

No. _____

In the
Supreme Court of the United States

Myron Motley,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Appendix

Rene Valladares
Federal Public Defender, District of Nevada
*Ellesse Henderson
Wendi Overmyer
Assistant Federal Public Defenders
Office of the Federal Public Defender
411 E. Bonneville Ave., Ste. 250
Las Vegas, NV 89101
(702) 388-6577
Ellesse_Henderson@fd.org
Wendi_Overmyer@fd.org

*Counsel for Petitioner

Appendix A

<i>United States v. Motley</i> , 89 F.4th 777, 783–86 (9th Cir. 2023)	
Published Opinion Affirming Conviction	1

Appendix B

<i>United States v. Motley</i> , No. 21-10296, 2023 WL 9014457 (9th Cir. Dec. 29, 2023)	
Memorandum Disposition Affirming Conviction, Affirming Sentence in Part, Vacating Sentence in Part, and Remanding	14

Appendix C

<i>United States v. Motley</i> , No. 21-10296, Dkt. 67 (9th Cir. April 18, 2024)	
Order Denying Petition for Rehearing	18

Appendix D

<i>United States v. Motley</i> , 443 F. Supp. 3d 1203 (D. Nev. 2020)	
Order Denying Motion to Suppress	19

Appendix E

<i>United States v. Motley</i> , 3:19-cr-00026-LRH-WGC, Dkt. 334 (D. Nev. Sept. 30, 2021)	
Judgment of Conviction	32

89 F.4th 777

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Myron MOTLEY, Defendant-Appellant.

No. 21-10296

|

Argued March 10, 2023

|

Submitted December 29, 2023 Las Vegas, Nevada

|

Filed December 29, 2023

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Nevada, [Larry R. Hicks](#), J., of participating in conspiracy to traffic in prescription opioids, after his motion to suppress evidence was denied, [443 F.Supp.3d 1203](#). Defendant appealed.

Holdings: The Court of Appeals, [Bennett](#), Circuit Judge, held that:

[1] on issue of first impression, defendant did not have objectively reasonable expectation of privacy in his opioid prescription records that were maintained in Nevada's Prescription Monitoring Program database;

[2] evidence provided substantial basis for finding that there was probable cause that defendant was engaged in conspiracy to illegally distribute prescription opioids;

[3] district court did not abuse its discretion in finding that wiretap was necessary to investigate conspiracy to illegally distribute prescription opioids; and

[4] evidence obtained through traditional investigative techniques that was sufficient to prosecute defendant on drug distribution counts did not negate necessity for wiretap search.

Affirmed.

Graber, Circuit Judge, filed opinion concurring in part and concurring in the judgment.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

West Headnotes (14)

[1] **Criminal Law** **Review De Novo**

Denial of motion to suppress evidence is reviewed de novo. [U.S. Const. Amend. 4](#).

[2] **Criminal Law** **Searches and seizures**

Criminal Law **Search and arrest**

In reviewing district court's probable cause determination as to wiretap warrant, Court of Appeals looks only to four corners of wiretap application and will uphold wiretap if there is substantial basis for findings of probable cause. [U.S. Const. Amend. 4](#); [18 U.S.C.A. § 2516](#).

[3] **Criminal Law** **Preliminary proceedings**

Search, Seizure, and Arrest **Interception or disclosure of electronic communications**

District court's decision that the wiretap warrant was necessary is reviewed for abuse of discretion. [U.S. Const. Amend. 4](#); [18 U.S.C.A. § 2516](#).

[4] **Search, Seizure, and Arrest** **Particular objects, items, and things in general**

Defendant did not have objectively reasonable expectation of privacy in his opioid prescription records that were maintained in Nevada's Prescription Monitoring Program database, and therefore law enforcement's search of those records did not violate Fourth Amendment, since regulation of opioids as controlled substance and regulatory disclosure of opioid prescription records was long-standing and pervasive. [U.S. Const. Amend. 4](#); [18 U.S.C.A. § 2516](#).

[5] Criminal Law  In Preliminary Proceedings

Defendant waived his challenge for consideration on appeal that district court erred in denying his request for evidentiary hearing under *Franks*, since defendant mentioned it only in passing in his appellate briefs and he did not provide any supporting arguments.

[6] Search, Seizure, and Arrest  Expectation of privacy

A criminal defendant may invoke the protections of the Fourth Amendment only if he can show that he had a legitimate expectation of privacy in the place searched or the item seized. *U.S. Const. Amend. 4*.

[7] Search, Seizure, and Arrest  Reasonableness; reasonable expectation of privacy

A legitimate expectation of privacy, for Fourth Amendment purposes, is established where the claimant can show: (1) a subjective expectation of privacy, and (2) an objectively reasonable expectation of privacy. *U.S. Const. Amend. 4*.

[8] Search, Seizure, and Arrest  Reasonableness; reasonable expectation of privacy

An expectation of privacy is legitimate, for Fourth Amendment purposes, if it is one which society accepts as objectively reasonable. *U.S. Const. Amend. 4*.

[9] Search, Seizure, and Arrest  Particular objects, items, and things in general

Statutory record-keeping requirements and laws that allow law enforcement officers to access records without warrant inform analysis of whether expectation of privacy is objectively reasonable. *U.S. Const. Amend. 4*.

[10] Search, Seizure, and Arrest  Particular cases

Evidence provided substantial basis for finding that there was probable cause that defendant was engaged in conspiracy to illegally distribute prescription opioids, supporting wiretap warrant, where wiretap affidavit established that defendant and several others, who were in frequent contact with defendant, were all obtaining large amounts of prescription opioids from same physician, defendant was buying prescriptions for himself and others, and defendant and at least one other co-conspirator were selling prescribed pills. *U.S. Const. Amend. 4*; *18 U.S.C.A. § 2516*; Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, *21 U.S.C.A. §§ 841(a)(1), 846*.

[11] Search, Seizure, and Arrest  Probable or Reasonable Cause

“Probable cause” for a wiretap warrant means a fair probability. *U.S. Const. Amend. 4*; *18 U.S.C.A. § 2516*.

[12] Search, Seizure, and Arrest  Necessity; inadequacy of other procedures

In determining whether government has shown necessity for wiretap warrant, Court of Appeals employs common sense approach, using standard of reasonableness to evaluate government's good faith effort to use alternative investigative means or its failure to do so because of danger or low probability of success. *U.S. Const. Amend. 4*; *18 U.S.C.A. § 2516*.

[13] Search, Seizure, and Arrest  Necessity; inadequacy of other procedures

District court did not abuse its discretion in finding that wiretap warrant was necessary to investigate conspiracy to illegally distribute prescription opioids, where wiretap affidavit explained, in specific detail, law enforcement's investigative methods, why those methods had been exhausted, and why other methods likely

would be ineffective in identifying members and scope of conspiracy. [U.S. Const. Amend. 4](#); [18 U.S.C.A. § 2516](#); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, [21 U.S.C.A. §§ 841\(a\)\(1\), 846](#).

[14] Search, Seizure, and Arrest  Necessity; inadequacy of other procedures

Evidence obtained through traditional investigative techniques that was sufficient to prosecute defendant on drug distribution counts did not negate necessity for wiretap warrant to obtain evidence for apprehension and prosecution of other satellite conspirators involved in illegal distribution of prescription opioids. [U.S. Const. Amend. 4](#); [18 U.S.C.A. § 2516](#); Comprehensive Drug Abuse Prevention and Control Act of 1970 §§ 401, 406, [21 U.S.C.A. §§ 841\(a\)\(1\), 846](#).

***779** Appeal from the United States District Court for the District of Nevada Larry R. Hicks, District Judge, Presiding, D.C. Nos. 3:19-cr-00026-LRH-WGC-1, 3:19-cr-00026-LRH-WGC

Attorneys and Law Firms

Ellesse Henderson (argued) and Aarin Kevorkian, Assistant Federal Public Defenders; [Rene L. Valladares](#), Federal Public Defender; Las Vegas Federal Public Defender's Office, Las Vegas, Nevada, for Defendant-Appellant.

Javier A. Sinha (argued), Attorney, Appellate Section, Criminal Division; [Lisa H. Miller](#), Deputy Assistant Attorney General; [Kenneth A. Polite, Jr.](#), Assistant Attorney General; United States Department of Justice, Washington, D.C.; [Robert L. Ellman](#), Assistant United States Attorney; Elizabeth O. White, Appellate Division Chief; Jason M. Frierson, United States Attorney; United States Attorney's Office, District of Nevada, Reno, Nevada; for Plaintiff-Appellee.

Before: [Susan P. Gruber](#), [Richard R. Clifton](#), and [Mark J. Bennett](#), Circuit Judges.

Opinion by Judge Bennett;

Concurrence by Judge [Gruber](#)

OPINION

[BENNETT](#), Circuit Judge:

Myron Motley appeals his conviction and sentence arising from his involvement in a conspiracy to distribute controlled substances—oxycodone and hydrocodone. In this opinion we address two issues: (1) whether the district court properly denied Motley's motion to suppress evidence obtained from two tracking warrants because Motley had no reasonable expectation of privacy in his opioid prescription records maintained in Nevada's Prescription Monitoring Program ("PMP") database; and (2) whether the district court properly determined that the wiretap warrant was supported by probable cause and was necessary.¹

We have jurisdiction under [28 U.S.C. § 1291](#). Given the government's long-standing and pervasive regulation of opioids, we hold that Motley had no reasonable expectation of privacy in his opioid prescription records maintained in Nevada's PMP database. Thus, there was no Fourth Amendment violation, and we affirm the district court's order denying suppression. We also affirm the district court's determination that the wiretap warrant was supported by probable cause and was necessary.

I. BACKGROUND

A. Nevada's PMP Database

Like in every other state,² Nevada operates an electronic database that tracks *780 filled prescriptions for controlled substances. [Nev. Rev. Stat. § 453.162](#) (2023). Nevada's database tracks drugs listed on Nevada's Schedules II–V. *Id.* Oxycodone is a Schedule II drug, and tramadol is a Schedule IV drug. [Nev. Admin. Code § 453.520\(2\)\(a\)](#) (2023); *id.* § 453.540(3) (2023). Both are opioids. *See United States v. Flores*, 725 F.3d 1028, 1032 n.2 (9th Cir. 2013) ("‘Oxycodone’ is a generic opioid pain reliever"); *Schedules of Controlled Substances: Placement of Tramadol Into Schedule IV*, 79 Fed. Reg. 37,623, 37,623 (July 2, 2014) ("Tramadol is a centrally acting opioid analgesic").

With exceptions not relevant here, pharmacies that dispense covered controlled substances must input certain information into Nevada's PMP database, such as the name and address

Appx. A, p.3

of the individual prescribed the controlled substance, the prescribed controlled substance, the quantity dispensed, and the appropriate “ICD-10 Code” that identifies the diagnosis for which the substance was prescribed. *Nev. Admin. Code § 639.926 (2023)*. Pharmacies must retain all prescriptions for at least two years, *Nev. Rev. Stat. § 639.236(1) (2023)*, and keep all “[f]iles of prescriptions ... open to inspection by members, inspectors and investigators of the [State] Board [of Pharmacy] and by inspectors of the Food and Drug Administration and agents of the Investigation Division of the Department of Public Safety,” *id. § 639.236(3)*.

The Nevada Legislature has mandated that the PMP database be designed to, among other things, provide information on “[t]he inappropriate use by a patient of controlled substances listed in schedules II, III, IV or V to ... appropriate state and local governmental agencies, including, without limitation, law enforcement agencies ..., to prevent the improper or illegal use of those controlled substances.” *Nev. Rev. Stat. § 453.162(1)(a)(1)*. The state entities responsible for developing the PMP database “shall report any activity [they] reasonably suspect[] may ... [i]ndicate ... inappropriate activity related to the prescribing, dispensing or use of a controlled substance to the appropriate law enforcement agency ... and provide the law enforcement agency ... with the relevant information obtained from the program for further investigation.” *Id. § 453.164(3)(a) (2023)*; *see also id. § 453.162(1)*. Certain law enforcement officers can access the PMP database without a warrant but only to “[i]nvestigate a crime related to prescription drugs” or to log information related to an investigation. *Id. § 453.165(4) (2023)*.³

B. Facts and Procedural History

1. First Tracking Warrant

In July 2018, law enforcement began investigating Motley because of information from a confidential informant (“CI”) who had proven reliable in a past, unrelated controlled purchase. The CI disclosed that Motley, who lives in California, regularly traveled to Reno, Nevada, to illegally obtain and sell prescription drugs.⁴ As part *781 of their investigation, law enforcement obtained a report from Nevada’s PMP database that showed a certain physician had prescribed Motley opioids—oxycodone and tramadol—averaging 279 morphine milligram equivalent (“MME”) per day over a several-year period. The amount prescribed suggested opioid abuse or diversion, as CDC guidance at the time recommended avoiding or carefully justifying an

increase in dosage to greater than or equal to 90 MME per day.⁵

In September 2018, law enforcement filed in Nevada state court an application for a warrant to install a global positioning system (“GPS”) tracking device on Motley’s vehicle. The affidavit in support included the information from the CI as well as the PMP database information about Motley’s opioid prescription history. The state court issued the search warrant, allowing law enforcement to place a tracking device on Motley’s vehicle for ninety days.

2. Second Tracking Warrant

In December 2018, after the first warrant expired, law enforcement sought a second tracking warrant in the United States District Court for the District of Nevada. The supporting affidavit repeated the information that supported the first warrant, including Motley’s opioid prescription history obtained from the PMP database. The affidavit also explained that the PMP database records showed that Dr. Eric Math was the physician who wrote the prescriptions, and the affidavit included new information that law enforcement had obtained from the first tracking warrant. A magistrate judge issued the second warrant, and later renewed it, allowing law enforcement to install a tracking device on Motley’s vehicle for a total of another ninety days.

3. Wiretap Warrant

Law enforcement later sought a wiretap warrant on Motley’s cell phone under *18 U.S.C. § 2516*. The 93-page affidavit reiterated the information contained in the two tracking warrant applications, including Motley’s opioid prescription history obtained from the PMP database. The affidavit explained that other PMP database records showed that Dr. Math was also prescribing large amounts of opioids to coconspirators of Motley’s. The affidavit included information establishing that Motley was well-acquainted and in frequent contact with those individuals. Some of this information was obtained through the GPS tracker on Motley’s vehicle and his phone records.

The affidavit included information supporting law enforcement’s contention that Motley was part of a drug trafficking organization. Information from several confidential sources (including the original CI) showed that Motley bought prescriptions for himself and others and then sold the prescribed pills, including to another coconspirator, Michael Slater, who would resell the pills.

Law enforcement observed Motley and his coconspirators engage in the following conduct “on multiple occasions”: Motley and Joseph Jeannette traveled to a pharmacy where Jeannette obtained an item from the pharmacy. Afterward, Motley drove to Slater’s apartment, and Motley and Slater appeared to conduct an exchange from Motley’s vehicle. Law enforcement conducted several controlled buys: a confidential source *782 bought oxycodone from Motley three times, and another confidential source bought oxycodone pills from Slater once.

The affidavit contained detailed reasons why a wiretap was necessary to achieve the goals of the investigation, including to identify the members and scope of the conspiracy. It explained that, although the confidential sources had provided useful information, they would probably be unable to obtain more details about the scope of the conspiracy without raising suspicion, given their limited relationships with Motley and Slater. The affidavit added that officers had evaluated other potential cooperators but ultimately determined that approaching such individuals would likely compromise the investigation.

The affidavit discussed the following investigative methods and explained, using case-specific details, why they would fail: more controlled purchases, undercover investigations, physical surveillance, search warrants, witness interviews, grand jury subpoenas, pole cameras, tracking warrants, GPS tracking warrants on cell phones, telephone toll analysis, covert recording devices, trash searches, financial investigations, and mail covers.⁶

The district court granted the application for a wiretap on Motley’s cell phone.

4. Relevant District Court Proceedings

A grand jury indicted Motley and his six coconspirators. Motley was charged with (and went to trial on) one count of conspiracy to possess with intent to distribute, and to distribute, oxycodone and hydrocodone, in violation of 21 U.S.C. §§ 841(a)(1), 846; four counts of distribution of oxycodone, in violation of 21 U.S.C. § 841(a)(1); and one count of distribution of hydrocodone, in violation of 21 U.S.C. § 841(a)(1).⁷

Motley moved to suppress the evidence obtained from the two tracking warrants, arguing that they rested on an unconstitutional warrantless search of his PMP database

records. He also argued that the wiretap warrant was invalid because the supporting affidavit failed to show that there was probable cause to believe that he was a member of a drug trafficking organization and failed to show the required necessity for electronic surveillance.

The district court denied the motion to suppress. It determined that the search of the PMP database without a warrant did not violate Motley’s Fourth Amendment rights because he had no reasonable expectation of privacy in the challenged PMP database information.⁸

*783 The district court also rejected Motley’s challenges to the wiretap warrant. The court found probable cause, as the affidavit established that “(1) the six codefendants were well-acquainted with each other[,] (2) Motley and Jeannette were regularly obtaining large quantities of opioids from Math, and (3) Motley was regularly selling opioids to Slater and other individuals, including confidential sources.” The court determined that that information established probable cause to believe that Motley was engaged in a drug trafficking conspiracy. The district court found the wiretap necessary because the affidavit showed that officers considered less intrusive methods and reasonably determined that they would have been ineffective.

A jury convicted Motley on all counts. The court sentenced him to 179 months’ imprisonment on each count, to be served concurrently, and to be followed by five years of supervised release. Motley timely appealed his conviction and sentence, raising several issues. In this opinion, we address Motley’s challenges to the district court’s denial of his motion to suppress evidence obtained from the tracking warrants and the court’s determination that the wiretap warrant was both necessary and supported by probable cause.

II. STANDARD OF REVIEW

[1] [2] [3] We review de novo the denial of a motion to suppress. *United States v. Magdirila*, 962 F.3d 1152, 1156 (9th Cir. 2020). In reviewing the district court’s probable cause determination as to the wiretap, we look “only to the four corners of the wiretap application” and “will uphold the wiretap if there is a ‘substantial basis’ for ... findings of probable cause.” *United States v. Meling*, 47 F.3d 1546, 1552 (9th Cir. 1995) (quoting *United States v. Stanert*, 762 F.2d 775, 779 (9th Cir.), amended, 769 F.2d 1410 (9th Cir. 1985)). We review for abuse of discretion the district court’s decision

that the wiretap was necessary. *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001).

III. DISCUSSION

A. Tracking Warrants

[4] [5] Motley argues that law enforcement's warrantless search of his opioid prescription records in the PMP database violated the Fourth Amendment, and without that illegally obtained information, the evidence was insufficient to support issuance of the tracking warrants.⁹ Thus, according to Motley, the district court erred in denying his motion to suppress evidence obtained from the tracking warrants. We reject Motley's argument, as we agree with the district court that there was no Fourth Amendment violation because Motley had no legitimate expectation of privacy in his opioid prescription records maintained in the PMP database.¹⁰

*784 [6] [7] [8] “[A] criminal defendant may invoke the protections of the Fourth Amendment only if he can show that he had a *legitimate* expectation of privacy in the place searched or the item seized.” *United States v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir. 2007). “This expectation is established where the claimant can show: (1) a subjective expectation of privacy; and (2) an objectively reasonable expectation of privacy.” *Id.* “An expectation of privacy is legitimate if it is one which society accepts as objectively reasonable.” *United States v. Thomas*, 447 F.3d 1191, 1196 (9th Cir. 2006).

Assuming, as the district court did, that Motley had a subjective expectation of privacy in his opioid prescription records, the question is whether that expectation was objectively reasonable. While this is an issue of first impression for our court, the First Circuit recently addressed it in *United States Department of Justice v. Ricco Jonas*, 24 F.4th 718 (1st Cir.), cert. denied sub nom. *Program Administrator of the New Hampshire Controlled Drug Prescription Health & Safety Program v. Department of Justice*, — U.S. —, 143 S. Ct. 207, 214 L.Ed.2d 80 (2022).

The First Circuit held that individuals do not have a reasonable expectation of privacy in prescription drug records maintained in New Hampshire's Prescription Drug Monitoring Program (“PDMP”) database. *Id.* at 736–37. The court focused on the closely regulated nature of prescription drugs under both federal and New Hampshire law. Under the Controlled Substances Act (“CSA”), “every registered dispenser of a controlled substance must maintain a complete

and accurate record of each such substance disposed of,” *id.* at 735, and keep those records for at least two years “for inspection and copying by officers or employees of the United States authorized by the Attorney General,” *id.* (quoting 21 U.S.C. § 827(b)). Similarly, New Hampshire's laws require practitioners to maintain records on all controlled drugs and keep such records “open for inspection to federal, state, county and municipal law enforcement officers and others whose duty it is to enforce the laws of New Hampshire or of the United States relating to controlled drugs.” *Id.* (cleaned up) (quoting N.H. Rev. Stat. Ann. § 318-B:12(II)). New Hampshire also requires the “report[ing] to the PDMP information about the dispensed drug, including the patient's name and address, the drug and quantity dispensed, and the date of dispensing.” *Id.*

The court concluded:

[I]n light of the intense government scrutiny to which prescription drug records are subject and the availability of those records for inspection without the need of court intervention under both state and federal law, a person does not have a reasonable expectation that the information contained in prescription *785 drug records will be kept private and free of government intrusion.

Id. at 736–37.

This analysis is persuasive. For over half a century, the federal government has regulated opioids under the CSA. Pub. L. No. 91-513, Tit. II, 84 Stat. 1236, 1250 (1970) (codified at 21 U.S.C. § 812) (classifying as Schedule II drugs any opiate produced “by extraction from substances of vegetable origin, or independently by means of chemical synthesis”). As the First Circuit recognized, under the CSA, registered dispensers of controlled substances must maintain records of each substance dispensed and make those records available for inspection and copying by the Attorney General for at least two years. *Ricco Jonas*, 24 F.4th at 735; see also 21 U.S.C. § 827(a)(3), (b). And since the CSA's inception, the Attorney General has had the authority to obtain these records without a warrant when investigating crimes related to controlled substances. Pub. L. No. 91-513, Tit. II, 84 Stat. 1236, 1272

(1970) (codified at 21 U.S.C. § 876(a)) (“[T]he Attorney General may ... require the production of any records ... which the Attorney General finds relevant or material to [an] investigation [related to controlled substances].”); *see also Ricco Jonas*, 24 F.4th at 735 (“Both federal and New Hampshire laws regulate controlled substances by requiring pharmacies ... to maintain prescription drug records and keep them open for inspection by law enforcement officers without the need of a warrant.”).

Nevada's laws track the CSA's close, extensive regulation of opioid prescriptions. *See Nev. Rev. Stat. § 453.162* (establishing the PMP database); *Nev. Admin. Code § 453.520(2)(a)* (classifying “opium and opiate” as a Schedule II drug). In general, all prescription records must be kept for at least two years and are open to inspection by the “[State Board of Pharmacy] and by inspectors of the Food and Drug Administration and agents of the Investigation Division of the Department of Public Safety.” *Nev. Rev. Stat. § 639.236(1), (3)*. Nevada established the PMP database nearly thirty years ago to prevent the illegal use of controlled substances. *See* 1995 Nev. Stat. 1433 (“The [PMP] program must ... [b]e designed to provide information regarding the inappropriate use of controlled substances ... to ... appropriate state agencies in order to prevent the improper or illegal use of such controlled substances.”). The state entities in control of the database have always had the obligation to report suspected illegal activity to law enforcement and to give law enforcement relevant information from the PMP database. *Id.*; *Nev. Rev. Stat. § 453.164(3)(a)*. Certain law enforcement agency employees can also access the PMP database without a warrant to “[i]nvestigate a crime related to prescription drugs.” *Nev. Rev. Stat. § 453.165(4)(a)*.

[9] Opioid use and prescriptions have thus been subject to well established and extensive regulation, including disclosure of opioid records to law enforcement *without* a warrant. On the undisputed historical record, for more than fifty years, society's expectation has been that law enforcement would closely monitor and have access to opioid prescription records. *See Ricco Jonas*, 24 F.4th at 739 (“[S]ociety's expectation has been for decades that law enforcement would have access to prescription drug records and would closely monitor the prescription and use of controlled substances.”).¹¹

*786 Motley argues that we should nonetheless find that his subjective expectation of privacy was objectively reasonable because society has recognized as reasonable,

patients' expectations of privacy in their medical records. The First Circuit declined to equate prescription drug records to all other medical records, and we again find its analysis persuasive. *Id.* at 735–36. Prescription opioid records are unlike general medical records. Opioid prescription records are only a “subset of medical records ... [that] do not generally or necessarily contain the more personal and intimate information that other medical records do.” *Id.* at 736 (noting that general medical records contain “‘sensitive medical history and other information, including about mental illnesses, learning disabilities, birth defects, illicit drug use, pregnancy terminations, domestic-violence history,’ patients' complaints and symptoms, and ‘the patients' family members,’ among others” (quoting *Eil v. U.S. DEA*, 878 F.3d 392, 396 (1st Cir. 2017))). Additionally, “unlike prescription [opioid] records, medical records are not subject to pervasive regulatory disclosures under both federal and state law.” *Id.* These crucial differences justify treating opioid prescription records differently from general medical records for Fourth Amendment purposes.¹²

Given the long-standing and pervasive regulation of opioids as a controlled substance and regulatory disclosure of opioid prescription records, Motley had no objectively reasonable expectation of privacy in his prescription opioid records maintained in Nevada's PMP database, and thus his Fourth Amendment challenge to the tracking warrants fails. We therefore affirm the district court's order denying suppression of the evidence obtained from the two tracking warrants.

B. Wiretap Warrant

[10] [11] [12] Motley also challenges the district court's determination that the wiretap warrant was necessary and was supported by probable cause. To authorize a wiretap warrant under 18 U.S.C. § 2516, the judge must find, as relevant here, that “there is probable cause for belief that an individual *787 is committing, has committed, or is about to commit” certain offenses. 18 U.S.C. § 2518(3)(a).¹³ “Probable cause” means a “fair probability.” *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The judge must also find 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.” 18 U.S.C. § 2518(3)(c). In determining whether the government has shown necessity, we employ a “common sense approach,” using “a standard of reasonableness to evaluate the government's good faith effort to use alternative investigative means or its failure

to do so because of danger or low probability of success.” *Blackmon*, 273 F.3d at 1207.

Motley's probable cause challenge fails because his suppression motion fails. Motley makes no alternative “lack of probable cause” argument. But even if Motley had made such an argument, it too would have failed. The wiretap affidavit established that Motley and several others, who were in frequent contact with Motley, were all obtaining large amounts of prescription opioids from the same physician; that Motley was buying the prescriptions for himself and others; and that Motley and at least one other coconspirator were selling the prescribed pills. This evidence provided a “substantial basis” for the district court's finding that there was probable cause that Motley was engaged in a conspiracy to illegally distribute prescription opioids. *Meling*, 47 F.3d at 1552.

[13] Turning to necessity, the affidavit explained, in specific detail, law enforcement's investigative methods, why those methods had been exhausted, and why other methods would likely be ineffective in identifying the members and scope of the conspiracy. As just one example, the affidavit explained that it would not be “feasible in the Reno area to introduce a UC [undercover law enforcement agent] into a DTO [drug trafficking organization] ... at a level high enough to accomplish the goals of the investigation,” and “[g]iven the relatively low-level contact [the confidential source] has had with Motley in recent months, it also would likely raise suspicion that [the confidential source] is introducing a UC to Motley, who is a stranger to Motley.” Given those and other facts, the affidavit explained that “Motley [would be] unlikely to reveal the inner workings of his DTO with the UC” and thus undercover operations would likely be unsuccessful. Based on the information in the affidavit, the district court did not abuse its discretion in finding that the wiretap was necessary. See *Blackmon*, 273 F.3d at 1207.

[14] Motley's counterarguments are unpersuasive. He claims that the government had all the evidence it needed “to prosecute [him] on the drug distribution counts.” Even if that were true, it would not negate necessity, because we have “consistently upheld findings of necessity where traditional investigative techniques lead only to apprehension and prosecution of the main conspirators, but not to apprehension and prosecution of ... other satellite conspirators.” *United States v. Torres*, 908 F.2d 1417, 1422 (9th Cir. 1990).

Motley also argues that the government could have employed other methods. But, as noted above, the affidavit explained why all the alternative methods identified by Motley would probably be ineffective or were tried and had failed.

We are also unconvinced by Motley's claim that the government “manufacture[d] *788 necessity” because it had identified some conspirators and knew that Dr. Math was their source. The government's need for a wiretap is not negated simply because it managed to obtain some evidence of a conspiracy without a wiretap. *See United States v. McGuire*, 307 F.3d 1192, 1199 (9th Cir. 2002) (“[T]here [is] a powerful government interest in identifying *all conspirators and the full scope* of the conspiracy.” (emphasis added)); *see also id.* at 1198 (“Because the government has a duty to extirpate conspiracy beyond its duty to prevent the mere commission of specific substantive offenses, ... the government is entitled to more leeway in its investigative methods when it pursues a conspiracy.” (footnote and citation omitted)).

In sum, the district court did not err in determining that the wiretap was supported by probable cause and was necessary, as the detailed, case-specific information in the affidavit established probable cause and showed that other investigative methods would likely have been unsuccessful in identifying the full scope of the conspiracy.

IV. CONCLUSION

We affirm the district court's order denying the motion to suppress because Motley had no reasonable expectation of privacy in his opioid prescription records maintained in Nevada's PMP database. We also affirm the district court's determination that the wiretap warrant was supported by probable cause and was necessary. The supporting affidavit contained more than sufficient evidence establishing probable cause that Motley was engaged in a conspiracy to illegally distribute prescription opioids. It also contained sufficient information for the court to reasonably conclude that a wiretap was necessary to identify the full scope of the conspiracy.

AFFIRMED.

GRABER, Circuit Judge, concurring in part and concurring in the judgment:

Appx. A, p.8

I concur in Part III-B of the opinion, which correctly rejects Defendant's challenges to the wiretap warrant. But I do not join Part III-A of the opinion, which affirms the district court's denial of Defendant's motion to suppress the evidence obtained as a result of two tracking warrants. Two alternative grounds support the district court's conclusion: the good-faith exception and harmlessness. I therefore concur in the judgment. The majority opinion declines to reach either of those alternative grounds and, instead, holds that Defendant did not have an objectively reasonable expectation of privacy in the identity and dosage of his prescription medications. We need not and, in my view, should not reach that substantial legal question in this case.

A. The Good-Faith Exception Applies, and Any Error Was Harmless.

As the district court held, the good-faith exception applies here. The Nevada statute clearly authorized the officer's access to the database, and the officer acted "in objectively reasonable reliance" on the statute. Illinois v. Krull, 480 U.S. 340, 349, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); see also Davis v. United States, 564 U.S. 229, 239, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (citing Krull for the rule that the good-faith exception extends "to searches conducted in reasonable reliance on subsequently invalidated statutes"). Whatever doubts one may have about the constitutionality of the Nevada statute, the fact that both of my colleagues and a unanimous panel of the First Circuit have held that persons lack a pertinent reasonable *789 expectation of privacy means that, at a minimum, the statute is not "clearly unconstitutional." Krull, 480 U.S. at 349, 107 S.Ct. 1160. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." Id. at 349–50, 107 S.Ct. 1160.

In addition, any error here was harmless. Even assuming that the information from the prescription database should have been excluded from Detective Johnson's affidavit, the remaining assertions in the affidavit provided probable cause. See, e.g., United States v. Nora, 765 F.3d 1049, 1058 (9th Cir. 2014) (holding that a "warrant remains valid if, after excising the tainted evidence, the affidavit's remaining untainted evidence would provide a neutral magistrate with probable cause to issue a warrant" (citation and internal quotation marks omitted)).

A confidential informant ("CI") who had proved reliable during an earlier controlled drug purchase explained, in some detail, Defendant's scheme. Detective Johnson reported:

The CI told me that [Defendant] comes from California and meets with a physician at [a specific office] approximately every 30 days. [Defendant] then meets this physician and the physician writes [Defendant] a prescription for Oxycodone. In addition, the physician gives [Defendant] a stack of prescriptions in other people's names for [Defendant] to sell to those people.... The CI's wife has received a prescription in her name from the physician via [Defendant], but has never actually seen the physician personally. The CI also stated that [Defendant] fills most [of] his prescriptions [at a specific pharmacy].

Detective Johnson verified some of the information given by the informant. For example, Detective Johnson determined that Defendant's car was registered in California. Similarly, the informant told Detective Johnson that Defendant was staying at a specific hotel in town, and officers saw Defendant at that hotel the next day. Finally, Detective Johnson reported that Defendant's criminal history, including a series of arrests for drug trafficking and possession, was consistent with the informant's information.

In sum, an informant—known to be reliable—described in detail a criminal scheme in which the informant's wife had participated personally; officers confirmed some aspects of the informant's description; and officers confirmed that Defendant's criminal history was consistent with the scheme. Accordingly, independent of the information derived from the prescription database, the affidavit supported a finding that there was a "fair probability" that the tracking device would yield evidence of a crime. United States v. Kvashuk, 29 F.4th 1077, 1085 (9th Cir. 2022), cert. denied, — U.S. —, 143 S. Ct. 310, 214 L.Ed.2d 136 (2022); see, e.g., Nora, 765 F.3d at 1059 ("[C]riminal history can be helpful in establishing probable cause, especially where the previous arrest or conviction involves a crime of the same general nature as the

Appx. A, p.9

one the warrant is seeking to uncover.” (citation and internal quotation marks omitted); United States v. Rowland, 464 F.3d 899, 907 (9th Cir. 2006) (“[A] known informant’s tip is thought to be more reliable than an anonymous informant’s tip.”); id. at 908 (“[A]n informant with a proven track record of reliability is considered more reliable than an unproven informant.”); id. (“[An] informant’s tip is considered more reliable if the informant reveals the basis of knowledge of the tip—how the informant came to know the information.”); id. (“[A] tip that provides detailed predictive information about future *790 events that is corroborated by police observation may be considered reliable.”).

I would uphold the denial of the motion to suppress on those alternative grounds: the good-faith exception and harmlessness.

B. Whether a Person Has an Objectively Reasonable Expectation of Privacy in Prescription Records is a Significant and Debatable Legal Question that We Ought Not Reach.

The majority opinion decides that Defendant lacked an objectively reasonable expectation of privacy in his prescription records. Because it is unnecessary to reach that significant legal issue, and because I have doubts about the majority opinion’s conclusion, I would not reach that issue.

Federal courts have “no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable.” O’Connor v. Ortega, 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987) (plurality opinion). “[T]he reasonableness of an expectation of privacy … differ[s] according to context.” Id. In concluding that persons lack a reasonable expectation of privacy in their prescription records, the majority opinion offers a plausible assessment of several relevant factors. But an alternative approach, described below, might yield a different result.

As a general matter, people reasonably expect privacy in their personal medical records. See, e.g., Norman-Bloodsaw v. Lawrence Berkeley Lab’y, 135 F.3d 1260, 1269 (9th Cir. 1998) (“The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its confidentiality.”); see also Ferguson v. City of Charleston, 532 U.S. 67, 78, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) (“The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests

will not be shared with nonmedical personnel without her consent.”). As the Supreme Court has noted, “an intrusion on that expectation may have adverse consequences because it may deter patients from receiving needed medical care.” Ferguson, 532 U.S. at 78 n.14, 121 S.Ct. 1281.

Prescription records are a subset of medical records and, accordingly, are entitled to some measure of privacy. Prescription records may not disclose as much information as a person’s entire hospital chart might. But prescription records can be extremely revealing, nonetheless. A knowledgeable person could tell, from prescriptions alone, that a person was undergoing treatment for a sensitive, private ailment, such as low testosterone or delayed puberty; weight loss associated with AIDS or chemotherapy; difficulty with conceiving; anxiety and panic disorders; or alcohol withdrawal or opioid use. The Supreme Court’s observation about medical records generally applies with equal force to prescriptions specifically: “an intrusion on [an expectation of privacy in prescription records] may have adverse consequences because it may deter patients from receiving needed medical[tions].” Id.

Nor is Nevada’s statute tailored in any way to opioids or to those drugs with the most potential for abuse. The statute applies broadly to all drugs on Schedules II-V. (Schedule I drugs have no medical use.) A more narrowly tailored statute—for example, a law that permitted warrantless searches of only the most dangerous prescription drugs, coupled with a requirement that persons filling those specific prescriptions be warned that their prescription data could be subject to search—likely would pass constitutional muster. But Nevada’s law indiscriminately allows warrantless searches of any and all prescriptions, even those drugs with no history *791 of abuse or resale, and even those drugs that reveal specific medical histories. The majority opinion at times focuses its analysis on opioids, but its holding is broad: persons have no reasonable expectation of privacy in any prescription record.

Finally, the other laws cited by the majority opinion do not fully establish that persons lack a reasonable expectation of privacy. Congress and state legislatures permissibly may impose a record-keeping obligation on medical providers, but those laws do not answer the question relevant here: does the Constitution permit law enforcement officers to rifle through those records solely in search of evidence of a crime? Similarly, the fact that Congress granted the Attorney General a wide subpoena power to “require the production of

any records (including books, papers, documents, and other tangible things which constitute or contain evidence) which the Attorney General finds relevant or material,” 21 U.S.C. § 876(a), does not answer the constitutional question. That subpoena power—like the searching authority granted by state law—is limited by the Fourth Amendment’s protection against unreasonable searches.

Some jurisdictions have concluded, contrary to the majority opinion’s conclusion, that persons do have a reasonable expectation of privacy in their prescription medications. For example, the Supreme Court of Louisiana has held that a warrant is required for an investigative search of prescription records, because “the right to privacy in one’s medical and prescription records is an expectation of privacy that society is prepared to recognize as reasonable.” State v. Skinner, 10 So. 3d 1212, 1218 (La. 2009) (emphasis added). Closer to home, the federal district court for the District of Oregon agreed, concluding in a well-reasoned opinion concerning Oregon’s analogue to Nevada’s prescription database that the intervenors’ “subjective expectation of privacy in their prescription information is objectively reasonable.” Or. Prescription Drug Monitoring Program v. U.S. DEA (Or. PDMP), 998 F. Supp. 2d 957, 966 (D. Or. 2014), rev’d on other grounds, 860 F.3d 1228 (9th Cir. 2017). On appeal, we held that the intervenors lacked standing, and we therefore did not reach the pertinent Fourth Amendment question. Or. PDMP, 860 F.3d at 1234–35. But we recognized the weightiness of the issue:

We acknowledge the particularly private nature of the medical information at issue here and thus do not question the seriousness of Intervenors’ fear of disclosure. Nor do we imply that this concern is unreasonable.

[Id.](#) at 1235.

In sum, the majority opinion reaches an important issue that has divided courts: whether a person has a reasonable expectation of privacy in prescription records. Because I have doubts about the correctness of the majority opinion’s conclusion, I would choose not to reach the issue; we should wait for a case in which the result matters to the outcome. For those reasons, I concur in the opinion only in part, but I concur in the judgment in full.

All Citations

89 F.4th 777, 23 Cal. Daily Op. Serv. 218, 2024 Daily Journal D.A.R. 1

Footnotes

- 1 We address Motley’s remaining arguments in a concurrently filed memorandum disposition. For reasons explained in the separate disposition, we affirm Motley’s conviction in full; we affirm in part and vacate in part the sentence; and we remand.
- 2 “As of February 2018, 50 states, the District of Columbia, and two territories (Guam and Puerto Rico) had operational [prescription drug monitoring programs (PDMPs)] within their borders.” Lisa N. Sacco et al., Cong. Rsch. Serv., R42593, *Prescription Drug Monitoring Programs* 4 (2018).
- 3 Motley does not challenge the constitutionality of Nevada’s laws establishing and governing the PMP database, and so we do not reach that question. Thus, the concurrence’s concern with the constitutionality of Nevada’s statute is irrelevant.
- 4 Specifically, an officer explained:

The CI told me that [Motley] comes from California and meets with a physician ... approximately every 30 days. [Motley] then meets this physician and the physician writes Motley a prescription for Oxycodone. In

Appx. A, p.11

addition, the physician gives [Motley] a stack of prescriptions in other people's names for [Motley] to sell to those people.

5 CDC, *CDC Guideline for Prescribing Opioids for Chronic Pain—United States, 2016* (Mar. 15, 2016), <https://www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm>.

6 Mail cover is the process by which a nonconsensual record is made of any data appearing on the outside cover of any sealed or unsealed class of mail matter, or by which a record is made of the contents of any unsealed class of mail matter as allowed by law

39 C.F.R. § 233.3(c)(1).

7 Motley was also charged with distribution of methamphetamine, but that count was dismissed.

8 Because it is unnecessary, we do not address the district court's alternative determination that, even if the search violated Motley's Fourth Amendment rights, the good-faith exception to the exclusionary rule barred suppression of the evidence obtained pursuant to the warrant. We also need not decide whether any error was harmless. The concurrence takes issue with our approach. But the issue—whether law enforcement may search opioid prescription records maintained in Nevada's PMP database—was squarely presented below, the district court decided it, and the parties fully briefed it on appeal. We believe that guidance is needed, as the parties request, on this important issue, particularly given the government's recent attempts to access prescription databases without warrants, which is likely to persist due to the existing opioid crises. See Sacco, *supra* note 2, at 26 ("In recent years, to investigate violations of the federal Controlled Substances Act (CSA), the DEA has demanded access to certain PDMP data without a court order or search warrant"); U.S. Dep't of Just., Civ. Div., *Opioid Enforcement Effort* (Mar. 22, 2023), <https://www.justice.gov/civil/consumer-protection-branch/opioid> ("With more than 84,000 Americans dying annually from prescription drug and synthetic opioid overdoses, the Department of Justice is committed to using every available tool to prevent overdose deaths and hold accountable those responsible for the opioid crisis." (footnote omitted)).

9 Motley does not argue that the affidavits supporting the tracking warrants were insufficient if his opioid prescription records are considered. His challenge therefore depends on whether law enforcement's search of his opioid prescription records violated the Fourth Amendment.

10 We also reject Motley's argument that the affidavit's statement that his 279 MME/day "prescription pattern can be an indicator for opioid abuse or diversion" was unsupported. The statement was supported by CDC guidance at the time, which explained that most experts agree that dosages greater than 50 MME/day "increases overdose risk without necessarily adding benefits for pain control or function," and dosages should not be increased to greater than 90 MME/day "without careful justification based on diagnosis and on individualized assessment of benefits and risks." CDC, *CDC Guideline for Prescribing Opioids for Chronic Pain—United States, 2016* (Mar. 15, 2016), <https://www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm>.

Motley also contends that the district court erred in denying his request for an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). But he waived this challenge, as he mentions it only in passing in his briefs and does not provide any supporting arguments. See *United States v. Stoterau*, 524 F.3d 988, 1003 n.7 (9th Cir. 2008).

11 The concurrence asserts that the statutory record-keeping requirements and laws that allow law enforcement officers to access such records without a warrant "do[] not answer the constitutional question." Concurrence at 791. We disagree. While such laws may not be dispositive, we agree with the First Circuit that such laws inform the analysis of whether an expectation of privacy is objectively reasonable. See *Ricco Jonas*, 24 F.4th at 734–35.

Appx. A, p.12

The concurrence also points to two cases that reached conclusions contrary to *Ricco Jonas*. Concurrence at 790–91. We find those cases unpersuasive. In *State v. Skinner*, the Supreme Court of Louisiana based its holding on “federal jurisprudence and Louisiana’s constitutional requirement of a heightened privacy interest for its citizens.” 10 So. 3d 1212, 1218 (La. 2009) (emphasis added); see also *id.* at 1215 (“Louisiana provides protection not only against unreasonable searches and seizures, but [its] Constitution explicitly protects against unreasonable invasions of privacy.”). Here, Motley points to no similar heightened privacy protection under Nevada’s constitution.

We also find unpersuasive the analysis in *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Administration*, as the district court’s holding rested on the view that prescription records should be treated the same as all other medical records. 998 F. Supp. 2d 957, 966 (D. Or. 2014), *rev’d on other grounds*, 860 F.3d 1228, 1231 (9th Cir. 2017). As discussed below, we reject that view.

- 12 We express no view as to the extent patients have a reasonable expectation of privacy in other types of medical or prescription records. We only decide that Motley had no objectively reasonable expectation of privacy in his opioid prescription records maintained in Nevada’s PMP database, given the long-standing and pervasive regulation of opioids as a controlled substance and regulatory disclosure of opioid prescription records. Thus, the concurrence is simply wrong in stating that our holding applies to “any prescription record.” Concurrence at 791.
- 13 Motley does not challenge the other probable cause requirements under § 2518. See 18 U.S.C. § 2518(3)(b), (d).

2023 WL 9014457

Only the Westlaw citation is currently available.
United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Myron MOTLEY, Defendant-Appellant.

No. 21-10296

|

Argued March 10, 2023

|

FILED DECEMBER 29, 2023

|

Submitted December 29, 2023 Las Vegas, Nevada

Appeal from the United States District Court for the District of Nevada, [Larry R. Hicks](#), District Judge, Presiding, D.C. Nos. 3:19-cr-00026-LRH-WGC-1, 3:19-cr-00026-LRH-WGC

Attorneys and Law Firms

[Robert Lawrence Ellman](#) Assistant U.S. Attorney, USRE - Office of the U.S. Attorney, Reno, NV, Javier Alberto Sinha Attorney, DOJ - U.S. Department of Justice, Washington, DC, for Plaintiff-Appellee.

Ellesse Henderson, Wendi L. Overmyer, Assistant Federal Public Defenders, Federal Public Defender's Office, Las Vegas, NV, for Defendant-Appellant.

Before: [GRABER](#), [CLIFTON](#), and [BENNETT](#), Circuit Judges.

MEMORANDUM*

*1 Myron Motley appeals his conviction and sentence arising from his involvement in a conspiracy to distribute oxycodone and hydrocodone.¹ We have jurisdiction under [28 U.S.C. § 1291](#) and [18 U.S.C. § 3742\(a\)](#). We affirm Motley's conviction, affirm his sentence in part and vacate it in part, and remand for limited resentencing consistent with this disposition.

1. Motley waived his Speedy Trial Act claim because he never moved to dismiss before trial. *See 18 U.S.C. § 3162(a)(2); United States v. Tanh Huu Lam*, 251 F.3d 852, 860–61 (9th

Cir.), as amended on denial of *reh'g* and *reh'g en banc* sub nom. *United States v. Lam*, 262 F.3d 1033 (9th Cir. 2001).

We review Motley's speedy trial claim under the Sixth Amendment for plain error, as he raises it for the first time on appeal. *See United States v. Sykes*, 658 F.3d 1140, 1149 (9th Cir. 2011). “In assessing the merits of a claimed violation of the Sixth Amendment speedy trial right, courts are to conduct a balancing test involving four separate factors: the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.” *Tanh Huu Lam*, 251 F.3d at 855.

On balance, the factors do not support the claim. Even assuming that the government should bear the responsibility for the COVID-related delay, the “focal” factor—reason for the delay—is neutral because Motley and his codefendants were also responsible for a substantial amount of the two-year delay. *United States v. King*, 483 F.3d 969, 976 (9th Cir. 2007). Further, the remaining factors do not weigh heavily in favor of a violation. The two-year delay was not excessive. *See id.* Motley did not consistently assert his speedy trial rights. *See id.* Finally, Motley's claim of prejudice is weak, as he provides only general assertions that he experienced anxiety and concern from his incarceration during the COVID-19 pandemic and fails to show that the delay prejudiced his defense.

2. Even assuming that de novo review applies, as Motley urges, his *Batson* claim fails. *See Batson v. Kentucky*, 476 U.S. 79 (1986). Because the first step of *Batson*'s three-step burden shifting framework is not at issue, we analyze only the second and third steps. *See Hernandez v. New York*, 500 U.S. 352, 358–59 (1991) (plurality opinion). As to the second step, the government offered race-neutral reasons for striking the alternative juror: he was young (twenty-two) and unemployed, and he lacked a significant work history. Moving to step three, Motley fails to show purposeful discrimination. Given the juror's characteristics, the prosecutor reasonably could have believed that the juror lacked the maturity and experience to serve responsibly on a jury. Nor did the prosecutor challenge three other Latino or Hispanic jurors, and Motley's comparative analysis fails to show pretext. These circumstances bolster our conclusion that Motley has not proved purposeful discrimination.² *See Palmer v. Estelle*, 985 F.2d 456, 458 (9th Cir. 1993); *United States v. Hernandez-Garcia*, 44 F.4th 1157, 1167 (9th Cir.), cert. denied, 143 S. Ct. 508 (2022).

*2 3. The government argues that plain error review applies to Motley's sufficiency-of-the-evidence challenges because, after the close of all the evidence, he failed to renew his motion for judgment of acquittal under [Federal Rule of Criminal Procedure 29](#). But even assuming that *de novo* review applies, as Motley argues, his insufficiency-of-the-evidence challenges fail. A conviction must be upheld if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Jackson v. Virginia](#), 443 U.S. 307, 319 (1979).

Contrary to Motley's position, the prosecution could prove the requisite mens rea under [21 U.S.C. § 841\(a\)\(1\)](#) by showing that Motley "knew the identity of the substance[s] he possessed." [McFadden v. United States](#), 576 U.S. 186, 192 (2015). There was more than sufficient evidence supporting the mens rea element. The doctor involved in the conspiracy, Dr. Math, wrote Motley many prescriptions for oxycodone. Motley provided a coconspirator with a prescription for hydrocodone written by Dr. Math and, after filling the prescription, the coconspirator gave Motley the prescription bottle so that Motley could take his share of the pills. The label on the bottle explained that the substance contained "hydrocod/acetam," short for [hydrocodone](#) and [acetaminophen](#). Based on this evidence, a rational juror could have found that Motley knew the substances were [oxycodone](#) and [hydrocodone](#).

We also reject Motley's claim that the evidence was insufficient to prove a conspiratorial agreement to possess with intent to distribute, or to distribute, the controlled substances. Motley obtained monthly prescriptions for large amounts of oxycodone or hydrocodone from Dr. Math in his own name *and* in his coconspirators' names. Motley paid Dr. Math between \$600 and \$800 for each prescription, and Dr. Math knew that Motley and his coconspirators were selling the pills and knew that he was vital to the conspiracy. During a recorded phone call between Motley and a coconspirator, they discussed how many pills the coconspirator had received, who should sell the pills, and the exchange of money. Another coconspirator testified that Motley would take a portion of her pills to resell. Viewing all this evidence in the government's favor, a rational juror could have found that Motley agreed with his coconspirators to possess with intent to distribute or to distribute oxycodone and hydrocodone. *See United States v. Loveland*, 825 F.3d 555, 557 (9th Cir. 2016) (noting that a conspiratorial agreement can be proved by circumstantial evidence).

4. Motley's jury instruction challenges are unavailing. Under [McFadden](#), the district court correctly refused to instruct the jury that the government had to prove that Motley knew the substances were listed as controlled substances. 576 U.S. at 192. A multiple conspiracies instruction was unnecessary because Motley was the only defendant at trial, and so there was no risk of spillover of guilt from a codefendant. *See United States v. Liu*, 631 F.3d 993, 1000 (9th Cir. 2011). The evidence also did not support a multiple conspiracies defense because the evidence showed that Motley was a key participant in the charged conspiracy, rather than a person involved only in a separate uncharged conspiracy. *See United States v. Moe*, 781 F.3d 1120, 1127 (9th Cir. 2015). Finally, the court instructed the jury that it had to find that "there was a plan to commit at least one of the crimes alleged in the indictment as an object or purpose of the conspiracy *with all of you agreeing* as to the particular crime which the conspirators agreed to commit," (emphasis added), and that Motley "joined in the agreement." These instructions amounted to a specific unanimity instruction, as they informed the jury that it had to agree on which conspiracy supported the conspiracy conviction.

*3 The indictment was not improperly amended by the jury instructions. "For a constructive amendment to inhere, jury instructions must 'diverge materially' from the indictment and evidence must have been 'introduced at trial that would enable the jury to convict the defendant for conduct with which he was not charged.'" [United States v. Alvarez-Ulloa](#), 784 F.3d 558, 570 (9th Cir. 2015) (quoting [United States v. Ward](#), 747 F.3d 1184, 1191 (9th Cir. 2014)). Although the instruction on the conspiracy charge omitted the indictment's text that the conspiracy was "not for a legitimate medical purpose and not in the usual course of professional practice," the court gave, verbatim, a separate instruction proposed by Motley:

A person who works with or for a pharmacy or a physician may not be convicted when he or she distributes or dispenses controlled substances in good faith for a legitimate medical purpose and in the usual course of professional practice.

A controlled substance is distributed or dispensed by a physician or pharmacist in the usual course of his or her professional practice and, therefore, lawfully, if the substance is distributed or dispensed by him or her in good faith in medically treating a patient.

When you consider the good faith defense, it is the defendant's belief that is important. It is the sincerity of his belief that determines if he acted in good faith.

If the defendant's belief is unreasonable, you may consider that in determining his sincerity of belief, but an unreasonable belief sincerely held is good faith.

Considering this instruction, which tracks the relevant wording in the indictment, the jury instructions did not "divege materially" from the indictment. *Id.*

5. In sentencing Motley, the district court did not clearly err in finding that Motley was an organizer or leader. *See United States v. Avila*, 95 F.3d 887, 889 (9th Cir. 1996). Considering all the evidence, the district court reasonably concluded that Motley exercised control over or organized others, as he arranged for, bought, and obtained his coconspirators' prescriptions. *See id.* And after the prescriptions were filled, Motley took or acquired large amounts of the pills so that he could resell them.

6. Nothing in the record suggests that the district court failed to appreciate its discretion to vary from the Sentencing Guidelines on policy grounds under *Kimbrough v. United States*, 552 U.S. 85 (2007). Motley points to a single statement made by the district court: "[T]he Court's policy, of course, [is] to be guided in every case by the sentencing guidelines." But that statement accurately describes the Guidelines' purpose. *See Beckles v. United States*, 580 U.S. 256, 263 (2017) ("[The Guidelines] guide the exercise of a court's discretion in choosing an appropriate sentence within the statutory range." (emphasis added)).

7. We reject Motley's challenges to the district court's total converted drug weight calculation. Contrary to Motley's argument, the district court did not improperly shift the burden by requiring him to prove a weight calculation. The record shows that the court found that the government had met its burden and then simply permitted Motley to challenge the court's finding.

Further, the court's calculation was not clearly erroneous. *See United States v. Alvarez*, 358 F.3d 1194, 1212 (9th Cir. 2004). Based on the evidence—including that Dr. Math regularly delivered the coconspirators' prescriptions to Motley directly and that Motley paid Dr. Math for his coconspirators' prescriptions—the court reasonably concluded that the government had proved by a preponderance that all the pills

prescribed by Dr. Math to Motley and his coconspirators during the relevant period were within the scope and in furtherance of the conspiracy and reasonably foreseeable. *See id.*; U.S. Sent'g Guidelines Manual § 1B1.3(a)(1)(A)–(B) (U.S. Sent'g Comm'n 2018) [hereinafter U.S.S.G.].

*4 8. The district court did not impose a substantively unreasonable sentence. The record shows that the court considered the required factors under 18 U.S.C. § 3553(a) in a "rational and meaningful" manner. *United States v. Ressam*, 679 F.3d 1069, 1089 (9th Cir. 2012) (en banc) (quoting *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (en banc)). Further, the sentence of 179 months fell within the Guidelines range. *See United States v. Carty*, 520 F.3d 984, 988 (9th Cir. 2008) (en banc) ("[W]e recognize that a correctly calculated Guidelines sentence will normally not be found unreasonable on appeal."). Considering the totality of the circumstances, the district court did not abuse its discretion by imposing a substantively unreasonable sentence. *See id.* at 993.

9. The district court did not orally pronounce the discretionary "standard" supervised release conditions set forth in U.S.S.G. § 5D1.3(c), but they appear in the written judgment. Under our recent decision in *United States v. Montoya*, 82 F.4th 640, 644–45 (9th Cir. 2023) (en banc), this was error. Thus, as in *Montoya*, we vacate the conditions of supervised release that were referred to as the "standard conditions" in the written judgment and remand "so that the district court can cure its error by orally pronouncing any of the standard conditions of supervised release that it chooses to impose and by giving [Motley] a chance to object to them." *Id.* at 656. Because the circumstances here are materially indistinguishable from those in *Montoya*, *see id.* at 645, we reject Motley's contention that we should simply strike the standard conditions. *See Dkt. No. 51.*

10. The district court plainly erred by imposing Special Condition 2, which improperly delegated to the probation officer the authority to decide whether Motley must participate in outpatient substance abuse treatment. Like the error in *United States v. Nishida*, the district court here delegated a decision that goes to the "nature or extent" of the punishment imposed. 53 F.4th 1144, 1152–53 (9th Cir. 2022). Under *Nishida*, Motley has shown that he is entitled to plain-error relief. *See id.* We therefore vacate Special Condition 2 and remand for the district court to reconsider that condition. *See Montoya*, 82 F.4th at 656 (noting that we have discretion whether to "vacate only a particular portion of the supervised release sentence").

**CONVICTION AFFIRMED; SENTENCE AFFIRMED
IN PART AND VACATED IN PART; and REMANDED.**

All Citations

Not Reported in Fed. Rptr. 2023 WL 9014457

Footnotes

- * This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).
- 1 In a concurrently filed opinion, we address Motley's challenge to the district court's order declining to suppress evidence obtained from two tracking warrants and determining that the wiretap warrant was necessary and was supported by probable cause. We address his remaining arguments in this disposition.
- 2 To the extent that Motley claims that the trial court found the government's reasons were pretextual, we disagree. At best, the transcript reflects that the court thought that they were not *Batson*-prohibited reasons or may have questioned the strength of the reasons.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

FILED

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

APR 18 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MYRON MOTLEY,

Defendant-Appellant.

No. 21-10296

D.C. Nos.

3:19-cr-00026-LRH-WGC-1

3:19-cr-00026-LRH-WGC

District of Nevada,

Reno

ORDER

Before: GRABER, CLIFTON, and BENNETT, Circuit Judges.

Defendant-Appellant filed a petition for panel rehearing and rehearing en banc. Dkt. No. 63. The panel has unanimously voted to deny the petition for panel rehearing. Judge Bennett has voted to deny the petition for rehearing en banc, and Judge Clifton has so recommended. Judge Graber has recommended granting the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc is DENIED.

443 F.Supp.3d 1203
United States District Court, D. Nevada.

UNITED STATES of America, Plaintiff,
v.
Myron MOTLEY, Joseph Jeannette, et al., Defendants.
United States of America, Plaintiff,
v.
Myron Motley, et al., Defendants.

Case No. 3:19-cr-00026-LRH-WGC,
Case No. 3:19-cr-00027-LRH-WGC
|
Signed 03/06/2020

Synopsis

Background: Defendant charged with participating in conspiracy to traffic in prescription opioids filed motion to suppress evidence, and another alleged co-conspirator moved for leave to join in suppression motion.

Holdings: The District Court, [Larry R. Hicks](#), Senior District Judge, held that:

[1] alleged narcotics conspirator whose vehicle was not the target of vehicle tracking devices authorized by search warrants could not challenge evidence obtained as direct result of these search warrants;

[2] alleged narcotics conspirator was not “person aggrieved” by any illegality in wiretap and would not be allowed to join in suppression motion;

[3] any expectation of privacy that defendant had in information stored on Nevada's Prescription Monitoring Program (PMP) database was not objectively reasonable;

[4] evidence that was obtained through search warrant based on information that police officer obtained, without warrant, from Nevada's Prescription Monitoring Program (PMP) database was obtained in good faith and did not have to be suppressed; and

[5] officer applying for wiretap of suspected opioid trafficking conspirator's personal cell phone made the requisite showing of “probable cause” and “necessity” for wiretap.

Motions denied.

Procedural Posture(s): Pre-Trial Hearing Motion.

West Headnotes (22)

[1] **Search, Seizure, and Arrest** Personal nature of rights; vicarious assertion

Third party does not have “standing” to challenge the search and seizure of another's property; Fourth Amendment rights are personal in nature and cannot be asserted vicariously. [U.S. Const. Amend. 4](#).

[2] **Criminal Law** Persons entitled to object
Search, Seizure, and Arrest Particular cases

Alleged narcotics conspirator whose vehicle was not the target of vehicle tracking devices authorized by search warrants could not challenge evidence obtained as direct result of these search warrants and would not be allowed to join in motion to suppress this evidence. [U.S. Const. Amend. 4](#).

[3] **Search, Seizure, and Arrest** Interception or Disclosure of Electronic Communications
Illegal wiretap may be challenged by any person aggrieved by the surveillance. [18 U.S.C.A. § 2518\(10\)\(a\)](#).

[4] **Search, Seizure, and Arrest** Interception or Disclosure of Electronic Communications
“Person aggrieved” by illegal wiretap, with ability to challenge the surveillance, means anyone who was a participant in an intercepted conversation or against whom the interception was directed. [18 U.S.C.A. § 2518\(10\)\(a\)](#).

[5] **Criminal Law** Persons entitled to object

Alleged narcotics conspirator who was not the target of wiretap targeting another alleged co-conspirator's personal cell phone, and who, in seeking to join in co-conspirator's motion to suppress evidence obtained by means of this wiretap, did not identify any of co-conspirator's intercepted communications in which he was a participant, was not "person aggrieved" by any illegality in wiretap and would not be allowed to join in suppression motion. [18 U.S.C.A. § 2518\(10\)\(a\)](#).

[6] Search, Seizure, and Arrest ↗ [Expectation of privacy](#)

Threshold question in any Fourth Amendment challenge to search is whether defendant had reasonable expectation of privacy in the property or place searched. [U.S. Const. Amend. 4](#).

[7] Search, Seizure, and Arrest ↗ [Reasonableness; reasonable expectation of privacy](#)

Defendant can establish legitimate expectation of privacy in the property or the place searched, as required to be able to invoke the protections of the Fourth Amendment, by showing both a subjective expectation of privacy and an objectively reasonable expectation of privacy. [U.S. Const. Amend. 4](#).

1 Case that cites this headnote

[8] Search, Seizure, and Arrest ↗ [Documents; records](#)

Even if alleged drug conspirator had subjective expectation of privacy in information stored on Nevada's Prescription Monitoring Program (PMP) database regarding the number of times that he filled prescriptions for different opioids, a database about which he had no knowledge before law enforcement officer accessed the database as part of narcotics investigation and used information thereon to apply for warrant to place tracking device on defendant's vehicle, any such expectation of privacy was not objectively reasonable and was not one on which defendant

could rely to challenge search warrant; by the time that officer accessed the PMP database to obtain defendant's information, defendant had already released that information to multiple parties, the prescribing physician, the pharmacy technicians who filled his prescriptions, and governmental entity that operated the PMP database. [U.S. Const. Amend. 4](#).

[9] Search, Seizure, and Arrest ↗ [Particular items in general](#)

Fourth Amendment does not prohibit the obtaining of information revealed to third party and conveyed by the third party to government authorities, even if the information is revealed on the assumption that it will be used only for limited purpose and that the confidence placed in the third party will not be betrayed. [U.S. Const. Amend. 4](#).

[10] Search, Seizure, and Arrest ↗ [Particular objects, items, and things in general](#)

Individuals who receive prescription drugs do not have any reasonable expectation of privacy, of kind protected by the Fourth Amendment, in records that pharmacies operating in the highly regulated prescription drug industry are required to keep. [U.S. Const. Amend. 4](#).

1 Case that cites this headnote

[11] Criminal Law ↗ [Reliance on statute, ordinance, or precedent; mistake of law](#)

Evidence that was obtained through search warrant based on information that police officer obtained, without warrant, from Nevada's Prescription Monitoring Program (PMP) database regarding the number of times that defendant had filled prescriptions for different opioids did not have to be suppressed, even assuming that defendant had a reasonable expectation of privacy in this information, of kind protected by the Fourth Amendment, given that officer had in good faith relied on legislation authorizing him to access this information for use

in ongoing narcotics investigation. [U.S. Const. Amend. 4](#).

[12] Criminal Law  Searches, seizures, and arrests

When evidence is obtained in violation of the Fourth Amendment, the exclusionary rule usually precludes its use in criminal proceeding against the victim of the illegal search. [U.S. Const. Amend. 4](#).

[13] Criminal Law  Purpose of Exclusionary Rule

Purpose of the exclusionary rule is to deter police misconduct.

[14] Criminal Law  Exclusionary Rule in General

Exclusionary rule does not apply in situations in which exclusion of the evidence obtained would not alter the misbehavior of law enforcement officers.

[15] Criminal Law  Reliance on statute, ordinance, or precedent; mistake of law

In addition to situations in which, unknown to police, a search warrant is mistakenly granted, the “good faith” exception to the exclusionary rule applies when law enforcement relies on a statute authorizing warrantless searches later found to be unconstitutional. [U.S. Const. Amend. 4](#).

[16] Search, Seizure, and Arrest  Nexus between place to be searched and evidence sought

Search, Seizure, and Arrest  Probable or Reasonable Cause

“Probable cause” exists, of kind required for issuance of search warrant or the grant of wiretap application, when the issuing judge determines that there is a fair probability that contraband or

evidence of a crime will be found in particular place. [U.S. Const. Amend. 4](#); [18 U.S.C.A. § 2518](#).

[17] Search, Seizure, and Arrest  Interception or disclosure of electronic communications

On challenge to wiretap authorization, reviewing courts are tasked only with looking at the four corners of wiretap application to determine if there is a substantial basis for findings of probable cause. [18 U.S.C.A. § 2518](#).

[18] Search, Seizure, and Arrest  Reliability or credibility; corroboration

Evidence was sufficient to support a “probable cause” finding that defendant and his codefendants were members of conspiracy to traffic in prescription opioids, as required for authorization of wiretap of defendant's cell phone for evidence of this conspiracy, given information from confidential informant who had provided reliable information in past that defendant was obtaining prescriptions for opioids from doctor, both in his own name and in name of confederate, which the two then distributed to others, information that police officer corroborated with information obtained from Nevada's Prescription Monitoring Program (PMP) database and from his observation of relevant parties, as well as through controlled drug buys from alleged members of conspiracy. [18 U.S.C.A. § 2518](#).

[19] Search, Seizure, and Arrest  Necessity; inadequacy of other procedures

Generally, in order to overcome the statutory presumption against granting a wiretap application, government must make a showing of the necessity therefor.

[20] Search, Seizure, and Arrest  Necessity; inadequacy of other procedures

In order to authorize wiretap, court must find that normal investigative techniques employing a

normal amount of resources have failed to make the case within a reasonable period of time.

[21] Search, Seizure, and Arrest  Necessity; inadequacy of other procedures

Mere presence of boilerplate language in wiretap application was not determinative of whether applicant had made requisite showing of the necessity for wiretap; rather, in deciding whether the requisite showing had been made, court was tasked with looking at the accompanying affidavits as a whole.

[22] Search, Seizure, and Arrest  Necessity; inadequacy of other procedures

Law enforcement officer applying for wiretap of suspected opioid trafficking conspirator's personal cell phone made the requisite showing of necessity for wiretap, despite suspect's contention that officer should have first made greater use of confidential sources, worked toward developing cooperators, or sought warrant for search of office of doctor from whom suspect allegedly obtained prescriptions for different opioids, where officer explained that none of his confidential sources was especially close to suspected leaders of conspiracy and would have aroused suspicions by attempting to insert themselves into the latters' dealings, explained why other investigative techniques had not led to information about other members of conspiracy, and explained that search warrant would be ineffective, not only because it would reveal existence of investigation, but because there was no intelligence to indicate that doctor illegally stored prescription opioids at his office.

Cameron, [Janice Anne Hubbard](#), Law Office of Janice Hubbard, LLC, Theresa A. Ristenpart, Ristenpart Law, LLC, [David R. Houston](#), [Scott W. Edwards](#), [Cheryl A. Field-Lang](#), Reno, NV, for Defendants.

ORDER

[LARRY R. HICKS](#), UNITED STATES DISTRICT JUDGE

Defendant Myron Motley has filed a motion to suppress evidence obtained via two search warrants dated September 6 and December 7, 2018. (ECF No. 113). Motley also contests the validity of a Title III wiretap warrant issued by this Court on March 22, 2019. The government responded (ECF No. 124), and Motley timely replied (ECF No. 127) and then subsequently filed a "supplement" to his reply (ECF No. 129). One of Motley's co-defendants, Joseph Jeannette, filed a motion to join in his motion to suppress. (ECF No. 114). For the reasons stated below, the Court denies Jeannette's motion for joinder and Motley's motion to suppress.¹

I. Factual Background and Procedural History

The following facts are adduced from the various pleadings and exhibits in the record. Motley currently faces charges in two separate cases. In Case No. 3:19-cr-00026-LRH-WGC, Motley and six other codefendants, are, to various degrees, indicted on thirteen charges related to a scheme to distribute oxycodone and hydrocodone (Motley is the only defendant indicted for conspiracy to distribute methamphetamine). (ECF No. 1). In Case No. 3:19-cr-00027-LRH-WGC, Motley is indicted alongside Randy Raihall (who is not a defendant in the other case) with distribution of hydrocodone. In his motion to suppress, Motley primarily challenges the issuance of two search warrants, the first of which was issued by a Nevada state court on September 6, 2018, and the second issued by this Court on December 7, 2018.

A. September 6, 2018 Search Warrant

In the application for that warrant, Detective Chris Johnson of the Reno Police Department ("RPD") stated that on July 27, 2018, he was contacted by a confidential informant ("CI," later referred to in the Title III wiretap application as "CS-1") with information that Motley was selling "illegal prescription narcotics" in the Reno/Sparks area. (ECF No. 113-1 at 3).

Detective Johnson stated that the CI “has been proven reliable during the course of a controlled drug purchase.” (*Id.*) The CI told Detective Johnson that Motley routinely travels from California to Reno, Nevada, to meet with a physician who worked at Renown Health; the physician would then write Motley prescriptions for oxycodone. (*Id.*) Additionally, the physician would give Motley a “stack of prescriptions in other people's names” for Motley to sell to them. *1207 (*Id.*) One of these individuals was the CI's spouse, who had purportedly received a prescription from the physician despite having never met him. (*Id.*) The CI went on to explain that Motley would fill most of his prescriptions at the Walgreens pharmacy on South Virginia Street in Reno. (*Id.*) Another detective with the RPD, Detective Leedy, obtained Motley's information from Nevada's Prescription Monitoring Program database (“PMP database”), which is a “database of information regarding the controlled substance prescriptions” dispensed to individuals in Nevada.² (*Id.*) Motley's PMP report indicated that he had routinely received oxycodone and tramadol from a “particular physician” (later revealed to be defendant Eric Math) averaging 279 morphine milligram equivalent (“MME”) per day. (*Id.* at 4). Detective Johnson stated that according to Centers of Disease Control and Prevention (“CDC”) guidelines, increasing the dosage of opioids to over 90 MME per day can increase the risk of overdose. (*Id.*) The “above prescription pattern,” he continued, “can be an indicator for opioid abuse or diversion.” (*Id.*)

Detective Johnson then related his attempts to track Motley. On August 14, 2018, the CI told Johnson that Motley was staying at the Grand Sierra Resort (“GSR”) hotel and casino in Reno. (ECF No. 113-1 at 4). Motley's PMP report indicated that he had filled his opioid prescriptions at his usual Walgreens four days earlier. (*Id.*) A vehicle records check revealed that Motley had a dark gray 2017 Nissan Rogue registered in his name; officers attempted to locate the automobile in the GSR parking lot but were unsuccessful. (*Id.* at 5). The following day, officers observed Motley in the GSR on the casino floor, but they were unable to track him after he disappeared into the residential portion of the casino. (*Id.*) Based on Detective Johnson's narrative and Motley's lengthy criminal history of drug trafficking, the state court granted the search warrant and allowed police to place a tracking device on Motley's Nissan.

B. December 7, 2018 Search Warrant

The second search warrant, issued on December 7, 2018, by Magistrate Judge Carla Baldwin, also sought to place a tracking device on Motley's Nissan. (ECF No. 113-2 at 4). In the warrant application, FBI Special Agent Erik Anderson summarized the relevant details of Detective Johnson's warrant and provided updates on the investigation since the issuance of the September 6 warrant. Agent Anderson stated that Motley had been spotted with several individuals, including Jeannette, at the Walgreens pharmacy on South Virginia Street. (*Id.* at 11). A check of Jeannette's PMP report revealed that Math had been prescribing him an average of 372 MME of opioids per day, well-above the CDC's recommended 90 MME limit. (*Id.*) Motley was observed traveling to various Reno-area casinos with Jeannette, where the two would sometimes meet with Math. (*Id.* at 12). Motley was also observed having brief meetings with individuals, including defendant Michael Slater (to whom Math had not prescribed any opioids), shortly after filling prescriptions at the Walgreens. (*Id.* at 13–14). In Agent Anderson's opinion, this was indicative of Motley illegally supplying opioids to these individuals. (*Id.*) Based on the information contained within Agent Anderson's affidavit, *1208 Judge Baldwin granted the search warrant.

C. March 22, 2019 Title III Wiretap Application

On March 22, 2019, Agent Anderson and the U.S. Attorney's Office for the District of Nevada applied to Chief Judge Miranda M. Du for a Title III wiretap of Motley's cell phone. (ECF No. 113-3 at 2–3). In Agent Anderson's affidavit accompanying the application, he alleged that Motley, Math, Jeannette, Slater, defendant Michael Kwoka, and defendant Alesia Sampson were involved in a drug trafficking organization (“DTO”) with Motley occupying a leadership position. (*Id.* at 35). Agent Anderson stated that three confidential sources were used in the investigation – CS-1, CS-2, and CS-3. (*Id.* at 39). CS-1, who is the same individual Detective Johnson used in his original investigation, alleged that Motley “managed at least five individuals” who were being supplied with opioids by Math. (*Id.* at 41). Motley would obtain an opioid prescription from Math written for one of his associates and then sell that associate the corresponding prescription. (*Id.*) The associate would fill the prescription and give Motley a cut of the pills. (*Id.*) Motley used his cell phone to coordinate these transactions. (*Id.*) CS-2 stated that Motley sells the majority of his prescription narcotics to Slater, who was the person who introduced CS-2 to Motley. (*Id.* at 42, 59). Agent Anderson

noted that “[m]uch of the information” provided by CS-2 had been corroborated through other investigative means, such as physical surveillance, CS-3, recorded meetings, and text messages. (*Id.* at 42, 62–63, 69). As for CS-3, Agent Anderson stated that CS-3 participated in recorded conversations with Slater and also provided text messages from Slater, both of which implicated Slater as a DTO member. (*Id.* at 43).

In his affidavit, Agent Anderson provided a detailed background of the investigation, incorporating much of the information used in the September 6 and December 7 search warrant applications along with new information obtained in part as a result of those warrants. (ECF No. 113-3 at 47–81). The new information included controlled buys conducted by law enforcement, whereby CS-2 and CS-3 purchased opioids from Motley and Slater respectively while wearing audio and video recording equipment. (*Id.* at 64–67, 70–71). Cell phone records from defendants indicate that from February 14 through March 13, 2019, Motley used his phone to contact Math 7 times, Slater 26 times, Jeannette 90 times, Kwoka 147 times, and Sampson 11 times. (*Id.* at 74–75, 78–80).

Agent Anderson also explained why certain investigative techniques were not used, considered, or otherwise would be ineffective to seek the information the wiretap would provide. Regarding additional confidential sources, Agent Anderson stated that while the confidential sources investigators had used up until that point provided them with useful information, none of the three were particularly close to either Motley or Math, the two heads of the DTO. (ECF No. 113-3 at 87–89). Agent Anderson believed that given the confidential sources' relationships (or lack thereof in the case of CS-1) with Motley and Slater were that of buyer-seller, it would have been suspicious for any of them to try to insert themselves into their operation. (*Id.*) Investigators also considered using Slater as a collaborator, but decided against it because “it [was] unlikely that Motley would share information with Slater regarding how Motley obtain[ed] the prescription opioids since to do so would eliminate Motley's need to be a seller of [opioids] to Slater.” (*Id.* at 90). Agent Anderson similarly believed that trying to introduce an undercover investigator into Motley's organization would be ineffective because “it is not feasible in the *1209 Reno area to introduce [an undercover officer] into a DTO such as this at a level high enough to accomplish the goals of the investigation.” (*Id.* at 93). In particular, he did not believe that any undercover officer would be able to infiltrate Motley's DTO any higher than CS-2 had. (*Id.* at 94).

Chief Judge Du granted the application for the Title III wiretap. Motley and his codefendants were indicted with the charges outlined above on May 23, 2019. (ECF No. 1). Following several continuances, Motley filed the instant motion to suppress on January 24, 2020 (ECF No. 113), to which Jeannette filed a motion to join (ECF No. 114).

II. Discussion

A. Jeannette's Motion for Joinder

[1] [2] Before the Court reaches the merits of Motley's motion to suppress, the Court will first discuss Jeannette's motion for joinder. In his motion, Jeannette argues that he should be allowed to join Motley's motion because he “is an indicted member of the same alleged conspiracy” and “the issues raised in the motion apply with equal force” to him. (ECF No. 114 at 1). It is well-established, however, that a third party does not have “standing” to challenge the search and seizure of another's property because Fourth Amendment rights are personal in nature and cannot be asserted vicariously. *Rakas v. Illinois*, 439 U.S. 128, 133–34, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). This case involves two tracking devices placed on Motley's vehicle and a wiretap targeting Motley's personal cell phone. Jeannette has not alleged that his vehicle or any of his personal property was the target of government intrusion. Accordingly, Jeannette cannot challenge evidence obtained as a direct result of the September 6 and December 7, 2018 search warrants. *See, e.g., U.S. v. Hernandez*, 647 F.3d 216, 219 (5th Cir. 2011) (defendant could not challenge the placing of a GPS device on his brother's truck because he did not own the truck or regularly drive it); *U.S. v. Rivera*, No. 11-CR-0196-J, 2012 WL 12919987, at *3 (D. Wyo. Mar. 22, 2012) (stating that certain defendants lacked the capacity to challenge the government's use of GPS devices because they neither owned or possessed the target vehicles).

[3] [4] [5] On the other hand, an illegal wiretap may be challenged by any person “aggrieved” by the surveillance. *U.S. v. Taketa*, 923 F.2d 665, 676 (9th Cir. 1991) (citing 18 U.S.C. § 2518(10)(a)). The Ninth Circuit has interpreted the phrase “aggrieved person” to mean anyone who was a participant in an intercepted conversation or against whom the interception was directed. *U.S. v. Oliva*, 705 F.3d 390, 395 (9th Cir. 2012); *U.S. v. King*, 478 F.2d 494, 506 (9th Cir. 1973). In Agent Anderson's affidavit, Jeannette is specifically

listed as a suspected member of the Motley DTO who had significant communication with Motley himself. (ECF No. 113-3 at 78–79). But in his motion for joinder, Jeannette does not identify any of Motley's intercepted communications in which he (Jeannette) was a participant. Jeannette does not have the capacity to challenge any intercepted communication of which he was not part; given that Jeannette has not identified any communications to which he was a party, the Court will deny his motion for joinder in full. *See, e.g., U.S. v. Azano Matsura*, 129 F.Supp.3d 975, 979 (S.D. Cal. 2015) (rejecting defendants' argument that because they were parties to at least one intercepted communication, they may challenge the contents of all intercepted communications).³

*1210 B. September 6 and December 7, 2018 Search Warrants

[6] [7] The central argument in Motley's motion to suppress is that law enforcement should have obtained a warrant before accessing his information in Nevada's PMP database because he had an objectively reasonable expectation of privacy in his information stored in the database. (ECF No. 113 at 8). The threshold question in any Fourth Amendment challenge to a search is whether the defendant had a reasonable expectation of privacy in the property or place searched. *O'Connor v. Ortega*, 480 U.S. 709, 715, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987). This expectation is established where the defendant can show both a subjectively and objectively reasonable expectation of privacy. *U.S. v. Ziegler*, 474 F.3d 1184, 1189 (9th Cir. 2007) (citing *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979)). This case presents a less straightforward question than most Fourth Amendment cases because the place that was searched was an online database not accessible to the general public.

Like nearly every other state, Nevada operates an online database that requires pharmacies and doctors to track prescriptions filled for schedule II, III, IV, and V controlled substances. *NEV. REV. STAT. § 453.162* (2020). The database is designed to provide information regarding the “inappropriate use by a patient of controlled substances to pharmacies, practitioners...appropriate state and local governmental agents...[and] law enforcement agencies...to prevent the improper or illegal use of those controlled substances. *Id.* § 1(a)(1). The statute and applicable regulations require pharmacies that dispense one of the covered controlled substances to log certain information, such as the name, address, and phone number of the

individual prescribed the controlled substance. *Id.* § 453.163; *NEV. ADMIN. CODE § 639.926 (2018)*. The pharmacy is also required to provide information regarding the substance prescribed, refill amount, and quantity dispensed. *NEV. ADMIN. CODE § 639.926 (2018)*. Only authorized individuals, such as practitioners and pharmacists, are allowed access to the database, and only for limited purposes. *NEV. REV. STAT. § 453.164* (2020). Law enforcement officers are allowed to access the database, but they may do so only to “investigate a crime related to prescription drugs” or log information related to an investigation. *Id.* § 453.165. There is no requirement that law enforcement obtain a search warrant before accessing the database.

The Supreme Court addressed prescription monitoring legislation in *Whalen v. Roe*, 429 U.S. 589, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). There, New York passed a law requiring the names and addresses of all people prescribed certain drugs along with information about the prescription be entered into a rudimentary digital database. *Id.* at 591, 97 S.Ct. 869. The Supreme Court upheld a privacy challenge to the law, noting that “individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.” *Id.* at 597, 97 S.Ct. 869. New York had a “vital interest” in controlling the distribution of dangerous drugs in its territory, and it could do so via the monitoring program. *Id.* The challengers had argued that the statute invaded a constitutionally protected “zone of privacy,” but the Supreme Court rejected this argument. It noted that the prescription information that had to be provided was shielded from public view with only a select group of *1211 individuals capable of accessing it. *Id.* at 601–02, 97 S.Ct. 869. And for those people, the Supreme Court stated that disclosure to them was not “meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care” and disclosures to people like doctors, hospital personnel, and public health agencies are “often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.” *Id.* at 602, 97 S.Ct. 869. “Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.” *Id.* Notably, the Supreme Court rejected the challengers' argument that a right of privacy emanated from the Fourth Amendment. *Id.* at 604, n. 32, 97 S.Ct. 869.

Little caselaw is available concerning the interaction between the Fourth Amendment and PMP databases. In one case, the

Drug Enforcement Administration (DEA) filed suit against the Utah Department of Commerce when it refused to honor an administrative subpoena that sought controlled substance prescription records of a criminal suspect. *U.S. Dep't of Justice v. Utah Dep't of Commerce*, No. 2:16-cv-611-DN-DBP, 2017 WL 3189868 (D. Utah July 27, 2017). Like Nevada, Utah had a prescription drug database that catalogued much of the same information as the PMP database at issue here. *Id.* at *3. Utah refused to honor the DEA subpoena because it did not first obtain a warrant to search the database, but the District of Utah ultimately ruled that the DEA was not bound by a requirement to obtain a search warrant. That court noted that under the Controlled Substances Act (CSA), the DEA was authorized to issue administrative subpoenas to investigate drug-related crimes that, under the applicable law, only required “reasonable relevance,” not probable cause. *Id.* at *2, 7. In doing so, the court held that individuals did not have a reasonable expectation of privacy in Utah's prescription database:

Controlled substance use is further regulated by the State of Utah under the Database Act, which has a parallel regulatory purpose. A patient in Utah decides to trust a prescribing physician with health information to facilitate a diagnosis. In so doing, a patient takes the risk—in this circumstance, a certainty—that his or her information will be conveyed to the government as required by the Database Act. The Supreme Court “has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.” Surely there is even less expectation of privacy in records held by a governmental entity, when considering a request by another governmental entity.

Id. at *8 (internal citations omitted). The court concluded by noting that while the state of Utah had the authority to require its own law enforcement officials to obtain a warrant before accessing the database, the Fourth Amendment did not require one. *Id.*

The District of Oregon faced a similar question in *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 998 F.Supp.2d 957 (D. Or. 2014). There, the DEA had served the same type of administrative subpoena on Oregon's prescription monitoring database, which the state similarly rejected. *Id.* at 960. Under Oregon law, health officials could only disseminate information contained in

the database to law enforcement *1212 if they obtained a valid court order based on probable cause. *Id.* Similar to the Utah case, Oregon sought a declaration that it was not required to comply with the administrative subpoena. The district court “easily” found that individuals with information in the database had an objectively reasonable expectation of privacy, but this determination was later overturned on appeal because the court failed to conduct the proper standing analysis for the patient challengers. *Id.* at 966; *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 860 F.3d 1228 (9th Cir. 2017). Outside of the standing issue, the Ninth Circuit found, like the District of Utah, that the CSA's administrative subpoena function preempted Oregon's requirement that law enforcement obtain a probable cause-based court order. *Oregon Prescription Drug Monitoring Program*, 860 F.3d at 1237.

After reviewing the relevant case law, the Court finds that Motley does not have a reasonable expectation of privacy in the information contained in Nevada's PMP database. The reasonable expectation of privacy inquiry has two components—a defendant must have a subjective expectation of privacy in the place searched, and society must be willing to recognize that expectation as reasonable. *Smith v. Maryland*, 442 U.S. 735, 740, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). It is unclear here whether Motley had a subjective expectation of privacy in his PMP records. There is no evidence to indicate that Motley knew of the database's existence during the time he filled the opioid prescriptions prescribed by Math, and he does not make any assertion of his knowledge in briefing.

[8] [9] But even assuming that Motley did have a subjective expectation of privacy in his database information, that expectation was not reasonable. First, the PMP database and the information contained within are maintained by a governmental entity (the Nevada State Board of Pharmacy) entirely outside of Motley's control. The Supreme Court's decision in *Whalen* established that States have a compelling interest in ensuring that prescription medication is not mishandled or abused within their borders, and a digital monitoring database is one permissible way of achieving that objective. *Whalen v. Roe*, 429 U.S. 589, 597, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). The Nevada State Board of Pharmacy grants law enforcement access to a suspect's information when they suspect illegal activity involving prescription drugs. NEV. REV. STAT. § 453.165 (2020). By the time the disclosure occurred in July 2018, Motley had already voluntarily released his information to multiple third parties—the prescribing physician (Math), the pharmacy technicians

who filled his order, and the governmental entity that operates the PMP database. The Supreme Court has held that the “Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [the third party] to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.” *U.S. v. Miller*, 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). This concept is referred to as the third-party doctrine.

In his reply, Motley cites to *Carpenter v. U.S.*, — U.S. —, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018), for the first time, arguing that the cell site data at issue in that case is the same as the PMP records in this case. But *Carpenter* is readily distinguishable. At issue in *Carpenter* was a standard practice of law enforcement at the time. They were obtaining cell site data from private entities, namely telecommunication companies like T-Mobile and Verizon, without search warrants. *Id.* at 2211–12. This data is generated when a cell phone pings off of a cell tower, and *1213 when gathered together, the data establishes a suspect’s location at any given time. *Id.* The Supreme Court held that warrantless access to cell site data was a violation of the Fourth Amendment; given the “unique nature of cell phone location records” that show a suspect’s movements just as effectively as a GPS tracking device, it made little sense to treat the two investigation techniques differently. *Id.* at 2216–17. Despite holding that the third-party doctrine did not apply to cell site data, the Supreme Court did not overturn *U.S. v. Miller*, the case that established the doctrine, instead noting that “a warrant is required in the *rare case* where the suspect has a legitimate privacy interest in records held by a third party.” *Id.* at 2222 (emphasis added).

The first difference between *Carpenter* and the instant case is what entity holds the data sought by the government. In *Carpenter*, the government (law enforcement) sought location data from private entities. — U.S. —, 138 S. Ct. 2206, 2211, 201 L.Ed.2d 507 (2018). But here, law enforcement sought prescription information from another governmental entity, the Nevada State Board of Pharmacy. As the District of Utah noted, there is a lesser expectation of privacy when a governmental entity requests records from another governmental entity as opposed to when the government requests information from a private entity. *U.S. Dep’t of Justice v. Utah Dep’t of Commerce*, No. 2:16-cv-611-DN-DBP, 2017 WL 3189868, at *8 (D. Utah July 27, 2017). See also *U.S. v. Hamilton*, 434 F.Supp.2d 974 (D. Or.

2006) (denying motion to suppress employment and financial records obtained from state employment office by a federal officer without a warrant).

[10] Second, individuals who receive prescription drugs do not have any reasonable expectation of privacy in the highly regulated prescription drug industry. In *U.S. v. Miller*, the Supreme Court held that a suspect did not have a reasonable expectation of privacy in records kept by his bank. 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). There, in the course of an ATF investigation, the federal government sought and received warrantless access to a suspect’s banking records, which consisted of checks, deposit slips, and account information. *Id.* at 437–38, 96 S.Ct. 1619. The court ruled that the defendant did not have any Fourth Amendment interest in the bank records because not only were the records the property of the bank, the bank kept them pursuant to the Bank Secrecy Act. *Id.* at 440–41, 96 S.Ct. 1619. Similarly, pharmacies are required to keep certain records pursuant to the Controlled Substances Act, and other courts have noted that the pharmaceutical industry is highly regulated by the federal government. *U.S. v. Acklen*, 690 F.2d 70, 75 (6th Cir. 1982) (the “pharmaceutical industry, like the mining, firearms, and liquor industries, is a pervasively regulated industry and that consequently pharmacists and distributors subject to the Controlled Substances Act have a reduced expectation of privacy in the records kept in compliance with the Act.”). See also *Big Ridge, Inc. v. Federal Mine Safety and Health Review Com’n.*, 715 F.3d 631 (7th Cir. 2013) (holding that miners did not have a Fourth Amendment expectation of privacy in health and personnel records held by their employers when, pursuant to the Mine Safety Act, a federal agency requested the records to ensure compliance). Given that the pharmaceutical industry is required by federal law to keep the types of records sought by Detective Leedy in this case, Motley did not have a reasonable expectation of privacy in the PMP database.⁴

*1214 Motley attempts to conflate information related to the lawful distribution of controlled substances with “medical records,” citing to *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004), but this comparison is misguided. (ECF No. 113 at 15). One of the legal challenges in that case was to an Arizona law that allowed the state’s Department of Health Services access to medical records kept at abortion clinics. *Id.* at 537. The Ninth Circuit held that this provision was unconstitutional because the abortion industry was not a “closely regulated” industry like, for instance, the liquor or veterinary drug industries. *Id.* at 550. Accordingly, the records

held at Arizona abortion clinics were not kept pursuant to federal law, unlike the PMP records at issue here, but rather in the course of the abortion clinics' ordinary business practices. An individual's general medical records are substantially different from an individual's prescription drug records.

Motley makes passing reference to the Health Insurance Portability and Accountability Act (HIPAA), asserting that “[n]one of the HIPAA exceptions to disclosures at the request of law enforcement officials cover warrantless searches of the PMP database.” (ECF No. 113 at 18). PMP databases, however, are not covered entities under HIPAA. HIPAA mandates that “covered entities” (health plans, healthcare clearinghouses, and healthcare providers) that transmit health information electronically abide by certain privacy rules. 45 C.F.R. §§ 160.103, 164.502. PMP databases are clearly not health plans or healthcare providers. HIPAA defines a “healthcare clearinghouse” as “a public or private entity that processes or facilitates processing of information received from another entity in nonstandard format or containing nonstandard data content into standard data elements or a standard transaction.” *Id.* § 160.103. A “transaction” is a “transmission of information between two parties to carry out financial or administrative activities related to health care.” *Id.* The primary purpose of the Nevada PMP database is to monitor the distribution and use of controlled substances to prevent abuse or criminal activity; this is clearly not a “financial or administrative activity.” PMP databases, therefore, cannot be considered healthcare clearinghouses, and are accordingly not covered under HIPAA.

[11] [12] [13] [14] [15] Even if Motley had reasonable expectation of privacy in the PMP database, Detective Leedy's search of it without a warrant is subject to the good faith exception. When evidence is obtained in violation of the Fourth Amendment, the exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search. *Mapp v. Ohio*, 367 U.S. 643, 649, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). But because the purpose of the exclusionary rule is to deter police misconduct, *U.S. v. Calandra*, 414 U.S. 338, 348, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), it does not apply in situations where exclusion of the evidence obtained would not alter the misbehavior of law enforcement officers, *U.S. v. Krull*, 480 U.S. 340, 348–49, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987). In addition to cases where, unknown to police, a search warrant is mistakenly granted, the good faith exception to the exclusionary rule applies where law enforcement rely on a statute authorizing warrantless

searches later *1215 found to be unconstitutional. *Id.* at 349–50, 107 S.Ct. 1160.

Detective Leedy had every reason to believe that he was authorized to access Motley's PMP records without a search warrant. The operative Nevada statute authorized him to inspect an individual's data in the PMP database in the course of an investigation into crimes involving prescription drugs. NEV. REV. STAT. § 453.165 (2020). Even if the warrantless search provision of the statute is later found to be unconstitutional, at the time of his investigation, he believed he was acting lawfully. A statement the Supreme Court made in *U.S. v. Leon* explains why excluding the evidence in this case would be misguided—“excluding the evidence can in no way affect [an officer's] future conduct unless it is to make him less willing to do his duty.” 468 U.S. 897, 920, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). See also *Davis v. U.S.*, 564 U.S. 229, 240, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (“In 27 years of practice under *Leon*'s good-faith exception, [the Supreme Court has] never applied the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct.”). Motley argues that there can be no good faith exception because of the District of Oregon's decision in 2014, but not only was that case non-binding in the District of Nevada and did not address Nevada's statute, it was overturned in 2017—well before Detective Leedy accessed the PMP database in July 2018.

Motley does not challenge any other aspect of the two search warrants, such as whether they allege facts sufficient to sustain a finding of probable cause. Accordingly, the Court will deny his motion to suppress the fruits of the two search warrants.

C. March 22, 2019 Title III Wiretap Application

Motley raises two arguments as to the validity of the March 22, 2019 wiretap application. First, he argues that there was insufficient evidence to support a probable cause finding that he and his codefendants were members of a drug trafficking organization (“DTO”). (ECF No. 113 at 21). Second, he argues that even if there was probable cause to support such a finding, the affidavit attached to the wiretap application failed to demonstrate a genuine necessity for electronic surveillance. (*Id.* at 24).

[16] [17] 18 U.S.C. § 2518 lists the requirements the government must meet to have a wiretap application granted. Relevant here, the government must demonstrate that:

- (a) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
- (b) There is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
- (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous; [and]
- (d) ... there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

Id. at (3). “Probable cause” exists when the issuing judge determines that there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Reviewing courts are tasked with only looking at the four corners of a wiretap *1216 application to determine if there is a “substantial basis” for the findings of probable cause. *U.S. v. Meling*, 47 F.3d 1546, 1552 (9th Cir. 1995).

[18] Motley argues that Agent Anderson's affidavit “fails to provide any evidence of a conspiratorial connection” between the defendants to traffic drugs. (ECF No. 113 at 21). The Court disagrees. Agent Anderson's affidavit notes that a reliable confidential source provided information to investigators that Math regularly sells prescription medication to Motley. (ECF No. 113-3 at 40–43). Two other confidential sources informed investigators that Motley resells opioids to Slater. (*Id.*) The PMP database records of Motley and Jeannette confirmed that Math had been prescribing them large dosages of opioids for some time. (*Id.* at 50). Law enforcement observed Motley repeatedly meeting with Math (at casinos), Jeannette, and Slater; Motley was also seen meeting briefly with Slater at his (Slater's) residence, and he was seen traveling around with Jeannette to pharmacies to fill opioid prescriptions. (*Id.* at 54–55). Investigators further observed Math, Kwoka, and Sampson together at a casino, where Kwoka was spotted dropping “a stack of cash” next to Math in exchange for a

piece of paper that was believed to be an opioid prescription. (*Id.* at 56). Further investigation revealed meetings between Motley, Kwoka, and Math. (*Id.* at 58–59). After those meetings, Motley would meet with Slater at his apartment. (*Id.*) Agent Anderson noted that Motley would frequently travel to Slater's apartment shortly after filling an opioid prescription at the Walgreens pharmacy, which lead him to believe that Motley was selling part of the opioids to Slater. (*Id.* at 61).

Agent Anderson also discussed several controlled buys that CS-2 and CS-3 participated in on behalf of law enforcement. CS-2 purchased oxycodone from Motley three times, once each on January 3, January 11, and March 14, 2019. (ECF No. 113-3 at 63–68, 73). Slater was the individual who initially contacted CS-2 via text to inform CS-2 that Motley had opioids available for sale. (*Id.* at 63). Previously, CS-3 had participated in a controlled buy with Slater and purchased opioids from him on December 18, 2018. (*Id.* at 70). Motley's phone records indicated that he had frequent contact with each of his codefendants between February 14 and March 13, 2019, especially with Jeannette and Kwoka, the former of whom he contacted 90 times and the latter 147 times. (*Id.* at 78–79).

Agent Anderson's affidavit establishes that: (1) the six codefendants were well-acquainted with each other; (2) Motley and Jeannette were regularly obtaining large quantities of opioids from Math, and (3) Motley was regularly selling opioids to Slater and other individuals, including confidential sources. The Court finds that Agent Anderson's affidavit established that there was probable cause to believe that Motley was engaged in a conspiracy to illegally distribute prescription opioids.

[19] [20] [21] Motley next argues that the affidavit was insufficient to establish that a wiretap was necessary. (ECF No. 113 at 26). Generally, the government must overcome the statutory presumption against granting a wiretap application by showing necessity. *U.S. v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985) (citing *U.S. v. Giordano*, 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974)). The court must find that “normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time.” *Id.* (quoting *U.S. v. Spagnuolo*, 549 F.2d 705, 710 (9th Cir. 1977)). Although Motley repeatedly complains of “boilerplate” language in Agent Anderson's affidavit (ECF No. 113 at 25), *1217 the presence of boilerplate language is not determinative to the necessity issue. *U.S. v. Garcia-Villalba*, 585 F.3d 1223, 1230 (9th Cir. 2009). Instead, courts

are tasked with looking at the accompanying affidavits as a whole. *Id.*

[22] Motley makes two arguments as to necessity.⁵ First, he argues that law enforcement failed to exhaust their confidential sources or work towards developing cooperators. (ECF No. 113 at 26). He asserts that law enforcement's failure to use CS-1's spouse as a confidential source because the spouse "was a drug addict" was "perplexing" given that CS-1 and CS-3 were also known drug users. (*Id.* at 27). Without a citation to evidence, he calls into doubt whether law enforcement ever approached CS-1's spouse "to assess her willingness to cooperate." (*Id.*) Missing from Motley's edited citations to Agent Anderson's affidavit is the latter's explanation why investigators never utilized CS-1's spouse as a confidential source – "CS-1's spouse was a drug addict and therefore unwilling to cooperate with investigators *since any cooperation on his/her part would mean termination of access to prescription opioids.*" (ECF No. 113-3 at 88) (emphasis added). It is logical to believe that someone addicted to prescription opioids would not want to endanger access to the opioids. Agent Anderson's explanation is certainly not, as Motley argues, "absurd." (ECF No. 113 at 27). Motley claims that CS-1's spouse would have been a "perfect cooperator," but he does not explain how the spouse would be "perfect" for achieving the aims of the investigation. (*Id.*) Agent Anderson's explanation that neither of the three confidential sources, especially CS-3, were especially close to Math or Motley is sufficient to establish that further utilization of any of them would not have been effective.

Motley also claims that Slater "was uniquely situated to infiltrate the alleged Mora-led [sic] DTO" and complains that investigators dismissed him as a possible confidant because he too was a drug user. (ECF No. 113 at 27). But Motley once again ignores Agent Anderson's explanation for why Slater would not have been an effective informant — "Although Slater is frequent[ly in] contact with Motley and is aware of what prescription opioids Motley will be selling, it is unlikely Motley would share information with Slater regarding how Motley obtains the prescription opioids since to do so would eliminate Motley's need to be a seller of prescription opioids to Slater." (ECF No. 113-3 at 90). This explanation is sufficient to show that utilizing Slater would likely not have advanced the goals of the investigation.

Second, Motley argues that law enforcement failed to consider utilizing an undercover officer as a prospective patient to infiltrate Math's office. (ECF No. 113 at 27). He

claims it is a "common practice" in investigations involving an overprescribing physician, but it was "inexplicably" not used in this case. (*Id.*) Motley's argument is belied by the evidence in this case, which shows that Math frequently conducted drug deals at Reno-area casinos rather than his office. Motley does not explain how effective introducing an undercover officer as a prospective patient would be. It is unclear to the Court how said officer would be able to infiltrate the Motley DTO simply by becoming a patient of Math. In his affidavit, Agent Anderson explained that given the relatively small scale of the Motley DTO, it would not have *1218 been feasible to introduce an undercover officer to the DTO beyond the officer completing a few low-level buys from either Slater or Motley. (ECF No. 113-3 at 93–94). The limitations of CS-2 and CS-3 provide credence to Agent Anderson's explanation.

Motley has not identified any other portions of Agent Anderson's affidavit that he claims are defective regarding the necessity of a wiretap. Upon a review of the other investigation methods considered by law enforcement, the Court is satisfied that they were given the appropriate level of thought as to their effectiveness. For example, law enforcement planned to conduct additional physical surveillance of the defendants and related individuals, but Agent Anderson noted that physical surveillance up until that point had failed to identify any other possible members of the DTO, such as an inside source at a pharmacy. (ECF No. 113-3 at 96). Agent Anderson also explained that search warrants would be ineffective because not only would their use reveal the existence of the investigation to defendants, but there was no intelligence to indicate that Math illegally stored prescription opioids at his office. The Court will accordingly deny Motley's motion to suppress the fruits of the March 22, 2019 wiretap.

III. Conclusion

IT IS THEREFORE ORDERED that defendant Joseph Jeannette's motion for joinder (ECF No. 114) is **DENIED**.

IT IS FURTHER ORDERED that defendant Myron Motley's motion to suppress evidence (ECF No. 113) is **DENIED**.

IT IS FURTHER ORDERED that this order be filed in Case No. 3:19-cr-00027-LRH-WGC, where it will serve to **DENY** Motley's motion to suppress evidence (ECF No. 47).

IT IS SO ORDERED.

All Citations

443 F.Supp.3d 1203

Footnotes

- 1 Motley filed an identical motion to suppress in a parallel case (Case No. 3:19-cr-00027). (ECF No. 47). Accordingly, this order will also be filed in that case, but the document numbers referred to herein will be from Case No. 3:19-cr-00026.
- 2 *Prescription Monitoring Program (PMP)*, NEVADA STATE BOARD OF PHARMACY, <http://bop.nv.gov/links/PMP/> (last visited March 3, 2020). The Board of Pharmacy's website explains that the database is "an online tool that allows prescribers and dispensers access to a patient's controlled substance prescription medication history." It also "aids...law enforcement agencies in the detection and prevention of fraud, drug abuse, and the criminal diversion of controlled substances."
- 3 Ordinarily, the Court would deny Jeanette's motion without prejudice and afford him an opportunity to identify the specific communications in which he alleges he participated. But because the Court finds that the March 22, 2019 wiretap application was lawfully granted, any amendment Jeanette could make would be futile.
- 4 Moreover, it is uncontested that a federal law enforcement officer could have obtained Motley's records in the PMP database through an administrative subpoena, which does not require probable cause. *Oregon Prescription Drug Monitoring Program v. U.S. Drug Enforcement Admin.*, 860 F.3d 1228, 1236–37 (9th Cir. 2017). Absent state law to the contrary, it would be illogical to allow a federal agent to obtain the records without a warrant but require a state agent to obtain a warrant before he could access the records.
- 5 Motley also makes a conclusory statement that "[c]ommencing a financial investigation is a condition precedent to a showing of necessity for a wiretap," but he cites to no supporting law. The Court declines to address arguments made without citation to controlling or persuasive authority.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

UNITED STATES DISTRICT COURT

District of Nevada

UNITED STATES OF AMERICA)	JUDGMENT IN A CRIMINAL CASE
v.)	
MYRON MOTLEY)	Case Number: 3:19-cr-00026-LRH-WGC
)	USM Number: 41289-048
)	<u>Chris Frey, AFPD</u>
)	Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) _____

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on Counts 1, 5, 6, 7, 10 and 13 after a plea of not guilty to the Indictment filed 05/23/2019 (ECF No. 1).

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846	Conspiracy to Posses with Intent to Distribute and to Distribute Oxycodone and Hydrocodone	05/23/2019	1
21 U.S.C. §§ 841(a) and 841(b)(1)(C)	Distribution of Oxycodone	01/04/2019	5
21 U.S.C. §§ 841(a) and 841(b)(1)(C)	Distribution of Oxycodone	01/11/2019	6

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

09/13/2021

Date of Imposition of Judgment



Signature of Judge

Larry R. Hicks, United States District Court
Name and Title of Judge

9/14/21

Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a) and 841(b)(1)(C)	Distribution of Oxycodone	03/14/2019	7
21 U.S.C. §§ 841(a) and 841(b)(1)(C)	Distribution of Oxycodone	04/10/2019	10
21 U.S.C. §§ 841(a) and 841(b)(1)(C)	Distribution of Hydrocodone	04/22/2019	13

DEFENDANT: Myron Motley
CASE NUMBER: 3:19-cr-00026-LRH-WGC

Judgment Page 3

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **ONE HUNDRED SEVENTY-NINE (179) MONTHS, CONCURRENT ON ALL COUNTS.**

The court makes the following recommendations to the Bureau of Prisons:
FCI SHERIDAN, OR

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Myron Motley
CASE NUMBER: 3:19-cr-00026-LRH-WGC

Judgment Page 4

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **FIVE (5) YEARS, CONCURRENT ON ALL COUNTS.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court, not to exceed 104 tests annually.
 The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Myron Motley
CASE NUMBER: 3:19-cr-00026-LRH-WGC

Judgment Page 5

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the specific risks posed by your criminal record and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the specific risks posed by your criminal record.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: Myron Motley

Judgment Page 6

CASE NUMBER: 3:19-cr-00026-LRH-WGC

SPECIAL CONDITIONS OF SUPERVISION

1. **Search and Seizure** - You shall submit to the search of your person, property, residence, or automobile under your control by the probation officer or any other authorized person under the immediate and personal supervision of the probation officer, without a search warrant to ensure compliance with all conditions of release.

The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
2. **Substance Abuse Treatment** - At the discretion of the U.S. Probation Office, you may be required to participate in an outpatient substance abuse treatment program and follow the rules and regulations of that program (provider, location, modality, duration, intensity, etc.). You must pay the costs of the program based on your ability to pay.
3. **No Gambling** - You must not engage in any form of gambling (including, but not limited to, lotteries, on-line wagering, sports betting) and you must not enter any casino or other establishment, *except for the purpose of employment, as approved and directed by the probation officer*, where gambling is the primary purpose (e.g., horse tracks, off-track betting establishments).
4. **Gambling Treatment** - You must participate in a gambling addiction treatment program and follow the rules and regulations of that program. The probation officer will supervise your participation in the program (provider, location modality, duration, intensity, etc.). You must pay the costs of the program, based on your ability to pay.

DEFENDANT: Myron Motley

Judgment Page 7

CASE NUMBER: 3:19-cr-00026-LRH-WGC

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Judgment Page 8.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	Ct. 1: \$100.00	NA	NA	NA	NA
	Ct. 5: \$100.00				
	Ct. 6: \$100.00				
	Ct. 7: \$100.00				
	Ct. 10: \$100.00				
	Ct. 13: \$100.00				

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage
U.S. District Court, District of Nevada Attn: Clerk of Court - Finance Department RE: Case No. 3:19-cr-00026-LRH-WGC 333 Las Vegas Blvd., South Room 1334 Las Vegas, NV 89101			
TOTALS	\$ _____	\$ _____	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Myron Motley
CASE NUMBER: 3:19-cr-00026-LRH-WGC

Judgment Page 8

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$600.00 due immediately. not later than _____, or
 in accordance with C, D, E, or F below; or**B** Payment to begin immediately (may be combined with C, D, or F below); or**C** Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or**D** Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or**E** Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or**F** Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

 Joint and Several

Case Number Defendant and Co-Defendant Names (including defendant number)	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate
---------------------------------------------------------------------------------	--------------	-----------------------------	----------------------------------------

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

Appx. E, p.39