telephone number attributed to him. (Transcript, RE 1246, Page ID # 12402.) This is because investigators could not confirm who was using the telephone. Officer Wills said he could not stress enough the amount of time he spent listening to the telephone calls. (Transcript, RE 1246, Page ID # 12403.) Yet, during cross-examination, when listening to just one voice on a recording and asked to identify the speaker—without hearing Mr. Mayfield's voice—Officer Wills said that his initial assumption was that the voice was Mr. Carey's, but he would need a little more to be sure. (Transcript, RE 1246, Page ID # 12404.) In short, without the context of a complete conversation, Officer Wills was unable to identify Mr. Carey's voice despite his claims that he had listened to hours of conversation in relation to the investigation of this matter.

This is critical testimony. First, counsel represented Mr. Carey, so it would be a very safe assumption that she would only be asking questions about Mr. Carey's voice. Second, he had listened to some calls 30 or 40 times, so he would likely

remember what some of the speakers said. (See Transcript, RE 1246, Page ID #12403.) Even with that, he was *still* not certain of the voice. Third, it was only after hearing Mr. Mayfield's voice that he believed he could identify who else was involved in that recorded telephone call. (Transcript, RE 1246, Page ID # 12404-12407.) He needed the context of the call to identify the speaker, but—as discussed previously—that is absolutely the wrong way to identify a voice. Finally, despite all the time he claimed to have spent listening to the recorded calls, some of the speakers in the transcriptions that he reviewed were improperly listed. These transcripts were used in court, yet the names were wrong. (Transcript, RE 1246, Page ID # 12405-12406.)

In sum, none of these witnesses qualified as opinion witnesses. And their flawed "identifications" should be viewed in the same light as improper eyewitness identifications. The line-up process is done to ensure that wrongful identifications are not made. Wrongful identifications lead to wrongful convictions that lead to wrongful imprisonment. But the court ignored the procedures that are required for eyewitness line-ups and allowed these flawed voice identifications to be admitted in a court of law.

Mr. Gentry had never spoken to Mr. Carey on the telephone, and he had an incentive to falsely identify him. Like Mr. Gentry, Officer Wills had never spoken to Mr. Carey on the telephone. Officer Alcala had spoken to Mr. Carey on the telephone one and a half years before, but only for mere minutes. Likewise, Officer Mize had spoken to Mr. Carey one and a half years before, but only a handful of times.

These identifications were the government's entire case against Mr. Carey. And the evidence against Mr. Carey was notable for what was *not* admitted. In a case where the charges involved drug dealing, the evidence against Mr. Carey contained:

- no drugs;
- no scales;
- no cutting agents;
- no ledgers;
- no packaging supplies;
- no controlled buys;
- no confidential informants;
- no undercover buys by law enforcement;
- no witnesses who bought drugs from Mr. Carey;
- no witnesses who sold drugs to Mr. Carey;
- no witnesses who saw Mr. Carey with drugs;
- no bank accounts with suspicious amounts of cash;
- no search of Mr. Carey's home that found drugs or any indication of drug activity;
- no search of Mr. Carey's car that found drugs or any indication of drug activity;
- no search of Mr. Carey's telephone that found evidence of drugs or any indication of drug activity;
- no search of Mr. Carey that resulted in drugs or evidence of drug activity; and

- no physical surveillance showing Mr. Carey involved in a drug transaction at all.

While opinion witness testimony may not always be required for earwitness identification, it is when the witnesses are serving as experts because their own interactions with Mr. Carey are so limited. Mr. Mize and Officer Alcala came into contact with thousands of people, and their interactions with Mr. Carey were minimal. (Transcript, RE 1245, Page ID #12218-12219; Transcript, RE 1250, Page ID # 13271-13272.) Mr. Gentry's "identification" came after the names of people on the phone call were actually listed on the screen; thus, giving him the "correct" answer. (Transcript, RE 1247, Page ID # 12621-12622.) Officer Wills used documents that stated that Mr. Carey was a mere "possible" user of one of the phones in question, and he needed to hear the "context" of the call to "identify" the voice. (Transcript, RE 1246, Page ID # 12402, 12404.) Given the science involved in voice identification and the minimal ability of the lay witnesses in this case, the court should not have allowed lay people to serve as "experts" in ear witness testimony.

II. The district court improperly allowed Agent Labno to be qualified as an opinion witness.

Mr. Carey was unfairly prejudiced when Agent Labno was allowed to testify as an opinion witness about drug distribution in this matter despite not having any experience whatsoever with the drug trafficking trade in the Grand Rapids, Michigan area. Defense counsel objected to Agent Labno being qualified as an opinion witness on this basis, but this objection was overruled. (Transcript, RE 1247, Page ID # 12718.) Mr. Carey was further prejudiced when Agent Labno testified, over objection,

about his contextual interpretation of telephone calls. (Transcript, RE 1247, Page ID # 12751.)

Federal Rule of Evidence (F.R.E.) 702 governs the admissibility of expert testimony and states the following:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Cases that have allowed drug trafficking experts to testify share a commonality—even without intimate or specific knowledge of the individual or organization involved, these experts have been allowed to apply their specialized knowledge and their principles and methods reliably to those who participate in drug trafficking because of the overall similarities in drug trafficking. See, e.g., *United States v. Ham*, 628 F.3d 801, 805 (6th Cir. 2011); *United States v. Thomas*, 74 F.3d 676, 682 (6th Cir. 1996), abrogated on other grounds *Morales v. American Honda Motor Co.*, 151 F.3d 500, 515 (6th Cir. 1998). These similarities include the use of packaging material and scales as well as the methods of distribution. Therefore, a drug trafficking expert is more apt to be able to apply his expertise reliably to a

narcotics trafficking organization without specialized or intimate knowledge of the individual or organization engaging in narcotics trafficking.

But while it may be true that general drug trafficking is a crime that may not be especially unique from offender to offender and does not necessarily require unique characteristics, this does not mean that an opinion witness can testify in every case or about any matter. In *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008), the court explained that much of the expert's testimony relied on testimonial statements and the testimony was well within the grasp of the average juror. The officer's summary testimony of how many firearms had been seized, that members of the gang had been arrested for drug dealing, and that members of the gang had committed murders was not proper expert testimony. *Id.* at 195. The court ruled that the government could have introduced this evidence through lay witness testimony and other competent evidence and that the jury was more than capable of interpreting and intelligently understanding this evidence without an expert guiding them. *Id.*

The court provided examples of testimony for which an expert was not needed, including testimony about the ways that gang members traveled or transported drugs, information about attendance at meetings, and how members communicated with each other. *Id.* Critically, the "expert" also improperly testified about how gang funds were used to buy firearms and narcotics and that gang members dealt drugs. *Id.* Especially troubling was the officer's testimony that summarized the results of the investigation into the gang. *Id.* The court explained that it could not determine

how the expert "applied his expertise" to the statements he heard before conveying them to the jury. *Id.* at 198-199.

Likewise, there was nothing that Agent Labno could offer the jury that it would not hear otherwise or form their own conclusions on based on the other evidence in this case. (Transcript, RE 1247, Page ID # 12718.) At trial, Agent Labno primarily listened to telephone calls or read text messages and then claimed he knew what they meant. This was despite the fact that Agent Labno had never worked on the streets of Grand Rapids or on any case in the Grand Rapids area. (Transcript, RE 1247, Page ID # 12714; Transcript, RE 1248, Page ID # 12839.) His only knowledge about drug distribution in Grand Rapids was based solely on what he had been told by other agents who worked in that area. (Transcript, RE 1247, Page ID # 12714.)

While Agent Labno claimed that code words and street slang are common across geographical areas and are fairly consistent over time, he could not possibly know this about the Grand Rapids area because he had no experience working there. (See Transcript, RE 1247, Page ID # 12716.) While he admitted that there was some individual variation in code words from city to city, state to state, and based on things such as age and demographics, he believed there to be a core base of code words and street slang that he alleged to be familiar with across multiple geographical areas. (Transcript, RE 1247, Page ID # 12716-12717.) However, he then had to admit that some code words have multiple meanings, too, depending on the context. (Transcript, RE 1247, Page ID # 12717.) Proffers and debriefs with other people help officers try to understand what terms or amounts mean. (Transcript, RE 1251, Page ID # 13354-

13355.) Notably, Agent Labno did not participate in any of these, and he did not identify the "consistent" terms before he went on to provide his own interpretation of the telephone calls and text messages.

To make matters worse, this opinion witness—who had incorrectly testified that cocaine was a Schedule I drug, when it is actually a Schedule II drug—was allowed to testify with no limits. (Transcript, RE 1247, Page ID # 12712-12713.) He claimed that shake was what is left after the powder cocaine is broken down into chunks. (Transcript, RE 1247, Page ID # 12755.) He stated that it was the "small, itty bitty chunks" that was less desirable and often contained a large amount of the cutting agent. (Transcript, RE 1247, Page ID # 12755.) And Agent Labno was adamant that he had never heard the term "shake" used in conjunction with marijuana in his entire eighteen years as an agent involved with narcotics investigations. (Transcript, RE 1248, Page ID # 12824-12825, 12847-12848.) But this was in direct contrast to other agents from the Grand Rapids area who had previously testified that shake refers to marijuana. (Transcript, RE 1248, Page ID # 12848, 12850, 12874.) For a purported expert in drug lingo, Agent Labno got many facts wrong. And this most definitely misled and confused the jury.

According to Agent Labno, code words for an ounce of drugs were zone, a whole onion, or a zip. (Transcript, RE 1247, Page ID # 12734, 12762-12763; Transcript, RE 1248, Page ID # 12802, 12841-12842, 12862.) A hizzy referred to a half ounce quantity. (Transcript, RE 1247, Page ID # 12744; Transcript, RE 1248, Page ID # 12803.) And while Agent Labno originally tried to categorize a zip as generally

referring to cocaine, he was ultimately forced to admit that it was specifically used to refer to marijuana in this case, too. (Transcript, RE 1248, Page ID # 12841-12842.)

Notably, Agent Labno was also allowed to testify at length about communications that were allegedly between Mr. Carey and Mr. Mayfield and purportedly involved drug trafficking. (Transcript, RE 1247, Page ID # 12747-12757, 12766-12767; Transcript, RE 1248, Page ID # 12840.) Agent Labno was allowed to cumulatively testify about what he believed certain telephone calls meant throughout his testimony. (See, e.g., Transcript, RE 1247, Page ID # 12744-12754.) He was allowed to present the government's case by "explaining" telephone calls to the jury under the guise of being an opinion witness when the jury was more than capable of listening to the telephone calls and deciding for themselves—which is exactly the function of the trier of facts. Agent Labno knew he was testifying in a drug distribution case, so his after-the-fact explanations were guided by his bias and knowledge of the government's case.

The Court of Appeals for the Sixth Circuit ruled that Agent Labno's qualifications allowed him to testify as an expert and said that his testimony helped the trier of fact to understand the evidence or determine a fact in issue. The court mentioned that he was able to supply specific terminology for drug amounts, so his testimony was relevant. (Appendix A, Opinion, RE 48-2, Page ID # 14.) But this information should have come from an expert who had first-hand experience and knowledge in the geographical area where the case was located. It was not necessary

to call in an "expert" from outside the area of the investigation to provide the jury with this information.

And the Court of Appeals for the Sixth Circuit severely minimized the fact that Agent Labno got many important facts wrong. While the court acknowledged that "Agent Labno conceded he never worked in Grand Rapids or on the investigation, that slang varied across regions, and that he spoke with colleagues about Grand Rapids slang before the trial[,]" it went on to state that that the jury heard those concessions and "considered them." (Appendix A, Opinion, RE 48-2, Page ID # 14.) But this ignores that Agent Labno's testimony—inaccuracies and all—was likely given more weight by the jurors than it should have been in this instance due to his "expert" status. Agent Labno testified outside of his range of expertise when he discussed the specifics as related to the Grand Rapids area, but the jury was unlikely to fully discount this information even though it was wrong because of the "expert" label.

In short, Agent Labno, while a purported expert on terminology in relation to the Chicago area, did not have "expert knowledge" of the Grand Rapids area. Because of this, his testimony was not based on proper knowledge and experience and he should have never been allowed to offer his opinion on subjects outside the area of his expertise.

III. The government did not meet the Title III necessity standard to justify the wiretap.

"Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63; 87 S. Ct. 1873; 18 L.

Ed. 2d 1040 (1967). Wiretapping a telephone line is a significant invasion of privacy that must only be undertaken after strict compliance with the law. Whenever a telephone line is tapped, every person who communicates on the tapped line has his or her privacy invaded. Because the government failed to meet the necessity requirement, Mr. Carey joined in a motion that was filed to suppress the fruits of the wiretap. (Motion, RE 361, Page ID # 883-895; Motion, RE 399, Page ID # 965-969; Transcripts, RE 1157, Page ID # 11069.)

The defense argued that the extraordinary step of requesting a wiretap was not justified at the point in the investigation when it was made and granted. (Transcript, RE 1157, Page ID # 10069.) There was a rush to get access to phones instead of pursuing the investigation through more conventional means when it was not yet necessary—or justified—to do so. (Transcript, RE 1157, Page ID # 10069-10070.) In short, law enforcement went too fast, and the evidence should be suppressed. (Transcript, RE 1157, Page ID # 10070.) The court denied the motion to suppress the wiretap evidence. (Transcript, RE 1157, Page ID # 10088-10089.) The court held that the defense had not shown sufficient deficiencies in the affidavit to require suppression. (Transcript, RE 1157, Page ID # 10089.) The Court of Appeals for the Sixth Circuit likewise agreed. (Appendix A, Opinion, RE 48-2, Page ID # 7.)

But the ongoing investigation had yielded much information before the wiretap. And further investigation through traditional means may have taken more effort on the part of law enforcement, but that does not mean that they had exhausted other avenues and could not continue to move forward without the wiretaps. The

issuance of the wiretaps was, therefore, unnecessary and should have been denied. And the Court of Appeals for the Sixth Circuit erred when it ruled otherwise.

18 U.S.C. § 2518(1)(c) establishes that in every application for an order authorizing or approving the interception of a wire, oral, or electronic communication, each application must include "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." "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." *United States v. Wuliger*, 981 F.2d 1497, 1506 (6th Cir. 1992). The protection of individual privacy is an overriding congressional concern that requires strict compliance with the law. *Id.*

In *United States v. Alfano,* 838 F.2d 158, 163 (6th Cir. 1988), the court established that the necessity requirement exists as an important protection against the frivolous use of a wiretap and to "ensure that a wiretap 'is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.'" *Id.*, quoting *United States v. Kahn*, 415 U.S. 143, 153, n. 12; 94 S. Ct. 977; 39 L. Ed. 2d 225 (1974). As the nature of wiretapping is highly intrusive, the intrusion of a wiretap is limited to only those situations in which normal investigative techniques are not sufficient. *United States v. Blackmon,* 273 F.3d 1204, 1207 (9th Cir. 2001).

The government must strictly adhere to the procedural steps of 18 U.S.C. § 2518 to guarantee that wiretapping only occurs when there is a genuine need for it. *Dalia v. United States,* 441 U.S. 238, 250; 99 S. Ct. 1682; 60 L. Ed. 2d 177 (1979). This requirement of necessity exists to ensure that investigators use the tool of electronic surveillance "with restraint" and not as the "initial step in criminal investigations." *United States v. Giordano,* 416 U.S. 505, 515; 94 S. Ct. 1820; 40 L. Ed. 2d 341 (1974). "Wiretaps are not to be used thoughtlessly or in a dragnet fashion." *Alfano*, 838 F.2d at 163. As the Sixth Circuit has stated, "what is needed is to show that wiretaps are not being 'routinely employed as the initial step in criminal investigation.'" *Id.*, citing *United States v. Landmesser,* 553 F.2d 17, 20 (6th Cir. 1977), quoting *Giordano,* 416 U.S. at 515.

The government carries the burden to overcome the presumption stated in Section 2518 by a showing of necessity. *Giordano,* 416 U.S. at 515. If the government fails to meet its burden, 18 U.S.C. § 2518(10) requires suppression of the evidence. "[W]here a warrant application does not meet the necessity requirement, the fruits of any evidence obtained through that warrant must be suppressed." *United States v. Rice,* 478 F.3d 704, 710 (6th Cir. 2007).

The analysis from the United States Court of Appeals for the Ninth Circuit of Section 2518 and the necessity requirement in *United States v. Ippolito,* 774 F.2d 1482 (9th Cir. 1985), is instructive as to its constitutional roots. The government is required to demonstrate that normal investigative means have either been tried and failed, or that they are unlikely to succeed. *Id.* at 1486. While the government is not

required to pursue every means of investigation, it cannot ignore other ways of investigation if such means appear to be "both fruitful and cost-effective." *Id.* If the courts ignore the statutory requirements of 18 U.S.C. § 2518, it allows the government to abandon traditional investigative procedures that would potentially achieve the same result without the "serious intrusion that a wiretap necessarily entails." *Id.*

Indeed, courts have recognized that while the government does not have to prove that every method has been tried and failed, it must give serious consideration to non-wiretap techniques, informing the court of its reasons why these techniques would likely be inadequate. *Rice*, 478 F.3d at 710. Further,

> [w]hile the prior experience of investigative officers is indeed relevant in determining whether other investigative procedures are unlikely to succeed if tried, a purely conclusory affidavit unrelated to the instant case and not showing any factual relations to the circumstances at hand would be . . . an inadequate compliance with the [necessity requirement]. [*Landmesser*, 553 F.2d at 20.]

And "the utmost scrutiny must be exercised to determine whether wiretap orders conform to Title III." *United States v. Kalustian,* 529 F.2d 585, 589 (9th Cir. 1975).

The government's Title III application failed the necessity requirement because the reasoning used to justify why typical investigative techniques were tried and failed or were likely to be inadequate amounted to mere conclusory statements. To issue the order authorizing the wiretap, the court must determine that, in part, "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous . . . ." 18 U.S.C. § 2518(3)(c).

"[B]are conclusory statements that normal techniques would be unproductive, based solely on an affiant's prior experience, do not comply with the requirements of section 2518(1)(c)." *United States v. Ashley*, 876 F.2d 1069, 1072 (1st Cir. 1989). "[B]oilerplate conclusions that merely describe inherent limitations of normal investigative procedures," not limitations in a particular investigation, are also insufficient for Section 2518(1)(c). *Blackmon*, 273 F.3d at 1210. "The government may not cast its investigative net so far and so wide as to manufacture necessity in all circumstances." *Id.* at 1211.

For example, in *Rice*, 478 F.3d at 711, the wiretap affidavit at issue contained many conclusory statements. The affidavit stated that the confidential source (CS) was not close enough to the target subject to gather information and the government had no other CS who could do so, but the "district court found inadequate the generic information included regarding how drug traffickers normally operate." *Id.* at 708. The affidavit stated that a pen register and trap and trace had been used but only indicated a pattern of telephone use by the subject to others suspected in the drug trade. *Id.* The affidavit "did not identify the individuals actually making and receiving the calls, and did not reveal the contents of the conversations." *Id.* The district court saw this as "general language about the usefulness of pen registers in general." *Id.* The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision that the affidavit failed to meet the necessity requirement because, along with the reasoning stated above, the affidavit also "contained generalized . . .

information about why grand jury subpoenas, witness interviewing and search warrants, and trash pulls would not be useful." *Id.* at 711.

Similarly, the United States Court of Appeals for the Ninth Circuit also found a wiretap affidavit insufficient to satisfy the necessity requirement in *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1115 (9th Cir. 2005). With regard to an argument that "neither physical nor video surveillance was likely to produce useful information[,]" the Ninth Circuit Court of Appeals observed, "Surely surveillance is not completely unsuccessful if it does not decipher what an individual is writing while she sits at her desk" because video or physical surveillance still could identify individuals involved in the conspiracy. *Id.* at 1114. The government further claimed in its wiretap affidavit that search warrants or grand jury subpoenas would be unlikely to succeed because they "would reveal the investigation to the targets." *Id.* at 1109.

The government also rejected the use of subpoenas "on the belief that conspirators would likely avail themselves of their Fifth Amendment privilege against self-incrimination." *Id.* In rejecting the government's claims, the court held that "[s]uch statements d[id] not reasonably explain why traditional investigative tools are unlikely to succeed in a particular investigation," and were boilerplate language. *Id.* at 1114. "That pen registers do not reveal the identity of callers; that drug dealers know it is in their best interest to reveal as little as possible; that witnesses cannot lead to the prosecution of an entire drug organization . . . are generic problems of police investigation." *Blackmon*, 273 F.3d at 1211. In *Kalustian*, 529 F.2d

at 589, the court likewise emphasized that "[i]n effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view."

Here, the government went through multiple investigative techniques that it claimed failed or would prove inadequate, reciting generalization after generalization. The affidavit did not explain why this case presented any investigative problems that were distinguishable in nature or degree from any other case involving an alleged conspiracy and similar offenses.

The "necessity requirement" exists as an important protection against the frivolous use of a wiretap and to "ensure that a wiretap 'is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.'" *Alfano,* 838 F.2d at 163, quoting *Kahn*, 415 U.S. at 153, n. 12. As indicated by the affidavit, the government did not meet the necessity requirement to obtain a Title III warrant. For instance, any flaws with using confidential sources is a generic problem of all investigations and how investigations normally operate, which is insufficient for the necessity requirement. See *Rice*, 478 F.3d at 708; see also *Blackmon*, 273 F.3d at 1211. Concerns about limitations as it related to subject witness interviews and the grand jury is, again, evident in every case. The government's rote explanations are unhelpful and do not clarify why the investigative techniques would not work in this particular case. *Gonzalez, Inc.*, 412 F.3d at 1114. And, contrary to the Court of Appeals for the Sixth Circuit's opinion, there were not "reams of fresh evidence"

offered in the subsequent applications. (Appendix A, Opinion, RE 48-2, Page ID # 9.) Indeed, all affidavits—while lengthy—contained much of the same information.

The Sixth Circuit stated that analogizing to the *Rice* and *Blackmon* cases was inapposite because "[n]either is on point." (Appendix A, Opinion, RE 48-2, Page ID # 11.) It stated that *Rice* involved an affidavit that contained misleading and reckless statements and that without these statements only uncorroborated thoughts and opinions remained. (Appendix A, Opinion, RE 48-2, Page ID # 11.) For *Blackmon*, the court held that the wiretap application contained material omissions and generalized statements that would be true of any narcotics investigation. (Appendix A, Opinion, RE 48-2, Page ID # 11.) Without specific facts, the "boilerplate conclusions" alone did not justify necessity of the wiretap in that case. (Appendix A, Opinion, RE 48-2, Page ID # 11.)

Just because there were not material omissions in the instant affidavits does not mean that the crux of those cases did not apply to this matter. In *Rice* and *Blackmon*, it was found that when the offending information was removed, what was left over did not support the issuance of the wiretap. The same holds true here. The requirements for obtaining the wiretap were not met. The facts relied on in *Rice* and *Blackmon* do not require that Mr. Carey also prove that there were misleading statements or material omissions first before the rest applies. In *Rice* and *Blackmon*, the requests for wiretaps were not adequate to allow the granting of the request. Here, the requests for wiretaps were also not adequate to allow for the granting of the wiretaps for the reasons outlined above. Therefore, these cases *do* still apply to

the instant matter and the Court of Appeals for the Sixth Circuit erred when it decided otherwise.

In effect, the government's position here was that all conspiracies are tough to crack, so the government needed electronic surveillance. But Title III does not support that expansive view. And the trial court and that United States Court of Appeals for the Sixth Circuit erred when they ruled otherwise.

IV. The district court improperly gave a constructive possession jury instruction.

"[A]n instruction should not be given if it lacks evidentiary support or is based upon mere suspicion or speculation." *United States v. James*, 819 F.2d 674, 675 (6th Cir. 1987). Jury instructions must be read as a whole to determine if they fairly and adequately submit the issues and applicable law to the jury. *United States v. Lee*, 991 F.2d 343, 350 (6th Cir. 1993). The question is what a reasonable juror could have understood the jury instruction to mean. *United States v. Buckley*, 934 F.2d 84, 87 (6th Cir. 1991).

Over objection, the district court gave a constructive possession jury instruction. (Transcript, RE 1252, Page ID # 13508-13509.) The court stated, in part, the following:

> First, I want to explain something about possession. The government does not necessarily have to prove that the defendant physically possessed the cocaine for you to find him guilty of this crime. The law recognizes two kinds of possession, actual possession and constructive possession. Either one of these, if proved by the government, is enough to convict.
>
> To establish actual possession, the government must prove that the defendant had direct, physical control over the cocaine, and knew that he had control of it.

> To establish constructive possession, the government must prove that the defendant had the right to exercise physical control over the cocaine, and knew that he had this right, and that he intended to exercise physical control over the cocaine at some time, either directly or through other persons. [Transcript, RE 1252, Page ID # 13530.]

But the government did not present a constructive possession theory as it relates to Mr. Carey; thus, the instruction should not have been given. There was insufficient evidence presented that Mr. Carey had the right to exercise physical control over drugs and that he intended to do this at some time in the future either himself or through a third-party. This instruction would confuse a reasonable juror, especially in Mr. Carey's case when absolutely no drugs were found—not in his presence or in the presence of a third-party—that were linked to Mr. Carey. And both the trial court and the Court of Appeals for the Sixth Circuit erred when they ruled otherwise.

V. The district court improperly calculated the drug quantity level attributed to Mr. Carey.

Mr. Carey was convicted of conspiracy to distribute and possess with intent to distribute cocaine and cocaine base as well as two charges of possession with intent to distribute cocaine. (Transcript, RE 1252, Page ID # 13552-13553.) Mr. Carey is liable for the actions of his co-conspirators that were reasonably foreseeable to him and in furtherance of the execution of the jointly undertaken criminal activity. See *United States v. Jenkins*, 4 F.3d 1338, 1346 (6th Cir. 1993). Therefore, Mr. Carey is only liable for the cocaine that (1) he knew about or that was reasonably foreseeable to him and (2) was within the scope of his criminal agreement. See *United States v. Campbell*, 279 F.3d 392, 399-400 (6th Cir. 2002).

In *United States v. Dukes*, 802 Fed. Appx. 966, 969 (6th Cir. 2020), the court stated that foreseeability must rise beyond knowing that every transaction requires an extensive network of people who import and distribute large quantities of controlled substances. Every member of the conspiracy is viewed as an individual and differentiated from every other member of the conspiracy. *Id.* Liability has been imposed when a defendant knew about: (1) the drug scheme's leadership; (2) particular instances of obtaining and selling drugs; (3) the potential for being caught by a government investigation; (4) the methods of creating drugs; and (5) actions taken by other drug dealers in the conspiracy. *Id.* at 969. Notably, knowledge about drugs alone does not amount to reasonable foreseeability. *Campbell*, 279 F.3d at 400.

The quantity of drugs on which a sentence is based must be supported by a preponderance of the evidence. *United States v. Anderson*, 526 F.3d 319, 326 (6th Cir. 2008). Estimated drug quantities are permitted as long as the district court erred on the side of caution. *Id.* In sum, the quantity of drugs supporting a sentence must reflect "a minimal level of reliability beyond mere allegation." *United States v. West*, 948 F.2d 1042, 1045 (6th Cir. 1991).

Mr. Carey's offense level was calculated at 30 and his criminal history category was calculated at category IV by the presentence report writer. (Transcript, RE 1253, Page ID # 13563.) The advisory guideline range was 135 to 168 months. (Transcript, RE 1253, Page ID # 13563.) Mr. Carey was sentenced to 150 months in custody for counts one, three, and eight, to be served concurrently. (Transcript, RE 1253, Page ID # 13594.)

On the telephone calls that were attributed to Mr. Carey, none of the calls specified drug amounts to warrant five kilograms of cocaine or more. (Transcript, RE 1253, Page ID # 13566.) One of the calls referenced "seven to eight." (Transcript, RE 1253, Page ID # 13566.)[2] Mr. Mayfield originally said that one to two grams were sold to Mr. Carey, then he said one to two ounces. (Transcript, RE 1253, Page ID # 13566.) There was no support in the calls or from the testimony of witnesses that Mr. Carey was involved with anyone other than Mr. Mayfield and then it was just for a short period of time—a mere 26 days. There was certainly no information anywhere to support that five kilograms or more could be attributed to Mr. Carey.

"[W]hen choosing between a number of plausible estimates of drug quantity, none of which is more likely than not the correct quantity, a court must err on the side of caution." *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990). This fact must be proven by a preponderance of the evidence at sentencing. *Id.* The preponderance of the evidence standard is difficult to achieve when a number of plausible theories concerning the quantity of drugs are presented and the evidence is insufficient to say that any one choice is more likely than not true. *Id.* at 1301.

"A district court may not 'hold a defendant responsible for a specific quantity of drugs unless the court can conclude the defendant is more likely than not *actually* responsible for a quantity greater than or equal to the quantity for which the defendant is being held responsible.'" *United States v. Jeross*, 521 F.3d 562, 570 (6th

[2] Mr. Carey is not conceding that he is the person on the telephone calls, but for the sake of ease of the reader, the caller purported to be Mr. Carey will be referred to as Mr. Carey.

Cir. 2008), quoting *Walton*, 908 F.2d at 1302. There must be a minimum level of reliability beyond mere allegations for a court to determine a drug quantity and attribute it to a defendant. *United States v. Sandridge*, 385 F.3d 1032, 1037 (6th Cir. 2004).

The government argued that Mr. Carey was directly involved in the shipment on April 6 by "procuring it, commanding, it, inducing it by [telling] Mr. Mayfield to go get it." (Transcript, RE 1253, Page ID # 13570.) But Mr. Carey was not Mr. Mayfield's "boss" and was in no position to tell him what to do. Indeed, it was Mr. Mayfield who was in control, so it was of absolutely no consequence what Mr. Carey wished for Mr. Mayfield to do. The government further argued that despite the fact that Mr. Carey did not know the amount of drugs, it did not change the fact that he was involved in inducing the shipment of cocaine and that he knew of Mr. Mayfield's actions and role in obtaining significant amounts of cocaine. (Transcript, RE 1253, Page ID # 13570-13571.) According to the government the fact that Mr. Carey knew the potential for being caught by the government, and that he knew methods for creating drugs, meant he should be held responsible for the shipment total. (Transcript, RE 1253, Page ID # 13571.)

The court overruled defense counsel's objection and held that Mr. Carey had a very close working relationship with Mr. Mayfield that involved drug activities. (Transcript, RE 1253, Page ID # 13576.) A defendant is liable for drugs that he knew about or that were reasonably foreseeable to him, and that were within the scope of the criminal agreement. (Transcript, RE 1253, Page ID # 13577.) It held that Mr.

Carey was involved in the five kilograms delivered from Texas between April 4 and April 6, 2018, because Mr. Carey had been soliciting Mr. Mayfield to make that trip. (Transcript, RE 1253, Page ID # 13577.) In reaching its decision, the court said that Mr. Carey was advocating to be held responsible for only the drugs that he personally touched. (Transcript, RE 1253, Page ID # 13577.) But Mr. Carey did not need to know the exact quantities to be held responsible for them. (Transcript, RE 1253, Page ID # 13577.)

The court's ruling was that because Mr. Carey knew that Mr. Mayfield was procuring controlled substances, he was responsible for the total amount of Mr. Mayfield's shipment. But the court's ruling makes no distinction between someone who is purchasing a set amount and people who are more involved and know the overall amount being procured. Mr. Carey did not know how much was procured. And he was not the only person who was alleged to have been waiting on its arrival.

The scope of jointly undertaken activity is not the same as the scope of a conspiracy. U.S.S.G. § 1B1.3, cmt. n.3(B) (2018); see also *United States v. McReynolds*, 964 F.3d 555, 562-565 (6th Cir. 2020). It was not within the scope of any agreement that Mr. Carey had with Mr. Mayfield for Mr. Mayfield to procure controlled substances for others. Mr. Carey had no agreement with Mr. Mayfield to do work for other people, and he did not work with Mr. Mayfield to get controlled substances ready for anyone else. The fact that Mr. Carey may have known about the actions of others does not equate to reasonably foreseeable relevant conduct under the law.

"Additional months in prison are not simply numbers. Those months have exceptionally severe consequences for the incarcerated individual. They also have consequences both for society which bears the direct and indirect costs of incarceration and for the administration of justice which must be at its best when, as here, the stakes are at their highest." *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017). Thus, because there was no agreement for Mr. Mayfield to procure five kilograms or more of cocaine and the amount was not reasonably foreseeable, the district court improperly determined the drug quantity as attributable to Mr. Carey, even under the preponderance of the evidence threshold. Estimated drug quantities are permitted as long as the district court erred on the side of caution. *Anderson*, 526 F.3d at 326. But that is clearly not what happened here

CONCLUSION AND RELIEF REQUESTED

The law applies to all regardless of the crimes that a man has been charged with committing. In this case, Mr. Carey's rights were violated by numerous decisions that were made before and during trial and also at sentencing. The district court and the United States Court of Appeals for the Sixth Circuit erroneously held otherwise. Accordingly, Mr. Carey respectfully requests that this Court grant his petition.

Respectfully submitted,

CHARTIER & NYAMFUKUDZA, P.L.C.

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/s/ MARY CHARTIER
Mary Chartier