

NO: \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED  
STATES OCTOBER TERM 2023

ANTOINE CLARK,

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

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On Petition for A Writ of Certiorari  
To the United States Court of Appeals  
For the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

1. Whether this Court should set limits on whether law enforcement's self-created exigent circumstances provide justification for a Title III wiretap?

## **PARTIES TO THE PROCEEDING**

This case is related to United States v. Gerald Spruell CTA3 No. 20-2912 and United States v. Daniel Robinson, CTA3 No. 20-2938.

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Antoine Clark respectfully petitions for a writ of certiorari to review  
the judgment of the United States Court of Appeals for the Third Circuit in  
this case.

**OPINION BELOW**

The Third Circuit's opinion affirming Petitioner's conviction and sentence  
is unpublished but available at 2023 WL 2400741 and appears at Appendix A.  
The opinion of the United States district court appears at Appendix B and is  
unpublished.

## **JURISDICTION**

The District Court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on August 8, 2019. The Third Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291 and issued its unpublished opinion on March 8, 2023. Rehearing was denied April 4, 2023. A copy of the Order denying Rehearing appears at Appendix C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## **STATUTORY PROVISIONS INVOLVED**

The relevant portion of 18 U.S.C. § 2518, Procedure for interception of wire, oral, or electronic communications is reproduced below:

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

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- (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;
- (d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;
- (e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

## STATEMENT OF THE CASE

### A. Charges

The Federal Bureau of Investigation (“FBI”) in conjunction with the Philadelphia Police Department (“PPD”) initiated an investigation into drug trafficking activity in South Philadelphia, Pennsylvania sometime in December 2013. Specifically, the target of the investigation was the activities conducted by “Friends” a/k/a “7<sup>th</sup> Street,” whereby drugs could be purchased by placing a telephone call to Target Phone #1 (267-984-7690) or Target Phone #2, and ordering the desired drug of choice - - heroin, cocaine or crack cocaine. After placing the order, delivery was made at a preset designated time and location which most often occurred on the day following the purchase order. “Friends” advertised their services by distributing business cards reading “Friend to Friend, U Help me I Help U, FRIENDS@YAHOO.COM 267-984-7690.”

The investigation continued through March 2016 without the use of wiretapping. Over the course of that 27-month investigation, defendants Antoine Clark, Gerald Spruell, Stephan Tucker and Daniel Robinson (“subject targets”) became known to law enforcement as operatives of “Friends.” In April 2016, a Title III wiretap was authorized on both Target Phones, which was renewed two times thereafter. The wiretap did not reveal “Friends” source for the heroin, for the cocaine or for the crack cocaine as law enforcement hoped it would. The wiretap

did, however, bring five additional “Friends” operatives to the attention of law enforcement; all being of much lower culpability than Clark, Spruell, Tucker and Robinson.<sup>1</sup> And, the wiretap revealed many more drug sale transactions over the course of the ensuing investigation attributed to the subject targets. Approximately 2-years after the last wiretap authorization terminated, on January 9, 2019, a grand jury returned an indictment charging the 9 individuals with various drug trafficking violations.

## **B. Trial and Sentencing**

In December 2019, Mr. Clark moved to suppress the evidence obtained from the wiretap communications. Therein, Mr. Clark argued, *inter alia*, that the affidavit did not establish that a wiretap was necessary to achieve the goals of the investigation.<sup>2</sup>

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<sup>1</sup> These individuals were charged in the resulting indictment. As is traditionally done, the defendants were listed in order of culpability - - most culpable appearing at the top of the list of defendants charged. All five of the newly discovered defendants fell in line after Clark, Spruell, Tucker and Robinson.

The vast difference between the 5 additional co-conspirators and the subject targets is reflected in the sentences imposed. Of the subject targets: Clark received 300 months imprisonment; Spruell received 312 months imprisonment; Tucker, S received 200 months imprisonment; and Robinson received 324 months imprisonment. Compare with the five additional co-conspirators: Wilkerson received 120-months imprisonment; Tucker, J received 60-months imprisonment; Fields received 30-months imprisonment; Robinson received 28 months imprisonment and Verticelli received 60-months imprisonment.

<sup>2</sup> The suppression motion also argued insufficient probable cause. This appeal does not challenge the district court’s probable cause determination, and therefore, arguments made in the suppression motion and at oral argument pertaining to the sufficiency of probable cause and the resulting findings are neither presented nor discussed herein.

During a hearing on the motion, defense counsel explained that whenever a call is placed to order a drug buy, the seller “would say, okay, we need time. I’ll call you back tomorrow . . . [law enforcement] always had lead time . . . they had the ability to know that a transaction was coming. And that’s an important . . . differentiation.” App. 455. Counsel further explained that:

Its not like . . . trying to catch drug dealers at random. They knew, okay, we have this target who is supposedly Antoine Clark. We know that he’s going to meet us at 10:00 tomorrow morning at this location with an ounce of drugs. We just got to follow him. We got to look at his phone. We got to see who he’s calling. That’s how you can work up the chain. Because you got to understand that right after that purchase was negotiated, there was a call, hey, bigger drug dealer, person further up the line, I need a whole ounce, I need a couple ounces, and they say, okay, meet me here. App. 455-456.

Counsel extended this line of argument to include the use of the cell phone tower to pinpoint where Clark was when he received the call in conjunction with the pole camera stating “there he is coming out his front door, getting in the car” and then follow him to the source. App. 456. Counsel further argued that there would be phone calls and text messages between the target and the source, which could be obtained and would lead to the identity of the source. Id. “Clearly[,] they have probable cause. They have a CI calling [the Target Phone] and drugs being delivered, so there would be no problem getting a warrant to get those records.” App. 457. “So the FBI is wrong in stating that that would not have worked. It certainly would have worked.” App. 456.

To emphasize the point, counsel asserted that cell tower, live surveillance

and phone records are commonly used by law enforcement in investigations. In fact, a multitude of evidence in this case will be presented to the jury through use of these investigative tools. However, in the affidavit the agent claims that these investigative tools are inadequate, because “we want Realtime information. And that’s not necessity.” App. 457. Importantly though, counsel asserted “they’re not saying it was likely to fail or unlikely to succeed, and that’s the problem” that is not showing necessity. App. 458.

To further the argument, counsel explained “that’s why these CI buys are important, because they’re arranging them for the next day. .... So that gives the FBI the opportunity to get all those records to put everything together.” App. 459-60. “The key is there’s nothing [in the affidavit stating] this would not work..... or its unlikely to work.” App. 460-461. “Instead of saying its unlikely to work, they said it’s just inadequate” and necessity requires a showing of unlikeliness to authorize the wire interception. App. 464, 466.

The government countered that a search warrant for the phone records would only produce the same evidence they already had through the pen register. App. 467. “Pen register data and search warrant data, even if you’re able to see the text, it’s not real time. It’s not telling you what the conversation is going on now, meet me at . . . 7<sup>th</sup> and tasker, where the wiretap allows you to have that information in real time and send surveillance to that area to see what’s going on.” App. 468.

The government explained that:

This is about using a wiretap when all other investigative

techniques have proved insufficient to fully establish the full range of the conspiracy, not just Defendant Clark or Defendant Spruell, but their underlings, the people above them, the people who are buying from them, the frequency of those buys and the amounts of those buys. I mean, that is the purpose of the wiretap. App. 469.

The government further pressed that they could have arrested Clark, Spruell, Tucker and Robinson “but that wasn’t the point of the investigation. . . it would have frustrated the broader goals of the investigation, which was to dismantle the whole thing and figure out where it went up and down.” App. 470.

The government reminded the court that it does not have “to exhaust all the other procedures before pursuing a wiretap. The purpose of [18 U.S.C §] 2518, the necessity requirement, could ensure that the Government doesn’t use this as a first option. . . . In fact, the only thing the Government must do is lay a factual predicate to inform the Court why other methods were not sufficient.” App. 479-80. The government then addressed the other techniques that were available and why they were not sufficient; essentially, repeating the arguments made in the affidavit. App. 482-4.

After reviewing the government’s proffer of investigative techniques used and its explanation of how such techniques failed to achieve the goals of the investigation – see findings of fact above - the district court ultimately found that the affidavit’s description of each investigative technique provides more than enough explanation to meet the United States’ burden of showing necessity for a wiretap. App. 62.

The Government introduced this wiretap evidence at a jury trial before the

district court. After which, the Petitioner was found guilty.

### **C. Third Circuit Opinion**

On appeal, Mr. Clark argued, *inter alia* that the Government's position was contrary to the Fourth Amendment to the Constitution and implicated his due process. Essentially, the government maintained that it need not exhaust *all* avenues of an investigation before resorting to a wiretap, rather it only needs to show that the methods it employed failed and that other methods would prove too dangerous to harmful to the investigation to pursue. *United States v. Bailey*, 840 F.3d 99, 114 (3d Cir. 2016); *United States v. Giordano*, 416 U.S. 505, 515 (1974). In finding the government carried its burden under Title III, the Circuit Court found: Here, the Government carried its burden under Title III.

The affidavit in support of the wiretap application adequately identified alternative investigative techniques and explained the reasons for their insufficiency. Confidential informants, for instance, could not infiltrate the higher ranks of Appellants' organization, while physical surveillance and pole cameras provided only limited information. Trash collection at Appellants' residences would have been impractical since garbage was commingled in communal dumpsters. And inquiries into Appellants' financial records proved inconclusive. Even if the Government failed to "exhaust all . . . investigative procedures," *id.* (emphasis added), it has adequately demonstrated that "normal investigative procedures" have failed or appear "unlikely to succeed if tried." 18 U.S.C. § 2518(3)(c). Nothing more is required.

*United States v. Clark*, 2023 WL 2400741 at \*1 (3d. Cir. 2023)

## REASONS FOR GRANTING THE PETITION

### I. This Court’s guidance on the extent of factors allowed to justify the use of a Title III Wiretap is critically important to future investigations.

The Third Circuit’s decision does not account for the Appellant’s argument that the justification for the Government’s wiretap authorization is based solely on their own failures from traditional investigative techniques. The Third Circuit has articulated that the purpose of the necessity requirement is to be used only where necessary when other investigative techniques have failed or would prove to be dangerous to law enforcement.

*United States v. Bailey*, 840 F.3d 99, 114 (3d Cir. 2016); *United States v. Giordano*, 416 U.S. 505, 515 (1974). It is axiomatic that the Government need not exhaust every investigative technique before resorting to wiretapping. *Bailey*, at 114. However, the attempt to perform such investigative techniques must be in good faith. As the Ninth Circuit has held, “such [terse rejections of investigative techniques] do not reasonably explain why traditional investigative tools are unlikely to succeed in a particular investigation but are boilerplate conclusions that merely describe inherent limitations of normal investigative procedures.” *United States v. Gonzalez*, 412 F.3d 1102, 1114 (9th Cir. 2005) (internal citations omitted).

Title III prohibits electronic surveillance by the federal government except under carefully defined circumstances. The procedural steps provided in the Act require “strict adherence” and “utmost scrutiny must be exercised to determine

whether wiretap orders conform to Title III.” *United States v. Giordano*, 416 U.S. 505 (1974).

The “necessity requirement” mandates that an application for wiretap authorization include “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” 18 U.S.C. § 2518(1)(c). The purpose of the necessity requirement is “to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications.” *United States v. Bailey*, 840 F.3d 99, 114 (3d Cir. 2016) citing *Giordano*, 416 U.S. at 515; *United States v. Blackmon*, 273 F.3d 1204 (9<sup>th</sup> Cir. 2001) (The necessity requirement exists in order to limit the use of wiretaps, which are highly intrusive) (citations omitted).

The Government insists that it attempted to use confidential informants, but they were not able to identify any historical information about the “Friends” Drug Trafficking Group members. The Government’s brief glosses over this argument and proceeds to discuss the challenges with physical surveillance and pole cameras. That argument too, is deeply flawed as it is the Government which placed those pole cameras before establishing that they were ineffective.

The Third Circuit’s decision ignores these critical points and only regurgitates the methods that law enforcement has tried without meaningfully engaging with why those methods failed. Functionally, there

must be a good faith effort by law enforcement to engage in these initial investigative tactics. Otherwise, law enforcement can merely pay lip service to the Constitution and the Wiretapping statute by not engaging in good faith investigatory methods initially, just to later obtain a wiretap.

**II. The legal question presented is exceptionally important.**

This case presents a question of exceptional importance because it affects virtually every criminal investigation in which a wiretap is used. The government cannot create its own exigent circumstances to justify a wiretap. To do so would vitiate constitutional protections enshrined in the fourth amendment and the necessity requirement under 18 U.S.C. § 2518. Otherwise, Title III wiretap authorizations would become the next encroachment of civil liberties and implicate the rights of every criminal defendant who is charged and ultimately convicted through the use of a wiretap. A decision from this Court setting a clear standard for the permissible bounds of when a Title III Wiretap is appropriate is especially necessary because there is both intra- and inter-circuit conflict and general inconsistency on this issue. *See S.Ct.R. 10(a).*

**III. This case is an ideal vehicle to resolve this question.**

This case is an ideal vehicle to address the issue because the District Court believed, and the Third Circuit affirmed the use of the Article III wiretap on the basis of the government's affidavit alone. The trial court record is well-developed, and the drug calculation methodology was a central issue before and during trial and at sentencing. The Third Circuit also

focused on this issue in its opinion, aiding this Court's review.

## CONCLUSION

Because the legal question presented is exceptionally important, the Court should grant this petition for writ of certiorari, set forth appropriate limitations under 18 U.S.C. § 2518, and reverse the decision of the Third Circuit Court of Appeals.

Dated: July 3, 2023

Respectfully Submitted:

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**PROOF OF SERVICE**

I, Joseph Schultz, Esquire, do swear or declare that on this date, July 3, 2023 , as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days. The names and addresses of those served are as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on, July 3, 2023

/S/ Joseph Schultz \_\_\_\_\_  
Joseph Schultz, Esq.