Appendix A Decision of the Third Circuit

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 20-2876, 20-2912, and 20-2938

UNITED STATES OF AMERICA

v.

ANTOINE CLARK a/k/a RICH
Appellant in No. 20-2876
GERALD SPRUELL
Appellant in No. 20-2912
DANIEL ROBINSON,
Appellant in No. 20-2938

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Nos. 2-19-cr-00015-001, 2-19-cr-00015-002, and 2-19-cr-00015-004)
District Judge: Honorable Gerald J. Pappert

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
January 24, 2023

Before: HARDIMAN, KRAUSE, and MATEY, *Circuit Judges.*

(Filed: March 8, 2023)

OPINION*

---

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

MATEY, *Circuit Judge*.

Appellants Antoine Clark, Gerald Spruell, and Daniel Robinson challenge their convictions and sentences for drug trafficking. Seeing no prejudicial error, we will affirm the District Court's judgments.

I.

Clark, Spruell, Robinson, and six other defendants were charged with conspiracy to distribute cocaine base ("crack") and heroin in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(A), and various other drug-related offenses. The charges stemmed from a drug trafficking operation using a phone (the "4400 phone") to receive and arrange orders for crack and heroin.

While Appellants' co-conspirators pleaded guilty to the charges against them, Clark, Spruell, and Robinson chose a jury trial and were convicted on all counts. Each received a sentence of at least 25 years' imprisonment and each sought post-trial relief. The District Court denied Appellants' motions, and this consolidated appeal followed. Finding no prejudicial error, we will affirm.[1]

II.

Appellants, both collectively and individually, challenge wiretap evidence obtained from the 4400 phone, the sufficiency of the Government's evidence in support of their conspiracy convictions, and the calculation of their sentences. We address those arguments, and the standard under which we review them, in turn.

[1] The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291.

A. Title III Wiretap

Clark and Robinson argue the District Court erred when it denied the motion to suppress the Title III wiretap of the 4400 phone.[2] They claim the Government failed to establish necessity for the wiretap. The necessity requirement, 18 U.S.C. § 2518, ensures that phone surveillance "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) (quoting *United States v. Giordano*, 416 U.S. 505, 515 (1974)). Because wiretaps are "not to be routinely employed as the initial step in criminal investigation," *id.* (quoting *Giordano*, 416 U.S. at 515), the Government's wiretap application must show that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous," *id.* (quoting 18 U.S.C. § 2518(3)(c)). But the Government need not "exhaust all other investigative procedures before resorting to" a wiretap. *United States v. Williams*, 124 F.3d 411, 418 (3d Cir. 1997) (citations omitted).

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'

[2] We review the District Court's approval of a wiretap application for clear error, "while exercising plenary review over its legal determinations." *United States v. Bailey*, 840 F.3d 99, 113 (3d Cir. 2016).

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.

B. Sufficiency of the Evidence

Spruell and Robinson also challenge the sufficiency of the Government's evidence in support of their conspiracy convictions.[3] They raise three issues: (1) Spruell contends that the evidence failed to show that he and his co-defendants were anything more than "independent contractors"; (2) Spruell and Robinson claim the Government improperly aggregated drug weights to meet the threshold of 21 U.S.C. § 841(b)(1)(A); and (3) Robinson challenges the Government's evidence of the drug weights distributed, based on testimony of FBI Agent Charles Simpson. None of these claims is availing.

To prove a conspiracy to distribute drugs, the Government must show that Appellants had (1) "a shared unity of purpose," (2) "an intent to achieve a common goal," and (3) "an agreement to work together toward that goal." *Bailey*, 840 F.3d at 108 (citation omitted). At trial, the Government presented ample evidence that for over two years Appellants shared a phone to service a joint customer base for narcotics, working

[3] Our review of the District Court's sufficiency determination is "highly deferential," and we view "the evidence in the light most favorable to the prosecution." *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 424, 430 (3d Cir. 2013) (en banc) (quotation omitted).

around the clock, with Spruell even describing himself as the "night man." Spruell Opening Br. 14. Recordings of conversations from the 4400 phone confirmed as much, revealing that Appellants arranged shift changes to cover phone orders, facilitated drug sales as a group, and warned one another of law enforcement detection. All of which provided a more than sufficient basis to support the jury's finding of conspiracy.[4]

The Government also properly aggregated drug weights to support Appellants' drug-related convictions. Along with conspiracy, Appellants were charged and convicted under 21 U.S.C. § 841(b)(1)(A), which penalizes the manufacturing, distribution, or possession with intent to manufacture or distribute at least one kilogram of heroin and at least 280 grams of crack. Spruell and Robinson allege that the Government, to meet that threshold, improperly aggregated Appellants' individual drug transactions in violation of our precedent. But the case on which they rely, *United States v. Rowe*, 919 F.3d 752 (3d Cir. 2019), does not apply. In *Rowe*, we rejected aggregation of drug weights as to a single defendant arrested for selling about 200 grams of heroin but convicted of distributing and possessing with intent to distribute 1,000 grams, meeting the threshold of § 841(b)(1)(A). *Id.* at 756. Spruell and Robinson, unlike the defendant in *Rowe*, were part of a conspiracy, not independent contractors in the criminal enterprise. Here, the

[4] Spruell and Robinson also challenge the Government's occasional references during trial to non-trial co-defendants as co-conspirators. But even if the District Court abused its discretion in allowing the co-conspirator language, in light of Appellants' conspiracy charges, any error was harmless, as the jury was properly instructed on the elements of conspiracy as well as on the Government's burden of proof. And we presume that jurors "follow the instructions given them by the court." *Glenn v. Wynder*, 743 F.3d 402, 407 (3d Cir. 2014).

Government also charged and established a conspiracy involving Spruell, Clark, and Robinson—a distinction we addressed in *United States v. Williams*, 974 F.3d 320 (3d Cir. 2020). There, we confirmed that drug quantities involved in 21 U.S.C. § 841(a) violations involving multiple conspirators "may be aggregated for determining the mandatory minimum of any one conspirator," as long as the quantities were "reasonably foreseeable" to that conspirator. *Id.* at 366. Nothing in the record or in the caselaw suggests that the aggregation theory was misapplied below.[5] Spruell and Robinson, as members of the conspiracy, were responsible for the entire, reasonably foreseeable volume of drugs distributed among the group to its customers—a result on which *Rowe* has no effect.

Nor does the evidence point to any error in the Government's calculation of the drug quantities stemming from the conspiracy. Robinson takes particular issue with FBI Agent Simpson, who testified about his extensive review of six weeks of wiretapped phone calls comprising 40 "shifts" on the 4400 phone. Using his findings from that

[5] Relatedly, Robinson also argues the jury instructions aggregating the weights constructively amended the superseding indictment in violation of the Fifth Amendment. Not so. Because this objection was not preserved at trial, we review it for plain error. *United States v. Boone*, 279 F.3d 163, 174 n.6 (3d Cir. 2002). The District Court explained to the jury that should it find Appellants guilty of conspiracy (based on the elements the Court outlined), it should subsequently consider "all the crack that the members of the conspiracy possess[ed] with *intent to distribute, distributed or intended to distribute*, and which was reasonably foreseeable to [Robinson]." Robinson App. 2750 (emphasis added). The instruction as to the quantity of heroin was substantively identical. The instruction simply made clear the jury could consider the drugs Appellants distributed *and* the drugs they possessed with intent to distribute—all offenses charged in the indictment. *See Williams*, 974 F.3d at 366. There was no constructive amendment.

investigation, Agent Simpson extrapolated the quantities and proportion of drugs sold during those shifts to the full two-year stretch of the conspiracy. Robinson claims that methodology was speculative and arbitrary, but he ignores the plethora of evidence supporting Agent Simpson's testimony. The Government also presented proof of Appellants' participation in 20 controlled drug purchases, showed evidence of Appellants' coordination of a large re-supply of crack, and offered testimony from a co-defendant. All of which combined, even without Agent Simpson's testimony, proved that Appellants' drug quantities exceeded the threshold of 21 U.S.C. § 841(b)(1)(A). Agent Simpson's testimony merely "tied together and confirmed what the underlying evidence had already established." Clark App. 30.[6]

C. Sentencing Calculations

Spruell and Robinson raise a series of challenges to their sentences. But none show prejudicial error.

First, Spruell argues that his prior drug convictions in Pennsylvania do not qualify as § 841(b)(1)(A) predicates because Pennsylvania's drug schedules are broader than the

[6] The same conclusion applies to arguments raised by Spruell and Robinson challenging the summary drug weight evidence used by the District Court at sentencing. As the District Court explained, its findings drew from the evidence adduced at trial, including Agent Simpson's testimony, the "hundreds of recordings" showing Appellants' drug activities, and the thousands of calls intercepted about drug sales. Clark App. 28–29. By any measure, Appellants fail to establish that the Court's findings were "completely devoid of minimum evidentiary support displaying some hue of credibility," as they must do to succeed. *United States v. Williams*, 898 F.3d 323, 332 (3d Cir. 2018) (citation omitted).

offenses covered by the Controlled Substances Act ("CSA").[7] We have concluded 35 Pa. C.S. § 780-113(a)(30) is divisible, so we apply the modified categorical approach. *United States v. Abbott*, 748 F.3d 154, 158 (3d Cir. 2014).

Section 780-113(a)(30) prohibits "the manufacture, delivery, or possession with intent to manufacture or deliver, a controlled substance." As the Supreme Court has instructed, any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are considered elements of the crime. *Abbott*, 748 F.3d at 159 (quoting *Alleyne v. United States*, 570 U.S. 99, 111 (2013)). Under Pennsylvania law, the type of controlled substance involved in the offense alters the prescribed range of penalties, meaning "the type of drug" is an element of the crime. *Id.*

So we look to the charging document to determine which controlled substance (i.e., which element of the statute) was involved in the defendant's offense. Spruell's prior conviction for cocaine[8] qualified as a "serious drug felony" under § 841(b)(1)(A), and thus a predicate offense for a sentencing enhancement under § 841(b)(1)(A).

[7] We exercise plenary review over legal questions, including challenges to the application of § 841(b) enhancements. *See United States v. Henderson*, 841 F.3d 623, 626 (3d Cir. 2016) (citation omitted).

[8] The Government acknowledges that Spruell's marijuana offense under 35 Pa. C.S. § 780-113(a)(30) was not a serious drug felony because it carried a maximum term of imprisonment of less than ten years. *See* 35 Pa. C.S. § 780-113(f)(1), (2); §§ 780-104(1)(iv), 780-102(b). That makes the enhancement in § 841(b)(1)(A) inapplicable. *See* 21 U.S.C. §§ 802(57), 841(b)(1)(A); 18 U.S.C. § 924(e)(2). As a result, Spruell's mandatory minimum term of imprisonment was 15 years, not 25 years as calculated in the presentence report and adopted by the District Court at sentencing. But as we discuss below that error is harmless. The enhancements in § 841(b) did not alter Spruell's Guidelines range or his actual sentence because Spruell's controlling non-career offender offense level was higher than the career offender calculations.

Next, Spruell questions the career offender offense level calculation in his presentence report. As the Government concedes, the calculation was improperly based on his conspiracy conviction. *United States v. Nasir*, 17 F.4th 459, 468, 469 n.10 (3d Cir. 2021) (en banc) (holding that inchoate crimes, including conspiracy, are not predicate offenses for a career offender enhancement). But the error played no role in the District Court's computation of Spruell's sentence. Under the sentencing guidelines, the career offender offense level governs the sentencing calculation only if it is *greater* than the offense level otherwise applicable. U.S.S.G. § 4B1.1(b). Spruell's *non-career* base offense level of 38 was greater than the incorrectly calculated career offender offense level of 37. So the latter was a nullity in the District Court's sentencing decision.[9]

Finally, Spruell argues that the District Court erred in computing his criminal history category. He claims that two prior offenses for which he was arrested on the same day—for a drug crime and for threatening a police officer—should have been treated as only one conviction for purposes of his criminal history score. Spruell's position is foreclosed by the clear language of U.S.S.G. § 4A1.2(a)(2). Prior sentences are counted separately under that provision "if the sentences were imposed for offenses that were

[9] Robinson made a similar argument on Reply. Normally we find such arguments forfeited. *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003). But since the Government acknowledged the mistake, we will address the error in Robinson's career offender offense level calculation. Robinson's non-career offender offense level was 36, producing a Guidelines range of 324 to 405 months, below the range the Court considered (360 months to life). This error is harmless because the Court sentenced Robinson to 324 months, the bottom of the correct Guidelines range. Given the Court's downward variance, there is no reasonable probability that Robinson's sentence would have been different had the correct Guidelines range applied.

separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). Spruell was arrested for possessing with the intent to deliver narcotics, and after arriving at the police station for processing, threatened several officers—a separate crime for which he was also charged. So the record is clear that Spruell was arrested for the drug offense *prior to* committing the second offense, threatening the officers. His prior sentences were properly counted separately.

III.

For these reasons, we will affirm the judgments of the District Court.

Appendix B Opinion of the District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	**NO. 19-15-1, 2, 3, 4 & 6**
	:	
ANTOINE CLARK, *et al.*	:	

ORDER

AND NOW, this 24th day of January 2020, following referral under Local Criminal Rule 41.1(b) (ECF Doc. No. 213) to consider Antoine Clark's Motion to suppress (ECF Doc. No. 195) challenging the probable cause or necessity of an April 14, 2016 Order authorizing a wiretap interception, the co-defendants' joinder (ECF Doc. No. 247), the United States' Opposition (ECF Doc. No. 215), following an extensive hearing, and for reasons in the accompanying Memorandum with Findings of Fact, it is **ORDERED** the Defendant's Motion (ECF Doc. No. 195) is **DENIED**.

KEARNEY, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	**NO. 19-15-1, 2, 3, 4 & 6**
	:	
ANTOINE CLARK, *et al.*	:	

MEMORANDUM
with Findings of Fact

KEARNEY, J. **January 24, 2020**

Over a period of almost two years, United States and Philadelphia special agents investigated a "Friends" Drug Trafficking Organization in Philadelphia which arranged heroin and crack cocaine purchases by calling a cell phone number provided on a business card to set a time and place for delivery. Like a food delivery service with several drivers and suppliers including Antoine Clark and others. While multiple investigative techniques allowed episodic capture of alleged illegal activity over several months, by April 2016 a special agent sought a wiretap for the two phone numbers at the center of this conspiracy swearing of a necessity to understand the full scope of the conspiracy and to allow a more immediate investigation of an estimated 200 transactions a day. The special agent appeared before us on April 14, 2016 with a 107-page affidavit of probable cause including over thirty-four pages of facts detailing Antoine Clark's specific conduct. The special agent described in substantial detail the variety of investigative efforts and the necessity to obtain a wiretap on the two telephone numbers at the center of this conspiracy. We then carefully studied the extensive affidavit before finding probable cause and a necessity to wiretap the two target phone numbers. The investigation continued. Following a 2019 indictment and on the eve of his trial, Mr. Clark asks us to suppress evidence obtained from this wire interception arguing the special agent's April 14, 2016 affidavit did not establish probable

cause or a necessity for a wiretap as opposed to less intrusive means. After studying detailed papers and an extensive hearing during which Mr. Clark's counsel began to challenge the veracity of the special agent's sworn facts contained in the affidavit of probable cause requiring our *Franks v. Delaware* analysis, we today deny his motion to suppress. The United States demonstrated much more than a fair probability of probable cause in the affidavit. The special agent specifically detailed the necessity of wire interceptions after describing the substantial shortcomings of each of the other possible and less intrusive means of uncovering the full scope and ongoing nature of this uniquely mobile drug conspiracy.

I. Findings of fact.

1. The parties do not dispute beginning in December 2013 and for the next six years, Special Agent Charles E. Simpson, III of the Federal Bureau of Investigation investigated the "Friends" Drug Trafficking Organization on suspicion of operating a busy delivery service for narcotics where customers could order drugs by calling one of two cell phones. The "Friends" Drug Trafficking Organization distributed business cards with the phone numbers. Members of the "Friends" Drug Trafficking Organization used the two phones to answer calls and to coordinate drug sales and delivered drugs throughout Philadelphia approximately 200 times a day.[1]

2. The parties do not dispute by April 2016, the investigators had used a variety of tools to discover the scope of this delivery business including pole cameras, confidential informants for specific purchases, GPS tracking devices, pen registry data, and physical surveillance.

3. On April 14, 2016, the United States appeared before us seeking authorization to initially intercept wire communications from two target phones supported by the Special Agent's 107-page Affidavit consisting of 161 paragraphs describing, among other things, his background,

the background of the investigation, the probable cause to intercept communications from these two phones, and detailing why he believed wire interception is necessary after explaining the shortcomings of the alternative investigative techniques.

4. Following careful review of the specific sworn averments, we authorized the interception of wire and electronic communications over the two target phones.[2]

5. Defendant Antoine Clark, joined by his co-defendants, now moves to suppress the evidence gathered from this interception of wire and electronic communications over the two target phones arguing the Special Agent misrepresented the nature of witness identification of Mr. Clark, failed to inform us of three material facts regarding other ongoing investigations, the use of one of the phone lines in an investigation a decade earlier, and the delay between the calls and drug delivery. Mr. Clark argues we could not have found probable cause if the Special Agent disclosed these facts. He also argues the Special Agent did not establish the necessity of wire interception given the efficacy of alternative less-intrusive investigative techniques.

6. After careful review of the challenged Affidavit and well-presented oral argument, we disagree with Mr. Clark and his co-defendants. The challenged Affidavit offered ample probable cause regarding the use of these phones for criminal activity and detailed how the alternative investigative techniques did not allow investigation of the scope of this ongoing conspiracy.

Special Agent Simpson's April 14, 2016 Affidavit

7. By April 2016, Special Agent Simpson had investigated various organized crime groups, including drug importation, distribution, and manufacturing groups, for six years.[3]

8. Special Agent Simpson worked with the Safe Streets Violent Drug Gang Task Force in Philadelphia since August 2010.[4]

9. Special Agent Simpson had specialized training in investigating complex cases involving Title III wiretap investigations, including knowledge of methods and techniques associated with the distribution of narcotics and experience with numerous investigative techniques.[5]

10. The Federal Bureau of Investigation's Philadelphia Division and the Philadelphia Police Department jointly investigated the "Friends" Drug Trafficking Organization.[6]

11. Special Agent Simpson participated in investigating Mr. Clark and his co-defendants since December 2013.[7]

12. His April 14, 2016 Affidavit sought our approval for an initial interception of wire communications for two target phones, one subscribed to by Mr. Clark ("Target Phone #2"), including voicemail messages and background conversations in the vicinity of the target phones.[8]

13. Special Agent Simpson estimated at least 200 drug sales using Target Phone #1 every day.[9]

14. Special Agent Simpson learned of Target Phone #2 through confidential witnesses'-controlled narcotics purchases. Mr. Clark primarily used Target Phone #2.[10]

15. Special Agent Simpson listed Mr. Clark as one of the target subjects of the wiretap and listed his criminal history of nine arrests between 2007 and 2012.[11]

16. Special Agent Simpson believed there was probable cause to believe Mr. Clark and his co-defendants committed, were committing, and would commit: (1) possession of a controlled substance with the intent to distribute, in violation of Title 21, United States Code, Section 841; (2) conspiracy to commit the offenses outlined in Title 21, United States Code, Sections 841(a)(1) and 843(b), in violation of Title 21, United States Code, Section 846; (3) use of communications facilities to facilitate narcotics trafficking offenses in violation of Title 21, United States Code,

Section 834(b); (4) possession of a firearm in furtherance of a drug trafficking crime, in violation of Title 18, United States Code, Section 924(c); (5) possession of a firearm by a convicted felon, in violation of Title 18, United States Code, Section 922(g)(1); and (6) money laundering, in violation of Title 18, United States Code, Sections 1956 and 1957.[12]

17. By the time of the Affidavit, the investigators had used three confidential witnesses and conducted over thirty controlled narcotics purchases with the target subjects and their associates.[13]

18. The evidence gathered by Special Agent Simpson during the investigation before the Affidavit included: thirty controlled buys made through Target Phone #1 and another number; ten controlled buys directly through Mr. Clark; and controlled buys made through Target Phone #2 and Mr. Clark when Mr. Clark was identified either by audio or video surveillance, a confidential informant, or law enforcement.[14]

19. Special Agent Simpson swore to fifty-nine instances of narcotic sales or narcotics-related conversations involving Mr. Clark.[15] One instance, on August 26, 2014, involved Mr. Clark selling $1,800 worth of drugs to a confidential informant.[16] Mr. Clark told the confidential informant he only had half the amount of drugs ordered, and another target subject arrived to provide Mr. Clark the rest of the drugs for the sale to the confidential informant.[17]

20. Special Agent Simpson swore on June 3, 2015, a confidential witness referred to as "CW-3" set up a controlled narcotics purchase with an unidentified male who answered Target Phone #1. CW-3 ordered a bundle of "D," or heroin, and the male replied he needed to know the identity of the caller. CW-3 said his name was "Ace" and he normally comes with "Greg." When the unidentified male still did not agree to meet with CW-3, CW-3 stated he would "do a shot" of the heroin in front of the male. CW-3, equipped with audio and video recording devices, arrived

at the designated meeting place. CW-3 placed a call to Target Phone #1 and told the same male he was at the meeting location. Minutes later, Target Phone #1 called CW-3, when the same male told him to walk down the street to meet him. CW-3 entered a car to meet the male "identified by CW-3 and your affiant as CLARK," who sold CW-3 14 individual packets of heroin for $100.[18]

21. Special Agent Simpson swore on August 20, 2015, CW-3 sent a text message to Target Phone #1: "Yo its ace need a bundle meet you on 13 at the park in 10?" CW-3 traveled to the meet-up location equipped with audio and video recording devices and $100 in controlled purchase money. Target Phone #1 sent a text message reply stating, "OK call." CW-3 placed a recorded telephone call to Target Phone #1. An unidentified male answered the phone, and CW-3 said he wanted a bundle of heroin and where he was waiting. The male responded he was on his way. Ten minutes later, surveillance units observed a car arrive. CW-3 approached the car and made a controlled purchase from "a male identified by CW-3 and agents" as Mr. Spruell. They had a discussion during which Mr. Spruell encouraged CW-3 to come see him more often. One hour later, CW-3, equipped with audio and video recording devices, was waiting to meet a suspect in an unrelated investigation when Mr. Spruell arrived and gestured for CW-3 to enter his vehicle. Inside the vehicle, CW-3 asked for heroin and crack cocaine, and Mr. Spruell stated he did not have enough with him because he recently sold most of it. Mr. Spruell reached into the car console and retrieved one of three cell phones and called an unidentified male on speaker phone. Mr. Spruell asked the unidentified male if he had any heroin, and the male said he did. Mr. Spruell and CW-3 drove to meet that unidentified male at a gas station. When a black Honda sedan arrived, Mr. Spruell instructed CW-3 to approach the Honda sedan to get the remaining bags of heroin. Mr. Spruell instructed the driver of the Honda sedan to give CW-3 the drugs, telling the unidentified male "who was later identified by CW-3 and agents as ANTOINE CLARK" CW-3 had already

paid for the drugs. CW-3 exited the Honda sedan and returned with Mr. Spruell to Mr. Spruell's car. Mr. Spruell dropped CW-3 off at the park where he picked CW-3 up. A short time later, surveillance video captured a black Honda Sedan, appearing to be the same one from the gas station, near 2840 Cantrell Street. Video captured a male "that appeared to be CLARK" exit the car and "a male that appeared to be SPRUELL" walk from the other direction both enter 2840 Cantrell Street. Pen register data collected for a telephone number previously used by Mr. Clark established that number received an incoming call from a number "believed to be used by" Mr. Spruell at the same time audio and video recordings from the controlled purchase confirmed Mr. Spruell was calling Clark at that time. Cell site data on the telephone number previously used by Mr. Clark established the phone was located in the vicinity of 2840 Cantrell Street during the time of this call. [19]

22. Special Agent Simpson swore a need for wire interception, including "insufficient evidence has been developed to ensure the successful prosecution of all individuals involved in these illegal activities." He swore he believed other unidentified individuals were involved in the conspiracy.[20]

23. Special Agent Simpson believed the interception of wire communications would identify other individuals deeply involved with the "Friends" drug trafficking organization.[21]

24. Special Agent Simpson swore, "the main objective of this investigation is to dismantle the drug distribution network in which the TARGET SUBJECTS and their associates, as well as subjects who have not been identified, are involved. Further, it is the intent of this investigation to accumulate evidence concerning suppliers, other mid-level drug distributors, and those engaged in violence to protect their drug operations. Investigative techniques utilized thus far have taken this investigation as far as possible, and, the investigation has yet to achieve its

objectives. It is your affiant's belief that the interception of wire communications to and from the TARGET TELEPHONES is necessary in order to obtain the evidence that will satisfy the objectives of this investigation."[22]

25. Special Agent Simpson swore as to his "belief that the interception of wire communications over the TARGET TELEPHONES is the only available technique that has a reasonable likelihood of fulfilling the goals of this investigation by securing the evidence needed to prove the involvement of the participants beyond a reasonable doubt."[23]

26. Special Agent Simpson swore the interception of wire communications was the only available technique to produce enough evidence to "convince a jury beyond a reasonable doubt of the (1) identity of the head of the narcotics trafficking organization; (2) the identities of the individuals involved in the narcotics trafficking organization; (3) the roles of the various individuals; (4) the full identification of the persons who provide narcotics to the organization; (5) the full identification of the persons who obtain narcotics from the organization; (6) the locations where the members of the organizations store their narcotics; (7) the methods by which the organization imports and distributes its narcotics; and (8) the methods by which the organization launders, distributes or conceals the assets acquired as a result of its narcotics trafficking activities."[24]

27. Special Agent Simpson swore "many of the normal and routine investigative techniques have been tried and have failed, reasonably appear to be unlikely to succeed if they are tried, or are too dangerous to employ…"[25]

28. Special Agent Simpson swore the information gained from confidential informants was "very useful in showing the existence of regular drug sales and an ongoing drug conspiracy."[26]

29. But, as Special Agent Simpson swore, confidential informants could not provide

information about the full scope of the criminal activity the target subjects may be engaged in nor "information sufficient to identify all members of the drug trafficking organization, including distributors, couriers, and suppliers." The Special Agent swore he and other investigators "determined that none of the three confidential witnesses (CW-1, CW-2, and CW-3) could infiltrate the organization at a level high enough to provide information on the narcotics trafficking activities and scope of the conspiracy because any attempt by them to rise significantly above their current roles as street-level purchasers would likely be viewed with great suspicion by the TARGET SUBJECTS, and would therefore place them in a dangerous position."[27]

30. Special Agent Simpson swore the investigators' strongest connection to the drug trafficking organization was the relationship between CW-1 and Mr. Clark. CW-1 could purchase small to medium amounts of heroin and crack cocaine from Mr. Clark, but CW-1 was not in a position to establish a relationship with any other member of the drug trafficking organization. CW-2 and CW-3 were not in positions to buy anything but personal use quantities of narcotics and had not established relationships with any members of the drug trafficking organization.[28]

31. Special Agent Simpson swore none of the confidential informants could introduce an undercover officer to the target subjects. Even if one of the confidential informants gained enough trust to accomplish an introduction, the amounts of narcotics the officer could purchase would likely be small. Because the target suspects are very cautious, they "question people that they do not normally deal with" and an undercover officer would be in danger without "many months of meetings and controlled purchases of small personal use amounts." [29]

32. Special Agent Simpson swore physical surveillance of the target subjects was "extremely difficult" for many reasons. Most of the organization's activities occur in the area where the 7th Street Gang organization operates, and most of the target suspects are members of

that gang. Many of the members of the organization avoid detection by law enforcement by speeding, driving backwards down public streets, or fleeing on foot. They also change cars frequently and use rental cars. Mr. Clark and Mr. Spruell have residences in a gated apartment community and the precise location of their apartments cannot be determined.[30]

33. Special Agent Simpson swore "the use of surveillance of suspected stash locations has not provided the necessary evidence to establish the breadth of the organization." He swore target subjects routinely relocate suspected stash locations.[31]

34. Special Agent Simpson swore investigators installed one fixed camera outside the residence of Mr. Stefan Tucker in May 2014 and a second fixed camera outside the residence of Mr. Spruell at 2840 Cantrell Street in February 2015. Investigators placed the pole cameras a distance deemed safe from the residences. The investigators removed the camera outside Mr. Stefan Tucker's residence in March 2015 because it was too far from the residence and Mr. Tucker moved away. The Cantrell Street camera identified some participants in the organization. The Cantrell Street camera also captured several handoffs of Target Phone #1 between the target subjects and the pickup of stashed drugs, but the camera's safe distance from the residence made confirmation of these suspected handoffs and drug pick-ups difficult.[32]

35. Special Agent Simpson swore a grand jury investigation would be impracticable as issuing grand jury subpoenas would alert the target subjects due to the close-knit nature of the "Friends" drug trafficking organization.[33]

36. Special Agent Simpson swore investigators decided not to interview Mr. Robinson when the Philadelphia Police Department brought him into custody on drug charges. Investigators determined this interview could compromise the investigation because "he was not likely to cooperate" and "would likely reveal the investigation" to the "Friends" drug trafficking

organization. Special Agent Simpson swore surveillance later showed Mr. Robinson back in the target area and resuming narcotics sales on Target Phone #1 shortly after his release from custody.[34]

37. Special Agent Simpson swore pen register records, toll records, and telephone subscriber information provided evidence of the use of telephones to facilitate narcotics sales but did not provide the contents of the conversations "which are essential as evidence and as leads to gather additional evidence for use in criminal prosecutions." Many numbers in the phone logs are not associated with specific subscriber names.[35]

38. Special Agent Simpson swore pen registry data could not show the complete nature of the target subjects' dealings: "Only through interception of their communications will it be possible to develop the evidence necessary to prosecute members of the 'Friends' organization, their suppliers, customers, and other unknown co-conspirators." Information gleaned from a wiretap may also determine the drug stash locations.[36]

39. Special Agent Simpson swore the pen registry data and telephone call records showed 1874 calls and 1977 text messages on Target Phone #2 between February 12, 2016 and March 27, 2016.[37] The Special Agent swore based on his "training and experience, the volume of calls during the specified timeframe on Target Telephone #2 is consistent with drug trafficking."[38]

40. Special Agent Simpson swore search warrants of properties would not advance the investigation because warrants would alert the target subjects to the presence of the ongoing investigation. Mr. Clark lives in a gated apartment community and determining the exact location of his apartment would risk detection. Subpoenaing the apartment manager may not yield information because drug dealers often rent apartments in the names of girlfriends or associates to avoid detection, but this action could alert the target subjects to the investigation. Even if searches

were successfully executed, they would only yield contraband evidence and would not identify the goals of the investigation, "which includes identifying all conspirators in the drug trafficking organization including the source of supply."[39]

41. Special Agent Simpson swore using subpoenas or warrants to compel the service provider to obtain stored copies of electronic communications would be unhelpful because the delay in obtaining the communications would not allow investigators to make timely use of the information to witness delivery of contraband or other conduct. He swore, "Based off an analysis of toll records, it appears as though the TARGET SUBJECTS communicate with some of the co-conspirators by text messaging to conduct drug transactions. Given the delay associated with obtaining such communications, investigators will not be able to make timely use of the information that may relate to an imminent delivery of contraband or conduct in furtherance of the TARGET OFFENSES."[40]

42. Special Agent Simpson swore, "using subpoenas or warrants to compel the service provider to obtain stored copies of previously sent or received electronic communications is not an adequate substitute for real time interception."[41]

43. Special Agent Simpson swore investigators considered examining discarded trash but rejected this technique because the target subjects are "cognizant of any law enforcement activity conducted in their neighborhood" and Mr. Clark and Mr. Spruell have residences in a housing community that does not place trash out on the curb for pickup. Examining the target subjects' garbage was unlikely to produce evidence illuminating the full extent of the drug conspiracy.[42]

44. Special Agent Simpson swore a mail cover, which permits documentation for sender information for mail received at a location, would be unhelpful to the investigation because

it only identifies the recipient received mail from a certain company or person. This technique is most helpful for financial investigations and would not reveal the scope of the "Friends" drug trafficking organization.[43]

45. Special Agent Simpson swore the United States initiated a financial investigation into the target subjects but it was not expected to accomplish the ultimate goal of dismantling the entire drug trafficking organization because it is common for drug dealers to use drug proceeds to purchase properties and vehicles to conceal the drug proceeds and investigators had not identified bank accounts of the target subjects.[44]

46. Special Agent Simpson swore the investigators installed a GPS tracking device n Mr. Clark's vehicle on March 30, 2015 but removed it on May 10, 2015 when Mr. Clark's vehicle was in an accident and moved to an auto-body repair location. A court authorized the re-installation on August 26, 2015 for 45 days when Special Agent Simpson learned Mr. Clark was using his vehicle again. The court reauthorized use of the GPS device three times. During the two most recent authorized period of GPS tracking, the investigators encountered multiple problems with the technology, requiring covert installations and maintenance of the GPS device. These steps posed danger because "narcotics traffickers generally have knowledge that law enforcement will often utilize court authorized GPS tracking of vehicles and subjects will take measures to detect law enforcement during the instillation [sic] of these devices." Mr. Clark's vehicle was again damaged, Mr. Clark stopped using the vehicle, and investigators removed the GPS device. The tracking device was "a good investigative tool in locating CLARK's vehicle," but it did not "allow surveillance to locate or identify other members of the organization and most importantly, determine their role." It also encountered the same difficulties as physical surveillance because Mr. Clark drives to evade law enforcement.[45]

47. Special Agent Simpson swore the United States had probable cause to arrest Mr. Clark, Mr. Robinson, and Mr. Tucker, but not for the other target subjects. Arresting only some of the members of the drug trafficking conspiracy "would alert other TARGET SUBJECTS and currently unidentified co-conspirators to the existence of this investigation and they would likely take measures that would seriously jeopardize the investigations and endanger CW-1 for assisting in the investigation." Prosecuting only these target subjects would not "advance the primary goal of this investigation, namely of identifying and implicating all of the participants of the drug trafficking conspiracy."[46]

48. Special Agent Simpson swore "investigative techniques utilized thus far have taken this investigation as far as possible, and, the investigation has yet to achieve its objectives. It is your affiant's belief that the interception of wire communications to and from the target telephones is necessary in order to obtain the evidence that will satisfy the objectives of this investigation."[47]

49. Soon after we authorized the wiretap, the United States began intercepting communications over the two target phones.[48]

50. The United States successfully applied to renew the wiretap twice.[49]

51. On January 9, 2019, our grand jury indicted nine defendants, including Antoine Clark, Gerald Spruell, Jerome Tucker, Daniel Robinson, and Stefan Tucker, with conspiracy to distribute controlled substances and related drug charges.[50]

Defendants move to suppress evidence from the wiretap

52. On December 30, 2019, Mr. Clark moved to suppress the wire communications arguing material omissions and misstatements change the probable cause inquiry and the Affidavit did not establish the wiretap was necessary to achieve the goals of the investigation.[51]

53. On January 3, 2020, the United States moved under Local Criminal Rule 41.1(b)

for us to hear Mr. Clark's motion to suppress the Title III wire communications and the assigned trial judge, Honorable Gerald J. Pappert, granted the unopposed motion.[52]

54. Judge Pappert granted the remaining co-defendants Gerald Spruell, Jerome Tucker, Daniel Robinson, and Stefan Tucker's motions to join Mr. Clark's motion to suppress.[53]

55. We set a hearing on Mr. Clark's motion for January 17, 2020 and afforded all parties an opportunity to present witness at a suppression hearing. The parties did not present witnesses but offered extensive oral argument and an exhibit on Mr. Clark's motion to suppress. Mr. Clark introduced an investigative report which he argued showed overlap between two ongoing investigations and mentioned a photo lineup and an audio recording, but did not introduce evidence of either, which he argued showed the confidential informant could not specifically identify Mr. Clark from two drug purchases contrary to the Special Agent's Affidavit.

II. Analysis

Defendants argue the Special Agent's April 14, 2016 Affidavit lacks a sufficient factual basis to determine probable cause and necessity for the interception of wire and electronic communications. They allege the Special Agent relied on stale and tenuous information and failed to provide a full and complete presentation of the facts relevant to the probable cause inquiry. They also argue the United States failed to try searching phones under a warrant, which they claim is one of the top three most productive investigative techniques for investigating a drug trafficking organization premised on a phone-based delivery system. By deciding not to pursue one of the best options at its disposal, Defendants argue the United States failed to establish necessity for the wiretap.

Defendants argue the Affidavit omits three material facts and misrepresents two specific identification facts learned through discovery, and these omissions and misstatements change the

probable cause and necessity determinations. Defendants list three material omissions: an investigation of another drug trafficking group took place at the same time, including the same agents and confidential informants; according to the Philadelphia Narcotics Bureau, the United States investigated the Target Phone #1 phone number over a decade before this investigation began; and controlled narcotics purchases by "CW-3" always involved lag time of between one hour and two days between the phone call and drug sale. Defendants argue the Special Agent misrepresented transactions occurring on June 3 and August 20, 2015 by stating CW-3 identified the man selling him drugs as Mr. Clark, when CW-3's identification was actually equivocal. These omissions and misrepresentations, the Defendants argue, change the probable cause and necessity determinations and warrant suppressing the communications intercepted by the wiretap. After analysis, we disagree with the Defendants.

A. The Special Agent's Affidavit provides substantial probable cause for wire interception.

Defendants argue the Affidavit fails to establish probable cause the crimes enumerated are being committed or evidence of the commission of those crimes would be obtained through interception of wire and electronic communications.[54] Defendants claim the Special Agent relied on "stale and tenuous" information and innuendo and fails to provide a "full and complete" presentation of relevant facts.[55]

The United States argues the Special Agent demonstrated the existence of probable cause in his 107-page Affidavit through observations of thirty controlled buys made through Target Phone #1 and another number; ten controlled buys directly through Mr. Clark; and controlled buys made through Target Phone #2 and Mr. Clark when Mr. Clark was identified either by audio or video surveillance, a confidential informant, or law enforcement.[56] The United States argued 36 pages of the Affidavit are dedicated to narcotics sales and narcotics-related conversations

involving Mr. Clark.[57] This abundant evidence provides a full and complete presentation of relevant facts establishing probable cause the crimes enumerated were being committed and evidence would be obtained through a wiretap.[58]

Congress requires the United States' applications for orders authorizing the interception of wire communications to establish probable cause through a statement of justifying facts and circumstances.[59] Congress requires the affiant include (1) details of the alleged offense; (2) a description of the facilities from which the communications are to be intercepted; (3) a particular description of the type of communications sought to be intercepted; (4) the identity of the persons committing the offense, if known, and of the persons whose communications are to be intercepted; (5) a full and complete statement of whether other investigative procedures have been tried and failed, or why they appear unlikely to succeed or are too dangerous; (6) a statement of the period of time for which the interception required to be maintained; and (7) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application involving any of the same persons, facilities, or places.[60]

The authorizing judge must determine probable cause exists for the belief the person is committing, has committed, or is about to commit a particular offense enumerated in section 2516 and particular communications concerning that offense will be obtained through the interception.[61] Probable cause exists where there is a "fair probability that contraband or evidence of a crime will be found in a particular place."[62] In determining whether probable cause to search exists, we must view the "totality of circumstances" detailed in the affidavit.[63] "Probable cause is not a matter of degree. Although *Berger* and *Katz* call for extra vigilance in the supervision of electronic eavesdropping, neither case separates probable cause into degrees. Moreover, no special probable cause requirement can be found in the statutory scheme. Certainly if a higher degree of probable

cause were intended, Congress would have so stated."[64]

Evaluating the totality of the circumstances detailed in his Affidavit, the Special Agent established probable cause. Mr. Clark was committing drug crimes and probable cause a wiretap would produce evidence of the crimes. The investigation described by the Special Agent spanned more than two years and used over seven investigative techniques, including confidential informants and undercover agents, physical surveillance, pole cameras, pen register and toll record data, financial investigation, and GPS tracking.

Thirty-six pages of detailed investigative findings pertaining to Mr. Clark's role in the drug conspiracy detailed, by more than a "fair probability," Mr. Clark's involvement with the drug trafficking organization. Special Agent Simpson swore to fifty-nine instances of narcotic sales or narcotics-related conversations involving Mr. Clark.[65] One instance, on August 26, 2014, involved Mr. Clark selling $1,800 worth of drugs to a confidential informant.[66] Because the "Friends" drug trafficking organization used a unique phone-based delivery service, the interception of electronic and wire communications would be especially likely to produce evidence revealing the scope of the drug conspiracy. The Special Agent's Affidavit amply establishes probable cause.

B. The Special Agent detailed the necessity for intercepting wire communications.

Defendants challenge our finding of necessity for the wire interception, arguing the Special Agent did not sufficiently explain the investigators' decision to not pursue certain investigative techniques or the failure of attempted investigative techniques to accomplish the investigators' goals.

Congress requires the Affidavit in support of a wiretap application to 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."[67] "These procedures [are] not to be routinely employed as the initial step in criminal investigation."[68] But the "statutory burden on the government is not great" to comply with the necessity requirement of the statute.[69] Section 2518(3)(c) does "not require the government to exhaust all other investigative procedures before resorting to electronic surveillance . . . [t]he government need only lay a factual predicate sufficient to inform the judge why other methods of investigation are not sufficient."[70]

The probable cause Affidavit does not need to show the United States tried all "theoretically possible choices."[71] "It is sufficient that the government show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation."[72] But the United States must explain the basis for that conclusion.[73] "Courts have declared that applications whose sole bases are general declarations and conclusory statements by the affiants will not support authorizations. The use of 'boiler plate' and the absence of particulars in requests for wiretap authorizations have not been permitted lest wiretapping become established as a routine investigative recourse of law enforcement authorities, contrary to the restrictive intent of Congress. In granting motions to suppress, however, the courts have emphasized the government's failure to justify the applications; they have not insisted that the government exhaust all possible traditional investigative techniques prior to the applications."[74]

In *United States v. Bailey*, our Court of Appeals affirmed a district court's approval of a wiretap application where the Affidavit swore a two and a half years-long investigation required a wiretap to learn the full extent of the drug trafficking organization.[75] The Federal Bureau of Investigation relied on confidential informants, undercover officers, physical surveillance, phone

records, pen registers, and intercepted prison phone calls to investigate the drug trafficking organization. But investigators found these techniques "inadequate to uncover the full reach of the conspiracy," and the United States secured authorization for a wiretap.[76] Defendants argued the affidavit failed to establish necessity for the wiretap because other investigative techniques produced sufficient information.[77] Our Court of Appeals evaluated the affidavit's explanation for each investigative technique. For example, because the Defendants largely conducted business over cell phones, the investigators installed pen registers but this technique did not ascertain the identities of callers.[78] Our Court of Appeals described the United States' application a "textbook model of care and thoroughness" and found the argument for suppression "totally without merit."[79]

In *United States v. Vento*, defendants moved to suppress evidence seized resulting from a wiretap because the United States' application did not mention the use of undercover agents.[80] The affidavit explained information gained from anonymous informants and physical surveillance and the futility of search warrants.[81] Our Court of Appeals held the United States' affidavit sufficient to meet the preconditions for authorization required by Congress, reasoning the United States' failure to mention undercover agents was "not controlling."[82] The court recognized normal investigative techniques could not "show the scope of the conspiracy," but noted "investigations are not restricted to crimes which can be probed satisfactorily by normal methods."[83]

The April 14, 2016 Affidavit's description of each investigative technique provides more than enough explanation to meet the United States' burden of showing necessity for a wiretap. As analyzed below, the Affidavit explained investigators either exhausted the normal investigative techniques available to them or reasonably concluded the specified procedures are unlikely to succeed if tried.

i. Use of confidential informants and undercover agents

Defendants argue the combination of confidential informants, physical surveillance, and GPS tracking offered the same information as a "more intrusive" wiretap, eliminating the necessity for a wiretap.[84] They argue the investigators could have followed confidential informants to meet-ups or used physical surveillance and GPS to gain real-time information, but "chose" not to.[85]

The United States responds the investigators followed target subjects, as demonstrated by the Special Agent's discussion of extensive physical surveillance.[86] The United States also argues the Affidavit explained controlled purchases of narcotics by confidential witnesses would not provide additional information because the confidential witnesses were not close enough to the target subjects to receive details about sources of supply or the full scope of the drug distribution activities.[87] The Affidavit also addressed how the cautious nature of the target subjects rendered the option of undercover officers too dangerous.[88]

The United States argues the facts in the Affidavit show confidential informant narcotics purchases were only a small percentage of transactions undertaken by the Friends drug trafficking organization. The investigators could glean only limited information from these interactions. Though the Special Agent explained the information provided by confidential informants benefitted the investigation greatly,[89] it did not and could not illuminate the full scope of the drug trafficking activities and meet the goal of the investigation.

ii. Physical surveillance

Defendants argue a wiretap was not necessary because investigators could photograph drug transactions and follow target vehicles close enough to identify drivers.[90]

The United States cited the Special Agent's sworn statements explaining how physical surveillance proved "extremely difficult."[91] Many of the members of the organization avoid

detection by law enforcement by speeding, driving backwards down public streets, or fleeing on foot. They also change cars frequently and use rental cars. Mr. Clark and Mr. Spruell have residences in a gated apartment community so the precise location of their apartments cannot be determined for surveillance.[92] The Special Agent also swore "the use of surveillance of suspected stash locations has not provided the necessary evidence to establish the breadth of the organization" due to the routine relocation of suspected stash locations.[93]

As the United States explained, physical surveillance could not capture the scope of a drug trafficking organization based on a phone delivery service.[94] The Affidavit described with particularity the failure of physical surveillance to determine the scope of the drug trafficking organization's activities.

iii. Pole cameras

Defendants argue investigators identified five residences of interest, but they only installed pole cameras at one of these locations.[95]

The United States argues the Affidavit described two pole cameras installed outside the residences of Mr. Stefan Tucker and Mr. Spruell, but they ultimately failed to identify activities outside the residences.[96] They failed to capture the scope of the organization because Mr. Stefan Tucker moved away from the targeted residence and the agents placed both cameras at a safe distance to avoid detection, rendering their videos ineffective in identifying suspected phone handoffs and drug pickups.[97] The Special Agent's description of the inadequacies of pole cameras is sufficient for the necessity determination.

iv. Interviews and grand jury

Defendants argue investigators could have used pen registry data to locate witnesses outside of the drug trafficking organization to interview.[98] They contend the Special Agent

conducted no meaningful review of pen registry data to look for other witnesses.[99] Defendants also argue the Special Agent ignored the possibility a grand jury investigation could have called witnesses beyond the target subjects.[100]

The United States argues investigators could not have located non-target witness interviewees or grand jury witnesses through phone numbers on the pen registry because most of those phone numbers did not have subscriber information.[101] Citing *United States v. Falcone*, the United States argues "as law enforcement officials need not exhaust every conceivable investigative technique before obtaining a wiretap, requiring them to perform a fishing expedition by cold calling hundreds of drug users based on a Pen Register is on its face ineffective and not likely to be fruitful."[102]

The Special Agent swore investigators considered interviews and grand jury testimony but determined it would be ineffective and compromise the ongoing investigation. The Special Agent swore a grand jury investigation would be impracticable because issuing grand jury subpoenas would jeopardize the investigation by alerting the close-knit members of the "Friends" drug trafficking organization.[103] Investigators' suspicions proved correct: They did not interview Mr. Robinson when the Philadelphia Police Department brought him into custody on drug charges, and soon after his release from custody, they observed Mr. Robinson resuming narcotics sales using Target Phone #1.[104]

The Special Agent sufficiently explained investigators' decision to not pursue interviews and grand jury testimony. Officials do not need to use every possible investigative technique before applying for a wiretap, and the Special Agent's sworn description of the close-knit nature of the "Friends" drug trafficking organization establishes the danger of interviewing target subjects to an

ongoing investigation. The Special Agent also described the inefficiency of cold calling pen register numbers, as most phone numbers used are burner phones.

v. Pen register and toll record data

Defendants argue the Special Agent "never articulates what evidence he possesses of greater criminal activity" than low level street sales.[105] They contend the Special Agent admits this lack of knowledge: "Only through interception of their communications will it be possible to develop the evidence necessary to prosecute members of the "Friends" organization, their suppliers, customers, and other unknown co-conspirators."[106] Defendants seem to suggest the Special Agent did not include enough information to show necessity to intercept contents of conversations when he had sufficient phone number and location data provided through the pen register.

The United States argues pen register and toll record data could not identify speakers or reveal the contents of conversations.[107] The Affidavit swore contents of conversations were "essential as evidence" in prosecuting the drug trafficking organization.[108] The pen register also did not provide identities of speakers, because most numbers in the phone logs were not associated with specific subscriber names.[109]

Our Court of Appeals in *United States v. Bailey* held an Affidavit established necessity for a wiretap where the drug trafficking organization also ran its operations primarily through cell phones.[110] The court recognized pen registers could not provide all the information necessary to meet the goals of the investigation, such as the identities of the people speaking on the phone.[111]

The Special Agent swears to facts explaining the shortfalls of pen registry and toll record data. The pen registry data alone—without considering the rest of the facts from a two-year

investigation sworn to in a 107-page Affidavit—suggests target subjects had a sophisticated and far-reaching organization. The pen registry data and telephone call records showed 1874 calls and 1977 text messages on Target Phone #2 in the six weeks between February 12, 2016 and March 27, 2016.[112] The Special Agent wrote, "Based on your affiant's training and experience, the volume of calls during the specified timeframe on Target Telephone #2 is consistent with drug trafficking."[113] The Special Agent detailed evidence of a drug conspiracy only penetrable through intercepting wire and electronic communications.

vi. Search warrants of property

Defendants do not challenge the Special Agent's explanation for bypassing search warrants of property. The Special Agent explained search warrants of properties would not advance the investigation because they would alert the target subjects to the presence of the ongoing investigation.[114] Determining the exact location of Mr. Clark's apartment would risk detection because he lives in a gated community and subpoenaing the apartment manager may not yield information because drug dealers often rent apartments in the names of girlfriends or associates to avoid detection.[115] Even if they obtained search warrants, they would only yield contraband evidence and would not identify "the goals of the investigation, which includes [sic] identifying all conspirators in the drug trafficking organization including the source of supply."[116]

vii. Search warrants of phones

Defendants argue the investigators' failure to pursue search warrants of telephones before applying for a wiretap abandoned one of the most promising investigative techniques and failed to reach the statutory requirement for necessity. They also argue the Special Agent used the wrong standard of "adequacy" to explain the decision to not pursue phone search warrants: "[U]sing subpoenas or warrants to compel the service provider to obtain stored copies of previously sent or

received electronic communications *is not an adequate substitute* for real time interception."[117]

The United States argues the Special Agent fully explained the futility of pursuing phone search warrants. After the inartful statement on the "adequacy" of warrants compared to wiretaps, the Special Agent swore: "Based off an analysis of toll records, it appears as though the TARGET SUBJECTS communicate with some of the co-conspirators by text messaging to conduct drug transactions. Given the delay associated with obtaining such communications, investigators will not be able to make timely use of the information that may relate to an imminent delivery of contraband or conduct in furtherance of the TARGET OFFENSES."[118] The United States also argues a phone search warrant would not provide additional information to the pen registry data, an investigative technique pursued by investigators.

At oral argument, the United States explained the combination of pen registry, toll records, telephone subscriber information, and confidential informant narcotics purchases failed to accomplish the goals of the investigation. Though narcotics purchases planned by confidential informants produced real-time information to investigators, these purchases amounted to only a small percentage of the drug transactions of the "Friends" drug trafficking organization. The availability of these investigative techniques, the United States argued, did not defeat the necessity for real-time interceptions of wiretap communications.

The Special Agent's Affidavit did not need to demonstrate investigators attempted all "theoretically possible choices."[119] Even if phone search warrants amount to one of the most important investigative techniques for investigating a drug trafficking organization using a phone-based delivery system, as Defendants argue, the Special Agent detailed why investigators believed phone search warrants would not provide investigation-furthering information. The Special Agent did not do so with "general declarations" or "conclusory statements"[120]—he explained how toll

records render a text-messaging based drug delivery system unamenable to an investigation relying on delayed communications data. The Special Agent's statement warrants are not an "adequate" substitute for real-time interception of communications is besides the point; he fully explains why phone search warrants would not aid the investigation. Using the word "adequate" does not alter our analysis.

viii. Electronic surveillance

Defendants argue the Affidavit's section on electronic surveillance uses boiler-plate language and did not explain any electronic surveillance. But the Special Agent merely explains why interception of wire and electronic communications is necessary: because other investigative techniques took the investigation as far as possible, but the investigators had not yet accomplished their goals.[121] The Special Agent did not swear investigators already conducted electronic surveillance.

ix. Mail covers and trash pulls

Defendants do not challenge the Special Agent's sworn explanation for rejecting the investigative techniques of mail covers and trash pulls. The Special Agent swore investigators considered but rejected examining discarded trash because the target subjects remained surveillance-sensitive and Mr. Clark and Mr. Spruell do not place trash on the curb for pickup. He swore examining the target subjects' garbage was unlikely to produce evidence illuminating the full extent of the drug conspiracy.[122] The Special Agent also described why a mail cover would be unhelpful because it only identifies the recipient received mail from a certain company or person. This technique is most helpful for financial investigations where investigators can look for mail from identified persons. It would not reveal the scope of the "Friends" drug trafficking organization operated over phone lines.[123]

x. Financial investigation

Defendants do not argue the Special Agent insufficiently explained why a financial investigation would not accomplish the goals. According to the Special Agent, the United States initiated a financial investigation into the target subjects. The Special Agent did not expect the financial investigation to accomplish the ultimate goal of dismantling the drug trafficking organization because drug dealers commonly use drug proceeds to purchase properties and vehicles to conceal drug proceeds and investigators had not identified bank accounts of the target subjects.[124]

xi. GPS tracking

Defendants argue the Special Agent's claim Mr. Clark was hard to surveil was false because investigators could "pinpoint his location at any time" using the GPS tracker on Mr. Clark's car.[125] They suggest Mr. Clark made eight controlled purchases during the GPS tracker's activation, and "those purchases were pre-arranged with plenty of time for surveillance vehicles to get into place and to track the location of the GPS tracker as to identify suppliers or distributors."[126]

The United States argues the Special Agent detailed the difficulties with the GPS tracking devices. Investigators encountered multiple problems with the technology requiring covert installations and maintenance of the GPS device. Reinstallations posed danger because "narcotics traffickers generally have knowledge that law enforcement will often utilize court authorized GPS tracking of vehicles and subjects will take measures to detect law enforcement during the instillation [sic] of these devices."[127] Mr. Clark's vehicle also sustained damage twice, preventing him from using it and eliminating the transmission of useful information from the GPS device. The tracking device was "a good investigative tool in locating [Mr.] CLARK's vehicle," but it did

not "allow surveillance to locate or identify other members of the organization and most importantly, determine their role."[128] It also encountered the same difficulties as physical surveillance, as Mr. Clark drove to evade law enforcement.[129]

The Special Agent details the shortcomings and difficulties with GPS tracking. Investigators attempted dangerous reinstallations of the tracking device when it malfunctioned despite the limitations of a GPS tracking device in identifying other members of the drug conspiracy and their roles. Information gleaned from GPS tracking devices does not eliminate necessity for the wiretap.

xii. Arrests

Defendants do not challenge investigators' decision not to arrest certain target subjects. The Special Agent swore the United States had probable cause to arrest Mr. Clark, Mr. Robinson, and Mr. Tucker, but not for the other target subjects.[130] Arresting only some of the members of the drug trafficking conspiracy would alert "currently unidentified co-conspirators to the existence of this investigation and they would likely take measures that would seriously jeopardize the investigations and endanger CW-1 for assisting in the investigation."[131] Prosecuting only these target subjects would not "advance the primary goal of this investigation, namely of identifying and implicating all of the participants of the drug trafficking conspiracy."[132] The Special Agent's explanation demonstrates how arrests reasonably appear unlikely to succeed if tried.

C. Defendants' references to specific omissions or misstatements do not defeat probable cause or necessity for wire interception.

Defendants argue this Court would not have found probable cause or necessity if the Special Agent had not made three material omissions and two material misrepresentations of fact in the Affidavit. The material omissions allegedly include: an investigation of another drug trafficking organization at the same time, including the same agents and confidential informants;

the United States investigated the Target Phone #1 phone number over a decade before this investigation began; and controlled narcotics purchases by a confidential informant ("CW-3") always involved a lag time of one hour to two days between the phone call and drug sale. Defendants argue the Special Agent misrepresented two material facts: The Affidavit states CW-3 identified an unidentified male as Mr. Clark on June 3 and August 20, 2015, when CW-3 did not make a definitive identification on either occasion.

Defendants first provided details of the alleged "material misstatements and omissions" at oral argument. The United States objected, arguing Defendants' arguments are properly suited for a *Franks* hearing. The United States argued Defendants failed to mention the substance of the alleged material misrepresentations and omissions in its motion. Defendants responded they were not seeking a *Franks* hearing through their argument. Because we are unaware of a standard for challenging an Affidavit based on the affiant's material omissions and misrepresentations besides the *Franks* standard, we assess Defendants' argument in the *Franks* context.[133] We conclude Defendants did not make a substantial preliminary showing necessary for a *Franks* hearing to suppress the electronic and wire communications.

i. The *Franks* standard

"In *Franks v. Delaware*, the Supreme Court held that the Fourth Amendment entitles a criminal defendant to an opportunity to overcome the presumption of validity of an Affidavit of probable cause by proving both (1) that the Affidavit contained 'a false statement [made] knowingly and intentionally, or with reckless disregard for the truth,' and (2) that once the allegedly false statement is removed, the remainder of the Affidavit 'is insufficient to establish probable cause.'"[134] To obtain a *Franks* hearing, the defendant must first make a "substantial preliminary showing" the Affidavit contained a false statement and the omitted statement is

material to the finding of probable cause.[135]

We are particularly mindful the defendant must present more than conclusory statements or arguments.[136] "Sworn statements or reliable statements from witnesses are examples of offers of proof sufficient to satisfy the substantial preliminary showing."[137] "When demonstrating that the affiant omitted a material fact or included a false statement with the requisite mens rea, it is insufficient to prove the affiant acted with negligence or made an innocent mistake."[138] *Franks* dealt only with misstatements, but our Court of Appeals has applied the *Franks* test to situations where affiants have omitted information from the Affidavit.[139]

Our Court of Appeals has not decided whether a defendant may seek a *Franks* hearing to challenge misstatements or omissions related to a wiretap necessity finding.[140] But most appellate courts have held *Franks* hearings are appropriate when defendants challenge false statements or omissions allegedly affecting the necessity requirement in an Affidavit for a wiretap application.[141] Because Defendants do not make the requisite preliminary showing to obtain a *Franks* hearing, we do not need to evaluate the merits of this application of *Franks*.

ii. Defendants' references to specific omissions or misstatements do not amount to a substantial preliminary showing requiring a *Franks* hearing.

Defendants argue the Special Agent first omitted the fact the same confidential informant and agents were involved in an investigation of another drug trafficking organization while conducting this investigation. The Defendants are incorrect to call this an omission: The Affidavit states the confidential informant was involved in two investigations in the description of the August 20, 2015 interaction cited by Defendants.[142] Because the Affidavit did not omit this fact, we do not evaluate it in the *Franks* context.

Though the Defendants argued the Affidavit omitted a second fact—the United States

investigated Target Phone #1 over a decade prior—they did not articulate an argument on this alleged omission. Defendants fail to make a preliminary substantial showing this omission could be material to our finding of probable cause.

Third, Defendants argue the Special Agent omitted CW-3's drug purchases involved lag time of one hour to two days between the phone call and drug sale. Defendants argue this delay could have allowed investigators to use phone search warrants to determine times of sales and then monitor target subjects through pole cameras and physical surveillance. The United States responds pen registry data provides the same insights as phone search warrants, and pen registry data failed to reveal the scope of the drug conspiracy. The United States also argues the confidential informants' drug deals comprised only a small percentage of the "Friends" drug trafficking organization's narcotics sales, so the Defendants' suggested combination of investigative techniques would not produce additional information or eradicate the necessity for a wiretap.

The Affidavit contradicts Defendants' argument the target subjects always waited at least an hour between a phone order and delivery of drugs. For example, in the August 20, 2015 controlled narcotics purchase, there is a ten-minute lag time between the phone call and the arrival of Mr. Spruell.[143] Even if Defendants made an offer of proof demonstrating the Special Agent intentionally or recklessly omitted a fact, this omission would not materially affect the finding of necessity. Congress does not require exhaustion of all investigative techniques as argued by Defendants. Instead, our Court of Appeals held Congress does "not require the government to exhaust all other investigative procedures before resorting to electronic surveillance."[144] For the reasons described above, the Affidavit's factual predicate establishing necessity sufficiently describes investigators' use or consideration of over twelve investigative techniques. Defendants

do not make a preliminary substantial showing they are entitled to a *Franks* hearing on this basis.

Defendants argue the Special Agent twice misrepresented CW-3's identification of a drug dealer as Mr. Clark. The first alleged material misstatement regards the Special Agent's description of a controlled narcotics purchase on June 3, 2015. The Affidavit states CW-3 set up a drug buy with an unidentified male who answered Target Phone #1.[145] CW-3 ordered a bundle of heroin and the male asked who was calling.[146] CW-3 said his name was "Ace" and he normally comes with "Greg."[147] When the unidentified male still did not agree to meet with CW-3, CW-3 stated he would "do a shot" of the heroin in front of the male.[148] CW-3, equipped with audio and video recording devices, arrived at the designated meeting place.[149] CW-3 called Target Phone #1 and told the same male he was at the meeting location.[150] Minutes later, Target Phone #1 called CW-3 and the same male told him to walk down the street to meet him.[151] CW-3 entered a car to meet the male "identified by CW-3 and your affiant as CLARK," who sold CW-3 14 individual packets of heroin for $100.[152]

Defendants argue the Special Agent misrepresented CW-3 identified the male as Mr. Clark. According to the Defendants, investigators showed CW-3 a photo lineup after the narcotics sale and CW-3 stated the photo of Mr. Clark "resembled" the male he bought drugs from. The Special Agent described the identification in definite terms, when the identification was actually equivocal.

The United States argues the Special Agent swore he also identified Mr. Clark. Because CW-3 and the Special Agent both identified Mr. Clark as the unidentified male, the United States argues the alleged misstatement is immaterial to the accuracy of the sworn averment. The misstatement also does not affect the totality of the circumstances of probable cause as to the entire 107-page Affidavit.

Defendants do not make an offer of proof, such as an Affidavit from an officer or CW-3

swearing CW-3 did not conclusively identify Mr. Clark during the June 3, 2015 photo lineup, as required by *Franks*. Neither do they persuade us the misstatement is material to the finding of probable cause. Because the Special Agent's identification of CW-3 is not challenged, the Affidavit's description of June 3rd's events—and Mr. Clark's alleged involvement—would remain corroborated without CW-3's unequivocal identification. More importantly, the totality of the circumstances of the lengthy and thorough Affidavit establishes probable cause without the paragraph describing events occurring on June 3, 2015.

The second alleged material misstatement occurs within the Special Agent's description of a controlled buy on August 20, 2015. CW-3 sent a text message to Target Phone #1: "Yo its ace need a bundle meet you on 13 at the park in 10?"[153] CW-3 traveled to the meet-up location equipped with audio and video recording devices and $100 in controlled purchase money.[154] Target Phone #1 replied, "OK call."[155] CW-3 placed a recorded telephone call to Target Phone #1.[156] An unidentified male answered the phone, and CW-3 placed an order for a bundle of heroin and described his location.[157] The male responded he was on his way.[158] Ten minutes later, surveillance units observed a car arrive.[159] CW-3 approached the car and made a controlled purchase from "a male identified by CW-3 and agents" as Mr. Spruell.[160] Mr. Spruell encouraged CW-3 to come see him more often.[161]

One hour later, CW-3, equipped with audio and video recording devices, waited to meet a suspect in an unrelated investigation when Mr. Spruell arrived and gestured for CW-3 to enter his car.[162] Inside the car, CW-3 asked for heroin and crack cocaine, and Mr. Spruell stated he did not have enough with him because he recently sold most of it.[163] Mr. Spruell reached into the car console and retrieved one of three cell phones.[164] Mr. Spruell called an unidentified male on speaker phone and asked if the unidentified male had any heroin, and the male said he did.[165] Mr.

Spruell and CW-3 drove to meet the unidentified male at a gas station.[166] When a black Honda sedan arrived, Mr. Spruell instructed CW-3 to approach the car to retrieve the remaining bags of heroin.[167] Mr. Spruell instructed the driver to give CW-3 the drugs, telling the unidentified male "who was later identified by CW-3 and agents as ANTOINE CLARK" CW-3 had already paid for the drugs.[168] CW-3 exited the black Honda sedan and returned with Mr. Spruell to Mr. Spruell's car.[169]

A short time later, surveillance video captured a black Honda Sedan, appearing to be the same one from the gas station, near 2840 Cantrell Street.[170] Video surveillance captured a male "that appeared to be CLARK" exit the car and "a male that appeared to be SPRUELL" walk from the other direction.[171] Both entered 2840 Cantrell Street.[172] Pen register data collected for a telephone number previously used by Mr. Clark established that number received an incoming call from a number "believed to be used by" Mr. Spruell at the same time audio and video recordings from the controlled purchase confirmed Mr. Spruell was calling Mr. Clark at that time.[173] Cell site data on the telephone number used by Mr. Clark established the phone's location in the vicinity of 2840 Cantrell Street during the time of this call.[174]

Defendants argue investigators mistakenly failed to turn off audio and video recording devices after CW-3 returned to the investigators. This recording allegedly shows the agent asking CW-3 what the person in the car looked like, and CW-3 didn't answer. The agent asked again and CW-3 said "brown-skinned." The agent asked if he had glasses, and CW-3 responded "I guess." The agent asked a third time what he looked like, and CW-3 responded "dark-skinned." Defendants argue this interaction belies the Special Agent's statement the unidentified male "was later identified by CW-3" as Mr. Clark because accidentally recorded footage proves CW-3 did not know the identity of the unidentified male.

Defendants argue this new information undermines CW-3's identification of the unidentified male as Mr. Clark on either the June 3th or August 20th interactions. They suggest the unidentified male on one of those occasions was not Mr. Clark—otherwise, CW-3 would have recognized him as the same person.

The United States argues video surveillance, pen registry data, and cell site tower data from the same time on August 20, 2015 sufficiently identifies the unidentified male as Mr. Clark. The United States also argues CW-3 *and* agents identified the unidentified male on August 20, rendering a misstatement immaterial because the identification of Mr. Clark did not rely solely on the word of CW-3. The United States contends the Affidavit provides sufficient unchallenged facts reaching the "fair probability that contraband or evidence of a crime will be found" standard required by probable cause.[175]

Defendants do not satisfy either prong of the *Franks* standard as they have not shown the Special Agent made a false statement knowingly and intentionally or with reckless disregard for the truth. Defendants did not produce the video footage or a reliable witness statement to support their contention CW-3's identification is flawed. But even if they made a substantial preliminary showing as to the misrepresentation in the Affidavit, they did not show the misrepresentation is material to determining probable cause for the interception of wire and electronic communications. The Special Agent's sworn detailed description of other sources for identifying Mr. Clark on August 20—video surveillance, pen registry data, and cell site tower data—alone establish probable cause.

D. Defendants' remaining arguments fail.

Defendants also argue the Special Agent lacked the necessary qualifications to conclude probable cause existed with respect to the enumerated crimes and the Special Agent's statement

"the Target Subjects are members of a larger drug trafficking organization, including distributors, couriers and suppliers" was false.[176]

i. The Special Agent's qualifications.

Defendants next challenge the Special Agent's failure to allege his previous experience in investigating a phone-based drug delivery service method.[177] They argue deficient qualifications render the Special Agent's statements "without foundation" and unable to "support a finding of probable cause."[178]

The United States argues the Special Agent dedicated three pages of the Affidavit to his qualifications in his six years of experience as an agent. The United States also avers "an officer's experience alone does not determine probable cause but rather the totality of the circumstances dictates whether probable cause exists."[179]

Defendants offer no support for their argument the Special Agent must have experience in investigating the precise type of delivery system used by drug trafficking organizations to swear to facts in an Affidavit in support of a wiretap application. The Special Agent's three-page description of his experience as an agent investigating drug trafficking organizations describes a law enforcement officer with knowledge of the means and methods by which narcotics traffickers commit crimes. Our determination of probable cause remains unchanged.

ii. Legal inadequacies

Defendants' remaining argument is threadbare: "Agent Simpson's assertion in his Affidavit that the Target Subjects are members of a larger drug trafficking organization, including distributors, couriers and suppliers is false."[180] The United States responds the wire intercepts led to the discovery of more indicted and unindicted co-defendants, including unveiling conversations with suppliers of narcotics.[181] Even if the Defendants' argument had merit, the United States

argues, it would not be grounds for suppression under a totality of the circumstances probable cause analysis.

The probable cause analysis is an evaluation of the totality of the circumstances.[182] As analyzed earlier in this memorandum, the Special Agent established probable cause a wiretap would reveal evidence of the enumerated crimes. This conclusory, one-sentence argument does not allow us to seriously reevaluate the determination of probable cause.

III. Conclusion

In the accompanying order, we deny Defendants' motion to suppress communications intercepted under our April 14, 2016 Order authorizing wire interceptions on the two target pone numbers. The Special Agent's Affidavit in support of the wiretap application detailed facts much more than sufficient to establish probable cause and necessity. Defendants' argument alleging omissions and misstatements does not reach the standard required for a *Franks* hearing. Defendants' remaining arguments also fail.

---

[1] ECF Doc. No. 195-1 at ¶¶ 18, 20.

[2] *Id.* at 105. We use the page numbers provided by the ECF system.

[3] *Id.* at ¶ 2.

[4] *Id.*

[5] *Id.* at ¶ 4.

[6] *Id.* at ¶ 8.

[7] *Id.*

[8] *Id.* at ¶ 7.

[9] *Id.* at ¶ 20.

[10] *Id.* at ¶ 21.

[11] *Id.* at ¶¶ 26-27.

[12] *Id.* at ¶ 9.

[13] *Id.* at ¶¶ 34, 38.

[14] *Id.* at ¶¶ 47-105.

[15] *Id.*

[16] *Id.* at ¶ 50.

[17] *Id.*

[18] *Id.* at ¶ 71.

[19] *Id.* at ¶¶ 115-116.

[20] *Id.* at ¶ 128.

[21] *Id.*

[22] *Id.* at ¶ 140.

[23] *Id.* at ¶ 129.

[24] *Id.* at ¶ 130.

[25] *Id.* at ¶ 129.

[26] *Id.* at ¶¶ 129, 131.

[27] *Id.* at ¶ 131.

[28] *Id.*

[29] *Id.*

[30] *Id.* at ¶¶ 132, 133.

[31] *Id.* at ¶ 132.

[32] *Id.* at ¶ 134.

[33] *Id.* at ¶ 135.

[34] *Id.*

[35] *Id.* at ¶ 136.

[36] *Id.*

[37] *Id.* at ¶ 124.

[38] *Id.* at ¶ 125.

[39] *Id.* at ¶¶ 137-138.

[40] *Id.* at ¶ 139.

[41] *Id.*

[42] *Id.* at ¶ 142.

[43] *Id.* at ¶ 143.

[44] *Id.* at ¶ 144.

[45] *Id.* at ¶¶ 145-146.

[46] *Id.* at ¶ 148.

[47] *Id.* at ¶ 140.

[48] ECF Doc. No. 195, at 8.

[49] *Id.*, at 5.

[50] ECF Doc. No. 215, at 3.

[51] ECF Doc. No. 195.

[52] ECF Doc. No. 199.

[53] ECF Doc. No. 247.

[54] ECF Doc. No. 195, at 5, 7.

[55] We address the Defendants' arguments on material omissions and misrepresentations in Section C of this memorandum.

[56] ECF Doc. No. 215, at 5.

[57] *Id.*

[58] *Id.*

[59] 18 U.S.C. § 2518.

[60] 18 U.S.C. § 2518(1)(b)-(d).

[61] 18 U.S.C. § 2518(3)(a)-(b).

[62] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[63] *Id.*

[64] *United States v. Falcone*, 505 F.2d 478, 481 (3d Cir. 1974) (internal citations omitted). In *Berger v. New York*, 388 U.S. 41 (1967), the Supreme Court invalidated a New York permissive eavesdrop statute as violative of the Fourth and Fourteenth Amendments. In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court held judicial authorization must precede the placement of electronic listening and recording devices on a public telephone booth. The appellants in *Falcone* argued these cases stand for the proposition wiretaps require a more vigorous degree of probable cause than search warrants. Our Court of Appeals disagreed.

[65] ECF Doc. No. 195-1 at ¶¶ 46-105.

[66] *Id.* at ¶ 50.

[67] 18 U.S.C. § 2518(1)(c).

[68] *United States v. Giordano*, 416 U.S. 505, 515 (1974).

[69] *United States v. Armocida*, 515 F.2d 29, 37 (3d Cir. 1975).

[70] *United States v. Williams*, 124 F.3d 411, 418 (3d Cir. 1997).

[71] *United States v. Vento*, 533 F.2d 838, 849-850 (3d Cir. 1976).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *United States v. Bailey*, 840 F.3d 99 (3d Cir. 2016).

[76] *Id.* at 106.

[77] *Id.* at 113.

[78] *Id.* at 115.

[79] *Id.* at 106.

[80] *United States v. Vento*, 533 F.2d 838, 849 (3d Cir. 1976).

[81] *Id.* at 850.

[82] *Id.*

[83] *Id.*

[84] ECF Doc. No. 195 at 11.

[85] *Id.*

[86] ECF Doc. No. 215 at 16.

[87] ECF Doc. No. 195-1 at ¶¶ 129, 131.

[88] *Id.* at ¶ 131.

[89] *Id.*

[90] ECF Doc. No. 195 at 12.

[91] ECF Doc. No. 195-1 at ¶ 132.

[92] *Id.* at ¶¶ 132, 133.

[93] *Id.* at ¶ 132.

[94] ECF Doc. No. 215 at 17.

[95] ECF Doc. No. 195 at 12.

[96] ECF Doc. No. 215 at 18.

[97] ECF Doc. No. 195-1 at ¶ 134.

[98] ECF Doc. No. 195 at 13.

[99] *Id.*

[100] *Id.*

[101] ECF Doc. No. 215 at 19.

[102] *Id.*

[103] ECF Doc. No. 195-1 at ¶ 135.

[104] *Id.*

[105] ECF Doc. No. 195 at 13-14.

[106] ECF Doc. No. 195-1 at ¶ 136.

[107] ECF Doc. No. 215 at 19.

[108] ECF Doc. No. 195-1 at ¶ 136.

[109] *Id.*

[110] *United States v. Bailey*, 840 F.3d 99, 115 (3d Cir. 2016).

[111] *Id.*

[112] ECF Doc. No. 195-1 at ¶ 124.

[113] *Id.*

[114] *Id.* at ¶ 137.

[115] *Id.* at ¶ 138.

[116] *Id.*

[117] *Id.* at ¶ 139 (emphasis added).

[118] *Id.*

[119] *United States v. Vento*, 533 F.2d 838, 849-850 (3d Cir. 1976).

[120] *Id.*

[121] ECF Doc. No. 195-1 at ¶ 140.

[122] *Id.* at ¶ 142.

[123] *Id.* at ¶ 143.

[124] *Id.* at ¶ 144.

[125] ECF Doc. No. 195 at 15.

[126] *Id.*

[127] ECF Doc. No. 195-1 at ¶ 146.

[128] *Id.* at ¶ 145.

[129] *Id.* at ¶¶ 145, 147.

[130] *Id.* at ¶ 148.

[131] *Id.*

[132] *Id.*

[133] District courts in our Circuit routinely employ the *Franks* analysis to evaluate challenges to an affidavit in support of a wiretap application's showing of probable cause or necessity based on misstatements or omissions. *E.g. United States v. Romeu*, No. 18-114, 2020 WL 118594 (M.D. Pa. Jan. 9, 2020), *United States v. Tutis*, 167 F.Supp.3d 683, 698-99 (D.N.J. 2016), *United States v. Savage*, No. 07-550, 2013 WL 1334169, at *15 (E.D. Pa. Apr. 2, 2013).

[134] *United States v. Gordon*, 664 F. App'x 242, 244-45 (3d Cir. 2016).

[135] *United States v. Yusuf*, 461 F.3d 374, 383 (3d Cir. 2006).

[136] *Id.* at 383, n.8.

[137] *United States v. Brooks*, 358 F. Supp. 3d 440, 474 (W.D. Pa. 2018) (citing *United States v. Heilman*, 377 F. App'x 157, 177 (3d Cir. 2010)).

[138] *Yusuf,* 461 F.3d at 383.

[139] *United States v. Frost*, 999 F.2d 737, 743 n.2 (3d Cir. 1993).

[140] *United States v. Heilman*, 377 F. App'x 157, 177 (3d Cir. 2010).

[141] *Id.* (citing *United States v. Green*, 175 F.3d 822, 828 (10th Cir. 1999); *United States v. Guerra–*

Marez, 928 F.2d 665, 670 (5th Cir.1991); *United States v. Cole*, 807 F.2d 262, 267–68 (1st Cir. 1986); *United States v. Ippolito*, 774 F.2d 1482, 1484 (9th Cir. 1985)).

[142] ECF Doc. No. 195-1 at ¶¶ 115-116.

[143] *Id.* at ¶ 115.

[144] *United States v. Williams*, 124 F.3d 411, 418 (3d Cir. 1997).

[145] ECF Doc. No. 195-1 at ¶ 71.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.* at ¶ 115.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.* at ¶ 116.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[176] ECF Doc. No. 195 at 20.

[177] *Id.*

[178] *Id.*

[179] ECF Doc. No. 215 at 8.

[180] ECF Doc. No. 195 at 20.

[181] ECF Doc. No. 215 at 10, n.8.

[182] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Appendix C Order of the Third Circuit Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2876

UNITED STATES OF AMERICA

v.

ANTOINE CLARK a/k/a RICH,
Appellant

(E.D. Pa. No. 2-19-cr-00015-001)

SUR PETITION FOR PANEL REHEARING

Present: HARDIMAN, KRAUSE, and MATEY, *Circuit Judges*.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, it is hereby **ORDERED** that the petition for rehearing by the panel is **DENIED**.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: April 4, 2023
Tmm/cc: Joseph T. Schultz, Esq.
Jason Grenell, Esq.
Matthew T. Newcomer, Esq.