NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN LEWIS and OTIS PONDS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER OTIS PONDS' APPLICATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Otis Ponds, by his attorney, CJA counsel Lynn C. Hartfield, pursuant to Supreme Court Rule 39, respectfully requests leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was granted leave to proceed *in forma pauperis* in federal district court and

on appeal. Undersigned counsel was appointed on appeal pursuant to 18 U.S.C. § 3006A.

DATED this 5th day of December, 2024.

Respectfully submitted,

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Counsel of Record

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN LEWIS and OTIS PONDS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER KEVIN LEWIS' APPLICATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Kevin Lewis, through undersigned counsel, CJA attorney Megan L. Hayes, pursuant to Supreme Court Rule 39, respectfully requests leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was granted leave to proceed *in forma pauperis* in federal

district court and on appeal. Undersigned counsel was appointed on appeal pursuant to 18 U.S.C. § 3006A.

DATED this 5th day of December, 2024.

Respectfully submitted,

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Attorney for Petitioner Kevin Lewis

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN LEWIS and OTIS PONDS,

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v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 outlines a procedural framework for the authorization and implementation of wiretaps. *See* 18 U.S.C. § 2510 et seq. Recognizing the extreme level of intrusiveness created by telephonic eavesdropping, Congress included a number of safeguards to curb overuse of the investigative technique and provided that communications that were unlawfully intercepted or were not supported by authorizations that complied with the statute are subject to suppression. 18 U.S.C. § 2518. Title III also provides that only a limited number of high-level individuals within the Department of Justice may authorize a wiretap application. 18 U.S.C. § 2516(1). This Court has strictly construed these requirements, holding that if someone other than an authorized official purports to approve a wiretap application, such application is invalid. *United States v. Chavez*, 416 U.S. 562, 570-71 (1974); *United States v. Giordano*, 416 U.S. 505, 533 (1974).

The question presented here is:

What evidence must the government present in a wiretap application to establish that an authorized official approved the application? And if a defendant makes a colorable argument that the application failed to establish that an authorized official in fact authorized it, what is the government's burden to rebut the defendant's claim?

LIST OF PARTIES

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

RELATED CASES

None known.

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Petitioners, Kevin Lewis and Otis Ponds, respectfully petition for a writ of certiorari to review the order and judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, *United States v. Lewis*, 116 F.4th 1144 (10th Cir. 2024), is found at Appendix A. The judgment on conviction for Petitioner Lewis is found at Appendix B, and for Petitioner Ponds at Appendix C. A transcript of a hearing in the district court considering the motion at issue is found at Appendix D, and the district court's order denying the motion is found at Exhibit E.

JURISDICTION

The Tenth Circuit entered judgment on September 10, 2024. (App. A at A-1). Pursuant to 28 U.S.C. § 2101(c), the deadline to file a petition for writ of certiorari is December 9, 2024.

The United States District Court for the District of Kansas had jurisdiction pursuant to 18 U.S.C. § 3231. The Tenth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2516(1) provides:

> The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any Acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interpretation may provide or has provided evidence of …(e) any offense involving … the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

18 U.S.C. § 2518(1)(a) provides:

> Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include … (a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

STATEMENT OF THE CASE

In a superseding indictment, the government charged Petitioners Lewis and Ponds, along with multiple other defendants, with participating in an alleged drug trafficking organization in and around Wichita, Kansas, in 2019. Prior to trial, Petitioners moved to suppress evidence derived from a wiretap order that authorized interception of communications from a cell phone used by one of the

defendants to communicate with the others.[1] The motion asserted that the wiretap application was invalid under 18 U.S.C. §§ 2516(1) and 2518(1), because it failed to establish that a statutorily designated official had authorized the application. Specifically, Petitioners contended that the signature on the authorizing documents, purported to be that of Deputy Assistant Attorney Bruce C. Swartz, appeared to be that of a different, unidentified person.

At a hearing on the motion to suppress, the district court acknowledged that the signature did not look like the name it purported to be, and that other than the signature on the documents, there did not seem to be any other way a court could determine that Mr. Swartz actually approved the application. (App. D at D-9-10, D-13). In response, the Assistant United States Attorney told the court that he had had an "email exchange" with Mr. Swartz, and that Mr. Swartz told him that was his signature. (App. D at D-11-12). The AUSA did not, however, provide the emails to the court or defense counsel.

In a written order, the district court denied the motion. (App. E). Although the court conceded that the defendants had made a "fair point" that the signature did not appear to match Mr. Swartz's name, it nonetheless concluded there is a presumption that authorizing individuals have properly exercised their authority, that the defendants had not rebutted. (App. E at E-24-25). It further ruled that the "fact" that the government's attorney had explained the process of securing DOJ

[1] The motion to suppress was filed by Petitioners' co-defendant, Travis Knighten. The Court of Appeals acknowledged that both Petitioners successfully joined the motion. (App. A at A-21).

authorization was "enough for the Court to conclude that the application was properly authorized by DAAG Schwartz [sic] here." (App. E at E-25).

After a jury found Petitioner Lewis guilty, the district court sentenced him to 420 months imprisonment. (App. B at B-1). Petitioner Ponds pled guilty and was sentenced to 80 months imprisonment. (App. C at C-1). They appealed their convictions and sentences, and a panel of the Tenth Circuit Court of Appeals affirmed. (App. A at A-9).

In affirming the denial of the motion to suppress, the Tenth Circuit, relying on *Dahda v. United States*, 584 U.S. 440 (2018), reasoned that a wiretap authorization is only insufficient if it is "'lacking in what is necessary or requisite.'" (App. A at A-23) (quoting *Dahda*, 584 U.S. at 450). Because the relevant statute, 18 U.S.C. § 2518(4), requires only that an authorization order include the "identity" of the authorizing official, the court held that the mere fact that the application and order "identif[ied]" Bruce Swartz "by name as the authorizing official" was sufficient to comply with the statute. (App. A at A-23).

The court declined to address the defendants' claim that the signature appeared to be that of someone other than Bruce Swartz, characterizing the signature on the documents as merely "illegible as any name." (App. A at A-23). It additionally declined to address the government's failure to produce any affirmative evidence, including the email correspondence represented to have transpired between the AUSA and Swartz, that Swartz in fact had authorized the application. (*Id.*). Addressing *Chavez*, the court focused only on the portion of the decision where

this Court upheld a wiretap order after the government presented evidence that an authorized official—albeit not the person named on the application—had actually authorized the application in question. (App. A at A-24). The court did not discuss the portion of the *Chavez* decision in which this Court held that a wiretap application that identified an authorized official, but was in fact authorized by someone other than a statutorily designated person, was invalid. The court also declined to discuss this Court's decision in *Giordano*, 416 U.S. at 505, which reached a similar conclusion. Instead, relying on the fact that in this case all relevant documentation "identified" Bruce Swartz, a statutorily designated official, the court concluded the application was sufficient. (App. A at A-26).

REASONS FOR GRANTING THE PETITION

In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act. Responding to concerns expressed by this Court in *Berger v. New York*, 388 U.S. 41 (1967) about the extreme intrusiveness and indiscriminate use of wiretaps, Congress enacted a statutory scheme that imposed strict restrictions on the issuance of wiretaps. These restrictions included requiring law enforcement to exhaust conventional investigative techniques before seeking a wiretap, allowing only specified individuals in the Department of Justice to authorize wiretap applications, and providing for judicial oversight of the wiretap authorization process. *See* 18 U.S.C. §§ 2510-20. Nonetheless, the number of wiretap applications submitted by both federal and state law enforcement has ballooned, from 174 in

1968 to 2406 in 2022, 1274 of which were authorized by federal judges. *See Title III Wiretap Orders Statistics*, ELECTRONIC PRIVACY INFORMATION CENTER.[2]

In 1972, this Court addressed the reach of Title III's requirement that only statutorily designated officials may authorize wiretap applications. *See Chavez,* 416 U.S. at 571; *Giordano*, 416 U.S. at 524. In both cases, the defendants challenged wiretap orders on the grounds that someone other than a statutorily designated official had approved the applications. *Chavez,* 416 U.S. at 566; *Giordano*, 416 U.S. at 510. This Court held in both cases that applications that were signed and approved only by an executive assistant to the Assistant Attorney General were invalid. *Chavez*, 416 U.S. at 569-70; *Giordano*, 416 U.S. at 523. However, where the government was able to present evidence with respect to one of the applications that, notwithstanding the signature on the application, a different statutorily authorized official had *actually authorized* the application, the Court held the application to be valid. *Chavez*, 416 U.S. at 575-77.

Since *Chavez* and *Giordano*, this Court has not reviewed any other Title III cases on the issue of how to establish that a statutorily designated official authorized a particular application. Circuit courts have considered particular factual situations, but have not set forth a general framework for evaluating government compliance with § 2518. For example, the Eighth Circuit found that where an application simply misidentified the authorizing official, but provided evidence that a different statutorily designated official had in fact authorized it, the

[2] Available at https://epic.org/title-iii-wiretap-orders-stats/ (last visited Dec. 2, 2024).

application remained valid. *United States v. O'Connell*, 841 F.2d 1408, 1416 (8th Cir. 1988). Similarly, the Second Circuit held that where a wiretap application was approved by a Department of Justice official who had the authority to approve the application if the primary statutorily designated official was unavailable, the government need not submit evidence of the unavailability of the primary official. *United States v. Terry*, 702 F.2d 299, 311 (2d Cir. 1983). By contrast, the D.C. Circuit affirmed a district court order suppressing two wiretap orders as facially insufficient where the orders, rather than identifying the authorizing official, simply stated that the wiretap application was authorized by "******." *United States v. Scurry*, 821 F.3d 1, 8-9 (D.C. Cir. 2016).

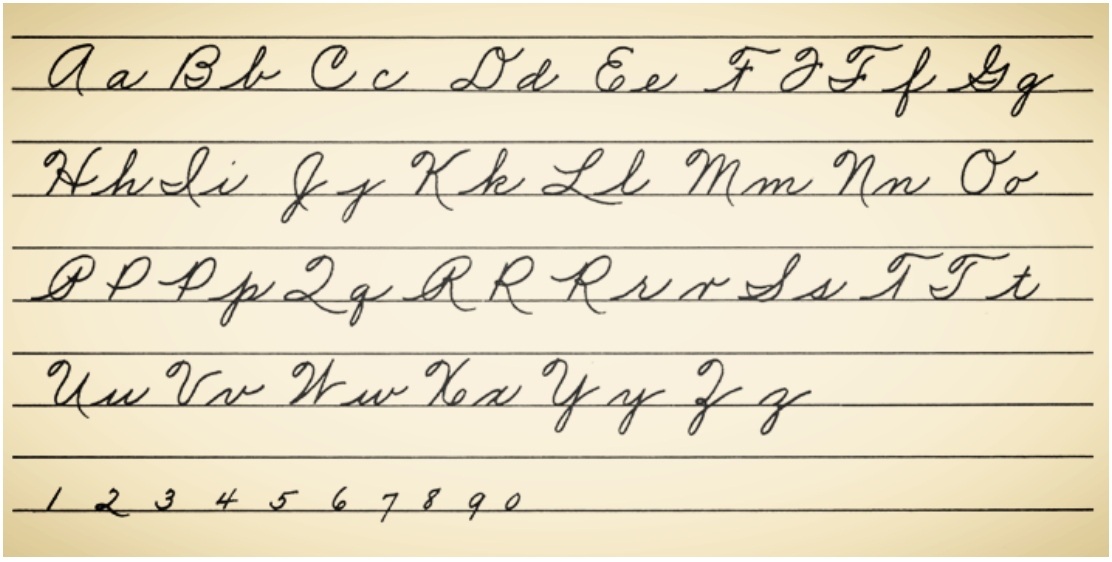
In this case, the government supplied an application purportedly authorized by Deputy Assistant Attorney General Bruce C. Swartz. The signature, however, does not appear to match the name, to the extent that the first letter of the first name resembles a "J,"[3] and the first letter of the last name, though difficult to discern, does not look like an "S."

APR 0 5 2019

Date

BRUCE C. SWARTZ
DEPUTY ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

[3] Under the widely used Palmer method of teaching cursive writing, only three capital letters, "J," "Y," and "Z," have "tails" that extend below the line on which a word is written:



See Joe Coffey, *Cedar Rapids Man Created Palmer Method of Handwriting Taught to Millions*, THE GAZETTE (Aug. 20, 2019), https://www.thegazette.com/community/cedar-rapids-man-created-palmer-method-of-handwriting-taught-to-millions/.

Petitioners challenged the government's compliance with § 2518, but in response, the Assistant United States Attorney merely represented, orally and while not under oath, that he had emailed Mr. Swartz and Swartz had informed him he had in fact signed the authorization. The emails were not supplied to either the district court or the defendants.

The Tenth Circuit, in affirming the denial of Petitioners' motion to suppress, acknowledged that the signatures on the applications were "illegible as any name," including the purported authorizing official. (App. A at A-23). It nonetheless held that so long as the application *identified* the statutorily designated official who authorized the application, that was sufficient to satisfy § 2518. (*Id.*). It held, in other words, that if the government merely names a particular statutorily designated official as the authorizing individual, it need not supply any assurance that the person in fact authorized the application. (App. A at A-25). Left unanswered is whether there are *any* circumstances under which merely identifying the authorizing individual by name would be insufficient, and whether, if a defendant makes a colorable claim that the person the government represents authorized the application does not appear to be the person who signed it, the government has any burden to establish that an authorized official actually authorized it.

These questions were not before the Court in *Chavez* and *Giordano*, because in both cases the government candidly admitted that a non-designated employee of

the Department of Justice authorized the applications. *Chavez*, 416 U.S. at 565-66; *Giordano*, 416 U.S. at 510. Here, the government's unusual response to the defendants' questioning the signature—telling the court that the AUSA emailed Mr. Swartz to confirm he authorized the application, but supplying no emails or affidavits—fails to provide meaningful assurance that Mr. Swartz did in fact authorize the application.[4]

In short, the Tenth Circuit's opinion sets out a rule that says all the government need do is *identify* the individual who authorized the application, with no other requirement to establish that the individual actually *did* authorize the application. It further fails to impose any burden on the government, when confronted with a colorable claim that the document purporting to authorize the application was signed by some other, unknown individual, to reconcile the matter, instead holding that having "identified" an authorized individual, it has complied with the statutory requirements. Such a rule conflicts with this Court's decisions in *Chavez* and *Giordano*, and would permit the government to make an end run around Title III, as well as insulate from oversight prosecutor's offices that endeavor to take shortcuts in the wiretap application process. This Court should

[4] To support its conclusion that Mr. Swartz authorized the application, the Tenth Circuit went outside the record and cited to other documents purportedly signed by Mr. Swartz that look somewhat similar to the signatures in this matter. (App. A at A-25). Perhaps if the Assistant United States Attorney had provided those documents at the suppression hearing, this case would look different. More important, however, the Tenth Circuit's investigation does not answer the legal questions presented here, that is, what *does* the government have to provide to an issuing judge to ensure compliance with the statute, and what is its burden to rebut a colorable claim of irregularity?

grant certiorari to clarify the government's obligations surrounding the authorization and approval of wiretap applications under Title III.

CONCLUSION

For the foregoing reasons, Petitioners Kevin Lewis and Otis Ponds respectfully request that their petition for a writ of certiorari be granted.

DATED this 5th day of December, 2024

Respectfully submitted,

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