APPENDIX A

JUDGEMENT OF THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS

FILED: August 1, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7215
(3:14-cr-00604-JFA-18)
(3:22-cv-00182-JFA)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOEY LAMONT BRUNSON, a/k/a Flex

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7215

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOEY LAMONT BRUNSON, a/k/a Flex,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Senior District Judge. (3:14-cr-00604-JFA-18; 3:22-cv-00182-JFA)

Submitted: July 30, 2024 Decided: August 1, 2024

Before NIEMEYER, AGEE, and HEYTENS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Joey Lamont Brunson, Appellant Pro Se. Kathleen Michelle Stoughton, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Joey Lamont Brunson seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 580 U.S. 100, 115-17 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Brunson has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

APPENDIX B

JUDGEMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DENIAL OF EN BANC REHEARING

FILED: November 4, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7215
(3:14-cr-00604-JFA-18)
(3:22-cv-00182-JFA)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOEY LAMONT BRUNSON, a/k/a Flex

Defendant - Appellant

O R D E R

Upon consideration of the motion to supplement the petition for rehearing en banc, the court grants the motion. The petitions for rehearing en banc were circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petitions for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX C

JUDGEMENT OF THE DISTRICT COURT OF SOUTH CAROLINA DENYING 28 U.S.C.§2255(a) AND DENIAL OF CERIFICATE OF APPEALABILITY

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

United States of America, Plaintiff-Respondent v. Joey Lamont Brunson, Defendant-Petitioner.	CR No. 3:14-604-JFA C/A No. 3:22-cv-182-JFA **ORDER**

I. INTRODUCTION

This matter comes before the Court for consideration of Joey Lamont Brunson's ("Petitioner" or "Brunson") *pro se* petition to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.[1] (ECF No. 2697). For the reasons stated below, the Court dismisses the petition.

II. FACTUAL AND PROCEDURAL HISTORY

Brunson's § 2255 motion asserts a slew of claims for relief based on a wide array of arguments. Accordingly, a brief overview of the facts shown at trial and the procedural history is necessary to place Brunson's arguments in the proper context.

A. Conspiratorial Activity

From the early 2000s until his arrest in 2017, Brunson participated in a cocaine trafficking organization headed by his cousin, Lamario Wright. Brunson's co-conspirators

[1] Because the Defendant/Petitioner is acting *pro se,* the documents he has filed in this case are held to a less stringent standard than if they were prepared by a lawyer and are thus construed liberally. *See Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

included Moses Gates, Samuel Richards, Stephen Graham, Sherrod White, and Antonio Ravenel.

On two occasions in the early 2000s, Brunson and Wright purchased kilograms of cocaine for resale in South Carolina. Brunson was incarcerated from 2004–2012 following a federal drug trafficking conviction. After his release, Brunson resumed drug dealing with Wright and others.

On occasion, Wright sold kilogram quantities of cocaine to Graham for resale. In 2013, Graham saw Brunson and Wright together in Atlanta. In addition, Sherrod White transported kilogram quantities of cocaine for Wright in his truck from Atlanta to South Carolina. Once, in Atlanta, Brunson delivered a bag of cocaine to White for shipment.

In the spring of 2013, Wright gave Ravenel several kilograms of cocaine to sell while Wright was away. Ravenel stole one kilogram to sell for personal profit. After Wright and Brunson discovered the theft, Brunson confronted Ravenel and repeatedly hit him.

In 2012, the FBI began investigating large-scale drug trafficking organizations in South Carolina. In June 2013, the FBI obtained judicial authorization to intercept wire and electronic communications over multiple phones used by Wright to discuss drug dealing. The FBI intercepted numerous calls and text messages between Brunson and Wright, including the following:

- On August 6, 2013, in a call, Brunson referred to his beating of Ravenel.
- On October 11, in a call, Brunson asked Wright for two ounces of cocaine.
- On October 12, in a text message, Brunson asked Wright for 4.5 ounces of cocaine.

- On October 16, in a call, Brunson asked Wright for between 4.5 ounces and 9 ounces of cocaine.
- On October 18, in a text message, Brunson asked Wright whether he was going to deliver 4.5 ounces of cocaine to him.
- On October 18, in a call, Brunson said that Richardson owed a $5,000 drug debt and that Richardson was making crack cocaine.

In November 2013, Wright was arrested and incarcerated on drug charges. Afterwards, Wright told Brunson to retrieve cocaine that Wright had stored in some woods and to give the drugs to Mark James for resale. Brunson complied and later told Wright that James had sold that cocaine.

Sometime in 2013, Wright purchased a Cadillac Escalade for approximately $37,000. Wright made an initial $10,000 down payment and then directed Brunson to obtain $27,000 from Graham, who owed Wright money for a cocaine deal. Wright directed Brunson to title the vehicle in Brunson's name and then gave Brunson cash from Wright's drug proceeds to pay the insurance on the vehicle. Wright carried drug proceeds in the Escalade.

During Wright's arrest, the FBI seized his Escalade. In early December 2013, Brunson contacted the FBI and asked that it return the vehicle to him. On December 9, at a meeting with FBI Special Agent Jason Greenan and other agents, Brunson admitted that the Escalade belonged to Wright after initially stating that it belonged to him. Brunson also admitted that he had previously been convicted of a crime punishable by imprisonment exceeding one year. The FBI agents then played three intercepted calls between Brunson

and Wright to Brunson. Brunson said that he was not in the drug business and that he was trying to discourage Wright from dealing drugs.

B. Indictment and Arrest

In August 2014, a federal grand jury indicted Brunson and others for conspiracy to distribute cocaine and crack cocaine in violation of 21 U.S.C. § 846. (ECF No. 3). Despite investigative efforts, the FBI was unable to locate Brunson for some time.[2]

In April 2016, SA Greenan, attempting to locate Brunson, staked out an address in Eutawville associated with Brunson. Greenan observed a black male matching Brunson's description exit a silver Suzuki. Greenan observed the man reenter the vehicle and depart the residence. Greenan followed the silver Suzuki, which DMV records showed was registered to Jamall Lamar Brunson, Joey Lamont Brunson's brother. Greenan initiated blue lights, and the vehicle began to pick up speed and a chase ensued. Ultimately, the vehicle stopped at a residence, and the driver fled on foot into a wood line and escaped. Before the silver Suzuki was towed, an inventory search was performed, and in plain view behind the driver's seat, officers found a marijuana plant. They also found documentation referencing federal wiretap statistics for 2013, and a CD with "Joey Brunson" written on it. The car was later released to Jamall.

In 2017, the FBI learned that Brunson was depositing unusually large sums of money into accounts at credit unions in Charleston and Summerville. On March 3, 2017, Brunson drove the same Suzuki that Greenan had encountered to the Summerville credit

[2] Although a fugitive at the time, Brunson filed several *pro se* motions, including a motion to dismiss the indictment, prior to his arrest.

union to make a deposit. Local law enforcement agents stationed at the credit union arrested Brunson. He was arrested with the keys to the Suzuki clipped to his belt. And in his wallet, police found a business card Greenan had left at Brunson's mother's home.

On March 10, 2017, FBI agents executed a search warrant on the Suzuki and seized two pistols, ammunition, crack cocaine, cocaine, marijuana, drug paraphernalia, and a drug ledger.

C. Pre-trial Proceedings

Shortly after arrest, Brunson sought release on bond. He was represented at that time by Timothy Ward Murphy, Esq., who the Court had appointed. Against counsel's advice, Brunson testified at the bond hearing. Under oath, Brunson falsely told the Court that his references to "a nine" and a "four way" on intercepted calls referred to a car's lug nut socket and a tire iron. He also testified that he did not drive the Suzuki to the bank on the day of his arrest. According to Brunson, someone else dropped him off there in a different car, and then his brother Jamall drove up in the Suzuki and handed him the keys. That resulted in the Government obtaining an additional charge against Brunson for perjury.

Approximately two weeks later, Brunson moved for Murphy to be relieved. The Court granted that request, and then new, retained counsel appeared. Counsel moved to suppress evidence obtained from the wiretaps and from the search of the Suzuki. After a hearing, the Court denied those motions in October 2013. Brunson dismissed his new counsel that day and requested time to get a new lawyer. Thereafter, Brunson, by his own choice, represented himself for several months.

In November 2017, the FBI conducted a search of Brunson's jail cell. This search was based on information from several cooperators that Brunson was communicating with codefendants by mail to influence their testimony and that Brunson had sensitive personal information of government attorneys and the court. Brunson was removed from his cell and all materials in his cell were searched by agents who were not involved in the underlying investigation. All seized materials were then reviewed by an Assistant United States Attorney who was not on the prosecution team (i.e., a "filter team") to ensure that no privileged or attorney-client material was transferred to the prosecution team.

Around that time, Brunson also moved to be released on bond. The Court denied his request. However, after confirming Brunson wanted to represent himself, the Court appointed former counsel Murphy as standby counsel.[3]

D. Trial

The four-day trial took place in March 2018. All twelve charges against Brunson went forward:

- Count 1: conspiracy to traffic five kilograms or more of cocaine and an additional quantity of crack cocaine, in violation of 21 U.S.C. § 846;
- Counts 2-7: using a telecommunications facility for drug trafficking, in violation of 21 U.S.C. § 843(b);
- Count 8: conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h);
- Count 9: possession of cocaine and marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1);

[3] As noted in several transcripts of record, both the Magistrate Judge and the undersigned followed their well-established practice of repeatedly advising Brunson of the potential dangers of self-representation and the benefits of accepting appointed counsel.

- Count 10: transporting a firearm by a felon, in violation of 18 U.S.C. § 922(g)(1);
- Count 11: possession of a firearm in furtherance of drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1); and
- Count 12: perjury, in violation of 18 U.S.C. § 1621.

The Government called several witnesses, including: SA Greenan; FBI Special Agent Brian M. Jones; ATF Special Agent Richard Brown; FBI Special Agent Luke Davis; Defendant Lamario Vincent Wright; Defendant Samuel Richards; Defendant Stephen Michael Graham; Defendant Moses Lofton Gates; Defendant Antonio Deshawn Ravenell; Defendant Sherrod Kovach Jerrell White; Jackie Wade, Branch Manager, Navy Federal Credit Union; and Rachel Sumner, Member Service Representative, Navy Federal Credit Union. In addition, the Government presented several items of evidence, including wiretap recordings involving Brunson's drug activities with Wright and others. Brunson was the only witness to testify in his defense.

Brunson also represented himself for the first part of the trial, giving his own opening statement and cross-examining the first two witnesses—Greenan and Wright. After that, Brunson asked Murphy to take over as lead counsel and Murphy handled the rest of the trial.

The jury found Brunson guilty on all counts.

E. Post-Trial

After the verdict, Murphy filed a motion for a new trial, arguing that a recent Supreme Court decision showed the wiretap evidence was defective and should have been suppressed. The Court denied that motion.

Brunson was sentenced in September 2018. After addressing numerous arguments Murphy made on Brunson's behalf, the Court imposed the statutorily required sentence of life in prison, plus a mandatory 60 consecutive months for the firearms charge. Brunson appealed.

Brunson was initially represented on appeal by Jessica Salvini, Esq. He moved for her to be relieved before she filed a brief. Then the Court appointed David Betts, Esq., who filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), questioning whether this Court properly denied Brunson's wiretap challenges. Brunson also filed three *pro se* supplemental briefs, raising a variety of issues. The Fourth Circuit directed supplemental briefing on the wiretap issue as well as on a question about the First Step Act's retroactivity. The Fourth Circuit held oral argument and then affirmed in a split opinion. *United States v. Brunson*, 968 F.3d 325 (4th Cir. 2020).

Brunson then filed the instant *pro se* § 2255 motion asserting 14 claims ranging from lack of jurisdiction to ineffective assistance of counsel. (ECF No. 2697). The Government then filed a response to Brunson's petition along with a motion for summary

judgment. (ECF No. 2818). Both parties then submitted additional briefing on the motion for summary judgment. (ECF No. 2849 & 2864).[4] Thus, this matter is ripe for review.

Brunson also filed several other related motions including: a motion for discovery (ECF No. 2850); a motion for an evidentiary hearing (ECF No. 2851); a petition for writ of habeas corpus ad testificant and ad prosequendum (ECF No. 2900); and a motion for a status conference. While the Court was finalizing this order, Brunson filed a petition for writ of mandamus with the Fourth Circuit.

III. LEGAL STANDARD

A. 28 U.S.C. § 2255

Prisoners in federal custody may attack the validity of their sentences pursuant to 28 U.S.C. § 2255. In order to move the court to vacate, set aside, or correct a sentence under § 2255, a defendant/petitioner must prove that one of the following occurred: (1) a sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose such a sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

"The scope of review of non-constitutional error is more limited than that of constitutional error; a non-constitutional error does not provide a basis for collateral attack unless it involves 'a fundamental defect which inherently results in a complete miscarriage

[4] After Brunson filed his initial §2255 motion, this matter was stayed pending the appeal of this Court's order denying Brunson's motion for recusal. The stay was lifted after receipt of the mandate from the Fourth Circuit dismissing that appeal.

of justice,' or is 'inconsistent with the rudimentary demands of fair procedure.'" *Leano v. United States*, 334 F. Supp. 2d 885, 890 (D.S.C. 2004) (quoting *United States v. Mikalajunas*, 186 F.3d 490, 495–96 (4th Cir. 1999)).

In deciding a § 2255 petition, a court need not hold an evidentiary hearing if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). The Court has thoroughly reviewed the motions, files, and records in this case, liberally construing Petitioner's filings, and finds that no hearing is necessary.

"When the district court denies § 2255 relief without an evidentiary hearing, the nature of the court's ruling is akin to a ruling on a motion for summary judgment." *United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007).

B. Summary Judgment

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). The movant has the burden of proving that summary judgment is appropriate. Once the movant makes the showing, however, the opposing party must respond to the motion with "specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

When no genuine issue of any material fact exists, summary judgment is appropriate. *See Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991). In deciding a motion for summary judgment, the facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* However, "the

mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

"[O]nce the moving party has met [its] burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show that there is a genuine issue for trial." *Baber v. Hospital Corp. of Am.*, 977 F.2d 872, 874–75 (4th Cir. 1992). The nonmoving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. *See id.* Rather, the nonmoving party is required to submit evidence of specific facts by way of affidavits, depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

Brunson's § 2255 motion asserts 14 separate grounds for relief which often overlap. As a general matter, many of his claims are barred by procedural default or the prohibition on relitigating issues presented on direct appeal. Moreover, each of his claims lack merit. Each claim for relief is addressed in turn below.

A. Ground 1: Sixth Amendment Violation (*Faretta* Claim)

First, Brunson argues that his "Sixth Amendment due process right to self-representation to prepare [his] own defense was violated . . . ." (ECF No. 2697-1, p. 1). In his response, Brunson makes clear that his claim is not one for ineffective assistance of

counsel, but rather a violation of his Sixth Amendment rights. Essentially, Brunson takes issue with his alleged inability to present a defense to all counts while representing himself at trial.

More specifically, Brunson avers that by appointing Murphy, first as standby counsel and later as lead counsel, the Court violated Brunson's right to represent himself. He argues this affected his case because Murphy did not call favorable witnesses who Brunson had planned to use at trial, among other things.

Initially, this claim fails as it is procedurally defaulted. A § 2255 motion is not a substitute for a direct appeal. *See United States v. Frady*, 456 U.S. 152, 165 (1982). Claims of error that could have been raised on direct appeal, but were not, are procedurally barred unless the petitioner shows both cause for the default and actual prejudice or that he is actually innocent of the offense. *See Bousley v. United States*, 523 U.S. 614, 621–22 (1998); *United States v. Bowman*, 267 F. App'x 296, 299 (4th Cir. 2008) (*per curiam*).

"[C]ause for a procedural default must turn on something external to the defense, such as the novelty of the claim or a denial of effective assistance of counsel." *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999). To show actual prejudice, a petitioner must demonstrate that errors in the proceedings "worked to his actual and substantial disadvantage" and were of constitutional dimension. *See Frady*, 456 U.S. at 170. To show actual innocence, a petitioner must demonstrate that he "has been incarcerated for a crime he did not commit." *United States v. Jones*, 758 F.3d 579, 584 (4th Cir. 2014).

"Ineffective assistance of counsel can constitute 'cause' excusing a procedural default." *United States v. Norman*, No. CR 7:17-527-HMH, 2020 WL 4043648, at *3 (D.S.C. July 17, 2020) (quoting *Murray v. Carrier*, 477 U.S. 478, 488–89 (1986)).

To show ineffective assistance of counsel, the petitioner must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that he was prejudiced by his counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Failure of proof on either prong ends the matter. *United States v. Roane*, 378 F.3d 382, 404 (4th Cir. 2004). With respect to the first prong, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, at 689. A reviewing court must be highly deferential in scrutinizing counsel's performance and must filter from its analysis the distorting effects of hindsight. *Id.* at 688–89. Only in "relatively rare situations" will a petitioner establish that, "'in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" *Tice v. Johnson*, 647 F.3d 87, 102 (4th Cir. 2011) (quoting *Strickland*, 466 U.S. at 690).

The presumption of effectiveness is even more deferential for appellate advocacy. "Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit." *United States v. Mason*, 774 F.3d 824, 828–29 (4th Cir. 2014) (internal citation omitted). Indeed, "winnowing out weaker arguments on appeal and focusing on those more likely to prevail . . . is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536 (1986) (internal citation omitted). But appellate counsel may render deficient performance by failing to raise "issues [that] are

clearly stronger than those presented." *Mason*, 774 F.3d at 829 (internal citation omitted). The ineffective assistance inquiry therefore requires a court to compare the strength of an issue not raised on direct appeal with the strength of arguments that were raised. *See Id.*

In addition to showing ineffective representation, the defendant must also show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* at 694. "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011) (citing *Strickland*, 466 U.S. at 693).

The rule for procedural default includes claims under *Faretta v. California*, 422 U.S. 806 (1975), first raised on collateral review. *See, e.g.*, *Brisbane v. United States*, No. 9:04-cr-00524-DCN, 2017 WL 2311586, at *4 (D.S.C. May 26, 2017).

Here, Brunson did not assert this *Faretta* claim within his direct appeal and his claim is therefore barred by the doctrine of procedural default unless he can demonstrate cause and prejudice or actual innocence. Although ineffective assistance of counsel can constitute the "cause" necessary to excuse procedural default, Brunson has made no such showing here.

In this instance, appellate counsel, Betts, carefully reviewed the record and the law and then found there were no arguable grounds for appeal, filing an *Anders* brief. He nevertheless questioned whether this Court properly denied Brunson's motion to suppress the wiretap evidence. Accordingly, appellate counsel performed the precise "winnowing" analysis that affords appellate counsel the presumption of effective assistance.

Brunson has offered no support to show his defaulted *Faretta* claim would have been clearly stronger on direct appeal than the wiretap issue Betts raised.[5]

Even if Betts' omission of this issue could somehow satisfy the first prong of ineffectiveness, Brunson would not be able to show prejudice. By filing an *Anders* brief, the Fourth Circuit was caused to review the entire record to see if there were any potentially meritorious issues for review. In addition to the wiretap issue Betts raised, the Fourth Circuit also found an issue involving the First Step Act's retroactivity—an issue no one had previously raised on appeal. Had the Fourth Circuit found there was a potentially meritorious *Faretta* issue, it would have ordered briefing on that. The Court's failure to identify this as a potential meritorious issue undercuts any remaining possibility that Betts performed deficiently or that he prejudiced Brunson. *See Murray v. Carrier*, 477 U.S. 478, 494 (1986) (to show actual prejudice, a defendant must show the defect he cites as cause worked to his "actual and substantial disadvantage," not merely that it created a "possibility of prejudice").

Accordingly, Brunson has not offered any legitimate basis for excusing the procedural default of the claim he now wants this Court to adjudicate. Consequently, the claim is subject to denial without reaching the merits. *See Garrett v. United States*, No. 2:03-cr-59, 2006 WL 1647314, at *4 (E.D. Va. June 13, 2006) (finding defendant's failure

[5] Apparently, Brunson did not find it to be a winning argument, either. He filed three *pro se* briefs on direct appeal. Although the 150 pages of additional briefing raised a variety of issues, Brunson failed to raise a *Faretta* violation.

to show counsel was ineffective by not appealing "necessarily prevent[ed] him from pursuing [the defaulted] grounds in his § 2255 motion").

Additionally, Brunson makes unsubstantiated claims throughout his briefings of actual innocence in an effort to avoid procedural default. Establishing actual innocence requires the defendant to prove "'that no reasonable juror would have convicted him.'" *Bousley v. United States*, 523 U.S. 614, 623 (1998) (quoting *Schlup v. Delo*, 513 U.S. 298, 327–28 (1995)). He must prove this "by clear and convincing evidence." *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999).

Specifically, Brunson maintains that he was never in the Suzuki on the day he was arrested at the bank. He tries to support that claim with what he represents to be an affidavit from his brother, Jamall. (ECF No. 2735-1). The affidavit avers that the gun and drugs in the Suzuki were Jamall's and that Brunson did not know about them because he did not go inside the car. *Id.* The affidavit falls far short of demonstrating actual innocence on any charge, let alone all charges, by clear and convincing evidence.

Brunson omits the fact that his cell phone was found in the Suzuki that day, he had the keys to it when he was arrested, and he had been observed driving it before. Thus, it is far from clear that any reasonable juror would not have convicted him. And in any event, Jamall's affidavit would, at best, relate to Counts 9 through 12. It offers nothing as to Counts 1 through 8. Brunson's actual innocence assertion misses the mark. Consequently, Brunson's claim is barred by procedural default.

Even if this Court were to hold this claim is not barred by procedural default, it would still fail on the merits. The Sixth Amendment guarantees criminal defendants the

right to trial counsel and also the right to self-representation. *Faretta*, 422 U.S. at 835. The right of self-representation generally must be honored even if the district court believes that the defendant would benefit from the advice of counsel. *Id.* at 834.

Brunson contends this Court violated the self-representation rights recognized in *Faretta* by appointing Murphy as standby counsel. But *Faretta* itself undercuts his argument. There, the Supreme Court recognized that courts "may—even over objection by the accused—appoint a standby counsel to aid the accused." 422 U.S. at 834 n.46; *see also McKaskle v. Wiggins*, 465 U.S. 168, 178–79 (1984) (appointment of standby counsel over self-represented defendant's objection is permissible). Thus, simply appointing Brunson a standby attorney was not improper.

Brunson next argues that his Sixth Amendment rights were violated when he was unable to procure a private investigator, he was unable to secure transcripts from a separate criminal action, and by the Government's use of a filter team to search his jail cell prior to trial.

Prior to trial, Brunson, while representing himself, asked the Court for permission to retain an investigator. In a hearing several weeks before trial, the Court granted that request, saying it would agree to authorize funding for an investigator's services. However, Brunson never retained one. Murphy contests that Brunson ever specifically asked him to help procure a private investigator. Brunson however avers he specifically requested such help from Murphy. When construing the facts in Brunson's favor, the Court must assume Brunson requested Murphy's aid in finding an investigator. However, Murphy was stand-by counsel at the time. Because there is no right to standby counsel, a defendant cannot

base an ineffective-assistance claim on standby counsel's acts or omissions. *See Alkebulanyahh v. Byars*, No. 6:13-cv-00918-TLW, 2014 WL 8849503, at *22 (D.S.C. Nov. 5, 2014) (collecting cases), *supplemented*, 2015 WL 2381351 (D.S.C. Mar. 3, 2015), *report and recommendation adopted*, No. 6:13-cv-00918-TLW, 2015 WL 2381353 (D.S.C. May 18, 2015). Thus, Brunson cannot point to Murphy's actions or inactions as standby counsel as violation of his Sixth Amendment rights.

Even if he could point to Murphy's inaction on this point, Brunson has failed to show how the outcome of his proceedings would have been any different. Brunson has offered nothing but pure speculation to show what information or aid a private investigator would have procured for use in trial. (ECF No. 2849-1, p. 8) ("[I]t is not inconceivable that if given the private investigator, Brunson requested at February hearing rather than after March 6, 2017 hearing, that I would've done better at trial.").

Brunson also avers that the Court violated his right to self-representation when it denied his access to certain materials such as copy of the transcript of Agent Greenan's testimony in the obstruction trial of Pagan Barnes, Brunson's wife. Brunson's request was denied after this Court found that the transcript was irrelevant to Brunson's case.

Again, Brunson's complaint about impeachment materials could have been raised on direct appeal, but it was not, and so it was defaulted. Moreover, Brunson fails to show how such a decision was a violation of his Sixth Amendment rights. Indigent defendants do not have an absolute right to free copies of transcripts. Rather, the decision whether to provide a defendant free copies is committed to a court's discretion. *See United States v.*

Kalita, 59 F. App'x 522, 523 (4th Cir. 2003). Brunson offers no authority suggesting that the Court, by exercising its discretion, violated his constitutional right to prepare a defense.

Brunson next takes issue with the use of a filter team to search his jail cell after allegations of witness tampering. Brunson alleges that the filter team protocol was not honored here, and that the prosecution team did in fact read and use his files. However, Brunson offers no evidence to support such an assertion. Brunson appears to base this claim on AUSA Rowell stating at hearing that "we" were copying the files and returning them to him. There is no indication that Rowell was referring to the prosecution team here but rather "we" referred to the Government broadly, including the filter team that did its work independently of the prosecution team to ensure that the latter received no privileged or otherwise protected materials. Rowell was not suggesting he or anyone on his prosecution team had such materials. Other than speculating on this issue, Brunson offers no evidence that proper filter team protocol was not used.

Finally, Brunson argues he "succumbed" mid-trial to the Court's "pressure" to have Murphy represent him. Thereafter, Murphy decided not to call some of Brunson's family as witnesses, leaving Brunson alone to testify in his defense. Murphy's strategic decisions regarding witness selection are discussed in detail below in relation to Brunson's other claims. Here, though, the dispositive point is that Brunson knowingly and voluntarily surrendered his right to proceed *pro se*. This Court made sure of that during trial, and it reaffirmed that when it considered Brunson's recusal motion. Having freely made that choice, Brunson cannot now use his voluntary and informed decision to attack his conviction.

B. Ground 2: Counsel's Conflict of Interest

Brunson next avers that his Sixth Amendment rights were violated because Murphy represented him despite "an obvious ongoing conflict of interest." (ECF No. 2697-1, p. 6).

"When a petitioner premises his ineffective assistance claim on the existence of a conflict of interest, the claim is subjected to the specific standard spelled out in *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), instead of that articulated in *Strickland.*" *United States v. Nicholson*, 475 F.3d 241, 249 (4th Cir. 2007).

"To establish that a conflict of interest resulted in ineffective assistance, more than a mere possibility of a conflict must be shown." *Id.* (cleaned up). The defendant "must show (1) that his lawyer was under 'an actual conflict of interest' and (2) that this conflict 'adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler*, 446 U.S. at 348).

The mere possibility of conflict is not enough to satisfy the first requirement. *United States v. Tatum,* 943 F.2d 370, 375 (4th Cir. 1991). Rather, the defendant "must show that his interests diverged with respect to a material factual or legal issue or to a course of action." *Nicholson*, 475 F.3d at 249 (cleaned up). In other words, an actual conflict exists when "the attorney is actively engaged in legal representation which requires him to account to two masters . . . [and] it can be shown that he took action on behalf of one." *Tatum*, 943 F.2d at 376.

But even when an "actual conflict" is shown, "an adverse effect is not presumed." *Nicholson*, 475 F.3d at 249. Instead, the defendant must separately prove that the conflict adversely affected his counsel's performance by satisfying the three-prong test set forth in *Mickens v. Taylor*:

> First, the [defendant] must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the [defendant] must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. . . . Finally, the [defendant] must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

240 F.3d 348, 361 (4th Cir. 2001) (en banc) (citation omitted).

Here, Brunson has failed to satisfy any of these requirements. Initially, Brunson appears to argue that Murphy made litigation choices based on a personal desire to maintain a favorable reputation with the Government. Brunson offers no direct evidence supporting such an assertion. Instead, he asks the Court to infer the existence of conflict based on Murphy's performance at trial. Specifically, Brunson takes issue with Murphy's decision to not call Brunson's family members as witnesses; his declining to object to testimony about crack cocaine found in Brunson's vehicle; and certain comments made in closing arguments. Brunson also alleges that before trial, Murphy declined to move to suppress the wiretaps because he thought such a motion would lack merit.[6]

Although Brunson obviously disagrees with these trial decisions, they in no way show Murphy acted under a conflict of interest. Instead, these actions were strategic decisions that an attorney is permitted to make without a defendant's consent. *See Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998)("Decisions that may be made without the defendant's consent primarily involve trial strategy and tactics, such as what evidence

[6] Brunson makes various other arguments relating to Murphy's performance at trial such as alleging the jury saw him in leg irons. In addition to touching on those arguments here, many of these same allegations are discussed in greater detail below as they are more akin to an ineffective assistance of counsel claim.

should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed.") (cleaned up). Such strategic decisions must be evaluated under the great deference counsel are afforded under *Strickland*. Brunson cannot obtain heightened judicial scrutiny of them simply by asserting they make out a circumstantial case Murphy acted in hidden self-interest. *See, e.g.*, *United States v. Reyes–Bosque*, 596 F.3d 1017, 1034 (9th Cir. 2010) (finding no conflict of interests where the alleged attorney–client conflict "centered on the fact that [the client] was unhappy with counsel's performance"); *United States v. Fields*, 483 F.3d 313, 353 (5th Cir. 2007) ("Mere disagreement about strategic litigation decisions is not a conflict of interest."); *Simon v. United States*, No. 4:12-cr-742-RBH- 1, 2017 WL 4156357, at *10 (D.S.C. Sept. 19, 2017) (finding defendant's disagreements about strategic decisions, and his "personality clashes" with counsel, did not create a conflict).

Brunson also recounts a heated exchange he had with Murphy in an affidavit attached to his motion. However, even assuming his recitation is accurate, such a heated conversation does not rise to the level of a conflict of interest. *See Brown v. United States*, No. CIV.A. DKC 07-0170, 2011 WL 886214, at *4 (D. Md. Mar. 11, 2011) ("Where the disagreements do not entirely destroy the attorney-client relationship, such disagreements do not constitute legal conflicts of interests that establish ineffective assistance of counsel."). Thus, although Brunson may have had disagreements with Murphy through his representation, none of Brunson's allegations rise to the level of a conflict of interest.

Moreover, Brunson has failed to show how Murphy's alleged conflict of interest affected his performance. Brunson offers no explanation of how he can satisfy the three

Mickens requirements for adverse effect. First, he has not shown any plausible defense strategy that would have been objectively reasonable for Murphy to pursue. For example, Brunson faults Murphy for not objecting to a DEA chemical analysist's testimony about drugs found in Brunson's car. However, Brunson himself had already consented to those drugs being admitted into evidence while he was proceeding *pro se*. Similarly, Brunson complains that Murphy did not call Special Agent Greenan back to the stand for further questioning. Brunson ignores the fact that Greenan testified while Brunson was representing himself. It was thus Brunson's responsibility to cross-examine Greenan at that time.

As for Brunson's complaints that Murphy chose not to call Brunson's family as witnesses, he has not demonstrated how calling them would have been objectively reasonable to Murphy. Murphy noted in his affidavit that he had serious reason to doubt the family's credibility. At a bond hearing, Brunson's mother and father each came so close to incriminating themselves on the stand that this Court had to advise them of their Fifth Amendment privilege against self-incrimination. Moreover, Murphy had serious doubts as to the veracity of Jamall's proposed testimony wherein he allegedly would have taken responsibility for the drugs and gun found in the Suzuki. Choosing which witnesses to call for trial is classic trial strategy to which counsel's choices are afforded great deference. Brunson has failed to show why Murphy's decisions were not reasonable.

This conclusion applies equally to any decision made regarding the filing of a motion to suppress. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998)("The decision whether to file a pre-trial motion to suppress a confession is a classic tactical decision.").

Moreover, Murphy raised the wiretap issue after trial which shows he was willing to raise that argument once he thought it was warranted. Thus, Brunson's argument that Murphy's alleged refusal to seek suppression in March 2017 was borne out of self-interest is without merit.

As a separate part of this claim, Brunson asserts Murphy was ineffective for allowing the jury to see Brunson in leg irons or not otherwise asking for a mistrial after they saw him in leg irons. Brunson has offered no support for his contention that the jury actually saw him in leg irons. Indeed, the undersigned is noted in the trial transcript as thanking the AUSA for preventing the jury from seeing Brunson in leg irons. Thus, Brunson has offered no evidence to support his contention the jury saw him in irons, that he was prejudiced in any way, or that his counsel was somehow deficient in not objecting.

Brunson also complained that Murphy failed to recall Agent Greenan or Lamario Wright to the stand after he took over the defense. However, as the Government points out, these witnesses were called while Brunson was representing himself. Brunson extensively cross-examined both men; he re-crossed Wright but not Agent Greenan. He thus had a full and fair opportunity to impeach them. Any shortcoming in those cross-examinations falls on Brunson, not Murphy.

C. Ground 3: Ineffective Assistance of Trial Counsel (Failure to Call Witnesses)

Brunson's next series of arguments assert claims for ineffective assistance of counsel as to various actions or decisions Murphy undertook during trial. Initially, Brunson asserts Murphy should have called several additional witnesses at trial including his father Joe Clemons, his brother Jamall Brunson, and Valerie Austin.

"The decision not to call particular defense witnesses is normally a strategic decision demanding the assessment and balancing of perceived benefits against perceived risks, and one to which '[Courts] must afford . . . enormous deference.'" *Basham v. United States*, 109 F. Supp. 3d 753, 838 (D.S.C. 2013) (quoting *United States v. Terry*, 366 F.3d 312, 317 (4th Cir. 2004)). That deference creates "a presumption that 'counsel's conduct falls within the wide range of reasonable professional assistance.'" *Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir. 2003) (quoting *Strickland*, 466 U.S. at 669). This is a decision for counsel alone to make, "even when the client disagrees." *United States v. Chapman*, 593 F.3d 365, 369 (4th Cir. 2010). "The reasonableness of the tactical decision actually made by counsel is of course subject to challenge, but the decision is not unreasonable simply because the client expressed a contrary view." *United States v. Chapman*, 593 F.3d 365, 369 (4th Cir. 2010).

Here, Brunson has not shown that the decision not to call these witnesses was unreasonable or otherwise outside of the deference afforded to defense counsel. First, Murphy explained in his affidavit that in Murphy's lengthy career of criminal litigation, he found that family members are "generally poorly received as witnesses." Moreover, Murphy was particularly concerned that these family members, Jamall Brunson and Joe Clemons, were not credible witnesses.

Clemons testified for Brunson at the December 2017 bond hearing. During his testimony, the Government asked him if, while in pretrial detention in this case, Brunson had asked him to get something out of a drawer in Brunson's house. When Clemons denied doing that, the Government indicated it had a recording of Brunson and Clemons

discussing this. After the Court warned Clemons about the danger of a perjury charge, he invoked his right to remain silent. Murphy was at that hearing and cited this testimony as a reason to believe that Clemons would not be credible and that calling him might be ethically problematic. Moreover, as Brunson acknowledges, ethical rules allow attorneys not to elicit testimony they reasonably believe may be false. *United States v. McCoy*, No. CR 98-207, 2005 WL 8159961, at *2 (E.D. La. Apr. 15, 2005) ("[T]he Court finds that it is reasonable for defense counsel to believe that any such alibi witnesses were willing to commit perjury in testifying at trial. Any attempt by the defendant's counsel to elicit false testimony through alibi witnesses would be in violation of the Rules of Professional Conduct governing the proceeding.").[7]

Murphy also spoke with Brunson's brother, Jamall, during a break in the trial. Jamall told Murphy he would testify that he drove the Suzuki to the bank without Brunson, and that Brunson had no idea the car contained drugs and a gun. Murphy found that story had "at best [] questionable value" and was "likely false"; it was contrary to what the bank's surveillance videos clearly showed. Murphy Aff. at 6. Based on that assessment, Murphy determined it would not be helpful for Jamall to testify and that calling Jamall would be unethical.

[7] Also, Brunson offers no proffer of what his father, Clemons, specifically would have said about Wright's truthfulness. That omission precludes Brunson from showing his father's testimony would have been not only admissible but impactful. *See, e.g., Jones v. United States*, No. 1:16-cr-94-MOC-DLH-1, 2020 WL 7318140, at *3 (W.D.N.C. Dec. 11, 2020) ("[A] defendant claiming ineffective assistance of counsel based on an uncalled witness should make a proffer of testimony from the uncalled witness.").

Brunson has also failed to show why it was unreasonable to decline calling Valerie Austin who Brunson identified as "compromised" and romantically committed to one of the Government's key witnesses. Brunson avers that she could testify under Rule 608 that Wright was not truthful at trial. He claims she would have testified Wright told her that he and Brunson did not deal drugs together in 2012 and 2013, and that the Government was pressuring him to lie in exchange for a sentence reduction. However, Brunson has not offered any statement from Austin specifying what testimony she would have offered if she had been called to the trial. Thus, his assertions are pure speculation and cannot be used to support his claims.

Accordingly, Brunson has failed to show how Murphy's strategic decision to not call these witnesses fell outside of an objective standard of reasonableness.

Moreover, Brunson has failed to establish any prejudice by showing a reasonable likelihood the outcome of his trial would have been any different. Brunson contends Jamall would have testified he was the one driving around with a gun, illegal drugs, and other evidence of a drug-dealing operation. Even if the Court were to assume that Jamall was willing to incriminate himself, this account is contradicted by video footage offered at trial. Therefore, it is unlikely a jury would have believed Jamall's version of events.

Meanwhile, Brunson does not identify what Clemons or Austin would have said at trial or offer any support for how their testimony would have changed the outcome. As to Austin, Brunson specifically cross-examined Wright about his conversations with Austin. Wright admitted he told her that he and Brunson did not deal drugs together, but then he clarified to the jury that they did, in fact, do so a few times. In other words, the jury had

already learned about Wright's and Austin's conversations, and it convicted Brunson anyway. Hearing about it again from Austin was unlikely to have changed that result.

In a somewhat related ground, Brunson faults Murphy for saying in closing that Brunson's explanation of how he got the keys to the Suzuki was "not a total fabrication." Brunson cannot show this comment was improper. Brunson would have the Court place the emphasis on "total," such that Murphy was saying Brunson's story was only somewhat of a lie. However, Brunson cherry-picks a single line while ignoring the surrounding context. Murphy was responding to the Government's argument that Brunson had made up a story about how he got to the bank, when video evidence told a different story. In that response, Murphy argued some evidence corroborated parts of Brunson's account, thus showing it was not, as the Government contended, "a total fabrication." There was nothing unreasonable about Murphy's comments as they show an attempt to rehabilitate Brunson's credibility. This conclusion is bolstered by other comments Murphy made in closings such as Brunson "got up there and told the truth" on the witness stand. Brunson has failed to show how these comments were unreasonable or how they prejudiced Brunson in any way.

Accordingly, Brunson's claims for ineffective assistance of counsel fail.

D. Ground 4: Actual Innocence

Within issue four, Brunson reiterates his argument that he is innocent of several charges and Jamall should have been presented as a witness to support his claims in trial. These arguments have been exhaustively detailed above and, therefore, further discussion is unnecessary.

E. Ground 5: Ineffective Assistance of Counsel (Failure to Object)

Brunson next argues that Murphy provided ineffective assistance of counsel by failing to object to the introduction of evidence of cocaine base, commonly referred to as crack. More specifically, evidence obtained from the search of Brunson's vehicle after his March 2017 arrest was later confirmed by a lab to be marijuana, powder cocaine, and crack cocaine. The crack itself was admitted as an exhibit in trial, and Special Agent Greenan confirmed it came from the vehicle.

Brunson argues Murphy should not have allowed either the crack itself or any testimony about it into evidence. He also contends Murphy should have objected to the jury having the crack cocaine exhibit for its deliberations.

Brunson first argues that crack was not appropriate evidence because his conspiracy to traffic charge in Count 1 considered conduct occurring from 2004 through June 2014. However, Brunson fails to mention that evidence of this crack was first introduced through Special Agent Greenan, who testified that it was found in Brunson's vehicle and then determined by a lab to be crack. When the Government moved to admit this crack into evidence, Brunson—who was representing himself at that point—said he had no objection. Brunson also never objected to Greenan testifying he found crack.

Brunson cannot now attempt to shift blame to Murphy for Brunson's own decision to not challenge the admission of the crack cocaine. *See Faretta*, 422 U.S. at 834 n.46 (defendant proceeding *pro se* cannot later complain his performance amounted to a denial of effective assistance of counsel). Nor can Brunson show that Murphy performed unreasonably once he took over as trial counsel. Murphy did not take over until the day

after the crack cocaine was admitted and Greenan testified about it. Murphy could not undo Brunson's prior, binding choice to not oppose admission of that evidence. Because Brunson allowed the crack to be admitted with no objection, Murphy had no basis for opposing a DEA forensic chemist testifying she determined that one substance from Brunson's vehicle was crack. Likewise, Murphy would have no grounds for opposing the jury considering admitted evidence in its deliberations. Therefore, Brunson has failed to show any ineffective assistance in this regard.

F. Ground 6: Ineffective Assistance of Counsel (Failure to Advocate)

Brunson next asserts that Murphy was ineffective for "refusing to expose Government's case to crucible of adversarial testing." (ECF No. 2697-1, p. 15).

"Counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690. Defense attorneys are "strongly presumed" to have performed that function. *Id.* Typically, the defendant must not only rebut that presumption but also prove prejudice. *See id.* at 692.

Although rare, prejudice may be presumed when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984). By asserting Murphy "refus[ed] to expose Government's case to crucible of adversarial testing," ECF No. 2697-1 at 15, Brunson is claiming this is one of those rare scenarios.

The *Chronic* standard "is an extremely high showing for a criminal defendant make." *Brown v. French*, 147 F.3d 307, 313 (4th Cir. 1998). A lawyer must truly have "entirely fail[ed]" to advocate for his client; merely making one or even several mistakes

that constitute deficient performance under *Strickland* does not show a complete failure. *See, e.g.*, *Glover v. Miro*, 262 F.3d 268, 276 (4th Cir. 2001) (attorney made several substantial errors, including misreading a statute and failing to contact a known witness, but did not entirely fail to advocate for client; he cross-examined witnesses, he advised his client on potential deals; he gave a vigorous closing; and he sought directed verdicts).

Here, Brunson cannot meet such a rigorous standard. In essence, Brunson avers Murphy could have and should have conducted a more thorough cross-examination of several Government witnesses. Brunson is not however, arguing that Murphy failed to perform, simply that Brunson believes Murphy's performance could have been better. The record belies Brunson's contention that Murphy wholly failed in his duties.

Murphy took lead as counsel just before the Government called its third witness, FBI Agent Brian Jones. From that point forward, he carried out his strategy, making objections when warranted and challenging witnesses' credibility through cross-examination. Murphy further argued for a directed verdict and guided Brunson through his direct examination. He then issued a closing argument which highlighted a strategy of challenging Government witness credibility. After the verdict was returned, Murphy continued advocating by renewing his directed-verdict motion and moving for a new trial.

Brunson offers no argument for how Murphy "entirely failed" him. Instead, Brunson nit-picks, identifying individual lines of transcript and then suggesting Murphy should have handled that moment differently. Brunson may not scour the record and select individual instances where additional lines of questioning could have been posed to support his contention that trial counsel was essentially non-existent. In apparently recognizing this,

Brunson's response continued to press specific instances wherein he claims Murphy's actions constitute ineffective assistance of counsel under *Strickland*. However, these claims likewise fail.

For instance, Brunson also argues that Murphy failed to request a jury charge on multiple conspiracies. A multiple conspiracy instruction "is not required unless the evidence shows that a particular defendant was involved *only* in an entirely separate conspiracy, unrelated to the conspiracy charged." *United States v. Wilkins*, 354 F. App'x 748, 757 (4th Cir. 2009) (emphasis added). Moreover, "a single conspiracy can be comprised of a loosely-knit association of members linked only by their mutual interest in sustaining the overall enterprise of catering to the ultimate demands of a particular drug consumption market." *Id.* (citation omitted). Brunson has offered no evidence presented at trial which would justify such a contention. The evidence presented at trial did not show that Brunson was involved only in a conspiracy unrelated to his charged offense of conspiring with Wright and others. Accordingly, Murphy had no grounds to request such an instruction. Brunson has thus failed to show how Murphy's actions were deficient or prejudicial.

Next, Brunson claims Murphy failed to object to the Government's improper vouching. Brunson's allegations of improper vouching involve three instances: (1) the Government saying, in its closing, that Wright's testimony was credible; (2) the Government calling Richards an expert; and (3) the Government asking Graham about the sentence reduction he received in exchange for testifying in another trial. Each argument fails.

First, in closing, the Government reminded the jury of the Court's instructions on assessing witness credibility. It then discussed the letters Wright and Brunson exchanged while Wright was in jail, noting that Wright wrote his while feeling pressure from his family. It pointed out that, unlike Wright's emotional testimony at trial, Wright wasn't under oath when he wrote those letters. The Government ended its point by "submit[ting]" to the jury that it could use its common sense to believe Wright's testimony. None of that was improper. *See United States v. Sanchez*, 118 F.3d 192, 198 (4th Cir. 1997) (vouching occurs when "a prosecutor indicates a personal belief in the credibility or honesty of a witness"); *Johnson v. United States*, No. 2:07-cf-924-DCN-3, 2014 WL 295157, at *6 (D.S.C. Jan. 27, 2014) ("A prosecutor's reference to facts relevant to the jury's assessment of the witness's credibility does not constitute impermissible vouching.").

Second, as to Richards, Brunson appears to be referring to the point in the Government's closing where AUSA Rowell remarked that he and Richards were roughly the same age and that Richards had spent "his entire career" in drug trafficking. This does not appear to be any form of vouching. It was not inappropriate to suggest that the jury could consider Richards' testimony about his extensive experience with drug trafficking when assessing his credibility.

Finally, Graham testified on direct that he had previously received a sentence reduction in exchange for testifying truthfully in another trial, and he was hoping to get another reduction for testifying truthfully against Brunson. That simply was not vouching. It was direct examination that appropriately elicited facts about Graham's prior history and his motivation for testifying in Brunson's trial. And to the extent Brunson might be

challenging something the Government said about Graham's credibility in closing, the Government properly noted that Graham had to tell the truth to have any hope of a sentence reduction and that Graham's testimony corroborated other evidence. *Cf. Johnson v. United States*, 2014 WL 295157, at *9 (prosecutor's reference to the cooperating witnesses' plea agreements did not constitute vouching).

Even assuming such comments were improper, Brunson has failed to show any prejudice. To determine whether comments prejudiced the defendant, courts consider "(1) the degree to which the comments could have misled the jury; (2) whether the comments were isolated or extensive; (3) the strength of proof of guilt absent the inappropriate comments; and (4) whether the comments were deliberately made to divert the jury's attention." *United States v.* Sanchez, 118 F.3d 192, 198 (4th Cir. 1997) (citation omitted). Improper remarks during closing argument mandate retrial only when the prosecutor's comments "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Collins*, 401 F.3d 212, 217 (4th Cir. 2005).

These factors weigh against Brunson. There is no indication these comments were made to deliberately divert the jury's attention or that the jury was misled. Moreover, these isolated comments do not outweigh the other evidence underlying the Government's case. Accordingly, Brunson's claim that Murphy failed to object to improper vouching fails.

Brunson also avers Murphy was derelict in allowing body cam footage into evidence at trial. At trial, the Government introduced police bodycam video of Brunson's arrest to which Murphy offered no initial objection. The jury saw footage depicting Brunson holding a blue bank deposit bag and wearing keys on his belt. Then, after the video showed Brunson

resisting arrest and saying he was an Indian or a sovereign, Murphy objected on grounds of relevance. The Government then agreed to stop playing the video. The Court made no ruling on Murphy's objection. Brunson now suggests the video was prejudicial and Murphy was ineffective for not opposing the video's introduction in its entirety and then not seeking a curative instruction after it was played.

However, Brunson offers no support for his argument that the video was not admissible. The video depicted him with evidence of the bank deposits he made while he was a fugitive avoiding arrest for years, and with the keys to the Suzuki. That was relevant to not only his guilt, but his consciousness of guilt. Accordingly, Brunson had failed to show how Murphy was ineffective for not lodging an objection sooner.

Lastly, Brunson takes issue with the depth of Murphy's cross-examination across several witnesses. But a lawyer "has no obligation to ask every question suggested." *Pipkin v. United States*, No. 4:05-cr-01129-TLW, 2015 WL 1810911, at *3 (D.S.C. Apr. 20, 2015). Moreover, Brunson offers only vague, speculative assertions about what further cross-examination might have uncovered. That is insufficient to demonstrate prejudice. Thus, Brunson's assertion that Murphy failed "to expose Government's case to crucible of adversarial testing" is without merit.

G. Ground 7: Ineffective Assistance of Appellate Counsel

In this claim for relief, Brunson argues that his appellate counsel, Betts, rendered ineffective assistance of counsel by failing to investigate and make meritorious claims for appeal.

As stated earlier in this order, Betts reviewed the record and filed an *Anders* brief certifying he believed there were no meritorious issues for appeal, but questioning whether the district court properly denied Brunson's wiretap motions. The filing of that *Anders* brief enabled Brunson to file a supplemental *pro se* brief raising whatever other issues he wanted the Fourth Circuit to consider. Brunson availed himself of that opportunity by raising a host of issues over three separate submissions. His arguments included: (1) his sentences for several charges were multiplicitous; (2) this Court tried him as an Article I court; (3) this Court constructively amended Count One and the Government constructively amended Count Eleven; (4) the Court lacked "legislative jurisdiction" over him; (5) that wiretap evidence was not properly admitted; (6) that his Speedy Trial Act rights were violated; and (7) all of his charges were constructively amended.

Now, Brunson contends Betts was ineffective because he failed to raise several arguments including: (1) the Court sentenced him over the statutory maximum; (2) the Court did not consult the Sentencing Guidelines; (3) the statute of limitations barred his prosecution on Count 1; (4) there was a "double jeopardy issue on Count One"; (5) the Court should have granted a Rule 29 motion to dismiss based on insufficient evidence; (6) the Court lacked jurisdiction under 28 U.S.C. § 2515; (7) the Court should have dismissed the indictment because the Government improperly searched his prison cell; (8) the Court's jury charges were confusing as to Count 8; (9) Count 1 was constructively amended; (10) his Speedy Trial Act rights were violated; and (11) he was subject to an "illegal search."

Brunson cannot show that Betts' failure to raise any of these claims was deficient or prejudicial. First, as discussed above, Brunson has the burden of showing these issues

are "clearly" stronger than the wiretap issue Betts raised. Brunson has completely failed to meet his burden of showing how any of these omitted claims were stronger than one that led to a published opinion with a dissent. He instead simply asserts, without explanation, that Betts should have raised these claims. In his response, Brunson claims each of his proposed issues for appeal were clearly stronger, "as a matter of law." He offers no support for such a contention. Such baseless assertions do not satisfy Brunson's difficult burden of rebutting the presumption of reasonable appellate performance.

Moreover, several of the claims he avers were not raised on appeal are raised in the current § 2255 motion—namely constructive amendment, prosecutorial misconduct, and sentencing errors. As shown throughout this order, such claims lack merit. Brunson thus cannot show those claims were "clearly" stronger than what Betts argued.

Brunson has also failed to show any prejudice. To demonstrate prejudice, Brunson has to present a "reasonable probability . . . he would have prevailed on his appeal" but for his counsel's unreasonable failure to raise an issue. *Smith v. Robbins*, 528 U.S. 259, 285–86 (2000). The circumstances of the appeal here prevent Brunson from establishing that but-for connection. First, in his *pro se* appellate briefs, Brunson raised the Speedy Trial Act and constructive amendment claims he contends Betts should have argued. The Fourth Circuit declined to entertain those claims which shows it did not find them even potentially meritorious. That, in turn, precludes a finding that the Fourth Circuit would have been reasonably likely to reverse on those issues. *See Waters v. United States*, No. 4:15-cr-158-BHH, 2019 WL 3495998, at *4 (D.S.C. Aug. 1, 2019) (finding defendant could not show

ineffective assistance on appeal, where defendant used *pro se* appellate briefs to put before the Fourth Circuit the issued he claimed appellate counsel should have raised).

Second, utilizing the opportunity to argue whatever he wanted on appeal, Brunson did not raise any of the other issues he now faults Betts for not raising. Brunson's failure to raise those issues in his appellate supplements prevents him from showing that Betts' performance prejudiced him. *See Drew v. United States*, No. 3:05-cr-70, 2011 WL 2173628, at *6 (N.D. W. Va. June 2, 2011) (finding defendant's failure to raise issue during *Anders* review in his direct appeal prevented him from showing appellate counsel's failure to raise issue prejudiced him).

Third, as discussed above, the Fourth Circuit's independent *Anders* review of Brunson's case was particularly searching. In *Anders* review, an appellate court studies the entire record below in a search for any potentially meritorious issues. The Fourth Circuit obviously satisfied that duty here as it identified a First Step Act issue no one in the case had previously raised on appeal. Had the court also believed the omitted issues here warranted review, presumably it would have ordered briefing on at least one of them. It did not and thus Brunson cannot show that, but for Betts' performance, Brunson would have prevailed on appeal.

H. Ground 8: Sentencing Errors

Brunson next contends that he received an unreasonable sentence after being found guilty on all counts. Brunson specifically asserts that the Court failed to consider the Guidelines at sentencing and imposed sentences that exceeded the statutory maximums.

As the Government points out, this claim is barred by procedural default as Brunson did not assert it on direct appeal. *Cf. Bennett v. United States*, No. 3:16-cv-520-RJC, 2018 WL 1187783, at *5 (W.D.N.C. Mar. 7, 2018) (finding defendant's excessive-sentence claim defaulted because defendant did not assert it on direct appeal).

Brunson attempts to circumvent the default by asserting Betts' failure to raise this issue on appeal is sufficient cause and prejudice. As discussed above, Brunson has failed to show how appellate counsel was in any way deficient in the filing of an *Anders* brief or why Brunson could not make this argument within his supplemental *pro se* filings. Thus, his arguments fail. Consequently, Brunson's claims are subject to dismissal without further discussion. However, Brunson's arguments also fail on the merits.

This claim rests on three basic assertions: the Court disregarded the Guidelines, believing it had to give the statutory maximum for all counts; the Court failed to discuss the § 3553 factors; and the Court imposed sentences exceeding the statutory maximum. Each are incorrect.

Initially, as it always does, the Court thoroughly considered the Guidelines in issuing Brunson's sentence. After lengthy discussion, the Court correctly found that the career-offender provisions applied, and that the statutory mandatory minimum of life on Count 1 ultimately drove the Guidelines range on imprisonment. The Court made sure to note that Brunson's range would have been 420 months to life (plus 60 consecutive months on Count 11) absent the mandatory life sentence.

Next, the sentencing transcript plainly shows the Court thoroughly discussed the § 3553(a) factors when explaining its sentence. The Court also conducted a proportionality analysis on the life sentence, finding it appropriate under the facts.

Finally, the Court did not exceed the statutory maximum sentence on any count. The Court imposed the statutory maximum prison terms on Counts 2 through 10 and 12. It imposed the minimum term for Count 1, which, admittedly, was also the maximum, and the minimum for Count 11. The Court also ordered the maximum supervised-release terms for Counts 2 through 8 and Counts 10 through 12. It ordered the minimum terms for Counts 1 and 9.

Although unclear, Brunson appears to argue that his sentences exceeded the statutory maximum because the Court added supervised-release terms after imprisonment terms. Brunson's argument is without merit as any term of supervised release is separate and apart from a term of incarceration. *See, e.g.*, *United States v. Work*, 409 F.3d 484, 489 (1st Cir. 2005) (stating "courts routinely have held that the combined sentence of years of imprisonment plus years of supervised release may exceed the statutory maximum number of years of imprisonment authorized by the substantive statute applicable to the crime of conviction" and collecting cases); *United States v. Pierce*, 75 F.3d 173, 178 (4th Cir. 1996) ("[S]upervised release is not considered to be a part of the incarceration portion of a sentence and therefore is not limited by the statutory maximum term of incarceration."). Thus, Brunson can show no error in sentencing and thus no prejudice from failing to assert such a claim on appeal.

In his response, Brunson also avers Murphy was ineffective as to sentencing for (1) not objecting to "unreasonable" and "unconstitutional" sentences; (2) not asking the Court to explain its sentence; (3) not arguing for a below-Guidelines sentence; and (4) not "going through the complete Rule 32 procedure." The transcript of the sentencing hearing contradicts Brunson's assertions. At sentencing, Murphy challenged the mandatory life sentence Brunson faced on Count 1 and many of the PSR's Guidelines calculations. When the Court resolved those arguments, the mandatory life sentence, plus five consecutive years, remained. Accordingly, Brunson has not shown how Murphy's action fell below an objective standard of reasonableness. Moreover, for the reasons discussed above, Brunson has failed to show any prejudice. Thus, this claim likewise fails.

I. Ground 9: Constructive Amendment of Count 1

Brunson next series of arguments involve allegations of constructive amendment to various counts of conviction. Initially, he avers that the Government constructively amended the indictment as to Count 1 by expanding the time frame beyond what the indictment alleged.

Initially, this claim is barred by the prohibition on relitigating issues raised on appeal. In his *pro se* submissions on appeal, Brunson argued that the Government and the Court constructively amended all counts of the indictment through opening and closing statements, jury instructions, and evidence. After fully reviewing his briefs and the record, the Fourth Circuit limited further consideration of the appeal to other grounds. In doing so, the Fourth Circuit declined to grant Brunson the relief requested.

A criminal defendant cannot "circumvent a proper ruling . . . on direct appeal by re-raising the same challenge in a § 2255 motion." *United States v. Dyess*, 730 F.3d 354, 360 (4th Cir. 2013) (quoting *United States v. Linder*, 552 F.3d 391, 396 (4th Cir. 2009)); *see also United States v. Roane*, 378 F.3d 382, 396 n. 7 (4th Cir. 2004) (noting that, absent "any change in the law," defendants "cannot relitigate" previously decided issues in a § 2255 motion); *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (holding criminal defendant cannot "recast, under the guise of collateral attack, questions fully considered" on direct appeal). This longstanding rule bars even claims implicitly decided on direct appeal through full *Anders* review. *See Randall v. United States*, No. 4:10-cv 70272-TLW, 2012 WL 3614626, at *3 (D.S.C. Aug. 20, 2012) (Fourth Circuit's plenary *Anders* review of defendant's case on direct appeal meant claim had been implicitly rejected); *United States v. Shelton*, No. 3:07-cr-329-CMC, 2010 WL 2569281, at *2 n.2 (D.S.C. June 24, 2010) (same).

Brunson presented his claims of constructive amendment to the Fourth Circuit and failed to find success. He may not litigate those claims again here. Thus, each of his claims for constructive amendment, which includes Issues 10, 11, and 13, are subject to summary dismissal. However, as explained below, each of these claims also fails on the merits.

The Fifth Amendment guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. Const. amend. V. It is therefore "'the exclusive province of the grand jury' to alter or broaden the charges set out in an indictment." *United States v. Moore*, 810 F.3d

932, 936 (4th Cir. 2016) (quoting *United States v. Whitfield*, 695 F.3d 288, 309 (4th Cir. 2012)).

The Grand Jury Clause is violated "when the indictment is effectively altered to change the elements of the offense charged, such that a defendant is actually convicted of a crime other than that charged in the indictment." *United States v. Burfoot*, 899 F.3d 326, 338 (4th Cir. 2018) (internal quotation omitted). However, not every difference between the government's proof and the indictment constitutes a fatal variance. *See United States v. Redd*, 161 F.3d 793, 795 (4th Cir. 1998). When the government's proof diverges to some degree from the indictment but does not change the crime charged in the indictment, a mere variance occurs. *United States v. Allmendinger*, 706 F.3d 330, 339 (4th Cir. 2013). Such a variance violates the defendant's Fifth Amendment rights only if it "prejudices [him] either by surprising him at trial and hindering the preparation of his defense, or by exposing him to the danger of a second prosecution for the same offense." *United States v. Ashley*, 606 F.3d 135, 141 (4th Cir. 2010) (internal quotation marks omitted). Importantly, and contrary to what Brunson asserts constructive amendments "do not require per se reversal." *United States v. Banks*, 29 F.4th 168 (4th Cir. 2022).

Count 1 alleged Brunson and others conspired to possess with intent to distribute and distribute powder and crack cocaine between 2004 and 2014. Brunson contends the Government's presentation at trial constructively amended this charge to include his marijuana distribution up through his March 2017 arrest. Brunson also alleges the Government improperly told the jury that Count 1 included money laundering, gun possession, and marijuana possession.

However, Brunson's arguments miss the mark. In its opening statement, the Government told jurors it would give them "three windows" of evidence to see how a drug conspiracy worked: wiretap recordings of Brunson; co-conspirators' testimony; and Brunson's activities while he evaded arrest. It is this third type of evidence that Brunson attacks. He argues that the evidence of him evading arrest for his prior criminal activity was improperly cast as conspiratorial conduct for Count 1.

The problem is that Brunson attempts to view Count 1 in a vacuum. It is true that the Government's trial presentation included Brunson dealing marijuana and cocaine, and illegally having guns, up through March 2017. That is because Count 9 charged him with possession with intent to distribute cocaine and marijuana on March 3, 2017; Count 10 charged him with felon in possession on that date; and Count 11 charged him with possessing firearms in furtherance of a drug trafficking crime on that date. Brunson could not have been surprised that the Government would present evidence on those separately charged offenses.

Brunson's argument also overlooks both the jury instructions and the verdict form. The Court made clear that the Government's arguments were not evidence and that the jury was to follow its instructions. It also told jurors their duty was to determine whether the Government had met its burden of proving "the specific facts necessary to find [Brunson] guilty of the crimes charged in the indictment." Then, instructing the jury on Count 1, the Court said the charge alleged a conspiracy involving powder and crack cocaine spanning from 2004 to 2014. The Court never told the jury that marijuana, money laundering, or gun possession was part of that count. Those correct instructions were reflected in the verdict

form, which directed the jury to make specific findings about the quantities of cocaine attributable to Brunson and to the larger conspiracy. These facts, taken together, eliminate any potential concern that Brunson was "actually convicted of a crime other than that charged in the indictment." *United States v. Randall*, 171 F.3d 195, 203 (4th Cir.1999) (internal quotation marks omitted); *see United States v. Foster*, 507 F.3d 233, 243 (4th Cir. 2007) (finding no danger of constructive amendment where, among other things, jury instructions tracked amendment, jury was told counsel's arguments were not evidence, and jury was told to decide whether Government had proved the charges alleged in the indictment).

J. Ground 10: Constructive Amendment of Count 9

Brunson next argues that the Government constructively amended Count 9 of the Indictment by introducing evidence of cocaine base when Count 9 only alleged he possessed with intent to distribute cocaine and marijuana in March 2017. As stated above, this claim is barred by the prohibition on relitigating issues raised on appeal. However, the Court will also address this claim to show it likewise fails on the merits.

Count 9 alleged Brunson possessed marijuana and cocaine and did not specifically allege the cocaine was crack. Brunson argues the Government constructively amended the indictment by introducing evidence that crack was recovered from his vehicle after his March 2017 arrest. The Government also introduced evidence of powder cocaine and marijuana in relation to this arrest.

Brunson bases this argument primarily on a discussion with the Court during a break in the trial. During that break, the Court and the parties discussed how to draft the verdict

form for Count 9. The Government erroneously said the charge included three different drugs: powder cocaine, crack cocaine, and marijuana. Brunson then corrected counsel, noting the indictment did not mention crack. The Government agreed with him.

The verdict form reflected this mutual understanding. It gave the jury the place to write whether he was guilty or not guilty, and then it provided boxes for the jury to specify the drug(s) it found Brunson unlawfully possessed: "Cocaine," "Marijuana," or both. The jury checked both boxes. And there was no danger that the jury checked the box for cocaine based on a finding that Brunson possessed only crack cocaine, rather than powder cocaine given the Court's clear instructions to the jury.

In explaining Count 1, the Court made clear that cocaine and cocaine base are different things. Then, in explaining Count 9, the Court said only that "cocaine" was one of the two charged substances; the Court never mentioned "cocaine base" or "crack." The Court continued with that distinction when it instructed the jury on how to fill out the verdict form. And as mentioned above, the Court instructed the jury to determine only whether Brunson was guilty of the specific crimes charged in the indictment. These instructions belie any assertion that the jury found Brunson guilty of Count 9 solely due to crack possession.

Brunson nevertheless maintains his conviction on Count 9 must have been based on crack alone because the Government introduced evidence that crack was found in his car in March 2017. What Brunson fails to mention is the Government also introduced evidence, without any objection by Brunson, who was then representing himself, that marijuana and powder cocaine were found in his car at that time. In failing to acknowledge this fact, he

offers no rebuttal to the far more plausible explanation for the jury's verdict: the jury convicted him of possessing powder cocaine and marijuana because the Government supplied compelling evidence he did just that.

To the extent Brunson argues that introduction of the crack cocaine evidence somehow influenced the jury's decision on other counts of the indictment, Brunson has offered no evidence or support of such a conclusory assertion. Thus, such an argument is likewise subject to dismissal.

K. Ground 11: Constructive Amendment of Count 11

Brunson next argues that the Government constructively amended Count 11 of the indictment because the jury was instructed on "use" of a firearm when Brunson was charged with "possession" of a firearm in furtherance of a drug trafficking crime. As stated above, this claim is barred by the prohibition on relitigating issues raised on appeal. However, the Court will also address this claim to show it likewise fails on the merits.

Section 924(c) makes it unlawful to "use[] or carr[y] a firearm" "during and in relation to any crime of violence or drug trafficking crime" or to "possess[] a firearm" "in furtherance of any such crime." The operative indictment here used the latter language, alleging Brunson "did possess a firearm" in furtherance of a drug trafficking offense. Brunson argues the Government constructively amended that language by saying during the trial that he "used" a firearm. Brunson's theory is that the jurors rendered a non-unanimous verdict on Count 11, some finding he used a gun while others finding he possessed it.

Brunson's argument overlooks the jury instructions issued at trial. Those instructions focused on "possession" by stating:

> For you to find the defendant guilty, the Government must prove each of the following beyond a reasonable doubt: Number one, the defendant possessed a firearm; and Number two, the defendant did so in furtherance of a drug trafficking crime which may be prosecuted in federal court. In order to find the defendant guilty of Count 11, you must find that he possessed the firearm in furtherance of the crime charged in Count 9. "In furtherance of" means the act of furthering, advancing, or helping forward. Thus, therefore, the Government must prove that the possession of the firearm furthered, advanced, or helped forward the crime -- the drug trafficking crime charged in this case.
>
> . . . .
>
> The mere accidental to coincidental presence of a firearm at the scene of a drug trafficking offense is not enough to establish that it was possessed in furtherance of the drug offense.

Trial Tr. at 692–93.

The Court further told the jury that counsel's statements were not evidence and that the jury was to evaluate the evidence only in view of what the indictment alleged. Thus, there was no danger that the jury rendered a non-unanimous verdict or that the jury convicted Brunson of something other than what the indictment alleged.

Moreover, Brunson can show no prejudice. If a jury convicted him of using a weapon in furtherance of a crime, it is inconceivable as to how those same jurors would not have also believed he possessed that weapon in furtherance of the same crime.

As part of this claim, Brunson argues Murphy was ineffective for failing to object to this particular jury charge. As mentioned, the jury charge focused on the "possesses" language, just as Brunson contends it should have, and the Court admonished the jury to reach a decision based on what the indictment alleged and to not credit the attorneys'

statements as evidence. There was nothing more for Murphy to ask the Court to say. *Cf. Molina-Sanchez v. United States*, No. 3:12-cr-316- FDW-DSC-2, 2018 WL 490551, at *5 (W.D.N.C. Jan. 19, 2018) (finding trial counsel was not ineffective for failing to challenge indictment's purported duplicity, where district court's jury charges eliminated any danger of a non-unanimous guilty verdict). Additionally, as stated above, Brunson is unable to show any prejudice even if he could have shown Murphy's actions were unreasonable.

L. Ground 12: Prosecutorial Misconduct

In Brunson's next claim, he raises a host of issues that he avers amount to prosecutorial misconduct which violated his right to a fair trial.

Here again, Brunson is attempting to present claims which are barred by procedural default. Brunson never raised these claims on direct appeal, and he is thus barred from asserting them for the first time here. *See, e.g., Gore v. United States*, No. 4:01-cr-0627-CWH-9, 2015 WL 10710282, at *18 (D.S.C. Sept. 28, 2015) (collecting cases). Although Brunson avers his default should be excused because appellate counsel failed to raise these claims, Brunson has offered no support to show this issue was stronger than those actually raised by appellate counsel or why he failed to make these claims in his *pro se* supplements. Thus, these claims are subject to dismissal for procedural default. However, even if the Court were to consider such claims, they likewise fail on the merits.

A claim of prosecutorial misconduct must be evaluated to determine whether the alleged misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Scheetz*, 293 F.3d 175, 185 (4th Cir. 2002) (citations omitted). To satisfy this standard, a defendant must prove two things: (1) the

Government's conduct was improper; and (2) that impropriety "prejudicially affected his substantial rights so as to deprive him of a fair trial." *Id.* Although he makes several prosecutorial misconduct allegations, Brunson fails to satisfy the above burden as to any of them.

First, Brunson argues the temporary seizure of his files from the jail frustrated his defense and violated Federal Rule of Evidence 502(b)(2). He alleges that the prosecutors in this case reviewed those files and gained insight as to his trial strategies. However, as discussed above, Brunson has offered no evidence to support such a theory. As noted by the Government, no one involved in prosecuting him took part in the search of his cell, the taking of files from that cell, and the review of those documents. Instead, unrelated FBI agents searched the cell and took the files, and an AUSA with no connection to the case reviewed them. These protocols were put in place precisely to protect the strategic interests Brunson raises in his motion. Brunson has not shown that anything privileged from that review was shared with the prosecuting team. Moreover, Brunson's cell was searched after cooperators indicated Brunson was trying to influence co-defendants' testimony and had personal information about government attorneys and the Court. Because the cause of the search was legitimate and the review protocols prevented disclosure to the prosecution team, Brunson can show no improper conduct or prejudice.

Brunson next asserts, in a conclusory fashion, that the Government improperly introduced evidence of crack cocaine when he was not charged in Count 1 or Count 9 with any offense involving that crack. Brunson makes no effort to show why this was improper or how he was prejudiced. Thus, this argument fails.

Next, Brunson contends the Government knowingly allowed Wright and Greenan to offer perjured testimony. On collateral attack, a defendant alleging this sort of misconduct must demonstrate three elements: (1) that the testimony at issue was false; (2) that the prosecution knew or should have known of the falsity; and (3) that a reasonable probability exists that the false testimony may have affected the verdict. *See United States v. Roane*, 378 F.3d 382, 400 (4th Cir. 2004); *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994).

Here, Brunson has failed to establish the first element by offering only vague allegations that the testimony was contradictory or conflicting. "Mere inconsistencies in testimony by government witnesses does not establish the government's knowing use of false testimony." *United States v. Griley*, 814 F.2d 967, 971 (4th Cir. 1987). Because Brunson fails to support his claims with any evidence showing the Government knowingly solicited false testimony, his claim fails.

Next, Brunson argues the Government improperly advocated for Murphy to be appointed as standby counsel. However, the transcript of the November 14, 2017, hearing shows the Government neither opposed nor advocated for any particular standby attorney. Thus, Brunson's allegations on this point are wholly without merit.

Brunson next contends the Government introduced evidence of his prior drug convictions for improper purposes. This assertion also lacks merit. Before Brunson decided on whether to testify, the Court and the Government advised him that he could be cross-examined on those prior convictions for the purpose of impeachment. He had no

questions about that possibility and impeachment of a witness is a fundamentally proper purpose. *See* Fed. R. Evid. 609. Thus, Brunson can show no misconduct.

In his response, Brunson cites to Federal Rule of Evidence 404(b) to argue that the Government improperly used evidence of his 2006 conviction for maintaining a stash house. Rule 404(b) is "only applicable when the challenged evidence is extrinsic, that is, 'separate' from or 'unrelated' to the charged offense." *United States v. Bush*, 944 F.3d 189, 195 (4th Cir. 2019) (quoting *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994)). On the other hand, criminal acts are admissible as intrinsic evidence "when they are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged." *Id.* (quoting *United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996)). In other words, evidence is intrinsic if it "forms an integral and natural part . . . of the circumstances surrounding the offenses for which the defendant was indicted" and "serve[s] to complete the story of the crime on trial." *Id.* (alteration in original and citations omitted). Here, the Government argued Brunson's maintenance of a stash house was evidence of his participation in the conspiracy charged in Count 1. In other words, that conviction was intrinsic evidence, not improper propensity evidence. It was also relevant to Count 10, as it showed Brunson's possession of a firearm followed a felony conviction. The Government did not engage in misconduct by using this evidence for proper purposes.[8]

[8] For this first time in his response brief, Brunson contends the Government improperly introduced evidence of a 1996 conviction involving cocaine. Because Brunson failed to raise this argument in his initial motion, the Court declines to review it here. Also, this claim is procedurally defaulted.

Brunson's next argument reasserts the claims for constructive amendment discussed above in relation to Issue 9. Brunson essentially argues the Government made comments that constructively amended the indictment on Count 1. For the reasons stated above, this claim lacks merit.

Lastly, Brunson contends it was improper for the Government to assert in its closing argument that he was a liar. The Government did state in its closing arguments that Brunson had lied. However, Brunson fails to mention that he admitted to lying and also, that he was charged with perjury. Specifically, when Brunson tried to get Wright's Escalade in 2013, he lied to the FBI about who owned it. The Government argued this falsity was evidence of Brunson trying to conceal the true ownership of the car and his involvement in the drug-trafficking conspiracy. And in discussing the perjury charge in Count 12, the Government contended Brunson lied to Magistrate Judge Gossett at the bond hearing and then repeated his lies at trial. Brunson admitted the first statement was a lie when he testified. The second comment was directly related to the perjury charge. Accordingly, the Government was discussing evidence introduced at trial: Brunson admitted at trial that he lied about the Escalade, and the jury had evidence that Brunson's bond hearing testimony was false. Thus, there is no support for Brunson's contention that these statements were improper.

Moreover, before closing arguments, the Court instructed the jury that anything lawyers said was not evidence and was not binding, and it told jurors they were the ones to decide credibility. Those clear instructions, which the jury is presumed to have followed, prevented any potential for the jury to give the Government's comments undue weight. Thus, Brunson can show no prejudice.

Accordingly, Brunson's various assertions of prosecutorial misconduct all fail.

M. Ground 13: Constructive Amendment of Count 8

In this claim, Brunson avers the Government yet again constructively amended Count 8 and, therefore, he was wrongfully convicted of a conspiracy to commit money laundering of drug proceeds.

As an initial matter, this claim was presented to the Fourth Circuit on appeal and therefore Brunson is barred from relitigating it here. However, it also fails on the merits as discussed below.

Although somewhat unclear, Brunson appears to allege that the evidence presented at trial was insufficient to convict him. Brunson supports this assertion by averring that a "financial transaction" has to involve a bank or the purchasing of drugs. Thus, Brunson concludes that getting drug money from Richards to get Wright a lawyer, and participating in buying an Escalade with drug money does not amount to a financial transaction under 18 U.S.C. § 1956.

Brunson's argument misses the mark. As the Court explained in its charge, the definition of "financial transaction" is broad: it means—

> (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

18 U.S.C. § 1956(c)(4); Trial Tr. at 688. The conduct at issue fits squarely within that definition and Brunson offers no authority indicating otherwise.

Next, Brunson points out that Count 8 had two paragraphs: the first alleged a "promotion" object, while the second alleged a "concealment" object. He argues that because the verdict form on Count 8 was general, the jury could have rendered a non-unanimous verdict. But as the Fourth Circuit recently noted, "[i]t is well established that 'the allegation in a single count of conspiracy to commit several crimes is not duplicitous, for [t]he conspiracy is the crime, and that is one, however diverse its objects.'" *United States v. Miller*, 41 F.4th 302, 313 (4th Cir. 2022) (quoting *United States v. Marshall*, 332 F.3d 254, 262 (4th Cir. 2003)); *see United States v. Bolden*, 325 F.3d 471, 492 (4th Cir. 2003) (holding that a § 1956(h) count alleging five statutory objects was valid, observing that "[c]ourts have uniformly upheld multiple-object conspiracies, and they have consistently concluded that a guilty verdict must be sustained if the evidence shows that the conspiracy furthered any one of the objects alleged").

Finally, Brunson argues the Court amended Count 8 because its charge on that count incorporated some of the definitions it used to explain Count 1. Brunson therefore argues the jury charge confused the jurors and led them to think they could find him guilty on Count 8 based on his 2017 bank deposits. Not so. The Court incorporated only its prior basic explanation of what a conspiracy is and how one joins it. In no way did that suggest that the Count 1 drug conspiracy, which predated those 2017 deposits, somehow spilled into the jury's deliberations on Count 8. Accordingly, this claim also lacks merit.

N. Ground 14: Failure to Suppress Wiretap Evidence

In his final ground for relief, Brunson argues that this court lacked jurisdiction to sentence him based upon the Government's use of wiretap evidence. Brunson is here again

arguing that evidence obtained from wiretaps should have been suppressed and this Court incorrectly denied his suppression motion. However, this issue was squarely rejected by the Fourth Circuit. *United States v. Brunson*, 968 F.3d 325, 327 (4th Cir. 2020) ("We conclude that the wiretap orders were sufficient under the Wiretap Act . . . . Therefore, we conclude that the district court did not err in denying Brunson's motion to suppress."). This Court is not at liberty to overrule the Fourth Circuit's clear decision on this point. While challenges to subject matter jurisdiction can generally be raised at any time, they cannot be raised over and over. *Boeckenhaupt v. United States*, 537 F.2d 1182, 1183 (4th Cir. 1976) (declining to entertain challenge to arresting officers' jurisdiction that appellate court had previously rejected).

Accordingly, Brunson's claim here fails to show he is entitled to any relief.

To the extent that any other argument Petitioner has asserted is not specifically addressed above, the Court finds that Petitioner has failed to set forth evidence creating a genuine issue of material fact showing that he is entitled to relief and therefore summary judgment is appropriate. In summation, Brunson has offered no meritorious grounds to support his motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

V. CONCLUSION

For the reasons stated above, the Government's Motion for Summary Judgment (ECF No. 2818) is granted, and Petitioner's motion for relief pursuant to § 2255 (ECF No. 2697) is denied. This action is hereby dismissed with prejudice. Consequently, Petitioner's motion for discovery (ECF No. 2850); motion for copies (ECF No. 2719); motion for an

evidentiary hearing (ECF No. 2851); petition for writ of habeas corpus ad testificant and ad prosequendum (ECF No. 2900); and motion for a status conference (ECF No. 2927) are denied as moot.

The Court has reviewed this petition in accordance with Rule 11 of the Rules governing Section 2255 Proceedings. In order for the Court to issue a certificate of appealability, Rule 11 requires that Petitioner satisfy the requirements of 28 U.S.C. § 2253(c)(2), which in turn requires that he "has made a substantial showing of the denial of a constitutional right." The Court concludes that he has not made such a showing, and it is therefore not appropriate to issue a certificate of appealability as to the issues raised in this petition.

IT IS SO ORDERED.

Joseph F. Anderson, Jr.

September 25, 2023
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

United States of America
Government/Respondent
v.
Joey Lamont Brunson
Defendant/Petitioner

Crim. Action No. 3:14-604-JFA
3:22-182-JFA

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars ($ _____), which includes prejudgment interest at the rate of _____ %, plus postjudgment interest at the rate of _____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____ .

■ other: Summary judgment is hereby entered for the respondent, United States of America. The petitioner, Joey Lamont Brunson, shall take nothing of the respondent from his petition filed pursuant to 28 U.S.C. 2255 and this action is dismissed with prejudice.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

■ Decision by the Honorable Joseph F. Anderson, Jr., United States District Judge, presiding.

Date: September 26, 2023

Robin L. Blume
CLERK OF COURT

s/Jennifer Peterson
Signature of Clerk or Deputy Clerk

APPENDIX D

DECISION OF APPELLATE COURTS IN CONFLICT ON LEON and TECHNICAL DEFECTS

NITED STATES OF AMERICA, APPELLEE v. ERIC SCURRY, ALSO KNOWN AS E, APPELLANT
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
821 F.3d 1; 422 U.S. App. D.C. 184; 2016 U.S. App. LEXIS 6401
No. 12-3104 Consolidated with 12-3105, 12-3109, 13-3055, 13-3068
April 8, 2016, Decided
December 3, 2015, Argued

Editorial Information: Subsequent History

Rehearing denied by, Rehearing, en banc, denied by United States v. Scurry, 2016 U.S. App. LEXIS 13286 (D.C. Cir., July 20, 2016)Motion denied by United States v. Scurry, 2018 U.S. Dist. LEXIS 143714 (D.D.C., Aug. 22, 2018)

Editorial Information: Prior History

{2016 U.S. App. LEXIS 1}Appeals from the United States District Court for the District of Columbia. (No. 1:10-cr-00310-RCL-4), (No. 1:10-cr-00310-RCL-7), (No. 1:10-cr-00310-RCL-1), (No. 1:10-cr-00310-RCL-2), (No. 1:10-cr-00310-RCL-3).United States v. Savoy, 883 F. Supp. 2d 101, 2012 U.S. Dist. LEXIS 113743 (D.D.C., Aug. 3, 2012)

Counsel Jonathan S. Zucker, appointed by the court, argued the cause for appellants Robert Savoy, et al. Dennis M. Hart, appointed by the court, argued the cause for appellant Eric Scurry. With them on the joint brief were Pleasant S. Brodnax III, Howard B. Katzoff, and Mark Diamond, all appointed by the court.

Daniel J. Lenerz, Attorney, U.S. Attorney's Office, argued the cause for appellee. On the brief were Vincent H. Cohen Jr., Acting U.S. Attorney, and Elizabeth Trosman, David B. Goodhand, and Arvind K. Lal, Assistant U.S. Attorneys. Elizabeth H. Danello, Assistant U.S. Attorney, entered an appearance.

Judges: Before: ROGERS and PILLARD, Circuit Judges, and WILLIAMS, Senior Circuit Judge. Opinion for the Court filed by Circuit Judge ROGERS.

CASE SUMMARY Motions to suppress certain wiretap evidence were improperly denied because the relevant wiretap orders were facially insufficient under 18 U.S.C.S. § 2518(10); each failed to identify the officials who pre-approved the underlying applications.

United States of America, Appellant, v. Carlos Lomeli; Manuel Hernandez, Appellees.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
676 F.3d 734; 2012 U.S. App. LEXIS 7791
No. 11-1549
November 16, 2011, Submitted
April 18, 2012, Filed

Editorial Information: Prior History

{2012 U.S. App. LEXIS 1}
Appeal from the United States District Court for the District of Nebraska.United States v. Lomeli, 2011 U.S. Dist. LEXIS 4656 (D. Neb., Jan. 17, 2011)

Counsel For United States of America, Plaintiff - Appellant: Thomas J. Kangior, Special Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, District of Nebraska, Omaha, NE.

For Carlos Lomeli, Defendant - Appellee: John William Gallup, Sr., Anthony N. Ike, Omaha, NE.

Carlos Lomeli, Defendant - Appellee, Pro se, Omaha, NE.

For Manuel Hernandez, Defendant - Appellee: Alan Stoler, Omaha, NE.

Judges: Before RILEY, Chief Judge, BEAM and BYE, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: The United States District Court for the District of Nebraska granted defendants' motions to suppress evidence obtained as a result of a wiretap under 18 U.S.C.S. § 2518 and the Fourth Amendment. The Government appealed.Where wiretap application stated that an appropriate official had authorized the application, but it did not include the actual authorizing documents, suppression was warranted because the application was insufficient on its face, as it did not comport with 18 U.S.C.S. § 2518(1)(a), and the omission was not "technical."

OVERVIEW: In furtherance of an ongoing narcotics investigation, an Assistant United States Attorney submitted an application for interception of wire communications to a federal judge who approved the requested wiretap. The application stated that "an appropriate official of the Criminal Division" had authorized the application, but the actual authorizing documents were not attached. During a hearing on defendants' motions to suppress, the Government entered into evidence the missing documents. The appellate court determined that suppression was warranted because the application was insufficient on its face, as it did not comport with the 18 U.S.C.S. § 2518(1)(a) requirement, and the omission was not "technical." One could not tell from the face of the application exactly who the authorizing individual was, just generically that authorization was received, which did not allow the authorizing judge to issue an interception order with the knowledge contemplated by Congress. The Government offered no evidence that the judge indeed knew the identity of the appropriate authorizing official. Also, the good faith exception under the Fourth Amendment did not apply.

OUTCOME: The appellate court affirmed the grant of the motions to suppress.

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. REGINALD SHANTEZ RICE, JOSE-ALBERTO JIMENEZ-HUERTA, GERMAN JOSE JIMENEZ-HUERTA, MARSHALL THOMAS EVANS, JR., DERRICK ALLEN SMITH, DEMETRIUS CRENSHAW, JAMES CRENSHAW, TERRY MIDDLETON, YOLANDA RAYMEL WALKER, DAMON L. SHEPPARD, MONTEZ MARCELLUS MOORE, TERRELL GRAY, Defendants-Appellees.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

478 F.3d 704; 2007 U.S. App. LEXIS 4778; 2007 FED App. 0088P (6th Cir.)

07a0088p.06No. 06-5245

March 2, 2007, Decided

December 6, 2006, Argued

March 2, 2007, Filed

Editorial Information: Subsequent History

Rehearing, en banc, denied by United States v. Rice, 2007 U.S. App. LEXIS 18746 (6th Cir., July 31, 2007)Later proceeding at United States v. Rice, 2007 U.S. Dist. LEXIS 87879 (W.D. Ky., Nov. 29, 2007)

Editorial Information: Prior History

{2007 U.S. App. LEXIS 1} Appeal from the United States District Court for the Western District of Kentucky at Louisville. No. 04-00083. Thomas B. Russell, District Judge. United States v. Rice, 2006 U.S. Dist. LEXIS 1572 (W.D. Ky., Jan. 17, 2006)

Counsel ARGUED: Terry M. Cushing, ASSISTANT UNITED STATES ATTORNEY, Louisville, Kentucky, for Appellant.

Michael R. Mazzoli, COX & MAZZOLI, Louisville, Kentucky, for Appellees.

ON BRIEF: Terry M. Cushing, Monica Wheatley, Amy M. Sullivan, ASSISTANT UNITED STATES ATTORNEYS, Louisville, Kentucky, for Appellant.

Scott C. Cox, Mark D. Chandler, COX & MAZZOLI, Louisville, Kentucky, R. Kenyon Meyer, DINSMORE & SHOHL, Louisville, Kentucky, Jamie L. Haworth, WESTERN KENTUCKY FEDERAL COMMUNITY DEFENDER, INC., Louisville, Kentucky, Frank A. Mascagni III, Louisville, Kentucky, Keith E. Kamenish, Louisville, Kentucky, Kevin C. Burke, BURKE LAW OFFICE, Louisville, Kentucky, Alex Dathorne, Scott James Barton, Louisville, Kentucky, L. Stanley Chauvin III, Louisville, Kentucky, Steven R. Romines, ROMINES, WEIS & YOUNG, Louisville, Kentucky, Richard L. Receveur, Louisville, Kentucky, Rob Eggert, Louisville, Kentucky, for Appellees.

Judges: Before: MOORE and CLAY, Circuit Judges; BELL, Chief District Judge. * MOORE, J., delivered the opinion of the**{2007 U.S. App. LEXIS 2}** court, in which CLAY, J., joined. BELL, Chief D. J., delivered a separate dissenting opinion.

CASE SUMMARY

PROCEDURAL POSTURE: In an interlocutory appeal, the Government sought review of a decision of the U.S. District Court for the Western District of Kentucky at Louisville, which suppressed the fruits of a wiretap used in its case against defendants pursuant to a warrant that was issued under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C.S. § 2510 et seq., and denied its motion for

reconsideration.Suppression of the fruits of a wiretap issued per a warrant under Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C.S. § 2510 et seq., was proper as a district court did not err in finding that misleading affidavit statements were made recklessly and that the warrant was unsupported; also, the good faith exception did not apply.

OVERVIEW: The federal district court found that, based on the affidavit, an issuing judge would mistakenly think that agents had conducted physical surveillance on a particular defendant and his associates, and that there was reason to believe that they had used violence or threats of violence, had violent histories, carried firearms, and wore bullet-proof vests. In fact, no surveillance had been conducted on defendant, and there was no information confirming that he carried a firearm. The district court further found that the misleading statements were made recklessly. Moreover, it found that the affidavit did not indicate either serious consideration of other investigative techniques or the reasons for the affiant's belief in the inadequacy of the other measures being used against defendant. Upon reconsideration, the district court also found that the good faith exception did not apply. The federal court of appeals affirmed, finding no clear error in the district court's factual determinations. In addition, the court of appeals held that the good faith exception did not apply to warrants improperly issued under Title III, citing both its plain language and its legislative history.

OUTCOME: The court of appeals affirmed the district court's order suppressing the fruits of the wiretap and denying the reconsideration motion.

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. KEVIN LEWIS, Defendant - Appellant.UNITED STATES OF AMERICA, Plaintiff - Appellee, v. OTIS PONDS, Defendant - Appellant.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

116 F.4th 1144; 2024 U.S. App. LEXIS 22929

No. 22-3125, No. 22-3126

September 10, 2024, Filed

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1}Appeals from the United States District Court for the District of Kansas. (D.C. Nos. 6:20-CR-10028-EFM-11 & 6:20-CR-10028-EFM-15).United States v. Lewis, 586 F. Supp. 3d 1094, 2022 U.S. Dist. LEXIS 28238, 2022 WL 482846 (D. Kan., Feb. 16, 2022)United States v. Lewis, 2022 U.S. Dist. LEXIS 29115, 2022 WL 486913 (D. Kan., Feb. 17, 2022)

Counsel Megan L. Hayes, Attorney at Law, Laramie, Wyoming, for Defendant Appellant Kevin Lewis.

Lynn C. Hartfield, Law Office of Lynn C. Hartfield, LLC, Denver, Colorado, for Defendant - Appellant Otis Ponds.

James A. Brown, Assistant United States Attorney (Kate E. Brubacher, United States Attorney, with him on the brief), Topeka, Kansas, for Plaintiff-Appellee.

Judges: Before MATHESON, PHILLIPS, and MORITZ, Circuit Judges.

Opinion by: PHILLIPS

Opinion

PHILLIPS, Circuit Judge.

These consolidated appeals share two legal issues raised by two defendants convicted of crimes arising from a vast conspiracy to distribute methamphetamine, marijuana, heroin, powder cocaine, and crack cocaine in Wichita, Kansas. One defendant, Kevin Lewis, went to trial and was convicted of all charges. The other, Otis Ponds, pleaded guilty days before trial but reserved his ability to appeal two issues: (1) whether the government violated his Sixth Amendment rights to a speedy trial and (2) whether he is entitled to an order suppressing all evidence derived from one of the FBI's wiretaps, on grounds that the wiretap application was not{2024 U.S. App. LEXIS 2} signed by the statutorily approved Department of Justice official designated on the authorization filing, but rather was signed by some other, unknown person. Lewis raises these same two issues in his appeal. In addition, Lewis alone raises a third issue: (3) whether the length of his sentence is substantively unreasonable. We affirm the district court's judgment as to all three issues.

AUSA Treaster's wiretap application names "Bruce C. Swartz" as the statutorily authorized official who preapproved the application. The district court's authorization order also names "Bruce C. Swartz" as the "duly designated official of the Criminal Division" who authorized the wiretap. Suppl. R. vol. 1, at 74. Two separate memos were sent on April 5, 2019, one to the Kansas U.S. Attorney and the other to AUSA Treaster, and both documents bear a signature above the name "Bruce C. Swartz." Those signatures match each other. Both memos also bear the personal**{2024 U.S. App. LEXIS 58}** stamp of "Bruce C. Swartz," identifying him as a Deputy Assistant Attorney General of the Criminal Division-a position with authority to approve wiretap applications under § 2516(1). All of this is more than enough to identify Swartz as the statutorily approved "person" and "official" who authorized the first wiretap. § 2518(1)(a), (4)(d).

These facts are a far cry from cases where courts have deemed wiretap authorizations facially deficient under subparagraph (ii). In those cases, the authorization orders typically fail to identify any authorizing individual by name, which is not the situation here. *See United States v. Scurry*, 821 F.3d 1, 8, 12, 422 U.S. App. D.C. 184 (D.C. Cir. 2016) (affirming the district court's ruling that two wiretap orders were "facially insufficient under 18 U.S.C. § 2518(10)(a)(ii)" because "where th[e] official's name should appear, there are only asterisks"); *United States v. Lomeli*, 676 F.3d 734, 740-42 (8th Cir. 2012) (concluding the wiretap application was "insufficient on its face" because "the application in this case just states generically that 'an appropriate official of the Criminal Division' had authorized the application," giving the "authorizing judge . . . no way of knowing the name of the actual, statutorily designated official that had indeed authorized the application"); *United States v. Radcliff*, 331 F.3d 1153, 1162 (10th Cir. 2003) (determining the wiretap orders were facially deficient because**{2024 U.S. App. LEXIS 59}** the orders "did not specify the identity of any person" but rather "listed by title every Department of Justice official with legal authority to authorize an application").

The purpose of § 2518(1)(a) and (4)(d) is to "fix[] responsibility" for the wiretap to a specific DOJ official to deter potential misuse or abuse of electronic surveillance. *See* S. Rep. No. 90-1097, at 101 (1968); *see id.* at 97 (discussing the importance of "centraliz[ing] in a publicly responsible official" the proper execution of "electronic surveillance techniques" to "avoid the possibility that divergent practices might develop" because, "[s]hould abuses occur, the lines of responsibility lead to an identifiable person"). The identification of Bruce C. Swartz by name as the authorizing official on the wiretap application, *see* § 2518(1)(a), and the court's authorization order, *see* § 2518(4)(d), sufficiently affixes the responsibility that Congress intended. Moreover, Congress easily could have written Title III to require that statutorily approved DOJ officials authorize wiretap applications with *authenticated* signatures, whether through a notary, witness, or some other way. But Congress chose not to. *See United States v. de la Fuente*, 548 F.2d 528, 534 (5th Cir. 1977) (stating that "[n]othing in the statute governing the**{2024 U.S. App. LEXIS 60}** authorization of wiretaps . . . requires that the government must authenticate the attorney general's signature on an authorization order as a predicate to use of wiretap evidence" and that Congress elected not to install "safeguard[s]" such as "requiring that an authorization signature be notarized, witnessed, or authenticated by personal testimony at trial"). Accordingly, we see no facial defect with an order that identifies Bruce C. Swartz by his name, his personal stamp, and an accompanying signature.19 *See Dahda*, 584 U.S. at 449 ("The statute means what it says. That is to say, subparagraph (ii) applies where an order is 'insufficient on its face.'" (quoting § 2518(10)(a)(ii))).

Because *Dahda* didn't define with precision the class of defects that require suppression under subparagraph (ii), other circuits since *Dahda* have grappled with that question. *See United States v.* ***Brunson***, 968 F.3d 325, 331 (4th Cir. 2020) (concluding "that the absence of the official's name from the face of the [authorization] orders, even if technically a defect, is not the type of defect that would render these orders facially insufficient"); *United States v. Friend*, 992 F.3d 728, 730-31 (8th Cir. 2021) (reviewing authorization orders that failed to identify the specific DOJ officials by name, even though the underlying wiretap applications did designate specific DOJ officials as the authorizing personnel). This case does not send us into those uncharted waters because, as we discuss below, Defendants have identified no defect with the authorization order in this case.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DANIEL EUGENE CRABTREE, a/k/a Buck Crabtree, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
565 F.3d 887; 2009 U.S. App. LEXIS 10720
No. 08-4411
May 19, 2009, Decided
March 27, 2009, Argued

Editorial Information: Prior History

{2009 U.S. App. LEXIS 1}
Appeal from the United States District Court for the Western District of Virginia, at Big Stone Gap. (2:05-cr-00004-jpj-1). James P. Jones, Chief District Judge.

Disposition:
VACATED AND REMANDED.

Counsel ARGUED: Brian Jackson Beck, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Abingdon, Virginia, for Appellant.
Steven Randall Ramseyer, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia, for Appellee.
ON BRIEF: Larry W. Shelton, Federal Public Defender, Abingdon, Virginia, for Appellant.
Julia C. Dudley, Acting United States Attorney, Roanoke, Virginia, for Appellee.

Judges: Before MICHAEL and TRAXLER, Circuit Judges, and Thomas D. SCHROEDER, United States District Judge for the Middle District of North Carolina, sitting by designation. Judge Traxler wrote the opinion, in which Judge Michael and Judge Schroeder joined.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was sentenced in the U.S. District Court for the Western District of Virginia, at Big Stone Gap, to 24 months imprisonment for violating the terms of his supervised release. The government established some of the violations by introducing audio tapes made by defendant's girlfriend in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.S. §§ 2510-2522. Defendant appealed.Defendant's sentence for violating the terms of his supervised release was vacated and remanded because some of the violations were established through audio tapes made by defendant's girlfriend in violation of the Omnibus Crime Control and Safe Streets Act, and the district court erred by applying a "clean hands" exception to 18 U.S.C.S. § 2515.

OVERVIEW: The court agreed with defendant that although the government was not involved in the interception of defendant's conversations, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.S. §§ 2510-2522, nonetheless prohibited the government from introducing evidence of the intercepted conversations. Because the plain language of 18 U.S.C.S. § 2515 prohibited the introduction of improperly intercepted communications without regard to whether the government was involved in the interception. The district court erred by applying a "clean hands" exception to 18 U.S.C.S. § 2515. Although the district court determined that defendant had committed numerous violations of the terms of his supervised release, the violations stemming from the girlfriend's recordings were far and

away the most serious of the violations. Because there was nothing in the record suggesting that the district court would have imposed the same sentence had it not considered the recordings, the error could not be considered harmless.

OUTCOME: The judgment of the district court was vacated and remanded. On remand, the district court had to exclude the recordings of defendant's conversations made by his girlfriend and any evidence derived from those recordings, as required by 18 U.S.C.S. § 2515.

A.

Title III prohibits, among other things, the interception of a telephone conversation by someone not a party to the conversation, *see* 18 U.S.C.A. § 2511(1)(a); *id.* § 2511(2)(d), and the intentional use or disclosure of the contents of a conversation intercepted in violation of the act, *see id.* §§ 2511(1)(c) & (d). Starnes was not a party to the recorded conversations and Crabtree did not consent to the recording. Thus, there is **{2009 U.S. App. LEXIS 4}**no dispute that Starnes violated Title III by recording Crabtree's telephone conversations or that disclosure of the contents of Crabtree's conversations is prohibited by Title III.

Because the recording of his conversations violated Title III, Crabtree moved in accordance with 18 U.S.C.A. § 2515 to exclude from the revocation hearing the recordings and any evidence derived from the recordings. Section 2515 is a statutory exclusionary rule that generally prohibits the introduction into evidence of illegally intercepted communications or evidence derived from illegally intercepted communications. The district court denied the motion. The court noted that the government had "no involvement in the illegal taping of these conversations," which the court believed warranted application of an "implied exception" to the exclusionary **{565 F.3d 889}** rule set forth in § 2515. J.A. 27. Crabtree appeals, arguing that the district court erred by applying a "clean hands" exception to § 2515.

B.

Whether § 2515 should be understood as containing a "clean hands" exception to its exclusionary rule is an issue that has divided the circuits. The Sixth Circuit has concluded that § 2515 does not preclude the government in **{2009 U.S. App. LEXIS 5}**a criminal prosecution from introducing evidence of a recording made in violation of Title III if the government had no involvement in the illegal interception, *see United States v. Murdock*, 63 F.3d 1391, 1404 (6th Cir. 1995), while the First, Third, and Ninth Circuits have refused to read such a clean-hands exception into § 2515, *see Chandler v. United States Army*, 125 F.3d 1296, 1302 (9th Cir. 1997); *In re Grand Jury*, 111 F.3d 1066, 1079 (3d Cir. 1997); *United States v. Vest*, 813 F.2d 477, 481 (1st Cir. 1987). We agree with the majority and conclude that § 2515 does not permit an exception to its exclusionary rule in cases where the government was not involved in illegal interception.

In our view, the issue is resolved by the language of § 2515 itself. Section 2515 states, in its entirety, that

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision **{2009 U.S. App. LEXIS 6}**thereof if the disclosure of that information would be in violation of this chapter.18 U.S.C.A. § 2515. The statute seems to clearly and unambiguously prohibit the use in court of improperly intercepted communications; we simply see no gaps or shadows in the language that might leave lurking a clean-hands exception. Because the statute is clear and unambiguous, our inquiry typically would start and stop with its plain language. *See, e.g., Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete." (citations and internal quotation marks omitted)).

LOS ROVELL DAHDA, Petitioner v. UNITED STATES
SUPREME COURT OF THE UNITED STATES
584 U.S. 440; 138 S. Ct. 1491; 200 L. Ed. 2d 842; 2018 U.S. LEXIS 2806; 86 U.S.L.W. 4278; 27 Fla. L. Weekly Fed. S 227
No. 17-43.
May 14, 2018, Decided*
* Together with *Dahda* v. *United States* (see this Court's Rule 12.4), also on certiorari to the same court.
February 21, 2018, Argued

Notice:

The LEXIS pagination of this document is subject to change pending release of the final published version.

Editorial Information: Prior History

{2018 U.S. LEXIS 1}ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUITUnited States v. Dahda, 852 F.3d 1282, 2017 U.S. App. LEXIS 5792 (10th Cir. Kan., Apr. 4, 2017)United States v. Dahda, 853 F.3d 1101, 2017 U.S. App. LEXIS 5791 (10th Cir. Kan., Apr. 4, 2017)

Disposition:

853 F.3d 1101 (first judgment) and 852 F.3d 1282 (second judgment), affirmed.

DECISION

{200 L. Ed. 2d 842} Wiretap orders issued by Federal District Court judge were not facially insufficient under 18 U.S.C.S. § 2518, because orders (1) lacked no information that statute required; and (2) would have been sufficient absent orders' language authorizing interception outside court's territorial jurisdiction.

CASE SUMMARY18 U.S.C.S. § 2518(10)(a)(ii) did not contain a Giordano-like core concerns requirement, but rather applied where an order was insufficient on its face. The defect in the instant orders, i.e., authorizing interception outside the territorial jurisdiction of the issuing court, did not result in an insufficiency under § 2518(a)(10)(ii).

OVERVIEW: HOLDINGS: [1]-Contrary to the lower court's conclusion, 18 U.S.C.S. § 2518(10)(a)(ii) did not contain a Giordano-like core concerns requirement, but rather the statute meant what it said, i.e., § 2518(10)(a)(ii) applied where an order was insufficient on its face; [2]-18 U.S.C.S. § 2518(10)(a)(ii) did not cover each and every error that appeared in an otherwise sufficient order, but it covered at least an order's failure to include information that 18 U.S.C.S. § 2518(4) specifically required the order to contain; [3]-The defect in the instant orders, i.e., authorizing interception outside the territorial jurisdiction of the issuing court, did not result in an insufficiency under § 2518(a)(10)(ii) as the sentence was surplus and without legal effect, and the orders clearly set forth the authorizing judge's territorial jurisdiction.

OUTCOME: Judgment affirmed. 8-0 decision

WIRETAP ORDER -- FACIAL INSUFFICIENCY -- SUPPRESSION
Headnote:5.
18 U.S.C.S. § 2518(10)(a)(ii) requires suppression when an order is facially insufficient. And in respect to this subparagraph, there is no good reason for applying the Giordano test. The underlying point of the Giordano limitation was to help give independent meaning to each of 18 U.S.C.S. § 2518(10)(a)'s subparagraphs. It thus makes little sense to extend the core concerns test to § 2518(10)(a)(ii) as well. Doing so would actually treat that subparagraph as surplusage, precisely what the United States Supreme Court tried to avoid. Consequently, § 2518(10)(a)(ii) does not contain a Giordano-like core concerns requirement. The statute means what it says. That is to say, § 2518(10)(a)(ii) applies where an order is insufficient on its face.

WIRETAP ORDER -- FACIAL INSUFFICIENCY -- SUPPRESSION
Headnote:6.
18 U.S.C.S. § 2518(10)(a)(ii) does not cover each and every error that appears in an otherwise sufficient order. It is clear that § 2518(10)(a)(ii) covers at least an order's failure to include information that 18 U.S.C.S. § 2518(4) specifically requires the order to contain. 18 U.S.C.S. § 2518(4)(a)-(e). An order lacking that information would deviate from the uniform authorizing requirements that Congress explicitly set forth, while also falling literally within the phrase insufficient on its face.

NITED STATES OF AMERICA, Plaintiff - Appellee, v. JOEY LAMOND BRUNSON, a/k/a Flex, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
968 F.3d 325; 2020 U.S. App. LEXIS 24230
No. 18-4696
July 31, 2020, Decided
January 29, 2020, Argued

Editorial Information: Subsequent History

Rehearing denied by, Rehearing denied by, En banc United States v. Brunson, 2020 U.S. App. LEXIS 27423 (4th Cir., Aug. 27, 2020)US Supreme Court certiorari denied by Brunson v. United States, 141 S. Ct. 1398, 209 L. Ed. 2d 134, 2021 U.S. LEXIS 857, 2021 WL 666526 (U.S., Feb. 22, 2021)Petition denied by, As moot In re Brunson, 2023 U.S. App. LEXIS 28254 (4th Cir. S.C., Oct. 23, 2023)

Editorial Information: Prior History

{2020 U.S. App. LEXIS 1}Appeal from the United States District Court for the District of South Carolina, at Columbia. Joseph F. Anderson, Jr., Senior District Judge. (3:14-cr-00604-JFA-18).United States v. Alexander, 693 Fed. Appx. 192, 2017 U.S. App. LEXIS 12630, 2017 WL 2992092 (4th Cir. S.C., July 14, 2017)

Disposition:
AFFIRMED.

Counsel
ARGUED: David Bruce Betts, Columbia, South Carolina, for Appellant. Thomas Ernest Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.
ON BRIEF: Brian A. Benczkowski, Assistant Attorney General, Matthew S. Miner, Deputy Assistant Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sherri A. Lydon, United States Attorney, Columbia, South Carolina, J.D. Rowell, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Denver, Colorado, for Appellee.

Judges: Before WILKINSON, NIEMEYER, and MOTZ, Circuit Judges. Judge Niemeyer wrote the opinion, in which Judge Wilkinson joined. Judge Motz wrote a dissenting opinion.

CASE SUMMARY Wiretap orders were sufficient under Title III of Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), and thus, district court did not err in denying defendant's motion to suppress, because in context, orders contained sufficient information to identify authorizing officials as required by 18 U.S.C.S. § 2518(4)(a)-(e).

OVERVIEW: HOLDINGS: [1]-The wiretap orders were sufficient under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the Wiretap Act), and thus, the district court did not err in denying defendant's motion to suppress, because in context, the orders contained sufficient information to identify the authorizing officials as required by 18 U.S.C.S. § 2518(4)(a)-(e), but even if the absence name of the authorizing official in the orders was a defect, it would not be the type of defect that rendered the orders "insufficient" under § 2518(10)(a)(ii), and even if the wiretap orders were thought to be facially insufficient, defendant's motion to suppress would have appropriately been denied under Leon's good faith doctrine; [2]-Because defendant was sentenced prior to the First Step Act's (FSA)

enactment, the benefits of § 401 of the FSA were not available to him.

OUTCOME: Judgment affirmed.

Opinion by: NIEMEYER

Opinion

{968 F.3d 327} NIEMEYER, Circuit Judge:

Joey Brunson, the defendant in this criminal prosecution, challenges the legality of three orders authorizing wiretaps on the ground that the orders did not, on their face, sufficiently identify the persons authorizing the applications for the orders, as required by law. The district court denied his motion to suppress evidence{2020 U.S. App. LEXIS 2} obtained from the wiretaps, and the evidence was used to convict Brunson of numerous drug-trafficking and related crimes.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Wiretap Act"), 18 U.S.C. § 2510 *et seq.*, authorizes federal judges to issue orders approving wiretaps when detailed statutory requirements are met. And it provides that when certain specified requirements are not met, the contents of any intercepted communications and evidence derived from them must be suppressed. *Id.* §§ 2518(4)(a)-(e); § 2518(10)(a).

The Wiretap Act authorizes the Attorney General and various other designated officials in the Department of Justice, including any Deputy Assistant Attorney General in the Criminal Division or National Security Division, to apply for a **wiretap order**, and it requires that *the application* for the order include the "identity of . . . the officer authorizing the application," 18 U.S.C. § 2518(1)(a), and also that *the order* authorizing the wiretap "specify . . . the identity of the agency authorized to intercept communications, and of the person authorizing the application," *id.* § 2518(4)(d). Failing the inclusion of this information, the order becomes "**insufficient**," and evidence obtained from the wiretap must be suppressed. *See id.* § 2518(10)(a)(ii){2020 U.S. App. LEXIS 3}.

In this case, the government identified *in each application* for a **wiretap order** the senior Justice Department official by title and name who authorized the application, but *in each proposed order* that it submitted to the district court, it included only the title, not the name of the official. Each order stated that the application for the order was authorized by "an appropriate official of the Criminal Division, United States Department of Justice, Deputy Assistant Attorney General, pursuant to the power delegated to that official by special designation of the Attorney General." The district court signed the order as submitted.

Brunson contends that because the orders did not include *the name* of each authorizing official, the orders were statutorily **insufficient** and therefore all evidence derived from them should have been suppressed. Accordingly, he argues that the district court erred in denying his motion to suppress.

Since the defect at issue did not implicate the requirements stated{**2020 U.S. App. LEXIS 14**} in §§ 2518(4)(a)-(e), the Court did not address the consequence of a technical defect that might arise by a failure to comply precisely with § 2518(4). *Dahda*, 138 S. Ct. at 1498. Indeed, it stated specifically that it was *not resolving* questions such as the consequence of a defect under § 2518(10)(a)(ii) based on "identifying the wrong Government official as authorizing the application." *Id.* In short, even though the government relied on courts of appeals cases holding that defects arising from a failure to comply to the letter with the requirements of §§ 2518(4)(a)-(e) did not warrant suppression, the Court refused to address the consequence of such technical defects.

Because *Dahda* does not address how we, in this case, are to determine whether the orders' failure to include the names of authorizing officials renders them "insufficient," we must look elsewhere.

B

Brunson's argument that the orders in this case failed adequately to include the "identity . . . of the person authorizing the application" for each order, as required by § 2518(4)(d), arises from the undisputed fact that, even though each order described the authorizing person by title, it did not include *the person's name*, and reference to the name in the application for the order was not an identification on the face{**2020 U.S. App. LEXIS 15**} of the order. He thus contends that the orders were "insufficient on [their face]," requiring suppression under § 2518(10)(a)(ii) of any evidence derived from the wiretaps.

Each order in this case states that it was issued "pursuant to an application authorized by an appropriate official of the Criminal {**968 F.3d 332**} Division, United States Department of Justice, Deputy Assistant Attorney General, pursuant to the power delegated to that official by special designation of the Attorney General." Thus, while the orders identified the authorizing official by title, they did not include the official's name, instead referring to the application where the name was provided.

Finally, even if the wiretap orders were thought to be facially insufficient, Brunson's motion to suppress would have appropriately been denied under the good faith doctrine articulated in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984).

{968 F.3d 334} In *Leon*, the Supreme Court held that evidence "seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective" is not subject to suppression, despite the existence**{2020 U.S. App. LEXIS 21}** of a constitutional violation. 468 U.S. at 905. The Court noted that the social costs of excluding evidence to vindicate Fourth Amendment rights are high, as the exclusion impedes the truth-finding functions of the judge and jury and possibly results in guilty defendants going free or receiving reduced sentences. *See id.* at 907. And suppressing evidence "obtained in objectively reasonable reliance on a subsequently invalidated search warrant" has only "marginal or nonexistent" benefits in terms of deterring Fourth Amendment violations. *Id.* at 922. Thus, the Court observed, where an officer acts in good faith, the benefits of suppressing the fruits of an invalid warrant are outweighed by the harms of doing so. *See id.*

While *Leon* carved out an exception to the *judicially created* exclusionary rule and this case involves a *statutory* exclusionary rule, we note that when Congress enacted the Wiretap Act, it did so against the backdrop of analogous Fourth Amendment jurisprudence. Indeed, the accompanying Senate Report specifically states that the statutory suppression remedy was designed to "largely reflect[] existing law." S. Rep. No. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2185. Moreover, *Leon*'s rationale is equally applicable in the statutory suppression**{2020 U.S. App. LEXIS 22}** context - "when law enforcement officers have acted in objective good faith or their transgressions have been minor," requiring suppression of evidence confers an unearned benefit on a guilty defendant that "offends basic concepts of the criminal justice system." *Leon*, 468 U.S. at 908. Moreover, in the same vein, the Supreme Court has specifically recognized that not every defect in a wiretap order justifies exclusion under the Wiretap Act's suppression provision. *See Dahda*, 138 S. Ct. at 1498.

Thus, we conclude that where law enforcement officials have acted reasonably and in good faith to comply with the central substantive requirements of the Wiretap Act, as is the case here, suppression is not justified. *See Moore*, 41 F.3d at 376-77 (holding that the good faith exception applied to the government's interception of communications pursuant to a wiretap order that was missing the judge's signature); *United States v. Brewer*, 204 F. App'x 205, 208 (4th Cir. 2006) (per curiam) (unpublished) (holding in the alternative that law enforcement officers "were entitled to rely on facially valid wiretap orders pursuant to the good faith exception"). Even though the wiretap orders submitted by the government did not contain the names of the authorizing officials, the accompanying applications did. More importantly, there was**{2020 U.S. App. LEXIS 23}** plainly no attempt to obfuscate the identity of the relevant officials, nor did the government fail to secure proper authorization for the applications submitted. And at the time the orders in question were issued in 2013, no court of appeals had held that a failure to include the name of the authorizing officer in the wiretap order rendered such an order substantively deficient. Indeed, numerous courts had considered challenges to similar orders and held that communications intercepted under those orders were *not* subject to suppression. *See, e.g., United States v. Gray*, 521 F.3d 514, 526-28 (6th Cir. 2008) (holding that the omission of the name of the authorizing officer from a wiretap order was a technical defect that did not require suppression); *United States v. Callum*, 410 F.3d 571, 576 (9th Cir. 2005) (same); ***United States v. Fudge***, **{968 F.3d 335}** 325 F.3d 910, 918 (7th Cir. 2003) (same); *United States v. Radcliff*, 331 F.3d 1153, 1162 (10th Cir. 2003) (same) (noting that "[e]very circuit to consider the question has held that § 2518(10)(a)(ii) does not require suppression if the facial insufficiency of the wiretap order is no more than a technical defect" (quoting *Moore*, 41 F.3d at 374)). Finally, when the D.C. Circuit declined to follow this line of cases, holding in 2016 that the omission of the authorizing officer's name rendered a wiretap order facially insufficient for purposes

of § 2518(10)(a)(ii), *see Scurry*, 821 F.3d at 8-12, the Department of Justice changed its practice to ensure that future{**2020 U.S. App. LEXIS 24**} orders *did* contain the name of the authorizing official.

In short, any defects in orders issued prior to 2016 resulted from good faith efforts to comply with the requirements of the Wiretap Act and not from intentional wrongdoing and therefore would not require suppression of the evidence obtained.

Dissent

Dissent by: DIANA GRIBBON MOTZ

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

The plain language of 18 U.S.C. § 2518(4), as the Supreme Court recognized in *Dahda v. United States*, 138 S. Ct. 1491, 200 L. Ed. 2d 842 (2018), forecloses any holding that the wiretap orders relied on here were facially sufficient. Accordingly, I must dissent.I.A.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, codified at 18 U.S.C. § 2510 *et seq.* ("Title III"), has the "dual purpose" of protecting**{2020 U.S. App. LEXIS 28}** individual privacy and setting forth uniform conditions for law enforcement interception of wire and oral communications. S. Rep. No. 90-1097, at 66 (1968). The statute balances the need to combat serious crime and the equally pressing imperative of safeguarding individual privacy from government overreach. *See id.* at 66-67. It does so by prohibiting all interstate interceptions of wire, oral, and electronic communications with limited exceptions, such as for law enforcement to investigate specified types of serious crime. *Cf. United States v. Hoffman*, 832 F.2d 1299, 1306 (1st Cir. 1987) ("[i]n a society which values privacy and the rights of the individual, wiretapping is to be distinctly the exception - not the rule.").

Title III specifies the obligations of both law enforcement and the authorizing court. It requires law enforcement to submit a **{968 F.3d 337}** detailed wiretap application to a court of competent jurisdiction and delineates the specific information that must be contained in that application. 18 U.S.C. § 2518(1). Only after a court independently makes the findings required by the statute can it issue an order authorizing the interception. *Id.* § 2518(3). Title III also separately lists the information that must appear in the court's order. *Id.* § 2518(4). It is the court's order, not the application,**{2020 U.S. App. LEXIS 29}** that authorizes the interception and provides a defense to civil penalties for unauthorized snooping. *Id.* § 2520(d)(1). An application without a subsequent court order is, legally speaking, no more than a piece of a paper.1

United States of America, Plaintiff - Appellee, v. Kenneth R. Friend, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
992 F.3d 728; 2021 U.S. App. LEXIS 9368
No. 19-3225
November 18, 2020, Submitted
March 31, 2021, Filed

Editorial Information: Subsequent History

Rehearing denied by, En banc, Rehearing denied by **United States v. Friend**, 2021 U.S. App. LEXIS 15858 (8th Cir. Mo., May 26, 2021)Motion granted by Friend v. United States, 142 S. Ct. 561, 211 L. Ed. 2d 350, 2021 U.S. LEXIS 5838, 2021 WL 5434171 (U.S., Nov. 22, 2021)US Supreme Court certiorari denied by Friend v. United States, 142 S. Ct. 819, 211 L. Ed. 2d 508, 2022 U.S. LEXIS 464, 2022 WL 89592 (U.S., Jan. 10, 2022)Petition denied by Friend v. United States, 2023 U.S. App. LEXIS 21656 (8th Cir. Mo., Aug. 17, 2023)

Editorial Information: Prior History

{2021 U.S. App. LEXIS 1}Appeal from United States District Court for the Western District of Missouri - Springfield.United States v. Friend, 2018 U.S. Dist. LEXIS 6556, 2018 WL 445121 (W.D. Mo., Jan. 16, 2018)

Counsel For United States of America, Plaintiff - Appellee: Randall D. Eggert, Assistant U.S. Attorney, Cynthia Jean Hyde, Nhan Duc Nguyen, Assistant U.S. Attorney, Assistant U.S. Attorney, U.S. ATTORNEY'S OFFICE, Springfield, MO.

For Kenneth R. Friend (Federal Prisoner: 27251-045), Defendant - Appellant: Elizabeth Unger Carlyle, Kansas City, MO.

Kenneth R. Friend (Federal Prisoner: 27251-045), Defendant - Appellant, Pro se, Pekin, IL.

Judges: Before COLLOTON, ARNOLD, and KELLY, Circuit Judges.

CASE SUMMARYA district court's denial of defendant's motion to suppress evidence obtained through the government's interception of his wire and electronic communications was affirmed since, even if the orders were insufficient, suppression of evidence was not warranted, because investigators reasonably relied in good faith on the court orders.

OVERVIEW: HOLDINGS: [1]-Evidence obtained through the government's interception of defendant's wire and electronic communications did not have to be suppressed because, while he argued that the court orders authorizing the interceptions were insufficient on their face, because they allegedly failed to specify the identity of the person who authorized the applications for the orders, 18 U.S.C.S. § 2518(10)(a)(ii) incorporated the good-faith exception to the exclusionary rule adopted in the Leon decision, and, given the state of the law in 2014, and even today in light of the Brunson decision, it was objectively reasonable for investigators to rely on the court orders at issue to intercept defendant's communications.

OUTCOME: Denial affirmed.

Criminal Law & Procedure > Search & Seizure > Electronic Eavesdropping > Warrants

Even accepting that a wiretap order is insufficient on its face if it fails to specify the identity of the person authorizing the application, it does not necessarily follow that an order must include the name of an authorizing official.

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Exceptions > Good Faith
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

Because the suppression provision, 18 U.S.C.S. § 2518(10)(a)(ii), is worded to make the suppression decision discretionary, and the legislative history expresses a clear intent to adopt suppression principles developed in Fourth Amendment cases, the United States Court of Appeals for the Eighth Circuit has ruled that the statute incorporates the good-faith exception to the exclusionary rule adopted in the Leon decision.

Opinion

Opinion by: COLLOTON

Opinion

{992 F.3d 729} COLLOTON, Circuit Judge.

Kenneth Friend appeals an order of the district court1 denying his motion to suppress evidence obtained through the government's interception of his wire and electronic communications. He argues that the court orders authorizing the interceptions were insufficient on their face, because they allegedly failed to specify the identity of the person who authorized the applications for the orders. We conclude that even if the orders were insufficient, suppression of evidence is not warranted, because investigators reasonably relied in good faith on the court orders. We therefore affirm the judgment.**{2021 U.S. App. LEXIS 2}**

The appeal arises from a prosecution of Friend for money laundering and conspiracy to distribute methamphetamine. *See* 18 U.S.C. § 1956(a)(1)(A)(i); 21 U.S.C. § 846. During an investigation, federal investigators secured five court orders authorizing the interception of Friend's wire and electronic communications. After a grand jury charged Friend, and the district court denied his motion to suppress all intercepted communications and evidence derived therefrom, Friend entered a conditional guilty plea. He reserved the right to appeal the order denying his motion to suppress. The district court then imposed a sentence of 324 months' imprisonment.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 establishes the procedure for law enforcement to intercept wire, oral, or electronic communications. *See* 18 U.S.C. §§ 2510-2523. The statute provides that an order authorizing the interception of communications "shall specify" several things, including "the **{992 F.3d 730}** identity . . . of the person authorizing the application" for the order. *Id.* § 2518(4)(d). The statute also provides that an aggrieved person "may move to suppress the contents" of an intercepted communication, "or evidence derived therefrom," if "the order of authorization or approval under which**{2021 U.S. App. LEXIS 3}** it was intercepted is insufficient on

its face." *Id.* § 2518(10)(a)(ii).

Friend's complaint is that the court orders authorizing interception of his communications do not include the name of an official who authorized the applications for the orders. The orders state that the applications were "authorized by a Deputy Assistant Attorney General, Criminal Division of the United States Department of Justice, who has been specially designated by the Attorney General of the United States to exercise power conferred upon him" to authorize an application.

Section 2516(1) provides that applications may be authorized by, among others, "any Deputy Assistant Attorney General . . . in the Criminal Division" of the Department of Justice, if the official has been "specially designated by the Attorney General." In Friend's case, the record shows that one of two Deputy Assistant Attorneys General in the Criminal Division who were so designated by the Attorney General-David Bitkower and Kenneth A. Blanco-approved each application. But although the name of either Bitkower or Blanco was included in each application, the official's name was not specified in the orders entered by the court.

Friend asserts that because § 2518(4)(d) requires an interception**{2021 U.S. App. LEXIS 4}** order to specify "the identity . . . of the person authorizing the application," the orders must include the name of the authorizing official. As the orders in this case did not do so, he maintains that each order was "insufficient on its face." 18 U.S.C. § 2518(10)(a)(ii). Friend points to the Supreme Court's observation in *Dahda v. United States*, 138 S. Ct. 1491, 200 L. Ed. 2d 842 (2018), that § 2518(10)(a)(ii) "covers at least an order's failure to include information that § 2518(4) specifically requires the order to contain." *Id.* at 1498 (citing § 2518(4)(a)-(e)). He also relies on *United States v. Scurry*, 821 F.3d 1, 422 U.S. App. D.C. 184 (D.C. Cir. 2016), where the court held that an interception order was insufficient on its face when it identified the authorizing official as "Deputy Assistant Attorney General of the Criminal Division," and there were five such officials in the Criminal Division. *See id.* at 8-12.

But even accepting that an order is insufficient on its face if it fails to "specify . . . the identity . . . of the person authorizing the application," it does not necessarily follow that an order must include *the name* of an authorizing official. The D.C. Circuit, for example, concluded that an order is sufficient if it "points unambiguously to a unique qualified officer holding a position that only one individual can occupy at a time." *Id.* at 8-9. On that view, an order may specify the identity of the**{2021 U.S. App. LEXIS 5}** authorizing person by listing, say, "the Attorney General of the United States" without naming "Merrick Garland," even though a reader must look outside the four corners of the order to discern who was serving in the specified office on the specified date. The Third Circuit likewise concluded that an order was sufficient where it identified the authorizing official as "Assistant Attorney General, Criminal Division, United States Department of Justice." Said the court: "It makes little difference in law that the person authorizing an application for interception was identified by title rather than by name." *United States v. Traitz*, 871 F.2d 368, 379 (3d Cir. 1989).

The Fourth Circuit addressed a related question in *United States v. Brunson*, 968 F.3d 325 (4th Cir. 2020). There, each order identified the authorizing official as "the **{992 F.3d 731}** Deputy Assistant Attorney General of the Criminal Division of the Department of Justice *who signed off on the application* leading to the issuance of the order." *Id.* at 332. The court concluded that the orders were not insufficient on their face because the description led to but one person: a particular Deputy Assistant Attorney General approved the applications, and his name was included in the applications submitted to the district court. Therefore, "both the authorizing judge**{2021 U.S. App. LEXIS 6}** and Brunson had a description sufficient to readily identify the one official who authorized the application for the order." *Id.* at 333.

The government argues that the orders in this case were sufficient on their face because they, too,

included a description that leads to a specific person who authorized the applications. Each order stated that the associated application was "*authorized by a* Deputy Assistant Attorney General, Criminal Division of the United States Department of Justice, who has been specially designated by the Attorney General of the United States to exercise power conferred upon him." *E.g.*, R. Doc. 987-3, at 3 (emphasis added). Each application, in turn, identified by name a specific Deputy Assistant Attorney General as the authorizing official, and attached an order of the Attorney General designating the specified attorney to approve applications. Thus, as in *Brunson*, the authorizing judge and the person subject to interception-by examining the order and the application-could readily identify the official who authorized the application. Friend counters that *Brunson* was wrongly decided, either because an order must include the *name* of an official to "specify" his "identity,"**{2021 U.S. App. LEXIS 7}** or because an order cannot satisfy the statute by identifying the official indirectly through reference to the application. *See Brunson*, 968 F.3d at 339-41 (Motz, J., dissenting).

We need not resolve whether the orders in this case adequately specified the identity of the person authorizing the application. Even assuming for the sake of analysis that the orders were insufficient on their face, suppression of evidence was not warranted. Because the suppression provision, § 2518(10)(a)(ii), is worded to make the suppression decision discretionary, and the "legislative history expresses a clear intent to adopt suppression principles developed in Fourth Amendment cases," this court has ruled that the statute incorporates the good-faith exception to the exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). *See United States v. Moore*, 41 F.3d 370, 376 (8th Cir. 1994); *see also United States v. Lomeli*, 676 F.3d 734, 742 (8th Cir. 2012). Under the circumstances here, the investigators acted with an objectively reasonable good faith belief that the court orders were sufficient.

The interception orders in this case were signed between August 26 and November 4, 2014, and each order authorized interceptions for a period of thirty days. As of those dates, at least one circuit had ruled that an order that specified "a duly designated official of the Criminal Division" as the official who authorized**{2021 U.S. App. LEXIS 8}** the application "did not violate any substantive requirement of Title III." *United States v. Fudge*, 325 F.3d 910, 917-18 (7th Cir. 2003). As discussed, the Fourth Circuit concluded last year that orders similar to those in this case were not insufficient on their face, because they described the authorizing official in a way that allowed for ready identification of a specific person when the orders were considered together with the applications. *Brunson*, 968 F.3d at 332-33. Friend cites no authority as of 2014 holding that a comparable order was insufficient on its face. *Cf. United States v. **{992 F.3d 732}** Gray*, 521 F.3d 514, 526-28 (6th Cir. 2008) (where order identified "no official at all," but record showed that a statutorily designated official gave authorization, the violation was "technical rather than substantive in nature," and did not require suppression); *United States v. Radcliff*, 331 F.3d 1153, 1161-63 (10th Cir. 2003) (concluding that order was insufficient on its face where it "listed by title every Department of Justice official with legal authority to authorize an application," but declining to suppress evidence).

Given the state of the law in 2014, and even today in light of *Brunson*, it was objectively reasonable for investigators to rely on the court orders at issue to intercept Friend's communications. Suppression of evidence is therefore not warranted.

The judgment of the district court**{2021 U.S. App. LEXIS 9}** is affirmed.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARLAND CALLUM, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. STEVEN RAY HENDERSON, aka Ray; Detail Ray, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JOHNNY LEE BARNES, aka Darnell Ferguson, aka J Fresh, Defendant-Appellant. UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DELVONNE MAURICE JENKINS, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
410 F.3d 571; 2005 U.S. App. LEXIS 9346
No. 02-10210, No. 02-10242, No. 02-10243, No. 02-10471
May 23, 2005, Decided
August 12, 2004, Argued and Submitted, San Francisco, California

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Callum v. United States, 126 S. Ct. 318, 163 L. Ed. 2d 278, 2005 U.S. LEXIS 7219 (U.S., 2005)

Editorial Information: Prior History

{2005 U.S. App. LEXIS 1} Appeal from the United States District Court for the Northern District of California. D.C. No. CR-98-40206-DLJ, D.C. No. CR-98-40206-DLJ-04, D.C. No. CR-98-40206-DLJ, D.C. No. CR-98-40206-8-DLJ. D. Lowell Jensen, District Judge, Presiding. United States v. Callum, 404 F.3d 1150, 2005 U.S. App. LEXIS 6707 (9th Cir. Cal., 2005)

Counsel Mark Rosenbush, San Francisco, California, for defendant-appellant Steven Ray Henderson; Richard B. Mazer, San Francisco, California, for defendant-appellant Garland Callum; Joyce Leavitt, Assistant Federal Public Defender, Oakland, California, for defendant-appellant Delvonne Maurice Jenkins; Michael Stepanian, San Francisco, California, for defendant-appellant Johnny Lee Barnes.

Rebecca C. Hardie, Assistant United States Attorney, Oakland, California, for the plaintiff.

Judges: Before: Harry Pregerson and Alex Kozinski, Circuit Judges, and John S. Rhoades, Sr., * District Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants sought review of a judgment from the United States District Court for the Northern District of California, which convicted them upon guilty pleas of conspiracy to distribute cocaine. Defendants' conditional pleas preserved their rights to appeal the denial of their motions to suppress communications that were intercepted in a wiretap under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.S. §§ 2510-2522.Suppression of intercepted communications was not required in drug trial; wiretap orders and corresponding applications were not facially insufficient under 18 U.S.C.S. § 2518(10)(a)(ii) for failure to identify who at DOJ authorized applications as required under § 2518(4)(d). Failure was not a substantial impairment of Congressional purpose.

OVERVIEW: The Drug Enforcement Administration, which suspected defendants of participating in a

drug trafficking ring in Northern California, and the Assistant United States Attorney (AUSA), who supervised the investigation, asked the Department of Justice (DOJ) for authorization to apply for court orders permitting oral, wire, and electronic surveillance. The AUSA received a DOJ authorization letter and presented it along with a wiretap application to a district judge who authorized wiretaps. Defendants argued that the documents were facially insufficient under 18 U.S.C.S. § 2518(10)(a)(ii) because they did not identify who at DOJ authorized the applications as required under § 2518(4)(d). The court concluded that suppression was properly denied because the written DOJ authorization constituted part of the applications and because failing to identify the DOJ source was not a substantial impairment of Congressional purpose. Further, the district court did not clearly err in concluding that the applications were authorized by DOJ before being presented to the judge for approval as required under 18 U.S.C.S. § 2516 and that there was no intentional or reckless omission of information.

OUTCOME: The court affirmed the judgment.

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. JOHN WESLEY RADCLIFF, Defendant - Appellant.
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
331 F.3d 1153; 2003 U.S. App. LEXIS 11856
No. 01-1557
June 16, 2003, Filed

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Radcliff v. United States, 540 U.S. 973, 124 S. Ct. 446, 157 L. Ed. 2d 323, 2003 U.S. LEXIS 7820 (2003)Subsequent appeal at United States v. Yehling, 456 F.3d 1236, 2006 U.S. App. LEXIS 20266 (10th Cir. Colo., 2006)

Editorial Information: Prior History

{2003 U.S. App. LEXIS 1} Appeal from the United States District Court for the District of Colorado. (D.C. No. 99-CR-61-N). United States v. Silcock, 61 Fed. Appx. 528, 2003 U.S. App. LEXIS 3870 (10th Cir. Colo., 2003)

Disposition:
Appeal dismissed in part; Defendant's conviction and sentence AFFIRMED.

Counsel David B. Savitz, Denver, Colorado, for Defendant-Appellant.
Robert M. Russel, Assistant United States Attorney, Denver, Colorado (John W. Suthers, United States Attorney, with him on the briefs) for Plaintiff-Appellee.

Judges: Before EBEL, ALDISERT, * and HOLLOWAY, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant was convicted of conspiracy to distribute methamphetamine and of carrying a firearm during and in relation to that conspiracy. The United States District Court for the District of Colorado sentenced defendant to 288 months of imprisonment. Defendant appealed his conviction and sentence. Defendant also appealed the denial of his motion to suppress.A reasonable jury could infer that defendant intended for his police service weapon to facilitate conspiracy for distribution of methamphetamine, and there was sufficient evidence that the firearm was carried "in relation to" drug trafficking crime.

OVERVIEW: Defendant was an undersheriff when he assisted his wife and her family members of distributing methamphetamine. Defendant alleged insufficient evidence for his firearm conviction, that the wiretap evidence should have been suppressed, and the district court erroneously declined to grant a downward departure based on his evidence of psychological coercion. The court of appeals found that a reasonable jury could infer that defendant intended for his service weapon to facilitate the conspiracy for the distribution of methamphetamine, and there was sufficient evidence that the firearm was carried "in relation to" the drug trafficking crime. The wiretap orders failed to name the Department of Justice officials who had authorized the wiretap applications and this failure did rendered the orders facially insufficient under 18 U.S.C.S. § 2518(10)(a)(ii). However, this insufficiency did not require suppression because the provision violated, 18 U.S.C.S. § 2518(4)(d), did not establish a substantive role and a

technical violation did not require suppression. The district court indicated that it simply did not think a departure was warranted for the type of coercion that defendant alleged.

OUTCOME: Defendant's conviction was affirmed and his sentence challenge was dismissed. The district court's denial of defendant's motion to suppress was affirmed.

APPENDIX E

DECISIONS OF UNITED STATES DISTRICT COURTS IN CONFLICT ON LEON and TECHINCAL DEFECTS

UNITED STATES OF AMERICA, vs. ALVARO ROMERO (1), and SIDNEY ANTHONY WORRELL (10)
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION
2018 U.S. Dist. LEXIS 218754
NO. 1:17-CR-00153-TH
November 2, 2018, Decided
November 2, 2018, Filed

Editorial Information: Subsequent History

Adopted by, Objection overruled by, Motion granted by United States v. Romero, 2019 U.S. Dist. LEXIS 3097 (E.D. Tex., Jan. 8, 2019)

Editorial Information: Prior History

United States v. Avilez, 2018 U.S. Dist. LEXIS 95133 (E.D. Tex., May 10, 2018)

Counsel **{2018 U.S. Dist. LEXIS 1}**For Alvaro Romero, Defendant: David P Cunningham, LEAD ATTORNEY, Attorney at Law, Houston, TX.

For Arturo Elizondo, In custody of US Marshal, Defendant: Norman Silverman, LEAD ATTORNEY, Attorney at Law, Houston, TX.

For Miguel Gerardo Rodriguez, In custody of US Marshal, Defendant: Mitchell Wayne Templeton, LEAD ATTORNEY, Templeton & Brinkley, Beaumont, TX.

For Ricardo Aviles, also known as Avilez, Defendant: Russell James Wright, LEAD ATTORNEY, Attorney At Law, Silsbee, TX.

For Cynthia Lopez, In custody of US Marshal, Defendant: Ron Johnson, LEAD ATTORNEY, Law Offices of Ron Johnson, Houston, TX.

For Jose Rubio-Villegas, Defendant: Reynaldo Padilla Morin, LEAD ATTORNEY, The Law Office of Reynaldo P. Morin, PLLC, Nacogdoches, TX.

For Ines Rubio-Villegas, Defendant: Jared Levi Gilthorpe, LEAD ATTORNEY, Galmor Stovall & Gilthorpe PLLC, Beaumont, TX.

For Alexander Alonso-Mascorro, Defendant: Joel Webb Vazquez, LEAD ATTORNEY, Joel Webb Vazquez, Beaumont, TX.

For Renard Dewayne Smith, Defendant: Thomas William Kelley, LEAD ATTORNEY, The Gertz Law Firm, Beaumont, TX.

For Sidney Anthony Worrell, In custody of US Marshal, Defendant: Brandon Elliott Ball, LEAD ATTORNEY, The Ball Law Firm, PLLC - Houston,**{2018 U.S. Dist. LEXIS 2}** Houston, TX; Mark William Bennett, LEAD ATTORNEY, Bennett & Bennett, Houston, TX.

For USA, Plaintiff: Christopher Thomas Rapp, LEAD ATTORNEY, U S Attorney's Office - Beaumont, Beaumont, TX.

Judges: Zack Hawthorn, United States Magistrate Judge.

Opinion

Opinion by: Zack Hawthorn

Opinion

REPORT AND RECOMMENDATION GRANTING DEFENDANT'S MOTION TO SUPPRESS

Pending before the undersigned is a "Motion to Suppress Wiretap Evidence" filed by Defendants Alvaro Romero and Sidney Worrell (Doc. No. 172). Because the wiretap orders do not contain the identity of the high-level Justice Department official who approved the applications, the orders are facially **insufficient**. *See* 18 U.S.C § 2518(4)(d). Thus, the contents of the wire communications and evidence obtained therefrom should be suppressed pursuant to 18 U.S.C. § 2518(10)(a)(ii).

IV. Motion to Suppress

The Defendants move to suppress all fruits of the{**2018 U.S. Dist. LEXIS 12**} interception of wire communications on the grounds enumerated in paragraph (ii)-that the Wiretap Orders are *facially* ***insufficient*** because they fail to identify the high-level DOJ official who approved the wiretap applications as required by 18 U.S.C. § 2518(4)(d). (Doc. No. 172, p. 9.)

The Government does not dispute that the orders are silent as to which duly authorized DOJ official authorized the application. Instead of explicitly naming the DOJ individual who authorized the request, the orders state that the applications "were authorized by a duly designated official of the Criminal Division, United States Department of Justice pursuant to the power delegated to that official by special designation of the Attorney General of the United States under the authority vested in him by 18 U.S.C. § 2516 . . ." The Government argues that the Defendants' motion should be denied on five grounds: (1) Defendants lack standing6, (2) the Title III Orders are facially sufficient when viewed with the accompanying Applications, (3) any defect is technical and does not warrant suppression, (4) Title III does not allow statutory suppression of intercepted electronic communications such as text messages7, and (5) agents relied on the Wiretap Orders in good{**2018 U.S. Dist. LEXIS 13**} faith and therefore Title III's exclusionary rule does not apply. (Doc. No. 181, p. 1.)

V. Legal Authority

Since Title III was adopted in 1968, the Supreme Court has addressed the sufficiency of wiretap orders in three landmark cases.

A. *United States v. Giordano*, 416 U.S. 505, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974)

In *United States v. Giordano*, the Supreme Court considered which DOJ officials could authorize wiretap applications under Title III, and whether suppression was required when an order was not properly authorized. At the time, the statute limited authority to "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General." *Id.* at 513. The order stated that the wiretap application was authorized by a specially designated Assistant Attorney General, but this was incorrect-the Executive Assistant to the Attorney General authorized the application. *Id.* at 509-10. The court found that, despite the confusion, there was no facial insufficiency, as "the order, on its face, clearly, though erroneously, identified [the Assistant Attorney General] as the Justice Department officer authorizing the application, pursuant to special designation by the Attorney General. As it stood, the intercept order was facially sufficient under § 2516(1)." *Id.* at 525 n. 14. Accordingly,{**2018 U.S. Dist. LEXIS 14**} the wiretap evidence was not suppressed under § 2518(10)(a)(ii).

The Court held that the communications were nevertheless "unlawfully intercepted," and thus subject to suppression pursuant to section 2518(10)(a)(i), because the Executive Assistant to the Attorney General, who had actually approved the application, lacked statutory authority to do so. In deciding that suppression was appropriate, the Court noted that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.* at 527. Applying this test, the court was "confident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored." *Id.* at 528.

In subsequent decisions, courts would interpret *Giordano* as holding that not *every* failure to comply

with a provision of the wiretap statute renders the interception unlawful, but that suppression is required only if the statutory provision**{2018 U.S. Dist. LEXIS 15}** is one "that directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States v. Lawson*, 545 F.2d 557, 562 (7th Cir. 1975). This became known as the "core concerns" test-where suppression hinged on whether the alleged violation implicated Congress' "core concerns" in implementing the protections enumerated in Title III.

B. *United States v. Chavez*, 416 U.S. 562, 94 S. Ct. 1849, 40 L. Ed. 2d 380 (1974)

United States v. Chavez, decided the same day as *Giordano*, involved a wiretap application and order that incorrectly identified an Assistant Attorney General as the authorizing official when the authorization had actually come from the Attorney General himself. *Id.* at 565 (*cf. Giordano* at 509-510, whose authorizing agent lacked statutory power to authorize the **wiretap order**). The Supreme Court found that the mistake did not render the **wiretap order** facially **insufficient** because the Attorney General-an official who possessed statutory authority-had in fact authorized the application. The Court concluded that mere *misidentification* of the official authorizing the application did not make the application unlawfully intercepted within the meaning of § 2518(10)(a)(i) because that identification requirement did not**{2018 U.S. Dist. LEXIS 16}** play a "substantive role" in the regulatory system. *Chavez*, 416 U.S. at 578. *Chavez* differed from *Giordano* because in *Giordano*, the alleged insufficiency was that the authorizing DOJ official lacked statutory authority, and in *Chavez*, the insufficiency was based on a mistake. Ultimately, the court in *Chavez* found that the evidence was not subject to suppression for being "unlawfully intercepted" under section 2518(10)(a)(i):

> Failure to correctly report the identity of the person authorizing the application . . . when in fact the Attorney General has given the required preliminary approval to submit the application, does not represent a similar failure to follow Title III's precautions against the unwarranted use of wiretapping or electronic surveillance and does not warrant the suppression of evidence gathered pursuant to a court order resting upon the application.*Id.* at 571. Both *Giordano* and *Chavez* focus on paragraph (i), which pertains to allegations that the electronic communication was unlawfully intercepted. Under *Giordano* and *Chavez*, a **wiretap order** can list an incorrect source of DOJ authority without creating a facial insufficiency, provided that the source listed is statutorily empowered to exercise authority. *United States v. Callum*, 410 F.3d 571, 576 (9th Cir. 2005).

C. ***Dahda*** *v. United States*, 138 S. Ct. 1491, 200 L. Ed. 2d 842 (2018)8

In ***Dahda***, the Supreme Court considered wiretap orders that impermissibly authorized wiretaps outside the District of Kansas, where the orders had been issued. The defendants claimed that the evidence obtained should be suppressed because the language in the order that purported to authorize wiretaps outside the District of Kansas made the order "**insufficient** on its face" within the meaning of § 2518(10)(a)(ii). *Id* at 1493.

The Tenth Circuit applied the *Giordano* "core concerns" test to hold that paragraph (ii) applies only where the insufficiency reflects an order's failure to satisfy the "statutory requirements that directly and substantially implement the congressional intention to limit the use of" wiretapping. ***Dahda***, 138 S. Ct. at 1493. The court identified two core concerns, concluded that neither applies to the surplusage included on the order that extended the territorial limitation, and denied the defendant's motion to suppress. *Id.*

The Supreme Court rejected the Tenth Circuit's reasoning, and held that the *Giordano* "core

concerns" test does not apply to paragraph (ii) challenges:

> The underlying point of *Giordano*'s limitation was to help give independent meaning to each of § 2518(10)(a)'s paragraphs. It thus makes little sense to extend{**2018 U.S. Dist. LEXIS 18**} the core concerns test to paragraph (ii) as well. Doing so would "actually treat that paragraph as 'surplusage'-precisely what [this] Court tried to avoid in *Giordano*." We consequently conclude that paragraph (ii) does not contain a *Giordano*-like "core concerns" requirement. The statute means what it says. That is to say, paragraph (ii) applies where an order is "**insufficient** on its face."***Dahda***, 138 S. Ct. at 1498 (internal citations omitted). The Court also referenced the Oxford English Dictionary for guidance in determining insufficiency: **insufficient** means "deficient" or "lacking in what is necessary or requisite." *Id.* (citing *Oxford English Dictionary* 359 (1933)). However, the Court was careful to restrict the veil of protection offered by paragraph (ii) in clarifying that not *any* legal defect that appears within the four corners of an order compels a finding of insufficiency and compels suppression. Instead, the Court reasoned that-at *a minimum*-the information required by § 2518(4) is required, and if lacking, would render an order "**insufficient** on its face." *Id.* at 1498; (referring to §§ 2518(4)(a)-(e) (requiring an order to specify, *inter alia*, the identity of the person authorizing the application)).

VI. Discussion

The issue before the court is whether the Wiretap Orders are facially **insufficient**{**2018 U.S. Dist. LEXIS 19**} for failing to identify the authorizing DOJ official, and if so, whether this insufficiency warrants suppression. This issue has been a matter of dispute in various courts for decades and has resulted in different rulings. However, now that the Supreme Court has made clear that the "core concerns" test does not apply to facial insufficiency challenges under § 2518(10)(a)(ii), the undersigned finds that suppression should be granted.

The Defendants rely on *Giordano* and *Chavez* to support their argument that the court must examine the four corners of the order and establish whether, on its face, the § 2518(4) requirements are satisfied. (Doc 172., p. 3.) The Defendants also rely on a case from the Court of Appeals for the D.C. Circuit, *United States v. Scurry*, 821 F.3d 1, 422 U.S. App. D.C. 184 (D.C. Cir. 2016). In *Scurry*, like here, the **wiretap order** did not include the identity of the high-level DOJ official who authorized the wiretap application.9 *Id.* at 367. The D.C. Circuit Court examined the four corners of the order as required by *Chavez* and *Giordano* to find the order to be **insufficient** on its face: "There can be little question that each of the [Defendants'] orders is '**insufficient** on its face' . . . because each fails to include information expressly required by Title III." *Id.* at 8 (internal citations{**2018 U.S. Dist. LEXIS 20**} omitted). Given that the orders authorizing the wiretaps in *Scurry* did not specify the statutorily required high-ranking DOJ official who had signed off on the underlying application, the D.C. Circuit mandated that the information collected pursuant to the wiretaps be suppressed. *Id.* ("To determine whether a **wiretap order** is facially **insufficient**, a reviewing court must examine the four corners of the order and establish whether, on its face, it contains all that Title III requires it to contain.") (noting that the D.C. Circuit's previous opinion in *United States v. Glover*, 736 F.3d 509, 515, 407 U.S. App. D.C. 189 (D.C. Cir. 2013), "left open the possibility that a 'technical defect' in a **wiretap order** might not rise to the level of facial insufficiency, but rather would render the order 'imperfect'").

In response, the Government relies on *Chavez* to argue that "not every failure to comply fully with any requirement provided in Title III" warrants suppression. The Government claims that the *application* identifies the authorizing individual, and that the order references the application-so by extension-the § 2518(4) requirements are satisfied.10 The Government recognizes the recent ruling in ***Dahda***-that the Supreme Court has rejected the "core concerns" approach for paragraph (ii) insufficiencies-but{**2018 U.S. Dist. LEXIS 21**} argues that because the *applications* contain the

required name of the authorizing person, the insufficiency on the order itself constitutes a technical defect, which under ***Dahda*** does not require suppression. The Government also relies on a series of pre-***Dahda*** circuit cases that have denied suppression under similar facts. *See United States v. Radcliff*, 331 F.3d 1153, 1163 (10th Cir. 2003) (holding that failure to identify authorizing person in order constitutes technical defect); and *United States v. Traitz*, 871 F.2d 368, 379 (3d Cir. 1989) (holding that the purpose of § 2518(4)(d) was not undermined where the authorizing official was named in the wiretap application but not in the **wiretap order**).

However, the Government's reliance on any pre-***Dahda*** case is outdated. Prior to ***Dahda***, many courts applied the "core concerns" test when analyzing whether a **wiretap order** was sufficient on its face. *See Traitz*, 871 F.2d at 379; *United States v. Vigi*, 515 F.2d 290, 293 (6th Cir. 1975). Again, the Supreme Court in ***Dahda*** made clear that the core concerns test does not apply to paragraph (ii) challenges, and narrowly defined what constitutes "facial insufficiency":

> It is clear that paragraph (ii) covers at least an order's failure to include information that § 2518(4) specifically requires the order to contain. *See* §§ 2518(4)(a)-(e) (requiring an order to specify, *e.g.*, the "identity of the person, if known, whose communications are to be**{2018 U.S. Dist. LEXIS 22}** intercepted," "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates"). **An order lacking that information would deviate from the uniform authorizing requirements that Congress explicitly set forth, while also falling literally within the phrase "insufficient on its face."*Dahda***, 138 S. Ct. at 1498 (internal citations omitted) (emphasis added).

Section 2518(4) requires that the *order*-not the application-contain the "identity . . . of the person authorizing the application." 18 U.S.C. § 2518(4)(d). The Wiretap Orders at issue do not contain this information. Instead, the Wiretap Orders provide a troublingly vague reference to a "duly designated official of the Criminal Division, United States Department of Justice pursuant to the power delegated to that official by special designation of the Attorney General of the United States under the authority vest in him by Section 2516 . . ." This description casts a wide net and does not narrowly identify the person authorizing the application.

Although Congress has amended Title III since its enactment in 1968, Congress has not changed the information required in a wiretap court order. *Compare* 18 U.S.C. § 2518(4)(a)-(e), with Title III, § 802, 82 Stat. at 219 (adding section 2518(4)(a)-(e) to Title**{2018 U.S. Dist. LEXIS 23}** 18). As the Supreme Court observed in *Chavez*, "[t]here is little question that [the identification requirements] were intended to make clear who bore the responsibility for approval of the submission of a particular wiretap application." *Chavez*, 416 U.S. at 571-72. "To specify a category of official or a job title is usually not the same thing as specifying the 'identity' of a 'person.'" *Scurry*, 821 F.3d at 11. The § 2518(4)(d) requirement that a **wiretap order** identify the person who authorized the wiretap application exists so that "[s]hould abuses occur, the lines of responsibility [would] lead to an *identifiable person." Scurry*, 821 F.3d at 11 (citing S. REP. NO. 90-1097, at 197) (emphasis added).

The undersigned cannot reconcile how the Wiretap Orders-and their blatant failure to comply with the § 2518(4)(d) requirement to identify the person authorizing the application-can satisfy scrutiny for facial insufficiency in a post-***Dahda*** regime. Although the Government urges the court to see this glaring deficiency as a mere "technical defect," the Supreme Court is clear that any failure to include information required by the § 2518(4) requirements renders the order facially **insufficient** under paragraph (ii). ***Dahda***, 138 S. Ct. at 1498. As the Supreme Court also recognized, "[t]he statute means what it says." *Id.; see also New Orleans Depot Servs., Inc. v. Dir., Office of Worker's Comp. Programs*, 718 F.3d 384, 393 (5th Cir. 2013) (en**{2018 U.S. Dist. LEXIS 24}** banc) ("[T]he first rule of statutory construction is that we may not ignore the plain language of a statute."). The statute very

clearly states that the *order* must contain the identity of the person authorizing the application. A reference to a "duly appointed" DOJ official-with no other identifying title or name-falls woefully short of creating a trail of responsibility to an *identifiable person*. Accordingly, the Wiretap Orders are **insufficient** on their face, and the evidence derived therefrom should be suppressed.

VII. The Government's Good Faith Defense

The Government claims that the Wiretap Orders were obtained well before *Scurry* and ***Dahda*** were decided, and that the court should be bound by the legal authority as it existed at the time the orders were signed. The Government cites to the Supreme Court's holding in *Davis v. United States*, 564 U.S. 229, 241, 131 S. Ct. 2419, 180 L. Ed. 2d 285 (2011), which held that evidence obtained during a vehicle search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule. While neither the Supreme Court nor the Fifth Circuit has addressed whether the good faith exception applies to suppression claims brought under § 2518, this issue has been litigated at the circuit level with varying results.**{2018 U.S. Dist. LEXIS 25}**11 The Sixth Circuit and the D.C. Circuit have concluded that the good faith exception is inapplicable to Title III wiretap cases. *See United States v. Rice*, 478 F.3d 704, 711-14 (6th Cir. 2007) and *United States v. Glover*, 736 F.3d 509, 513, 407 U.S. App. D.C. 189 (D.C. Cir. 2013), *abrogated by* ***Dahda***. Whereas the Fourth, Eighth, and Eleventh Circuits have held that it does apply. *See United States v. Moore*, 41 F.3d 370, 376 (8th Cir. 1994); *United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988); *see also United States v. Brewer*, 204 F. App'x 205, 208 (4th Cir. 2006) (unpublished).

The undersigned finds no need to analyze whether the good faith exception applies to Title III cases. Because even if it does, the Government does not prove, nor does the evidence establish, that the Government's error was the result of "reasonable reliance" on binding precedent. At the time the Wiretap Orders were executed in 2014, there was no binding Fifth Circuit or Supreme Court case holding that evidence obtained from a facially **insufficient wiretap order** should not be suppressed as long as the "core concerns" test is satisfied. In fact, the Supreme Court in ***Dahda*** recognized that *Giordano* was trying to avoid having "core concerns" test apply in facial sufficiency challenges. ***Dahda***, 138 S. Ct. at 1498 (holding that the underlying point of *Giordano*'s limitation was to help give independent meaning to each of § 2518(10)(a)'s paragraphs, and that it makes little sense to extend the core concerns test to paragraph (ii) as well).

The § 2518(4) requirements**{2018 U.S. Dist. LEXIS 26}** are remarkably clear-wiretap orders must contain the identity of the person authorizing the application. The statute means what it says, and any assumption otherwise is simply not reasonable nor deserving of the good faith exception. Moreover, it is worth noting that the issue of facial sufficiency of wiretap orders is not a novel concept-this issue has been litigated since the 1970??s. Nearly every circuit and many district courts have addressed the sufficiency of wiretap orders, with some involving analogous facts to this case. And yet, many of the same deficiencies or issues keep occurring, requiring court intervention, and in some instances, suppression is the result. In an effort to avoid matters of contention and possible suppression, the Department of Justice and its officers should be reminded that "Title III is an exacting statute obviously meant to be followed punctiliously." *Callum*, 410 F.3d at 579. The *orders*-not just the applications-require the five elements listed in § 2518(4), including the identity of the person authorizing the application. One would plausibly think this requirement could very easily be satisfied by listing the actual name of the authorizing official in the order itself. This is**{2018 U.S. Dist. LEXIS 27}** a very simple step in the complicated process of preparing the application and order, and yet it seems to oftentimes be overlooked or forgotten.

VIII. Recommendation

Title III requires that wiretap orders specify the identity of any person authorized to make the wiretap

application. 18 U.S.C. § 2518(4)(d). The Government concedes that the Wiretap Orders in this case do not provide this necessary element. The undersigned finds that this deficiency renders the Wiretap Orders facially **insufficient**. Because an aggrieved person may move to suppress the contents of wire communications intercepted or the evidence derived therefrom on the grounds that the **wiretap order** is **insufficient** on its face, the undersigned recommends granting the Defendants' Motion to Suppress.

UNITED STATES OF AMERICA, v. CHRISTOPHER LASHER, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION
2019 U.S. Dist. LEXIS 109655
CRIMINAL ACTION FILE NO. 4:18-CR-00003-MLB-WEJ-18
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Judges: WALTER E. JOHNSON, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: WALTER E. JOHNSON

Opinion

NON-FINAL REPORT AND RECOMMENDATION RE: DEFENDANT LASHER'S MOTION TO SUPPRESS INTERCEPTED COMMUNICATIONS [556]

This matter is before the Court on defendant Christopher Lasher's Motion to Suppress Intercepted Communications Pursuant to Title III [556]. For the reasons stated below, the undersigned **RECOMMENDS** that said Motion be **DENIED**.