NO. 22-7148 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2022

UNITED STATES OF AMERICA,
Respondent,

v.

KARTEU OMAR JENKINS,
Petitioner.

On Petition for Writ of Certiorari
To the Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Karteu Omar Jenkins # 22356-021
FCI Forrest City Low/POB 9000
Forrest City, AR 72336

Pro se

QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT ERRED IN NOT APPOINTING NEW COUNSEL AFTER THE SECOND HEARING ON THIS MATTER?

II. WHETHER THE DISTRICT COURT ERRED IN NOT APPOINTING NEW COUNSEL AFTER THE SECOND HEARING ON THE MATTER?

III. WHETHER THE DISTRICT COURT VIOLATED MR. JENKINS' FIFTH AND SIXTH AMENDMENT RIGHTS WHEN IT BASED ITS DRUG WEIGHT CALCULATIONS ON ACQUITTED CONDUCT?

LIST OF PARTIES

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B-2 The January 10, 2019 Order of the United States District Court for the Southern District of Georgia, Savannah Division.

The June 7, 2019 Order of the United States District Court for the Southern District of Georgia, Savannah Division.

The February 24, 2020 Order of the United States District Court for the Southern District of Georgia, Savannah Division.

APPENDIX C...The October 21, 2022 Order on hearing and rehearing en banc by the Eleventh Circuit.

TABLE OF AUTHORITIES

CASES **PAGE NUMBER**

Constitutional Provision:

Others:

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

[X] For cases from **federal courts**:

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is

[X] is unpublished; or

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

[X] is unpublished.

The opinion of the United States Court of Appeals for the Eleventh Circuit on motions for reconsideration appears at Appendix C.

JURISDICTION

The date on which the United States Court of Appeals decided the case was on June 8, 2022 and October 21, 2022. **See Appendix A and C, respectively.**

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

United States Constitutional Amendment IV – The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitutional Amendment V – 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.

United States Constitutional Amendment VI – In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The indictment charged that between 2014 and August 2017, Jenkins and 19 others conspired to possess with intent to distribute 5 kilograms or more of cocaine, 50 kilograms or more of marijuana, and various other controlled substances not at issue in this appeal (Count 1). The Indictment also charged that on March 22, 2017, Jenkins and another person possessed with intent to distribute 500 grams or more of cocaine (Count 3). **ECF # 1**. After a 4-day jury trial, Jenkins and co-defendant, Eugene Allen, were convicted of conspiring to possess with intent to distribute 500 grams or more but less than 5 kilograms of cocaine and 50 kilograms or more of marijuana as to Count 1; and Defendant was convicted on Count 3. **ECF # 672**. The jury rejected the charged offense for Count 1 of 5 kilograms or more of cocaine; and, instead found at 500 grams but less than 5 kilograms of cocaine, a lesser included offense for Count 1.

At sentencing, Jenkins was held accountable for 11.9 kilograms of cocaine based on a finding by the district court using the preponderance of evidence standard. This quantity of cocaine together with a quantity of marijuana equated to an equivalency of 1000 but less than 3000 and a base offense level of 30 (total offense level of 38). Jenkins' criminal history category was determined to be II. **PSR ¶ 42**. His advisory guideline range was 262–327 months in custody. **PSR ¶ 66**. Defense counsel objected to the applied enhancements[1] and argued that the appropriate calculation based on the findings of the jury without the weight from the "decoded" calls would result in a base offense level of 24, not 30 as contemplated by the PSR. Jenkins personally asked to be

[1] Jenkins base offense level of 30 was enhanced 2-level for possession of a firearm; 4-level for role in the offense, and 2-level for maintaining a premise to distribute drugs.

sentenced based on the weights found by the jury. **ECF # 885[2] at 145–46.** The court rejected these arguments and sentenced Defendant to 290 months in prison. **ECF # 885 at 151.** On February 23, 2021, the judgment was filed. **ECF # 853.**

On March 3, 2021, Defendant filed a timely notice of appeal. **ECF # 861.** On appeal, Jenkins argued seven issues and adopted three other issues that his co-defendant, Eugene Allen, filed. After oral argument, the Eleventh Circuit affirmed the District Court on August 29, 2022. United States v Jenkins, No. 21-10705 (11th Cir. 8/29/2022). A petition for rehearing and rehearing en banc was filed on September 19, 2022 and denied on October 21, 2022.

REASONS FOR GRANTING THE WRIT

For Issue One, the writ should be granted to determine whether it was clear error and an abuse of discretion to deny relief on a motion to suppress when the lower court made an incorrect ruling which the appeal court recognized, but in which the appeal court still affirmed the district court's ruling.

For Issue Two, the writ should be granted to determine whether the appeal court clearly erred for finding that the district court did not abused its discretion for the denial of a second motion for new counsel without considering: "1) the timeliness of the motion; 2) the adequacy of the court's inquiry into [the] merits of the motion; and 3) whether the conflict was so great that it resulted in a total lack of communication between the defendant and [her] counsel thereby preventing an adequate defense." United States v. Calderon, 127 F.3d 1314, 1343 (11th Cir. 1997).

[2] Filed sentencing transcript.

For Issue Three, the writ should be granted to determine whether including acquittal conduct determined by a preponderance of evidence at sentencing is a violation of Jenkins' Fifth and Sixth Amendment rights.

ARGUMENTS

I.

WHETHER THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS WIRETAP EVIDENCE AND IN DETERMINING THAT HE ABANDONED SOME OF HIS CLAIMS?

In 2014, the investigating agent in this case, Agent Chris Petrou, learned that inmate Eugene Allen[3] was allegedly running a drug enterprise inside a state prison. **ECF # 902[4] at 18**. In 2015, Agent Petrou learned of a Bibb County wiretap investigation into a different inmate, Kelvin Carswell, at the same state prison. Mr. Carswell was being investigated for murder and, as part of that investigation, state officers received a wiretap authorization out of Bibb County. At some point during that initial investigation, Mr. Carswell sold his tapped phone to Allen. **ECF # 902 at 19**.

Without seeking an additional warrant, authorities continued to intercept Mr. Allen and his contacts on the tapped phone, eventually recording phone calls between Allen and others. Agent Petrou asked the Bibb County officers to send him all the calls so he could review them. Reviewing the calls took months and involved sending the calls to the FBI in Atlanta to be transcribed. Agent Petrou testified that he then determined that the evidence from the Bibb County calls was stale. **ECF # 902 at 20**.

In 2016, Agent Petrou again began listening to Mr. Allen's jail calls, only this time they were calls occurring from the Chatham County jail. He then obtained pen

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[3] Eugene Allen is a co-defendant of Defendant and was charged with him in Count One of the Indictment.
[4] Evidentiary hearing transcript for motion to suppress wiretap evidence.

register/trap and traces for some numbers that Mr. Allen was communicating with. **ECF # 902 at 23**. Agents heard calls between Allen, Charmaine Simms, and Ronald Allen. **ECF # 902 at 25**. On December 9, 2016, authorities sought warrants in Chatham County to intercept Ms. Simms' phone and Mr. Allen's phone. **ECF # 902 at 26**. By the time agents got around to applying for a 9th intercept warrant, in early 2017, the intercepted calls had captured a person known as "Yay" on some of the intercepted calls. Agents later alleged that "Yay" was the Jenkins. **ECF # 902 at 50**.

Co-defendant Charmaine Simms filed a motion to suppress all of the intercepts based on the fact that agents had no authority to continue listening to calls on Mr. Carswell's phone after they learned it had been sold to Mr. Allen. **ECF # 233**. In lieu of filing his own motion, Mr. Allen moved to adopt this motion. **ECF #'s 233; 2343**. The Jenkins filed his own motion to suppress evidence and a supplement to that motion. **ECF # 549**. Jenkins also filed a motion to adopt the arguments of co-defendant Eugene Allen and, therefore, the arguments of co-defendant Simms. **ECF # 454**. That motion was granted. **ECF # 522**.

An evidentiary hearing was held on April 4, 2019 before the magistrate judge on the motions to suppress. **ECF # 583**. At the hearing on the matter, counsel for Jenkins made clear that "at least part of" his argument was based on a claim that the intercepted calls from phones # 9 and # 12 were "fruit of the poisonous tree." Counsel also argued that the government "got information from those [other phones] and then they used that to broaden it unnecessarily and unlawfully to Target Phones # 9 and # 12, which were Jenkins' phones. **ECF # 902 at 10**. The Court asked if part of his argument was a "fruit of the poisonous tree" claim that the intercepts for phones "9 and 12 build off

conversations that are recorded on Mr. Allen's contraband cell phone to which Jenkins is a party." **ECF # 902 at 10**. Counsel responded, "Yes, sir." **ECF # 902 at 10**.

The magistrate judge filed a report and recommendation on May 7, 2019 and recommended that the motion to suppress wiretap information be denied. **ECF # 588**. The Report found that if Jenkins had a standing to challenge the wire intercept on target phones # 9 and # 12, he did not have standing to challenge any of the other eleven calls. **Id. at 5 of 11**. The trial court adopted the R & R of the magistrate judge on May 28, 2019. **ECF # 591; see also Appendix B**.

The magistrate judge, relying on United States v Leon, 468 U.S. 897 (1984), also found that Jenkins could not overcome two insurmountable obstacles to his success on his suppression motion – the "good faith doctrine" and "necessity". In Leon, the justices held that evidence seized on the basis of a mistakenly issued search warrant could be introduced at trial. The exclusionary rule, argued the majority, is not a right but a remedy justified by its ability to deter illegal police conduct. In Leon, the costs of the exclusionary rule outweighed the benefits. The Court held that the exclusionary rule is costly to society. Guilty defendants go unpunished and people lose respect for the law. The benefits of the exclusionary rule are uncertain. The rule cannot deter police in a case like Leon, where they act in good faith on a warrant issued by a judge. **Id. at 902**.

The Leon good faith exception should not apply in this case. Under Leon, 468 U.S. at 923, the "good faith" exception to the rule requiring the suppression of evidence for violations of the Fourth Amendment keeps evidence from being suppressed only when law enforcement officers obtain evidence through objective good faith reliance on a facially valid warrant that is later found to lack probable cause. See United States v.

Gonzalez, 969 F.2d 999, 1004 n.4 (11th Cir. 1992). However, "in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued." Leon, 468 U.S. at 922-923. In the instant matter, the trial court erred in determining that the evidence which was unlawfully gathered by the illegal wiretaps was protected by the Leon good faith exception. **See ECF # 588 at 5.** The issuing judge wholly abandoned his judicial role to require sufficient probable cause to intercept Defendant's calls, it was unreasonable to rely on the supporting affidavit to intercept Defendant's calls, and the warrant is so facially deficient that the executing officers could not have reasonably presumed it to be valid.

The district court's reliance on Leon is misplaced, since, Leon does not apply in every situation and certainly not in the instant matter. Agent Petrou's action in the instant matter cannot be shield from attack by the "good faith doctrine"; because, Petrou was on a "fishing expedition" in search of criminal activity, and who sought and received more than nine wire intercept orders to listen over a nine-month period. After the first three or four warrants to intercept orders, the issuing judge for the warrants became a rubber stamp only.

On appeal, Jenkins argued that the trial court erred in determining that he did not have standing to challenge calls intercepted over Mr. Allen's phone because Mr. Allen was in custody, that the "good faith doctrine" did not apply to his case, and that there was no "necessity" to seek warrants to intercept for more than nine months. Even though, the Eleventh Circuit found that Jenkins had standing to challenge the wiretap evidence, as the Government conceded on appeal, it held that the district court did not err in denying

Jenkins' motion to suppress that evidence; because, the records showed that the wiretaps at issue were properly authorized. **See Appendix A at 3 of 4.**

In order for a wiretap to be legal and the evidence gathered from such surveillance to be admitted in court, the warrant application must comply with federal laws even if state law enforcement is the only body of law involved. The warrant application must include:

1. All of the relevant facts that establishes that probable cause exists to believe that a particular crime has been, is being, or is about to be committed;
2. Probable cause to believe that particular communications concerning the investigation will be intercepted; and,
3. A description of previously utilized investigative methods and a finding that using less invasive means to obtain the evidence sought is not feasible.

Wiretap warrants may not last any longer than what is necessary to gather the evidence sought. Under federal law, orders may be authorized for up to 30 days. However, the State's Attorney Office may apply for an extension of a wiretap warrant. Which, the court may or may not grant. Secondly, a wiretap warrant does not allow law enforcement the freedom to listen to any and all of the targeted person's conversations/communications. Law enforcement must limit their intrusion to only those communications that are within the scope of the investigation.

Under federal law, prosecutors must present wiretap evidence to the judge in order for it to be sealed. A failure to do so will result in the evidence being inadmissible in court. In 2016, the Georgia Supreme Court reversed a Bibb County judge's ruling that wiretap evidence in a 2008 murder trial could be used. Judge Keith Blackwell wrote that prosecutors did not present a "satisfactory explanation" for their failure to "immediately"

present wiretap evidence to the judge so he could seal it, which is required by federal law[5].

Jenkins argued in his filing and at the evidentiary hearing that the wiretap authorizations failed to demonstrate the "necessity" required by Title III. **See ECF # 549 at 6.** Title 18 U.S.C. section 2518 (1) (c) requires "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. To be sure, that requirement is often referred to as "necessity." See, e.g., United States v. Maxi, 886 F.3d 1318, 1331 (11th Cir. 2018) (Section 2518 (1) (c)'s "necessity requirement is designed to ensure that electronic surveillance is neither routinely employed nor used when less intrusive techniques will succeed."

Title III requires Federal, state and, other government officials to obtain judicial authorization for intercepting "wire, oral, and electronic" communications such as telephone conversations and e-mails. It also regulates the use and disclosure of information obtained through authorized wiretapping. 18 U.S.C. sections 2516-18. Under 18 U.S.C. section 2518 (3), a judge may issue a warrant authorizing interception of communications for up to 30 days upon a showing of probable cause that the interception will reveal evidence that "an individual is committing, has committed, or is about to commit a particular offense". Section 2517 provides that a law enforcement or investigating officer may use, disclose to another law enforcement or investigating officer, or disclose during testimony information obtained in authorized wiretapping,

[5] *Court Rules Wiretap Evidence Inadmissible in Macon Trial*, Ashley Trawick, 13WMAZ, March 2016.

provided the use or disclosure "is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure."

The trial court erred in determining that the wiretap applications met the necessity requirement. Together, 18 U.S.C. section 2518 (1) (c) and (3) (c) comprise the necessity requirement for wiretap orders. According to 18 U.S.C. section 2518 (1) (c), the government may establish necessity for a wiretap by any of three, alternative methods. The government may show that (1) traditional investigative procedures have been tried and failed; (2) reasonably appear unlikely to succeed if tried; or (3) are too dangerous to try. See United States v. Smith, 31 F.3d 1294, 1298 n. 2 (4th Cir. 1994). Electronic interceptions should not be permitted if "traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153 n.12 (1974).

These "necessity" requirements are designed to ensure that "wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 425 U.S. 143, 153 n.12 (1974). Inasmuch as "necessity is a keystone of congressional regulations of electronic eavesdropping, courts examine closely challenges for non-compliance and reject applications that misstate or overstate the difficulties involved." United States v. Lyons, 507 F. Supp. 551, 555 (MDD 1981).

The Government carries the burden to demonstrate that traditional investigative techniques would not suffice to expose the crime. United States v. Oriakhi, 57 F.3d 1290, 1298 (4th Cir. 1995). The Fourth Circuit has cautioned that the Government cannot satisfy this burden "through a mere boilerplate recitation of the difficulties of gathering useable evidence." Id.(quoting United States v. Leavis, 853 F.2d 215, 221 (4th

Cir. 1988). Rather, the government must base its need on real facts and must specifically describe how, in the case at hand, it "has encountered difficulties in penetrating [the] criminal enterprise or in gathering evidence" with normal techniques "to the point. . .where wiretapping becomes reasonable." United States v. Doe, 31 F.3d 1294, 1298 (4th Cir. 1994), cert. denied, 115 S.Ct. 1170 (1995). The Affidavits (9) hardly describe difficulty penetrating a criminal conspiracy or problems acquiring evidence through the use of usual law enforcement techniques.

As noted above, almost the entirety of the affidavit in support of the applications for phones 9 and 12 is about the previously intercepted calls – which the court determined Jenkins was not permitted to challenge. The Government stated its belief that traditional methods will not work to further the investigation, but there was no support for this claim. As to Jenkins, the affidavit does not explain why traditional methods of investigation would not work. The affidavit for the March 2017 intercept of phone 12 actually notes that agents did conduct aerial surveillance on Jenkins' residence. There is no showing why continued surveillance would not work. There were no controlled buys, consensual recordings, arrests, grand jury subpoenas, search warrants, trash pulls, GPS devices, pole cameras, confidential informants, or undercover agents employed to investigate Jenkins prior to the issuance of the wiretap warrants. As outlined in United States v. Gonzalez, 412 F.3d 1102, 1112 (9th Cir. 2005), the "limited use of traditional methods does not establish that normal tools were sufficiently exhausted before the government requested a wiretap." Further, a single instance of failed surveillance does not establish that any subsequent surveillance could be ruled out as likely to be

unsuccessful or too dangerous to pursue. See United States v. Blackmon, 273 F.3d 1204, 1209 (9th Cir. 2001).

In this case, it appears that there was very little effort to investigate through traditional methods. Blackmon is similar. There, the Ninth Circuit Court of Appeals held that the wiretap application at issue did not meet the Title III necessity requirement because the affidavit contained "boilerplate assertions" that were "unsupported by specific facts relevant to the particular circumstances of this case" and that would be true of most if not all narcotics investigations. Id. at 1210-11. The same issues are present (or not present, as it were) in this case. The Government in this case claims that the wiretap and electronic surveillance "will further the current goals," but made no showing that other means of investigation will not do the same. Accordingly, this Court should find that the trial court erred in determining that the necessity requirement was met in this case.

Lastly, Jenkins has standing to challenge all the wiretaps in this case, not just those from his personal phones. Under Title III, an "aggrieved person" may seek to suppress oral communications intercepted by the Government. See 18 U.S.C. section 2518 (10) (a); United States v. Fury, 554 F.2d 522, 525 (2d Cir. 1977). Title III defines an "aggrieved person," in part, as "a person who was a party to any intercepted wire, oral or electronic communication or a person against whom the interception was directed." 18 U.S.C. section 2510 (11). As outlined in his affidavits and at the April 4, 2019 suppression hearing, Jenkins was captured on the wiretap intercepts for telephones 1, 3, and 6. See **ECF # 550; 902.**

Jenkins was thus, an aggrieved party and should have been permitted a full and fair opportunity to litigate the issues related to all of the wiretaps. Because he was not permitted to do so, his conviction should be vacated and this case should be remanded so that he can litigate this issue. The warrant applications for phones 9 and 12 were insufficient to support a finding of probable cause to intercept Jenkins' calls. Without waiving any argument that he should be permitted to challenge all of the wiretap applications on remand, Jenkins asserts that the warrants as to target phones # 9 and # 12 were invalid. Like affidavits underlying search warrants, affidavits in support of electronic interceptions must be based on information that is sufficiently current to support a finding of probable cause. See, e.g., United States v. Bervaldi, 226 F.3d 1256, 1264 (11th Cir. 2000) (The affidavit must establish that probable cause exists at the time the warrant was issued).

The most common misconception about wiretaps is that the government can legally intercept whatever communications it wants. That simply isn't true. Given the premium we place on privacy, the use of wiretapping is strictly controlled and regulated. Wiretapping is intended to serve as a type of "last resort" in criminal investigations, and their initiation and continued use requires approval from a judge, and compliance within the limitations of the law. Investigators and prosecutors must provide ample evidence regarding the investigative steps they have exhausted, and effectively argue that the only available option left is legal interception of private conversations. Typically, they will point to fruitless grand jury inquiries, surveillance, pole cameras, and informants or cooperating witnesses when seeking approval from the court.

The Government can establish probable cause for a wiretap with facts showing that (1) a crime is being, has been, or is about to be committed and (2) communications about the crime will be intercepted by the requested wiretap. See 18 U.S.C. section 2518 (3) (a)-(b). Although Jenkins clearly argued that the warrants at issue lacked probable cause (**ECF # 339 at 10**), the district court did not address the probable cause standard in its initial or final report and recommendation on this issue (**ECF # 588**). It found instead that the Leon good faith exception excused any illegality and that officers were not required to show that the wiretap was the last resort for evidence collection. **ECF # 588 at 5-10**. This recommendation was adopted by the district court. **ECF # 591**.

The warrants did lack probable cause, however, to suggest that Jenkins was involved in the crimes being investigated. And, to the extent the warrant applications relied upon the previous wiretap intercepts to support a finding of probable cause, Jenkins was prevented from fully litigating that issue. The affidavits for phones 9 and 12 rely heavily on the previously intercepted calls to support its claim of probable cause. **See March 15, 2017 affidavit (citing March 2, 2017 call between phones 6 and 9; March 3, 2017 call between phones 6 and 10; March 5 call between phones 6 and 12; March 7, 2017 calls between phones 6 and 9; etc.)**[6]. There is no information in the affidavit that is not conclusory or based on previous intercepts. Jenkins should be permitted to make a more complete challenge to the probable cause allegations underlying these applications on remand.

[6] These affidavits were admitted at the April 4, 2019 suppression hearing. **ECF # 902**.

II.

WHETHER THE DISTRICT COURT ERRED IN NOT APPOINTING NEW COUNSEL AFTER THE SECOND HEARING ON THIS MATTER?

Jenkins alleged that the district court abused its discretion in denying his second request for substitution of appointed counsel; because, it was clear that there was a fundamental problem with the attorney-client relationship. Before and during trial, Jenkins was represented by W. Joseph Turner, Esq. On three separate occasions, the Court held hearings on Jenkins' requests for new counsel. **See ECF #'s 912; 913; 914.**

During the first hearing on January 10, 2019, the court noted Jenkins' dissatisfaction with counsel's representation. **ECF # 912 at 11.** At this hearing, Jenkins explained to the court that counsel had failed to communicate with him, failed to share wiretap information with him, so that, he could determine if he was on any of the intercepted calls; and, failed to share and discuss discovery. **ECF # 912 at 12.** Jenkins was arrested on December 8, 2017 in Alabama; counsel was appointed to represent Jenkins on December 20, 2017.

Counsel adopted motions to suppress filed by other defendants on January 16, 2018. **ECF # 228-1.** Even though, counsel had been representing Jenkins for over a year at the time of the hearing, he did not have a valid explanation for his deficient performance in failing to share discovery, failing to listen to and to discuss the wiretaps with Jenkins. Counsel failed to file a motion to suppress the information from Jenkins' Alabama arrest some five months after the Georgia conspiracy ended. The magistrate judge denied the motion. **ECF # 546.** Even though, the magistrate judge denied the

motion to replace Jenkins' court-appointed counsel, it ordered counsel to provide Jenkins with discovery. **ECF # 912 at 22.**

At a February 19, 2019 evidentiary hearing on the suppression of wiretap evidence, Turner had not provided, shared, or discussed any of the discovery with Jenkins and he had not shared any of the wire intercepts that was going to be used against him.

On June 6, 2019, another hearing was held on Jenkins' second request to replace counsel. At the June 6th hearing, the court started by noting that Jenkins had included "some bases that can constitute good cause" in the last paragraph of his recent motion, including "a complete breakdown in communication and an irreconcilable conflict that is leading to an unjust verdict." **ECF # 913 at 6.** The court noted that Jenkins' motion stated that he had "tried all ways possible in order to contact and communicate with counsel with no good outcome" and that "there are motions to suppress that Jenkins would like to see raised in this case that counsel has not raised." **ECF # 913 at 7.** Jenkins told the court that he had been in custody since December 8, 2017, and had only been able to contact Turner by phone one time and that counsel would not respond to multiple texts and emails from his mother.

Jenkins also told the court that he had received only one letter from counsel during that time. The letter was dated May 28, 2019. **ECF # 913 at 7-8.** The letter included copies of motions and a denial order for the motions, for which all deadlines had passed. **ECF # 913 at 8.** Jenkins told the court that counsel never consulted with him prior to court dates. **ECF # 913 at 8-9.** Counsel admitted to not having visited with Jenkins since the January 10, 2019 hearing. **ECF # 913 at 9-10.** Jenkins provided examples of counsel's deficient performance, citing numerous responses from the

government and orders from the court stating that counsel failed to adequately articulate specific facts to respond to motions. **ECF # 913 at 13.** Jenkins told the court that he believed counsel should have subpoenaed the officer who was the actual affiant for the wiretaps and search warrants to be questioned at the suppression hearing. **ECF # 913 at 13.** Jenkins stated, "You have a search warrant that is illegal. You have a wiretap that I believe is illegal. But if you don't point out the actual specific facts on where they violated it, it's never going to be drawn to the judge that its illegal." **ECF # 913 at 14.**

Although, the court instructed Turner to provide Jenkins with discovery and transcripts of the intercepted calls, at the time of the January 10th hearing, counsel had not complied by the June hearing. **Id.** The court took the matter under advisement and ultimately denied the request for new counsel, finding that "[Jenkins'] concerns are understandable, given the gravity of the situation, but they do not rise to the level of "good cause." **ECF # 595 at 4.**

On February 19, 2020, five months after his trial, Jenkins again told the court he wanted the court to appoint a new lawyer or allow him to represent himself. Jenkins gave the court several reasons why the court should appoint a new counsel or allow him to represent himself that included: there were several interceptions of conversations that were intercepted that Jenkins felt either were not him or were out of the approved conversations to be heard; that he had not never heard any audio until trial and saw video at trial for the first time. Jenkins reminded the court that he had brought these issues before the court before, once in January and one in June; and the court had instructed counsel to provide transcripts on intercepted calls at both hearing, counsel had failed to do so. Both times, counsel was appointed back to represent Jenkins. **ECF # 914 at 12.**

On February 24, 2020, the district court denied Jenkins' third request to replace Turner. **ECF # 749.**

In affirming the district court's denial of Jenkins' motions to replace counsel, the Eleventh Circuit found that the district court adequately inquired into the matter when it held three separate hearings on the motions to find that there was no breakdown in communication between the two which meant that there was no good cause to grant Jenkins' motions to replace counsel. **See Exhibit A at page 3 of 4.**

Jenkins believes he had "good cause" to replace counsel; because of the gravity of the situation and the failure of the Eleventh Circuit to consider the situation from his perspective. Turner had one witness and he failed to communicate with this one witness, who was the Jenkins. Turner failed to share and discuss discovery with Jenkins, failed to obtain Jenkins' opinion and input on the evidence, on the wiretaps and the seized drugs from others, and Turner filed a motion to suppress wiretap evidence without or before discussing the wiretap evidence with Jenkins. Jenkins never got the chance to evaluate the evidence and went to trial not knowing what evidence was going to be used against him. Without having a chance to participate in his defense via the discovery and communication with counsel, Jenkins was unable to assist Turner in defending him.

It is expected of counsel to advise the defendant of what rights they have in his case and what can be expected throughout the process, ensure that their client's rights are not violated at any point through the process, and negotiate when necessary. In McMann v. Richardson, 397 U.S, 759 (1970), the court ruled that, "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the

mercies of incompetent counsel." As the Sixth Amendment gives the right to a fair trial, having a lawyer who provides sufficient counsel is a necessary component.

Good cause is required for an indigent defendant to receive a different appointed attorney to represent him. United States v. Joyner, 899 F.3d 1199, 1205 (2018). Good cause means "a fundamental problem, such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict which leads to an apparently unjust verdict." Id. This Court's own rules for appointment of new appellate counsel for indigent defendants require only that there be "incompatibility between attorney and client or other serious circumstances." 11th Cir. R. 46-10 (c).

Given Jenkins' repeated notices to the court regarding the breakdown in the attorney-client relationship and the failure of counsel to properly investigate the case, it was an abuse of discretion for the court to deny his request for appointment of new counsel. Rather than hold counsel to a good cause standard, it appears that the court was requiring something more than the complete breakdown in the attorney-client relationship and the irreconcilable differences that Jenkins so clearly outlined for the court. It appears that the court believed something more than a fundamental problem in the attorney-client relationship was required. It was an abuse of discretion to require such a showing from Jenkins. See United States v. Velazquez, 855 F.3d 1021 (9th Cir. 2017) (Defendant's first appointed counsel moved to withdraw and the motion was granted. The defendant moved to replace the second appointed counsel, claiming that there were no communications between her and her attorney and that her attorney had engaged in no pre-trial investigation. When that motion was ultimately denied, she entered a guilty plea. The Ninth Circuit held that the trial court erred in failing to grant the motion to

replace counsel. In addition, the Ninth Circuit held that the guilty plea had to be vacated.).

As a result of the court's error in denying these requests – and Jenkins' second request prior to trial in particular – Jenkins was denied a fundamentally fair process. His convictions should be vacated and he should be given a new trial, with new counsel.

III.

WHETHER THE DISTRICT COURT VIOLATED MR. JENKINS' FIFTH AND SIXTH AMENDMENT RIGHTS WHEN IT BASED ITS DRUG WEIGHT CALCULATIONS ON ACQUITTED CONDUCT?

Mr. Jenkins asserts that it was a violation of his Fifth Amendment Due Process rights and his Sixth Amendment right to a jury trial for the sentencing court to increase his sentence based upon conduct that was explicitly rejected by the jury. This practice of using acquitted conduct to increase a defendant's sentence completely negates the role of jury as fact-finder and denies a fundamentally fair process to the defendant. Mr. Jenkins was not on notice that such conduct could be used to increase his sentence once the jury explicitly rejected it as a bases for his conviction and it was not reasonably foreseeable to him that such arbitrary and speculative findings could be a basis for a proper sentence.

Jenkins was charged in two counts of an eighteen-count Indictment which charged him with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine and 50 kilograms of marijuana, in violation of 21 U.S.C. Sections 846, 841 (a) (1) and (b) (1) (A) and (C) (Count 1), and, possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. Sections 841 (a) (1) and (b) (1) (B) (Count 3). Jenkins was convicted after a jury trial as charged for Count 3, but for Count 1, the jury found that Jenkins had conspired to possess with intent to distribute and to distribute

at least 500 grams but less than 5 kilograms of cocaine, rejecting the charged amount in the Indictment of 5 kilograms or more of cocaine.

Jenkins's PSR outlined his statutory penalty of 5 to 40 years' imprisonment under 21 U.S.C. section 841 (b) (1) (B). **(ECF # 847 at 20.)** It provided for a base offense level of 30 and three enhancements: 1) two points for possessing firearms; 2) two points for maintaining a premises for drug distribution; and 3) four points for his role in the offense as an organizer or leader. **(ECF # 847 at 12-13.)** The base offense level was determined by the converted drug weight of at least 1,000 kilograms but less than 3,000 kilograms, which stemmed from: 1) 15 wiretap intercepts (1,974 kilograms); 2) the March 22, 2017 traffic interdiction (318 kilograms); 3) the search of Jenkins's residence (39.200017 kilograms); and 4) the cocaine seizure during his arrest (100.2 kilograms). **(ECF #'s 847 at 11; 885 at 108.)** The resulting total offense level was 38 with a criminal history category of II, and an advisory guidelines range of 262 to 327 months' imprisonment. **(ECF # 847 at 20.)** Jenkins objected to the base offense level and all enhancements. **(ECF # 847 at 23-28.)**

At sentencing, the Government presented testimony from lead case agent Petrou to rebut Jenkins's objections. **(ECF # 885 at 13, 77.)** Using the transcripts of the calls played at trial, Petrou explained the cocaine quantities attributed to the intercepts relied on by the PSR. **(ECF # 885 at 11, 24-25.)** He described the conversations in each intercept, which showed that Jenkins directed and facilitated the cocaine's delivery through transporters to Savannah-based buyers. **(ECF # 859-1 at 62; 885 at 16, 21-22, 26, 28, 31-34, 37-39, 43-46.)** Petrou testified the drug quantities were based on amounts specified in the intercepted conversations and the buyers' orders as revealed by the

interdiction of cocaine, which was supplied by Jenkins to Devin Dabney for delivery to Edward Tyler (522 grams), Keith Brigham (607 grams), and Aaron Hubbard (518 grams). **(ECF # 885 at 28, 31-34, 37-39, 41-45, 57-58.)**

During arguments on defense counsel's motion for a judgment of acquittal as to count 1, the government explained the evidence it had submitted to the jury: [B]ased on the stipulations, I had calculated that I believe somewhere – a little over 2 and half kilograms of powder cocaine were seized and are tendered into evidence. In conjunction with that, we have evidence of additional trips that had been occurring for a lengthy period of time that correspond to the testimony of Agent Minton, particularly, and others regarding quantities of cocaine that could be corroborated by the final seizure and the amounts that could be extrapolated due to the re-ups that Jenkins was being supplied with in Atlanta and then the calls in which the trips were being sent down (a total of 11.9 kilograms of cocaine).

The jury heard the evidence as presented by the agent at trial and rejected those quantities from the wire intercepts by finding beyond a reasonable doubt that the quantity of cocaine was less than 5 kilograms. The jury accepted some quantity of cocaine less than 5 kilograms and found Jenkins guilty of conspiring to possess with intent to distribute at least 500 grams but less than 5 kilograms of cocaine. **ECF # 672.** Then, at sentencing, Jenkins's cocaine-quantity was established by a preponderance of the evidence based on acquittal conduct which the jury had rejected. **(ECF #'s 847 at 11; 885 at 108.)** On appeal, Jenkins argued that the district court erroneously relied on cocaine amounts decoded from the intercepted calls. **(Jenkins Br. 51).** Even though, "[i]t is well established that deciphering of coded language is . . . permissible," United

States v. Perry, 14 F.4th 1253, 1278 (11th Cir. 2021), decoding of coded language is not permissible when the decoding has been rejected by the jury verdict to a lesser quantity.

Our Constitution guarantees the presumption of innocence until the government proves guilt beyond a reasonable doubt. Once a defendant has been duly convicted by a jury, however, sentencing is generally a matter of judicial determination. The evidentiary standards at sentencing are lower compared to the guilt-innocence phase, and, per 18 U.S.C. Section 3661, Congress barred any limitation on the conduct sentencing courts may consider in imposing punishment. In United States v. Watts[7], this Court held that the consideration of acquitted conduct by a preponderance-of-the-evidence standard at sentencing did not violate the double jeopardy clause.

Congress enacted the Sentencing Reform Act to curtail inconsistency and unpredictability in sentencing that had been exacerbated by the broad discretion afforded judges working within statutory ranges. This act eventually spawned the federal sentencing guidelines, which are designed to facilitate uniformity by providing formulaic procedures to calculate a sentence based on consideration of "relevant conduct" and the jury's verdict. In other words, the idea is to impose more individualized sentences by considering more factors. In United States v. Booker[8], this Court held that, while the guidelines are advisory as opposed to binding, the Sentencing Reform Act requires judges to consider the guidelines during sentencing.

Lower standards of proof at sentencing — in conjunction with 18 U.S.C. Section 3661, legal precedent and application of the guidelines — means that federal judges may consider a wide array of relevant conduct in determining a defendant's sentence,

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[7] 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997).
[8] 543 U.S. 220 (2005).

including conduct for which underlying charges have been acquitted by a jury. While the Supreme Court determined acquitted-conduct sentencing did not violate the double jeopardy clause in Watts, the court has never addressed whether the Sixth Amendment right to a trial jury prohibits the practice.

The Supreme Court declined to review Jones, but Justice Scalia — joined by Justices Clarence Thomas and Ruth Bader Ginsburg — penned a dissent from denial of certiorari that outlined the fundamental flaws with acquitted-conduct sentencing. See Jones v. United States, 135 S. Ct. 8 (2014). Scalia wrote, "Petitioners present a strong case that, but for the judge's finding of fact, their sentences would have been 'substantively unreasonable' and therefore illegal. If so, their constitutional rights were violated. The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, requires that each element of a crime be either admitted by the defendant, or proved to the jury beyond a reasonable doubt. Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime and must be found by a jury, not a judge. We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must either be admitted by the defendant or found by the jury. It may not be found by a judge.... For years, however, we have refrained from saying so.... This has gone on long enough."

Not only does permitting judges to find facts based upon a preponderance of the evidence violate the right to have one's guilt proven beyond a reasonable doubt, in the context of acquitted conduct sentencing, it cuts to the heart of the right to a trial by jury

and greatly diminishes the role of the jury. The right to a jury trial developed as a "check or control" on executive power—an essential "barrier" between "the liberties of the people and the prerogative of the crown." Duncan v. Louisiana, 391 U.S. 145 (1968).

In Jones, the defendants faced two charges: (1) distributing a small amount of drugs and (2) conspiring to distribute a large number of drugs. The jury convicted on the distribution charges, but the defendants were acquitted of conspiring to distribute. Despite the jury's acquittal, the sentencing judge found the defendants engaged in the conspiracy by a simple preponderance of the evidence and imposed significantly longer sentences based on this finding of fact. Had the judge not overridden the jury acquittal for the conspiracy charge, the three defendants would have served 27 to 71 months for distributing in accordance with the guidelines. Instead, they were respectively sentenced to 180, 194 and 225 months — calculations based largely upon conduct the government tried, but failed, to prove beyond a reasonable doubt.

Acquitted-conduct sentencing effectively divests individuals of their Sixth Amendment right to trial-by-jury by divesting citizens of their historical and constitutional role in the administration of criminal justice. While a defendant remains "not guilty" on paper, the sentencing judge's veto of the jury's verdict renders the acquittal meaningless for all practical purposes. Consideration of acquitted conduct at sentencing effectively eliminates the democratic role of the jury in the criminal justice system, inverting the power structure to allow government to limit the people rather than people to limit the government. This line of flawed reasoning has led to horrific results as the following examples illustrate:

Cheryl Ann Putra was charged with aiding and abetting in connection with the sale to a government informant of one ounce of cocaine on May 8, 1992, and another count of the same offense for the sale of five ounces on May 9, 1992. The jury convicted her of the May 8th incident but acquitted her of the May 9th incident. At sentencing, the judge determined by a preponderance of the evidence that Putra had participated in the May 9th transaction. Explaining that Putra's involvement in the May 9th transaction was "relevant conduct" under USSG section 1B1.3, the judge added the drug amounts from both transactions, which gave Putra a GSR[9] of 27 to 33 months. Had Putra been convicted of both charged offenses, her GSR would have been the same 27 to 33 months. Without the use of the acquitted conduct, Putra's GSR would have been 15 to 21 months. The court sentenced her to 27 months. See United States v. Putra, 78 F.3d 1386 (9th Cir. 1996).

In United States v. Mercado, 474 F.3d 654 (9th Cir. 2007), defendant Mercado was convicted by jury of various counts of drug conspiracy. But the jury acquitted Mercado of participation in three murders, violent crimes in the aid of racketeering, and assault with a deadly weapon. Based on his drug convictions, Mercado's GSR was 30 to 37 months. But at sentencing, the judge considered the acquitted conduct, finding by a preponderance of the evidence that Mercado had participated in those crimes and sentenced him to 20 years in prison.

In 2015, Vincent Asaro was tried on charges related to his alleged participation in a 1978 robbery and a 1969 murder. The jury acquitted Asaro of all charges. In 2017, Asaro pleaded guilty to a separate offense, and his GSR was 33-41 months in prison. But the judge who had presided at his earlier trial was also the judge who sentenced him on

[9] Guideline Sentencing Range.

his 2017 conviction. The judge explicitly stated she was "firmly convinced" that the government had proved the charged crimes at the 2015 trial and sentenced Asaro to 96 months based on the acquitted conduct from that earlier trial. United States v. Asaro, No. 17-CR-127 (E.D.N.Y. Dec. 28, 2017).

The hallmark of the American judicial process, enshrined in the Sixth Amendment to the U.S. Constitution, is the right to a trial by jury and the concomitant right of requiring the government to prove guilt beyond a reasonable doubt. As observed by U.S. Supreme Court Justice Brennan, "the requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons.... There is always, in litigation, a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant in his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of ... persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of ... convincing the factfinder of his guilt." In re Winship, 397 U.S. 358 (1970).

While the preponderance of the evidence standard is most often sufficient for determination of the facts in civil trials, the Winship Court found that, in criminal trials "a person ... would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case."

Circuit Judge Millett wrote in her concurring opinion in United States v. Bell, 808 F.3d 926 (D.C. Cir. 2015), the "requirement that the jury, not a judge, find facts fixing

the permissible sentencing range applies to statutory limitations; it is hard to understand why the same principle would not apply to dramatic departures from the Sentencing Guidelines range based on acquitted conduct. After all, the Supreme Court has held that, as a matter of law, a sentence within the Guidelines range is presumptively reasonable and lawful, and any 'major departure' from that range requires 'significant justification.'" (Citing Gall v. United States, 552 U.S. 38 (2007)).

Judge Millet continued: "Because the Sentencing Guidelines have 'force as the framework for sentencing,' Peugh v. United States, 133 S. Ct. 2072, 2083 (2013), and because, in the usual case, 'the judge will use the Guidelines range as the starting point in the analysis and impose sentence within the range,' Freeman v. United States, 131 S. Ct. 2685, 2692 (2011), the Guidelines demark the de facto boundaries of a legally authorized sentence in the mine run of cases. Given that reality, the Sixth Amendment should not tolerate the use of acquitted conduct specifically rejected by the jury to provide the required 'significant justification' for" increasing a defendant's sentence." Bell, 808 F.3d at 928-29.

Jenkins respectfully requests that his sentences on Counts 1 and 3 be vacated, the case be remanded for re-sentencing without the acquittal conduct.

CONCLUSION

Jenkins respectfully requests that his convictions on Counts One and Three be vacated due to failure to substitute counsel when there was an obvious breakdown in communication, or, in the alternative to vacate the sentences on Count One and Three and order re-sentencing.

Respectfully submitted on the 11th day of January 2023.

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