

No. 22-5612

Supreme Court, U.S.
FILED
JUL 14 2022
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

Luis Gomez — PETITIONER
(Your Name)

vs.

United States — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeals, Seventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Luis Gomez, Reg#16304-089
(Your Name)

F.C.I.-La Tuna, PO BOX 3000
(Address)

Anthony, NM 88021
(City, State, Zip Code)

N/A
(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

Does a prosecutor's improper Vouching to the jury, rise to a level of reversal in accordance of the 5th Amendment. and Unduly prejudice the defendant?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
CONCLUSION.....	13

INDEX TO APPENDICES

APPENDIX A Decision of the United Court of Appeals, Seventh Cir

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Bruton v United States, 391 U.S. 123, 88 S CT 1620 (1968).....	9
Sprint/United Management v Mendelsohn, 128 S CT 1140 (2008).....	10
People v Okundaye, 189 ILL APP.3D 601, 545 N.E. 2D 505 (1989)....	8
United States v Bozza, 365 F.2d 206 (2nd Cir. 1966).....	9
United States v Brown, 692 F.2d 345, 350 (5th Cir. 1982).....	8
United States v Cunnungham, 462 F.3d 708 (7th Cir. 2006)..	7,9,10,11
United States v Gomez, 29 F.4th 915 (7th Cir. 2022).....	11
United States v Harris, 464 F.3d 733, 744 (7th Cir. 2006).....	11
United States v Leon, 468 U.S. 435 (1984).....	11
United States v McMahon, 495 F.3d 410 (7th Cir. 2007).....	7,9,11
United States v Nash, 54 F.2d 1006 (1932).....	9
United States v Noel, 581 F.3d 490 497 (7th Cir. 2009).....	10

STATUTES AND RULES

Federal Rules of Evidence,

401.....	8
402.....	8
403.....	8

OTHER

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

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 29 F.4th 915; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was March 31, 2022.

☒ No petition for rehearing was timely filed in my case.

[] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from state courts:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In June 2016, the government set up surveillance on a money courier in regards to a tip that they received. That tip led to a \$150,000.00 seizure. Also, later in the fall of 2016, undercover Home Land Security Investigations agents, (H.S.I.) intersepted an additional \$110,000.00 from a different money courier, which led to a Jonathan Martinez-Acosta.

At this point in the investigation, law enforcement installed a motion activated pole camera in the alley behind Mr. Luis Gomez's House.

November 7, 2016- Mr. Gomez loaded a Mercury Grand Marquis on a flatbed truck. No evidence of illegal activity.

At an undisclosed date and time, the government placed a wiretap on multiple individuals.

January 29, 2017- Agents learned of a pickup vehicle, picked up not by Mr. Gomez, but by Mr. Acosta and Mr. Sotelo, a Chrysler '300' from a car hauler at a wal-mart. Said '300' was driven to Mr. Gomez's garage, however, video evidence shows Mr. Gomez drove away from the garage in a Volkswagen Jetta. Again no evidence of Mr. Gomez's involvement.

March 5, 2017- New Mexico State Police stopped a car hauler with a Chrysler '300'.

February 28, 2017 Video shows two individuals in a Hummer and a Cadillac Escalade stop in an alley to converse, then the video shows Mr. Gomez and Mr. Sotelo take a car off a trailer and

replace the car with a Volkswagen Jetta,
from an unidentified garage.

March 3, 2017- Video from Gomez's camera pole shows Gomez waving the Volkswagen into his garage. After 10 minutes, the Volkswagen reappears and is directed down the alley. Still no evidence of wrong doing.

March 22, 2017- A agent Dykema, conducted a surveillance operation at an address in Milwaukee and during his observation, he located a Mercury Grand Marquis on a flatbed trailer. Present were Mr. Sotelo and Mr. Manriquez. Not present, was Mr. Gomez, who has been wrongfully labeled as a leader/organizer.

Sotelo and Manriquez were discussing how much to pay a legitimate car hauler.

May 13, 2017- Nebraska County Police stop a car hauler with a Mercury Grand Marquis.

April 18, 2017- Officer Dykema seen a Jetta in West Burnham, Milwaukee, while a phone tap of Mr. Gomez's phone, has him discussing his position in relation to the Jetta. Which has not been identified in any illegal activity.

April 18, 2017 Illinois State Police stopped a car hauler with a Volkswagen Jetta and found \$145,000.0 in US currency, which is not illegal. Many legit reasons to move money around in secret

May 2017,

At an unidentified date and time, agents overheard a conversation between Hildalgo and a car hauler, and pursuant to that conversation agents alerted Michigan State authorities.

July 25, 2017-

Michigan State Police after acting on extremely stale information, stopped a car hauler with a Mercedes Benz SUV, carrying 10 packs of Methamphetamine.

December 5, 2016 Through September 1, 2017-

There were approximately 60 conversations between 6 individuals, and per the government, these conversations related to the Volkswagen Jetta, the Chrysler 300, the Mercury Marquis, and the Mercedes Benz SUV.

However, given the issues in this brief relate to the government's effort to bolster its case contrary to this Court's decisions in **UNITED STATES v CUNNINGHAM, 462 F.3D 708 (7TH Circuit 2006)** and **UNITED STATES v McMAHON, 495 F.3D 410 (7TH Circuit 2007)**, the details of these conversations are not included.

REASONS FOR GRANTING THE PETITION

Wiretaps are a legitimate and usefull tool for law enforcement. The decision of whether to authorize a wiretap is a legal issue. Given the Fourth Amendment, Congress and the Department of Justice installed a rigorous procedure, including multiple approvals and reviews before the government may wiretap a person's phone. These multiple reviews by law enforecement officials and the court's authorization, are designed to safeguard the guarantees set forth in the Fourth Amendment. Having complied with the legal requirements to obtain a wiretap, the evidence derived from a wiretap is admissible if it is relevant and material to issues at hand in the trial. The procedure required to obtain authorization for a wiretap is neither erlevant nor material to whether defendant committed teh crime of whice he or she is accused.

This case was tried in 2019. The Court of Appeals for the Seventh Circuit decided **CUNNINGHAM** in 2006 and **McMAHON** in 2007, both of which addressed the government's use of the safeguards mentioned above to strengthen its case that the defendant was guilty. Although the offending testimony was similar, the Court reversed **CUNNINGHAM** and affirmed **McMAHON**. The difference being that counsel in **CUNNINGHAM** objected to the testimony and counsel in **McMAHON** did not, making the review one of abuse of discretion. **McMAHON** at 417. While there was no objection in this case, the error here the four-prong test enunciated in **McMAHON**, (1) error, (2) plain, (3) affected the substantial rights, and (4) affected the fairness, integrity, or public perception of the proceeding. **McMahon** at 418.

The Court's opinion in **CUNNINGHAM** explained in rather blunt language why bolstering testimony such as in this case was irrelevant

"... the government recounted a litany of procedures of the local U.S. Attorney's office, the Office of the Attorney General, and the Drug Enforcement Administration ("DEA") utilized in seeking court authorization for two telephone wiretaps. In doing so, the government's witness's testimony suggested to the jury that a panel of senior government lawyers in the Office of the Attorney General in Washington, D.C. and others in law enforcement were of the opinion that there was probable cause to believe the defendants were indeed engaging in criminal activity. The admissions of this irrelevant evidence had the effect of improperly bolstering the credibility of the government's case in the eyes of the jury, and the error was not harmless. Accordingly, we reverse and remand.

... It is apparent that the Title III evidence was not relevant in this case... The procedure used and the opinions obtained in gaining authority for use of the wiretaps were wholly unrelated to the defendants' guilt or innocence and not necessary to be established to prove the case against the defendants. See Fed. R. Evid. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.") 402 ("Evidence which is not relevant is not admissible.")

The obvious purpose of the evidence was to show the jury there were several senior government attorneys and agents who all believed there was probable cause that the defendant were involved in a drug conspiracy, and, indirectly, that they all believed, in their professional judgment, the defendants were in fact committing drug-related crimes. As the defendants see things, and we agree, the jury was infected by the opinions of these unnamed government attorneys and agents. The government witness was improperly vouching for how good the evidence was. Furthermore, the various procedures (i.e., safeguards) that were detailed served only to bolster the credibility of the unnamed attorneys and agents' respective determinations. Without a limiting instruction, the jury was free to consider the evidence in making its determination regarding the defendants' guilt or innocence. In short, the government piled on needless, unfairly prejudicial evidence that may have affected the jury's judgment, and this error was not harmless. See *UNITED STATES v. BROWN*, 692 F.2D 345, 350 (5TH Circuit 1982) (finding it was "clearly error" for the district court to admit the wiretap authorization into evidence as foundation evidence and explaining that "the content of the order was neither relevant nor probative to the jury's task of evaluating the actual wire-tap conversations") *FN6* cf. *PEOPLE v. OKUNDAVE*, 189 ILL. APP. 3D 601, 136 ILL. DEC 981, 545 N.E. 2D 505, 513 (1989) (reversing criminal conviction because "the highly prejudicial and irrelevant evidence of the facts and circumstances surrounding the acquisition of probable cause and the issuance of the search warrant was clearly inadmissible").

CUNNINGHAM at 709, 712 & 713.

In **McMahon**, the court paraphrased the offending testimony.

"Horton's testimony set out the procedures used to obtain approval to wiretap a suspect's telephone conversations. Under these procedures, the agents prepare an affidavit in support of a request for a court order allowing the wiretapping. The affidavit is reviewed by the the local United States Attorney's office, after which it is sent to the Department of Justice in Washington for its approval of the request. After DOJ approval is received, the request is presented to the chief judge of the relevant district for consideration. If an order allowing the interceptions is signed, monitoring can begin. Horton went on to explain that every 10 days a report must be prepared for the chief judge review to see whether the wiretaps reveal criminal activity so that the interception can continue. Horton testified that there were wiretaps on five different cell phones from December 2003 to March 2004. The jury instructions stated that the wiretap conversations "were legally intercepted by the government."

McMahon at 415.

The testimony in this case is strikingly similar to the error in both **Cunningham** and **McMahon**.

The error in this case was as egregious as that in **Cunningham** and **McMahon**. Juries are not "endowed with superhuman ability to control their emotions and intellects." **BRUTON v UNITED STATES**, 391 U.S. 123, 134, 88 S CT 1620 (1968) "It is impossible realistically to suppose that when the twelve good men and women" conferring in the jury room in this case did not take note of the fact that multiple layers of law enforcement and a federal judge had determined that Luis Gomez was committing a crime. **UNITED STATES v BOZZA**, 365 F.2D 206, 215 (2ND Circuit 1966) quoted by the Supreme Court in **Burton**. Judge Learned Hand commented that such "mental gymnastics" are beyond a jury's power **UNITED STATES v NASH**, 54 F.2D 1006, 1007 (1932). How is it possible for the defendant to be more prejudiced? As noted in **McMahon**, the error was exacerbated every 10 days when the agent made the report to the federal judge and wiretapping continued. The government, of course

will argue that the evidence was overwhelming, and therefore the error was harmless. But the fact is this error was of the government's making and as stated in **UNITED STATES v NOEL**, 581 F.3D 490, 497 (7TH Circuit 2009), this was "simply a back-door way to show that numerous government agents believed the defendant was committing crimes, which was impermissible." "The only plausible reason the government would want" to do so "was to persuade the jury to agree." Noel at 498.

This was not a situation in which a balance had to be struck as to whether otherwise relevant evidence ran afoul of Rule 403 of the **Federal Rules of Evidence**. See **Sprint/United Management v Mendelsohn**, 128 S CT 1140 (2008). The evidence was irrelevant and prejudicial. The case law of the Seventh Circuit has stated so emphatically. Why then was it offered? **Cunningham** and **Noel** stated the purpose of testimony was "obvious." **Cunningham** at 713, **Noel** at 497. The motivation was that the government was not confident in its evidence and this evidence would help tip the scales. It was offered to persuade the jurors to agree with anonymous law enforcement personnel and a federal judge that Luis Gomez was committing drug crimes. The Government recognized the Seventh Circuit's reluctance to reverse such convictions and therefore, for the government, it was a win-win scenario. The evidence tips the balance and even if called to task, branding the evidence in hindsight as "substantial" or "overwhelming" will carry the day. This strategy has been remarkably successful for the government. But overlooking or failing to address these errors only increases the government's temptation to disregard the Seventh Circuit's case law and increase public speculation about whether laws are selectively enforced.

This was not harmless error. It was an intentional effort to

"back door" the jury and infect "the fairness and integrity," not only of the defendant's trial, but of justice itself. Whereas court will not apply the exclusionary rule in cases where law enforcement acts in good faith, (**United States v Leon**, 468 U.S. 435 (1984) and **United States v Harris**, 464 f.3d 733, 740 (7th Circuit 2006)), Mr Luis Gomez asks this court to hold the lower court and the government responsible for its intentional decision to flaunt its decisions in order to augment its evidence and convict Mr. Gomez.

The same reason for not applying the exclusionary rule in cases such as **Leon** applies here. Reversal is necessary to preserve the integrity of the proceedings.

Furthermore, the government concedes that "the foundation for the wiretap evidence in Gomez's trial was presented improperly, with too much detail laid before the jury about the T-III authorization process" See doc 30 Filed 10/29/2021 pg. 17. Also, see doc 49 filed 03/31/2022 pg. 35, the Seventh Circuit also concedes that the government used bolstering testimony; "In closing, we want to be very clear: the use of bolstering testimony of the nature used in this case is impermissible and it has the potential to damage our criminal courts whenever it is used. The responsibility for avoiding this falls squarely on the government." see also, **United States v Gomez**, 29 F.4th 915 (March 2022)"we are disturbed that the government continues to us **Bolstering Evidence** in criminal trials. [15] years have now passed since **Cunningham** and **McMahon**, yet it still happens."

As stated above, reversal is necessary to preserve the integrity and fairness of the proceedings. Also, Mr. Luis Gomez is at the mercy of this court and prays that he is granted relief.

~~In addition to Mr. Luis Gomez's claim on Improper Vouching, Mr.~~

Gomez requests this court to take into consideration the following information that the government alleged, however, did not prove to a jury, his Leader/Organizer Role, and the quantity and quality of the cocaine. Also, Mr. Gomez would like to bring to the courts attention a video that was submitted as evidence, in regards to Mr. Luis Gomez's status in the conspiracy, as well the danger that he faces regarding the missing drugs and money. In the video, Mr. Gomez's life is clearly threatened, and clearly goes to show that Mr. Gomez is in fact far from being a Leader/Organizer. The video ID is vid-20170423-wa0000.

Also, as evidence, in Mr. Gomez's discovery file, there are telephone intercepts that prove he is not an Organizer/Leader. The following are phone numbers and the pages in Mr. Gomez's discovery that prove he is not a leader.

651-313-2147	pg.01	Mario Esquivel
262-957-9633	pg.277	Elder Rodriguez
414-888-1558	pg.1355	Mario Esquivel
262-957-9633	pg.1190	Mario Esquivel
414-460-2094	pg.322	Oscar Garnica
	389	
	314	

The above names and numbers further show Mr. Gomez's role as equal to those named above.

Mr. Gomez believes that due to the evidence presented, his status as a Leader/Organizer should be reversed. Also, since the government did not prove weight and purity of the drugs, that too should be reversed.

In sum, Mr. Gomez prays that this court reverses all counts and remand for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Luis F Gomez

Date: August 10, 2022