IN THE
SUPREME COURT OF THE UNITED STATES

_____

KENDRICK RAMON PAGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Joseph G. Bertogli
300 Walnut St., Suite 270
Des Moines, IA 50309
PHONE: (515) 244-7820
FAX: (515) 244-9125

ATTORNEY FOR PETITIONER

QUESTION PRESENTED

1. Whether the 8th Circuit erred by affirming the district court's denial of Page's MTS wiretap evidence because the necessary probable cause under 18 USC Section 2518(3)(a) and (b) was lacking the minimization requirement under 18 USC Section 2518(5) was not met, and the necessity requirements of 18 USC Section 2518(3)(c) were not complied with.

2. Whether the 8th Circuit erred by affirming the trial court's refusal to provide Page with a theory of defense instruction because its decision conflicts with decisions by the Supreme Court and other United States Courts of Appeals who have addressed the issue of when a theory of defense instruction is required.

LIST OF PARTIES

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

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OPINIONS BELOW

Kendrick Ramon Page respectfully prays that a writ of certiorari issue to review the judgment of the 8th Circuit Court of Appeals in Case No. 21-3793, entered on February 24, 2023, made final with its denial of rehearing on April 10, 2023. The opinion of the 8th Circuit Court of Appeals appears in the Appendix to the petition and is reported at *United States v Armstrong, 604 F 4th 1151 (8th Cir. 2023)*. The appeal stemmed from Page's conviction and sentence of 340 months entered by the Honorable John A. Jarvey, Chief District Court Judge on November 22, 2021, *United States v Page,* case number 3:19-cr-0129. *United States v Armstrong, 604 F 4th 1151 (8th Cir. 2023).*

JURISDICTION

The United States Court of Appeals for the 8th Circuit entered judgment on February 24, 2023. A petition for rehearing was denied on April 10, 2023.

The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

CONSTITUITIONAL PROVISIONS

4th and 5th Amendments to the United States Constitution

STATEMENT OF THE CASE

Page accepts the procedural history recited by the 8th Circuit on pages 2-6 of his February 24, 2023, Opinion. Further facts will be provided as needed.[1]

[1] In this Petition the following abbreviations will be used:

The indictment was obtained as a result of an extended investigation into the alleged drug distribution activities of Page and others commencing in 2001 or 2002. The various law enforcement organizations (LEO) included the Burlington Police Department, Southeast Iowa Narcotics Task Force, West Central Family Task Force, and other supporting LEO. (PSR p. 4-36).

The efforts of law enforcement in this investigation included at a minimum the following sources of information:[2]

a. Grand jury and administrative subpoenas;
b. Confidential informants and cooperating witnesses;
c. Controlled purchases;
d. Interviews with subjects and/or associates;
e. Traffic stops;
f. Search warrants and consensual searches;
g. Physical surveillance;
h. Pen registers and trap and trace devices;
i. Telephone toll records;
j. Mobile tracking devices;
k. Geo-location data;
l. Trash searches;
m. Mail cover requests and package interdiction;
n. Financial investigation;

"R. Doc" — district court clerk's record, followed by docket entry and page number, where noted;
"Supp. Tr." — Suppresion hearing transcript, followed by the page number of the originating document and paragraph number, where noted;
"Trial Tr." — Trial transcript, followed by page number;
"Sent. Tr." — Sentencing hearing transcript, followed by page number and;
"PSR" --- Presentence investigation report, followed by page number.

[2] The details summarizing these categories of evidence will be summarized in Brief Point I.

o. Interception of wire and other communications. (Supp. Tr. p. 1-32, R. Doc. 198).

On September 13, 2019, and again on October 10, 2019, the government filed Applications for an Orders Authorizing the initial and subsequent interception of wire and electronic communications alleging there was probable cause to believe that the Defendant as well as other target subjects have committed, are committing, and will continue to commit certain target offenses including the following:

a. Distribution and possession with intent to distribute controlled substances in violation of 21 USC Section 841(a)(1);

b. Conspiracy and attempt to distribute and possess with intent to distribute controlled substances, in violation of 21 USC Section 846;

c. Unlawful use of communication device to commit and facilitate the commission of drug trafficking offenses, in violation of 21 USC Section 843(b).

Both applications further allege probable cause to believe that particular wire and electronic communications of the Defendant and others would be obtained through the interception of wire and electronic communications occurring to and from a cellular telephone bearing the number 630-461-2069, subscribed to one Cimone Buchanan and used by the Defendant. In particular, the government alleged there was probable cause to believe that those wire and electronic communications would concern the specifics of the target offenses, including:

a. The nature, extent and methods of operation of the target subjects unlawful activities;

b. The identity of the target subjects, their accomplices, aiders and abettors, co-conspirators and participants in their illegal activities;

c. The receipt and distribution of narcotics and money involved in those activities;

d. The locations and items used in furtherance of those activities;

e. The existence of locations of records relating to those activities;

f. The location and source of resources used to finance their illegal activity;

g. The location and disposition of the proceeds from those activities.

In addition, the communications were expected grant admissible evidence of the commission of the target offenses. (R. Doc. 198).

The government further alleged in the Application that normal investigative procedures have been tried and have failed and would reasonably appear to be unlikely to succeed if tried or were too dangerous to employ. (R. Doc. 198).

On September 13 and again on October 10, 2019, the United States District Court for the Central District of Illinois entered an Order pursuant to *18 USC Section 2518* authorizing interception of wire and electronic communication from the telephones requested in the application used by the Defendant and others for a period not to exceed 30 days. (R. Doc. 198). Both orders further provided that the

monitoring of conversations must immediately terminate when determined that the conversation was unrelated to communications subject to interception. (R. Doc. 198).

On March 27, 2020, Page filed his MTS evidence of the wire interceptions performed in this case. (R. Doc. 110). Hearing was held on July 10, 2020. The court entered its Order denying Page's MTS on July 17, 2020. (R. Doc. 201). At trial, the government produced testimony from numerous cooperator witnesses including David Davis, Keith Nash, Mikel Simmons, Wilbert Bowers, Cody Neff, co-defendant Fredrick Reed, Cassandra Lewis, and Phillip Jones. (Trial. Tr. Vol. 2 p. 103-123, 129-138, 178-188, 211-233, 237-254, 294-303, Trial Tr. Vol. 3 p. 329, 333-356, 363-395).

The government further produced several undercover buys/payoff transactions alleged to be related to Page and other co-defendants including transactions between Phillip Jones and Page. (R. Doc. 198). Nicholas Hiland, a Quincy, Illinois officer in the West Central Illinois Task Force testified how his agency assisted in the investigation. (Trial Tr. Vol. 4 p. 654). Previously, Hiland had obtained wiretap authorizations to monitor Page and the government introduced recorded wiretaps into evidence. (R. Doc. 198, Trial Tr. Vol. 4 p. 671-672). Detective Hiland testified that between September 13 and November 9, 2019, agents intercepted over 14,000 calls on Page's phone. (Trial Tr. Vol. 5 p.

717). A number of these calls with accompanying transcripts were admitted into evidence. (Trial Tr. Vol. 5 p. 671).

The government also introduced evidence as a result of 9 search warrant executions. On November 19, 2019, officers from approximately 25 different agencies were involved in the simultaneous executions of search warrants in Burlington, Iowa; West Burlington, Iowa; Iowa City, Iowa; Chicago, Illinois and Dallas, Texas. These search warrants netted cellphones, ammunition, and several firearms, marijuana, money transfer receipts, vacuum sealing equipment, and other items LEO believed relevant to their investigation. (PSR p. 32-36).

Following the completion of the evidence, Page requested a multiple conspiracies instruction both in his written request and on the record. (R. Doc. 450; Trial Tr. Vol. 5 p. 794-798). Page's request for a multiple conspiracies instruction was denied. (Trial Tr. Vol. 5 p. 802-805).

REASONS FOR GRANTING THE WRIT

I. THE 4TH AMENDMENT DEMANDS REVERSAL OF THE 8TH CIRCUIT'S ORDER AFFIRMING THE DISTRICT COURT'S DENIAL OF PAGE'S MTS WIRETAP EVIDENCE.

A. The Application and Affidavit In Support of The Orders Authorizing Interception of Wire And Electronic Communications Were Not Supported by Probable Cause.

To obtain a wiretap, the government must establish the following:

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in [18 USC Section 2516];
>
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception…
>
> (d)…there is probable cause for belief that the facilities from which, of the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person. *18 USC Section 2518(3)*

Both applications listed the target offenses to include the following:

a. Distribution and possession with intent to distribute controlled substances in violation of 21 USC Section 841(a)(1);

b. Conspiracy and attempt to distribute and possess with intent to distribute controlled substances, in violation of 21 USC Section 846;

c. Unlawful use of communication device to commit and facilitate the commission of drug trafficking offenses, in violation of 21 USC Section 843(b).

Both applications allege probable cause that the interception of wire and electronic communications from the target telephone would concern the specifics of target offenses, including:

a. The nature, extent and methods of operation of the target subjects unlawful activities;

b. The identity of the target subjects, their accomplices, aiders and abettors, co-conspirators and participants in their illegal activities;

c. The receipt and distribution of narcotics and money involved in those activities;

d. The locations and items used in furtherance of those activities;

e. The existence of locations of records relating to those activities;

f. The location and source of resources used to finance their illegal activity;

g. The location and disposition of the proceeds from those activities. (App p. 2-3)

Page contends that government's Exhibit 2, pages 34-42 and government's Exhibit 5, pages 36-47, failed to establish the probable cause necessary under 18 USC Section 2518(3)(a) and (b). (R. Doc. 133, p. 5). The essence of those pages of the Affidavit which are contained in Section IX which is headed "**Facts Establishing Probable Cause**", centers around information from CHS #6. Paragraph 82 of the first Affidavit provides that CHS #6 told LEO that Page was utilizing three separate cell phones, none of which matched the number of **Target Number #1**. (Gov. Supp. Ex. 2 p. 34). Additionally, paragraph 83 at page 34 of Government's Suppression Exhibit 2 recited that Page allegedly sent text messages from **Target Number #1** to CHS #6 which were comprised of the following:

PAGE: Wat it do?

PAGE: This KP get at me.

TFO Hiland expressed his opinion that text message allegedly sent from Page to CHS #6 was about Page encouraging CHS #6 to contact him to set up drug

transactions. That contention is unsupported by any reasonable and articulable "facts" to support that conclusion. *See Terry v Ohio, 392 US 1 (1968); Reed v Georgia, 448 US 438 (1980).*

Likewise, no further reasonable or articulable facts can be discerned from an alleged conversation between Page and CHS #6 provided below:

> **PAGE:** What's you talking about man? I'm not there, but it's there.
>
> CHS #6: Shit man, I can do it all.
>
> **PAGE:** What's you talking about?
>
> CHS #6: Man, whatever you bring nigga I'm gonna get rid of, you already know.
>
> **PAGE:** What's you looking at?
>
> CHS #6: I got a little money, I gots some money if that's what you talking bout.
>
> **PAGE:** You know I am gonna put you on deck, but you know (inaudible).
>
> CHS #6: I got about two with me, two g's maybe three.
>
> **PAGE:** Let me know exactly so I know exactly what I need to do for you.
>
> CHS #6: Shit, I got put two five with it, two thousand five hundred.
>
> **PAGE:** Ok, where you at? Where you fitting to be?
>
> CHS #6: I'm at the house though.
>
> **PAGE:** Ok, how long you gonna take you to get there I am fittin' to send my partner's cousin to you.

CHS #6: Ok, give me about an hour.

Again, TFO Hiland surmised that telephone call involves discussing a pending methamphetamine transaction. Hiland's interpretation is suspicion and not based on any reasonable or articulable facts. Hiland's statement about his opinion of the subject matter of that phone conversation is a conclusion not fact.

The 8th Circuit analyzed the requirements of 18 USC Section 2518(3)(b) using standards enumerated in *United States v Merrett, 8 F 4th 743, 750 (8th Cir. 2021)* which provided, "This probable-cause requirement is coextensive with the Fourth Amendment's probable-cause requirement." *Id*. The 8th Circuit went on to state that the government was required to show "a fair probability" based on "the totality of the circumstances" that the cellphone number identified in the wiretap applications "was used or about to be used for criminal activities or that [Page], a person engaged in prescribed conduct, commonly used the cellphone". (8th Circuit Op. p. 9). The 8th Circuit found that the examples provided by Page regarding text-message exchanges between himself and a "CHS #6" failed to meet the probable cause standard. In affirming the district court, the 8th Circuit found that those text-messages amply support probable cause under USC Section 2518(3)(d), particularly when considered along additional communications involved a call between Page and CHS #6 that took place a day after the text-messages between Page and CHS #6 set forth in Page's brief where the affidavit characterizes that

later text-message exchange as a direction from Page to CHS #6 to go to an address in Burlington where CHS #6 met an alleged associate of Page, Big Head, for the purchase of 225 grams of methamphetamine for $2,500. (8th Circuit Op. p.10). The 8th Circuit failed to cite where in the affidavit this reference occurred.[3] Page submits that a review of the affidavits provided in support of the application for wiretap order fails to establish the very text-message exchanges cited by the 8th Circuit which it relied upon to affirm the district court's conclusion that the probable-cause requirement of 18 USC Section 2518(3)(d) was satisfied.

The provisions of the affidavit contained in paragraphs 87-105 on pages 36-42 of Government's Suppression Exhibit 2 fail to establish reasonable or articulable facts upon which to base a finding of probable cause that **Target No. 1** was being used for the commission of any target offenses as alleged in the application and affidavit. Those paragraphs are merely conclusory opinions rather than containing specific and articulable facts. *United States v Kahn, 415 US 143 (1974); United States v Gaines, 639 F 3d 423 (8th Cir. 2011)*.

Neither the government's suppression Exhibit 2 nor 5 support a finding that probable cause existed that the **Target No. 1** was being used for criminal

[3] Nowhere in the district court's Order denying Page's MTS is any such text-message found.

conversations.[4] Accordingly, the 8th Circuit erred by finding that the probable-cause requirement of 18 USC Section 2518(3)(d) was satisfied.

B. The 8th Circuit Erred by Finding that the Minimization Requirement under 18 USC Section 2518(5) were Met.

Title III requires the minimization of calls:

> "…Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days..." *18 USC § 2518(5)*.

The 8th Circuit correctly noted that the Supreme Court in *Scott v United States, 436 US 128, 140 (1978)* interpreted Section 2518(5)'s minimization requirement requires agents to conduct the surveillance in such a manner as to minimize the interception of all non-relevant communications. (8th Circuit Op. p. 10). Assessing whether intercepted communications have been minimized in accordance with Section 2518(5) requires the reviewing court to determine whether the government's actions were reasonable based on "objective assessment of an officer's actions in light of the facts and circumstances then known to him". *Id at 137*.

[4] The Defendant has focused on Gov. Supp. Ex. 2 because the Defendant asserts that if Gov. Supp. Ex. 2 was not supported by probable cause then any inclusion of intercepted wire communications in Gov. Supp. Ex. 5 were fruits of the poisonous tree and must be excluded. *United States v Dahda, 138 Sup. Ct. 1491, 1499 (2018).*

That inquiry considers a variety of factors, including "criminal activities scope, the investigating agents' reasonable expectations that the communications' content, the authorizing judge's continuing judicial supervision, the communications' length and origin, and whether the speakers relied on code or ambiguous language". *United States v Campbell, 986 F 3d 782, 801 (8th Cir. 2021)*. The 8th Circuit reviewed the district court's findings that the government's minimization efforts were reasonable for clear error. (8th Circuit Op. p. 11).

The 8th Circuit in support of its decision affirming the district court on the satisfaction of the minimization requirements noted that those minimization efforts by the government were complicated by the fact that agents had reason to believe that the scope of Page's criminal enterprise was broad, that he used coded language when discussing his drug-trafficking activities and that he often involved his family members in his crimes. (8th Circuit Op. p. 11). Additionally, the 8th Circuit figured that the 230 calls cited by Page in response to the district court's Order requiring identification of non-minimized calls, represented fewer than 3% of the 9,000 calls the government intercepted. (8th Circuit Op. p. 11). The 8th Circuit further determined that the government established that the vast majority of those calls claimed by Page to not meet the minimization requirement were, in fact, minimized within 2 minutes. (8th Circuit Op. p. 11).

The 8th Circuit's findings that the calls cited by Page were minimized is not supported in the record. Neither the district court nor the 8th Circuit cited any reference to the record in determining that those calls had been minimized. The 5 and a half page, single-spaced chart identifying the phone calls that Page claimed were not minimized contained phone calls lasting well over 2 minutes and a review of Page's Suppression Exhibit A clearly established the length of those non-relevant calls contained phone calls that were recorded lasting up to 12 minutes and more. (R. Doc. 124).

Accordingly, Page submits that the district court committed clear error and that the 8th Circuit erred in affirming the district court's finding that the government had met the minimization requirement of *18 USC Section 2518(5)*.

C. The 8th Circuit Erred by Affirming the District Court's Finding that the Application and Affidavit Met the Necessity Requirements of 18 USC Section 2518(3)(c).

Before approving a wiretap, the court must satisfy itself that traditional law enforcement methods are unlikely to succeed or are too dangerous to attempt. *18 USC Section 2518(3)(c)*. Consideration of alternative law enforcement methods is central to the issuing courts necessity inquiry. *United States v Ippolito, 774 F 2d 1482, 1485 (9th Cir. 1985)*. Although an investigating agency need not exhaust all possible investigative technics before requesting a wiretap, *United States v Homick, 964 F 2d 899, 903 (9th Cir. 1992)*, it must demonstrate that "normal

investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time." *United States v Spagnuolo, 549 F 2d 705, 710 (9th Cir. 1977)*. Where ordinary investigative technics have not been employed, the afiant must show that employment of such technics "reasonably appear unlikely to succeed if tried or to be too dangerous." *United States v Ailemen, 986 F Sup. 1228, 1231 (N.D. CAL. 1997)*, boiler plate assertions that the standards are met based on an agent's knowledge and experience will not suffice. *Id.* Instead, the affidavit must contain an "adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable" the issue in court to determine on its own whether there is the requisite necessity for the use of a wiretap. *Id* at 1231. The court's inquiry should be guided by common-sense and practical considerations. *United States v Echavarria/Olarte, 904 F 2d 1391, 1396 (9th Cir. 1990)*.

The September 13, 2019, Affidavit in Support of the Application for Wiretap Intercept detailed at paragraph 107 and page 42 of Government's Suppression Exhibit 2 the goals and objectives of the investigation including:

a. The nature, extent and methods of operation of the target subjects unlawful activities;

b. The identity of the target subjects, their accomplices, aiders and abettors, co-conspirators and participants in their illegal activities;

c. The receipt and distribution of narcotics and money involved in those activities;

d. The locations and items used in furtherance of those activities;

e. The existence of locations of records relating to those activities;

f. The location and source of resources used to finance their illegal activity;

a. The location and disposition of the proceeds from those activities. (R. Doc. 198)

In this case, TFO Hiland testified as to the law enforcement investigatory tactics utilized prior to the application for wiretap that were highly successful in producing evidence sufficient to charge Page and the remainder of his co-defendants with conspiracy to distribute methamphetamine and cocaine.

a. **Grand Jury and Administrative Subpoenas-** TFO Hiland detailed numerous administrative and grand jury subpoenas which had been served related to this investigation which assisted LEO in identifying subscribers of specific telephone and money transfer records;

b. **Confidential Informants and Cooperating Witnesses-** TFO Hiland detailed the existence and cultivation of 12 cooperative human sources (CHS) leading to at least 6 controlled buys/payoffs between February 14, 2008, and July 19, 2019. (Gov. Supp. Ex. 2 p. 45-52). LEO's most proficient CHS was CHS #6, who produced specific information regarding Page receiving methamphetamine from California and distributing it in the Southern District of Iowa and the Central District of Illinois. The mere allegation of LEO and TFO Hiland that it would be unlikely that the CHSs could provide additional or more detailed information about Page and his co-defendants without raising suspicions is mere supposition and contained no

explanation why those ordinary investigative techniques were or would not be effective. *United States v Ailemen, 986 F Supp. 1228, 1231 (N.D. CAL. 1997)*;

c. **Controlled Purchases-** As provided above prior to applying for a wiretap order LEO conducted at least 6 undercover buys/payoff transactions relating to Page and other co-defendants. TFO Hiland admited that controlled purchases are useful in gathering admissible evidence against Page and his co-defendants but merely makes a conclusory statement that those controlled buys failed to further the investigative goals which include the identification of the Page's SOS;

d. **Interviews of Subjects or Associates-** TFO Hiland admited that the interviews of subjects of investigations or associates of Page including David Davis, Shelly Garcia, Jason Ballard, John Varly, Keith Nash, Mickel Simmons, Glenn Wooden, Patraial Sims, among others, who provided LEO in this case with immense amounts of information leading to evidence;

e. **Traffic Stops-** On May 30, 2019 LEO effectuated a traffic stop Malik Buchanan and seized 10 pounds of methamphetamine. LEO had previously on May 15, 2019 seized cash as the result of a traffic stop in Quincy, Illinois. These traffic stops and others proved effective in gathering evidence in this case;

f. **Search Warrants and Consensual Searches-** TFO Hiland noted in his Affidavit that in 2013 LEO executed a search warrant at the residence of Tavaris Morrow netting cocaine powder, cocaine base, and marijuana. In 2017 LEO executed a search warrant at Keith Nash's residence netting 188 grams of methamphetamine and 27 grams of marijuana. Both Morrow and Nash were alleged known associates of Page;

g. **Physical Surveillance-** TFO Hiland stated that LEO had conducted physical surveillance on approximately 16 separate occasions in conjunction with controlled purchases and pay-offs leading to the identification of numerous individuals alleged to be associated with Page. Hiland further stated that while surveillance is an effective law enforcement technique it would

not be effective with regards to determining the whereabouts of the Page because Page's Burlington residence is located in a neighborhood where law enforcement cannot park on the street due to limited parking. Page's other suspected residence in Roselle, Illinois likewise cannot utilize surveillance due to limited parking and restrictions. It appears that even though utilized, TFO Hiland's conclusion that physical surveillance would not be effective in this case is again only conclusory. *United States v Echavarria-Olarte, 904 F 2D 1391 (9th Cir. 1990)*;

h. **Pen Registers and Trap and Trace Devices-** TFO Hiland affirmed that in June of 2019 a court authorized pen register and trap and trace on **Target Number #1** was effected and that as a result of the trap and trace and pen register efforts numerous phone numbers believed by LEO to be associated with the commission of target offenses were identified as being in contact with Target Number #1. TFO Hiland merely states that the use of the pen register and trap and trace techniques employed in this case were ineffective. Again, this is a conclusory statement not based upon an "adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable" the court to determine on its own whether there was the requisite necessity for the use of wiretap. *Ailemen at 1231.*

i. **Telephone Toll Records-** TFO Hiland provides that records from Sprint pursuant to an administrative subpoena for **Target Number #1** between May 23, 2019 and June 18, 2019 was useful to establish an association among alleged members and associates of Page and to pinpoint critical contacts between them. Hiland noted that 452 phone calls and 22 text messages between **Target Number #1** and target Ashley Wilson. That being said, Hiland then concludes that toll records are not adequate to identify the source or sources of the drugs or monetary instruments and states that the interception of wire and electronic communications to and from **Target Number #1** is necessary. Again, these are more conclusory statements and lack the factual basis necessary for the court to determine

whether or not a wiretap meets the necessity requirements of Title III. *Ailemen, supra.*

j. **Mobile Tracking Devices-** TFO Hiland concluded that the use of mobile tracking devices would be insufficient to meet the goals of the investigation merely because Page was alleged to commonly use rental vehicles in his travels. Mobile tracking devices were not utilized in this investigation and TFO Hiland does not provide an adequate explanation as to why they would be unsuccessful so as to provide the Court with enough information on the issue of necessity.

k. **Geo-location Data-** TFO Hiland noted that in June of 2019 a federal search warrant authorizing Sprint to provide location data for **Target Number #1** was entered which tells LEO every 15 minutes the location of that phone. Without going into any factual basis as to why this technique is ineffective, Hiland merely states the conclusion that it has been insufficient to meet the goals of the investigation.

l. **Trash Searches-** TFO Hiland stated that trash searches are effective in locating discarded drug packaging, empty containers of cutting agents, repackaging materials, indicia of residency, travel documents, and paperwork related to financial institutions of those involved in drug trafficking. He stated that trash pulls were effective on at least 3 occasions netting numerous financial records, residence identification information, drug packaging material, and other evidence indicative of drug trafficking activities. Although trash pulls effected in this case netted evidence in support of the investigation, TFO Hiland concluded that trash pulls by themselves would, in his opinion, fail to fully identify all the members of the organization, the role of each conspirator, or identify locations where drugs and proceeds were being stored. Every known law enforcement evidence gathering technique has its pros and cons. Here TFO Hiland merely focuses on the cons without presenting the necessary factual basis for the court to judge whether the necessity requirement of Title III has been met;

m. **Mail Cover Requests and Package Interdiction-** TFO Hiland stated in his Affidavit that no attempts where made by law enforcement to contact the USPS and that even if it did the information obtained from that particular technique would not be sufficient to meet the investigations goals. Again, Hiland merely concluded that law enforcement technique would not work;

n. **Financial Investigation-** TFO Hiland stated that LEO identified Moneygram and Wal-Mart money services as ways that money was being transferred back and forth between alleged involved individuals and state to state. In April of 2018 LEO issued a subpoena on RIA Financial Services and Moneygram which revealed that between July of 2013 and March of 2018 Page was alleged to have sent over $5,000 on 21 occasions of $600 or less. On one occasion Page was alleged to have received $2,800 from Ashley Wilson sent from West Burlington, Iowa to Sacramento, California. Hiland fails to identify any reasons why engaging in financial examination such as that utilized in this investigation was in any way inadequate to investigate the alleged activities of Page. *Ailemen, at 1231.*

The 8th Circuit admitted that the above efforts were indeed successful. (8th Circuit Op. p. 8). The 8th Circuit then found Hiland's affidavits also explained how the conventional methods used had failed and would have likely continued to fail so as to meet the necessity requirement of Section 2518(3)(c). (8th Circuit Op. p. 8).

Page submits that the 8th Circuit erred in that given the extended investigation of Page and others which commenced in 2001 and resulted in the December 11, 2019, one-count indictment and the normal and reasonable law

enforcement investigative techniques employed over this nearly 20-year investigation clearly provided sufficient evidence without the employment of a wiretap. There was simply no need for a wiretap to be utilized in this case.

II. THE CIRCUIT'S OPINION DENYING PAGE'S THEORY OF DEFENSE INSTRUCTION CONFLICTS WITH THE SUPREME COURT'S DECISION IN CRANE V KENTUCKY, 476 US 683 (1986) AS WELL AS OTHER UNITED STATES COURTS OF APPEALS OPINIONS ADDRESSING THE ISSUE OF WHEN A THEORY OF DEFENSE INSTRUCTION IS REQUIRED.

The 8th Circuit Opinion, citing *United States v. Burris, 22 F.4th 781, 786 (8th Cir. 2022)* held that a theory of defense instruction is unnecessary if the Government's evidence is substantial. This analysis is in error.

The United States Supreme Court has long held that a defendant is entitled to present his theory of defense.

> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers v. Mississippi, supra,* or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington v. Texas,* 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta,* 467 U.S., at 485, 104 S.Ct., at 2532; cf. *Strickland v. Washington,* 466 U.S. 668, 684–685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)."

Crane v. Kentucky, 476 U.S. 683, 690 (1986). The right to present a defense factually would be empty without the jury being instructed on the corresponding legal theory which aligns with said facts.

In *United States v. Christy, 647 F.3d 768 (8th Cir. 2011)*, the 8th Circuit embodied this concept.

> "The rationale offered in our cases is that a theory-of-defense instruction "is a legitimate response to the indictment which is usually read with the instructions," *United States v. Brown*, 540 F.2d 364, 381 (8th Cir. 1976), and the defendant should be allowed not just "a mere general or abstract charge," but "a specific instruction on his theory of the case," *Apel v. United States*¸ 247 F.3d 277, 282 (8th Cir. 1957) (internal quotation omitted), that "direct[s] the jury's attention" to consider the defendant. *United States v. Casperson*, 773 F2d 216, 223 (8th Cir. 1985); see also *United States v. Barham*¸595 F.2d 231, 244 (5th Cir. 1979) ("[T]he instructions must be sufficiently precise and specific to enable the jury to recognize and understand the defense theory, test it against the evidence presented at trial, and then make a definitive decision whether, based on that evidence and in light of the defense theory, the defendant is guilty or not guilty.").

Christy, *647 F.3d at 770.*

The trial court denied the instruction in part based upon its view of the evidence in which one defendant "didn't know what the other was doing, but that is classic and is covered by the jury instructions that a conspirator doesn't need to know all the other conspirators, doesn't need to know the details, doesn't have to agree to play a particular role, and those are instances that fall within the general rule and don't establish multiple conspiracy." (Trial Tr. Vol. 5 p. 803). However, the trial court's reasoning accepted the Government's factual positions while ignoring a fact finder's ability to consider the evidence differently.

The right to a theory of defense instruction requires the court to instruct the jury even where the evidence is "weak, inconsistent, or of doubtful credibility."

United States v. Casperson, 773 F.3d 216, FN.12 (8th Cir. 1985) citing United States v. Prieskorn, 658 F.2d 631, 636 (8th Cir. 1981); see also United States v. Kenyon, 481 F.3d 1054, 1071 (8th Cir. 2007) (reversing a conviction where there was sufficient evidence to present an intoxication instruction to the jury).

The 8th Circuit opinion's focus upon the sufficiency of the evidence does not give enough weight to the constitutional aspects of the instruction's import when it is at the heart of the defendant's defense.

"As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States, 485 U.S. 58, 63 (1988) (citing Stevenson v. United States, 162 U.S. 313 (1896))*. This right exists even where the defendant raises inconsistent defenses. *Id.* at 65.

The focus on whether a theory of defense instruction is not, therefore, whether the Government's evidence is sufficient to overcome the instruction. Rather the focus is on whether a juror would determine there is sufficient evidence to find in the defendant's favor.

The First Circuit Court of Appeals has articulated the standard this way:

> A criminal defendant is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it. In making this determination, the district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. Rather the court's function is to examine the evidence on the record and to draw those

> inferences as can reasonably be drawn therefrom, determining whether the proof, take in the light most favorable to the defense can *plausibly* support the theory of the defense. This is not a very high standard to meet, for in its present context, to be "plausible" is to be "superficially reasonable."

United States v. Gamache, 156 F.3d 1, 9 (1st Cir. 1998) (internal citations omitted).

Another way to understand the 8th Circuit's error is its focus on whether the evidence supported the verdict rather then whether sufficient evidence was generated to support the instruction at the time it was given. As the Seventh Circuit has stated:

> A defendant's right to submit a defense for which he has an evidentiary foundation is fundamental to a fair trial, and has been considered protected under both the Fifth and Sixth Amendments. The Sixth Amendment, which assures the defendant of a right to trial by jury, is violated where the trial judge directs a verdict on an issue against the defendant. "if the trial judge evaluates or screens the evidence supporting a proposed defense and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration." Moreover, a Fifth Amendment violation occurs when the instructions provided do not "accurately [reflect] the law as it appeared at the time of the alleged criminal conduct."
>
> Consequently, a defendant is entitled to have a jury consider any defense theory that is supported by law and has some foundation in the evidence.

Whipple v. Duckworth, 957 F.2d 418, 423 (7th Cir. 1992)[5]*; see also Conde v. Henry, 198 F.3d 734, 739-40 (9th Cir. 1999)* (noting a defense instruction must be given if it is supported by some evidence).

In this case, the multiple conspiracy instruction was supported by some evidence. The multiple conspiracies instruction should have been given as required by the Fifth and Sixth Amendment. The 8th Circuit's deviation from the evidence supporting the instruction to the strength of the Government's case distinguishes it from Supreme Court precedent and the precedent of several other circuits.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/

JOSEPH G. BERTOGLI
ICIS No. AT0000797
300 Walnut, Suite 270
Des Moines, Iowa 50309
Telephone: 515/244-7820
Facsimile: 515/244-9125

[5] Later overturned *en banc* on the basis that in this particular defendant's case a state law existed which prohibited the defendant from raising entrapment unless the defendant admitted to the underlying offense. See *Eaglin v. Welborn, 57 F.3d 496, 500-02 (7th Cir. 1995)* (*en banc)*