

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ISAI SALATIEL RUIZ PEDRAZA
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI
FOR REVIEW OF DECISION OF THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED

Whether the government satisfied the necessity requirement of 18 U.S.C. §2518(1)(c) in applying for a wiretap warrant, when the brief investigation prior to the application had produced substantial results using traditional investigatory techniques and there were no objective signs that the success with these tools had come to an end?

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OPINIONS OF THE LOWER COURTS

In the United States District Court for the Western District of Kentucky, Action Number 5:15-CR00101-DCR-REW-1, Isai Ruiz Pedraza was convicted of conspiracy to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §846, money laundering in violation of 18 U.S.C. §1957, conspiracy to money laundering in violation of 18 U.S.C. §1956(h), and possession of a machine gun in violation of 18 U.S.C. §922(o). He was sentenced to two hundred sixty two (262) months' imprisonment on October 14, 2016. (R.216, Judgment, PageID#1087-92) The evidence which formed the basis for the conviction was obtained by officers of the United States Drug Enforcement Agency ("DEA") pursuant to a Title III wiretap investigation.

The United States Court of Appeals for the Sixth Circuit affirmed the conviction and sentence in case number 16-6612, in a joint opinion with Mr. Pedraza's co-defendants, *United States v. Orozco, et al*, No. 16-6599/6606/6612/6624, filed November 15, 2017.

JURISDICTION

Isai Salatiel Ruiz Pedraza respectfully petitions that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit in case 16-6599/6606/6612/6624. No petition for rehearing was filed in this matter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The “necessity” requirement of the Title III wiretap authority is found in 18

U.S.C. §2518(1)(c):

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

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

STATEMENT OF THE CASE

1. Facts of the Case

After trial in the Eastern District of Kentucky, Isai Ruiz Pedraza was convicted of conspiracy to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §846, money laundering in violation of 18 U.S.C. §1957, conspiracy to money laundering in violation of 18 U.S.C. §1956(h), and possession of a machine gun in violation of 18 U.S.C. §922(o), and sentence of two hundred sixty two (262) months' imprisonment. (R.216, Judgment, PageID#1087-92) The evidence which formed the basis for the conviction was obtained by officers of the United States Drug Enforcement Agency ("DEA") pursuant to a Title III wiretap investigation.

These DEA agents began to monitor a cell phone associated with Mr. Ruiz Pedraza after the number was identified as part of another drug investigation in Central Kentucky. (R.251, Trial Transcript Vol.3, Page ID #2477-78) The agents began surveillance and monitoring Ruiz Pedraza's phone calls through a separate Title III intercept. (Id., Page ID#2479). Intercepts from three separate telephones were introduced at trial, Target Telephone 1 (859-913-0737), Target Telephone 2 (859-539-9760) and Target Telephone 6 (859-333-7298). (Id., PageID#2485; R.249, PageID#227)

The intercepted phone calls were almost entirely conducted in Spanish and had to be translated. (R. 249, Trial Transcript Vol.1, PageID#2105) DOJ translator Lisa Rivera testified that she listened to the calls and made determination that all three lines were from the same speaker/person. (Id., PageID#2118) Cross-examination of Ms. Rivera revealed that the original translations were changed significantly before arriving

at the final transcripts used at trial. (Id., PageID#2121-39) For example, fifty changes were made just to a single November 10th phone conversation. Id.

Prior to obtaining the wiretap warrants, Special Agent Stout executed a search warrant to collect cellphone location information for the number associated with Mr. Ruiz Pedraza. (R.132, Order Denying Suppression, PageID#628.) On August 13, 2015, agents searched through Mr. Ruiz Pedraza's trash at his residence. The agents found what they believed was a ledger containing payments of \$32,000 and \$128,000 between July 20 and 29, 2015. (Id., PageID#629.) These papers appeared to refer to packages of marijuana. (Id.)

On August 16, 2015, pen register data indicated that Mr. Ruiz Pedraza stopped using the cellphone being tracked. Special Agent Stout then sought pen register data for a new number, also believed to be associated with Mr. Ruiz Pedraza. This phone became Target Telephone 1. (R. 132, PageID#629.) According to Agent Stout, pen register data, toll records, and surveillance indicated that Mr. Ruiz Pedraza used Target Telephone 1.

On August 19, 2015, agents obtained a search warrant to place a GPS tracking device on Mr. Ruiz Pedraza's vehicle. (R.132, PageID#629.)

In late August 2015, the agents began surveillance of two residences associated with Ruiz Pedraza, 2632 Kearney Ridge and 586 Stonetown Road in Stamping Ground, Kentucky. (R.249, PageID#2028) On August 26, 2015, Agents observed Alfredo Albores pull up to Mr. Ruiz Pedraza's residence and enter with a bag. (R.132, PageID#629) Albores left without the bag. (Id.) That evening, Mr. Ruiz Pedraza traveled to a Super 8 Motel in Richmond, Kentucky, where he got out of a white-panel van, exchanged keys with an unknown male, and left the area in another vehicle. (R.132, PageID#630) O n

September 15, 2015, agents applied for and received permission to begin a thirty-day wire and electronic interception on Target Telephone 1. (R.132, PageID#630) The following day they applied for the same for Target Telephones 2 and 3, which they also believed belonged to Mr. Ruiz Pedraza. (Id.)

Although the agents continued surveillance of Mr. Ruiz Pedraza, they did not observe him in actual possession of any drugs, firearms or cash. (R.249, PageID#2083, 2149, 2159; R.250, PageID#2323)

Pursuant to the wiretap authorizations, agents intercepted a phone call allegedly between Mr. Ruiz Pedraza and an unknown man discussing “dropping it” with “the orange one” on October 7, 2015. (R.250, PageID#2197) The agents followed Mr. Ruiz Pedraza’s vehicle to a gas station on I-75 near the Ironworks exit in Lexington. Vol.1, 153-66. There a minivan containing Mr. Ruiz Pedraza and Mr. Albores parked next to a bright orange semi-truck. The agents views were obstructed and they did not see any transactions between the two vehicles. (R.249, PageID#2149-51) The agents then followed the semi-truck into Indiana, and had Indiana State Police conduct a traffic stop on the vehicle north of Indianapolis. (Id., PageID#2151). The driver of the semi-truck was Gilberto Garza Solis. A search of the semit-truck revealed \$312,000 hidden in the cab of the truck behind a speaker cabinet. (R.250, PageID# 2199-2203) The speaker cabinet appeared to have tool marks, as if someone had tried to force it open. (Id.) The agents did not see anyone with tools in truck. (Id.)

In November 2015, while monitoring the phone calls pursuant to the wiretaps, agents intercepted a phone call from an unidentified male indicating that a man named Ezequiel would arrive with a delivery of a large shipment of cocaine. (R.251,

PageID#2525.) Communications intercepted between Mr. Ruiz Pedraza and Ezequiel Arias Orozco provided the date, time, and location for the delivery (Id., PageID#2534-35, 2538-42.)

Based upon these intercepted communications, agents applied for a warrant to track the location of Orozco's phone. (R.251, PageID#2542.) The phone traveled from St. Louis to Chicago, and then Chicago to Lexington. (Id.) This trip to Chicago was not recorded on the travel logs for the semi-truck. (R.250, PageID# 2282-83.) The semi-truck was driven by Defendant Guerra Gutierrez, and eventually arrived at the identified location, soon followed by a blue minivan driven by Albores. (R.251, PageID#2551.) Both vehicles were later stopped. In the minivan Albores was driving, law enforcement officers found three large shopping bags containing 28 kilograms of cocaine. The semi-truck was pulled over, with Guerra Gutierrez driving, Orozco in the passenger's seat, and Avila in the sleeping berth. (Id., PageID#2334.) A subsequent search revealed a small baggie of cocaine in the cab of the truck. (Id., PageID#2372.)

The wiretap intercepts also lead agents to seek and obtain a search warrant for properties associated with Mr. Ruiz Pedraza, including the residence at 586 Stonetown Road in Stamping Ground, Kentucky. (R.251, PageID#2557-70) There, the agents found no drugs in the residence, but did find several guns in a safe, including an M16 automatic weapon. (R.250, PageID#2192)

Mr. Ruiz Pedraza was indicted on December 15, 2015. (R.15, Indictment, PageID#94) A superseding indictment was returned on February 5, 2016. (R.88, Superseding Indictment, PageID#330-36) Shortly afterwards, he filed a motion to suppress all intercepted communications, as well as all evidence derived from such

communications. (R. 111, Motion to Suppress, PageID#443-47) The district court denied the motion. (R.132, Order, PageID#627-36)

At trial, the governments case consisted of the details of the investigation, as recounted by the agents, coupled with the testimony of Albores. The jury found Mr. Ruiz Pedraza guilty on all counts. (R.180, PageID#793- 94) On October 17, 2016, the district court sentenced him to two hundred sixty two months. (R.216, PageID#1087-92)

2. Procedural History

Mr. Ruiz Pedraza appealed to the Sixth Circuit Court of Appeals. One of the issues raised was whether the evidence gathered pursuant to a wiretap should have been excluded because the application for the wiretap did not meet the statutory “necessity” requirement, 18 U.S.C. § 2518(1)(c). Mr. Ruiz Pedraza challenged the government’s wiretap application on five grounds related to the necessity requirement: (1) traditional investigative techniques had been yielding relatively quick and substantial progress; (2) the period during which traditional investigative techniques were employed was too abbreviated, lasting only about two months; (3) the government’s wiretap application employed a non-chronological narrative designed to obscure the brevity and significant achievements of traditional investigative techniques; (4) the government failed to demonstrate that further use of traditional investigative techniques would be futile or unlikely to succeed, and (5) the government’s wiretap application improperly reframed the inherent limitations of certain investigative techniques as indicia of their futility in a specific case.

The court of appeals affirmed the district court, finding the government had satisfied the necessity requirement. The Sixth Circuit held that “even if the government’s

traditional investigative techniques yielded progress prior to the application, and even if that period was ‘abbreviated,’ these are of no moment” and did not impact the necessity inquiry. *Orozco*, at *9. Regarding the non-chronological narrative in the application, although Judge Reeves acknowledged the confusing nature of the narrative, the Sixth Circuit accepted his explanation that “he was able to parse out the relevant facts.” *Id.*, 10. Finally, the Sixth Circuit found that the application detailed a thorough, quality investigation and “non-invasive techniques such as physical surveillance, trash searches, interviews with cooperating defendants, and pen registers were either conducted and exhausted or, based on Pedraza's ‘surveillance-conscious’ nature, deemed too risky to continue without jeopardizing the investigation.” *Id.*, at 13-14.

REASONS FOR GRANTING THE WRIT

I. The court of appeals decision is incorrect.

“Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices.” *United States v. Berger*, 388 U.S. 41, 63 (1967). When Congress enacted the wiretap procedures in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, its chief concern was to “protect[] individual privacy” while preserving “electronic surveillance as a weapon against the operations of organized crime.” *United States v. Kahn*, 415 U.S. 143, 151 (1974). “There is, of course, some tension between these two stated congressional objectives,” the Court acknowledged, “and the question of how Congress struck the balance in any particular instance” calls for careful application of “the precise wording chosen by Congress in enacting Title III.” *Id.*

Congress has directed that a Title III wiretap warrant, unlike an ordinary search warrant, requires not only a finding of probable cause, but also a finding that the wiretap is necessary. The affiant is required to set forth the necessity in the particular investigation by including in the affidavit in support of the wiretap warrant an explanation that “normal investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” 18 U.S.C. § 2518(3)(c). To obtain a wiretap warrant, the government must provide, in addition to its facts supporting probable cause, “a full and complete statement” about other investigative procedures that have been tried and failed. 18 U.S.C. § 2518(1)(c). Title III provides its own suppression remedy on the ground that “the communication

was unlawfully intercepted,” with no requirement of deliberate or reckless falsehood. 18 U.S.C. § 2518(10)(a).

Courts initially made clear that this necessity requirement meant what Congress stated, “the court must find that alternative methods have been tried or would not have succeeded.” *United States v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985). When it enacted Title III, Congress contemplated that this finding would be based on an exhaustive inquiry into the sufficiency of, “for example, standard visual or aural surveillance by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants.” S.Rep. 90-1097, 1968 U.S.C.C.A.N. 2112, 2190. After investigatory advancements through the years, the list of traditional techniques the government should be required to deploy or explain away is much longer: toll registers, financial investigations, controlled buys, mail and trash covers, trap-and-trace devices, and, where appropriate, newer technologies such as GPS tracking and cell-site data.

The decision of the Sixth Circuit here allows officers to clear the necessity hurdle with much less effort. In the case *sub judice*, the Sixth Circuit holds that “[e]ven if the government’s traditional investigative techniques yielded progress prior to the application, and even if that period was ‘abbreviated,’ these are of no moment. Neither of these claims is probative of whether the government’s application was sufficient at the time it was made.” *United States v. Orozco, et al*, 2017 U.S.App Lexis 22992, R. 54-2, at *9 (November 15, 2017)(attached). This decision by the Sixth Circuit substantially undermines the standard that wiretap warrants were not necessary when

more traditional investigative techniques were sufficient to expose the crime in a reasonable period of time. Effectively, the Sixth Circuit has allowed wiretaps in drug trafficking investigations, and increasingly other suspected crimes, simply due to the nature of such investigations so long as the officers state that they have attempted some other traditional investigative techniques, regardless of how successful these techniques have been or how long the techniques have been used.

This Court long ago established that the first aspect of the necessity requirement – proof that “other investigative procedures have been tried and failed,” §2518(1)(c) – embodies the principle that law enforcement officers cannot resort to wiretaps if “traditional investigative techniques would suffice to expose the crime.” *Kahn*, 415 U.S. at 153 n.12. To demonstrate that regular procedures “have been tried and failed,” the government “need not exhaust every conceivable investigative technique...,” but it must at least demonstrate that “ordinary investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time.” *United States v. Bennett*, 219 F.3d 1117, 1122 (9th Cir. 2000) (citations omitted).

Traditional investigative techniques were certainly adequate in this case. In pages 25 and 26 of its brief to the Court of Appeals, the government argued that even without the wiretap evidence, the evidence obtained through other traditional investigative techniques is so overwhelming that any error due to the wiretap should be considered harmless error. While Mr. Pedraza does not concede that the evidence against him was overwhelming, it is clear that the traditional investigative techniques were producing the evidence that the government would ultimately rely on at trial and these other techniques were sufficient without the need to resort to wiretap surveillance.

The second aspect of the necessity test calls for proof that “other investigative techniques reasonably appear to be unlikely to succeed if tried, or to be too dangerous.” § 2518(1)(c). “Such a showing must allege specific circumstances that render normal investigative techniques particularly ineffective,” a Ninth Circuit case commented, “to prevent the government from making general allegations about classes of cases and thereby sidestepping the requirement that there be necessity in the particular investigation in which a wiretap is sought.” *United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985). “[A] purely conclusory affidavit unrelated to the instant case and not showing any factual relations to the circumstances at hand would be, in our view, an inadequate compliance with the statute,” wrote the Sixth Circuit. *United States v. Landmesser*, 553 F.2d 17, 20 (6th Cir. 1977). “What is required in addition ... is information about particular facts of the case at hand which would indicate that wiretaps are not being ‘routinely employed as the initial step in criminal investigation.’” *Id.* (quoting *United States v. Giordano*, 416 U.S. 505, 515 (1974)).

The Sixth Circuit’s decision here is also inconsistent with its prior decision in *United States v. Rice*, 478 F.3d 704, 709-711 (2007). In the affidavit seeking Title III wiretap authorization in the *Rice* case, the government agents alleged, like here, that the traditional investigative techniques employed were inadequate to accomplish all of the objectives and identify all of the individuals involved in an alleged drug trafficking investigation. In the affidavit, the agent alleged that physical surveillance had been employed, but only with limited success, allowing the agents to identify locations and vehicles involved and corroborate information from a confidential source. *Rice*, 478 F.3d at 707. The affidavit indicated that physical surveillance presented risks due to

threats of violence, and the use of firearms and bullet proof vests by members of the drug trafficking organization. *Id.* The Wenthert affidavit in *Rice* claimed that the use of confidential sources were inadequate because the sources were unlikely to discuss the full extent of the organization's activities or membership and the sources had not been able to complete drug purchases from the targets. *Id.*, at 708. The *Rice* affiant alleged that use of pen registers and telephone toll analysis had resulted in "limited usefulness", but did not identify individuals actually making or receiving calls or the contents of the conversations. *Id.* Finally, the *Rice* affidavit alleged that other traditional investigative techniques, such as a grand jury investigation, search warrants, subject interviews and trash pulls were not likely to be successful, reciting general problems with these investigative techniques in drug trafficking investigations. *Id.*

The *Rice* Court found these claims regarding traditional investigative techniques were not sufficient to satisfy the necessity requirement of Title III. The Court held that the affidavit merely made general complaints about the usefulness or shortcomings of various traditional investigative techniques. The *Rice* Court made clear that the necessity requirement did not merely protect against the impermissible use of the wiretap as the "initial step in a criminal investigation" as the government argues here, but also discussed its primary purpose. 478 F.3d at 710. The purpose of the necessity requirement is "to ensure that a wiretap 'is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.'" *Id.*, quoting *United States v. Alfano*, 838 F.2d 158, 163 (6th Cir.), *cert. denied*, 488 U.S. 821, 109 S. Ct. 64, 109 S. Ct. 65 (1988) (quoting *United States v. Kahn*, 415 U.S. 143, 153 n.12, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974)).

The alleged inadequacies recounted in the wiretap application here are remarkably similar to the failed claims in the Rice affidavit. According to the government's brief in the court of appeals, the affidavit here claimed: (1) pen register data failed to provide the content of the telephone communications; (2) physical surveillance was difficult due to Pedraza's allegedly "abrupt driving maneuvers;" (3) cooperating sources had little information about Pedraza; and (4) search warrants risked alerting Pedraza to the investigation. Brief for Appellee, R.45, Page 31-2.

These alleged limitations are simply general limitations on the investigative techniques themselves-the same limitations which were insufficient to support the wiretaps in *Rice*. Pen register data will never provide the content of the telephonic communications. By its very nature, this data does not invade the privacy of the contents of the communications and does not provide access to this content. Likewise, the execution of search warrants will always risk alerting the object of the warrant about the existence of the investigation. The use of physical surveillance always requires agents to surveil individuals who may wish not to be followed and take evasive actions. These allegations simply recount the inherent deficiencies of each different technique. The affidavit does not explain why these techniques would not be adequate in this particular investigation. Finally, the allegation that cooperating sources had little information about a party does not alone establish that traditional investigative techniques were tried and failed or were inadequate to expose the crime under investigation. In many investigations, cooperating sources may have information about some individuals or aspects of a crime, but not all.

The government's argument here is essentially that because all traditional investigative techniques have their inherent limitations in drug trafficking investigations, government agents should always be permitted to obtain wiretaps after initial investigatory efforts. This makes the necessity requirement of Title III a nullity-a mere formality available in all drug trafficking investigations, rather than a protection against the impermissible use of a wiretap "in situations where traditional investigative techniques would suffice to expose the crime." *Kahn*, supra, 415 U.S. at 153 n.12.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DATE: February 12, 2018