

**In The
Supreme Court of The United States**

ERNEST MILTON GLOVER;
HELERY PRICE,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISCTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title III “aggrieved person” standing differs from Fourth Amendment standing, and whether targets of electronic surveillance have Title III standing when they are named as targets in the court orders authorizing the surveillance, and are implicated by the surveillance, but their voice is not actually intercepted and their property is not implicated.

Whether counsel renders ineffective assistance of counsel under the Sixth Amendment when counsel fails to move to suppress highly incriminating evidence even though a colorable argument exists to support suppression.

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OPINION BELOW

On October 10, 2017, the United States Court of Appeals for the D.C. Circuit issued a published opinion denying the Petitioners' appeal on the issues presented herein. *United States v. Ernest Glover*, 872 F.3d 625 (D.C. Cir. 2017). The opinion of the D.C. Circuit is attached to this Petition in the Appendix. (A-1)

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the D.C. Circuit was issued on October 10, 2017. *United States v. Ernest Glover*, 872 F.3d 625 (D.C. Cir. 2017).

STATUTES INVOLVED IN THE CASE

This case involves interplay between constitutional Fourth Amendment standing to challenge an illegal search and statutory standing under Title III as aggrieved persons “against whom the interception was directed” pursuant to 18 U.S.C. § 2510(11). The text of this statute is also reproduced in the Appendix. (A-22)

This case also involves the right of effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. The text of the Sixth Amendment is reproduced in the Appendix. (A-24)

STATEMENT OF THE CASE

In June 2007, Petitioners were indicted in the district court for the District of Columbia alongside three codefendants for allegedly conspiring to distribute and possessing with intent to distribute one kilogram or more of phencyclidine (PCP), Case No. 07-152. Petitioners proceeded to a joint trial in February 2008, with two other codefendants, Anthony Suggs and Glendale Lee.

On March 13, 2008, the jury found both Petitioners guilty of conspiracy to distribute PCP. On August 7, 2008, the district court sentenced both Petitioners to a mandatory life sentence without the possibility of parole, as required by statute.

Petitioners made timely direct appeals to the United States Court of Appeals for the D.C. Circuit jointly with codefendant Anthony Suggs. (Record Nos. 08-3084; 08-3082; 08-3083). All convictions were affirmed. *See United States v. Ernest Glover*, 681 F.3d 411 (D.C. Cir. 2012). A Petition for Rehearing and Rehearing *En Banc* was filed and denied on July 6, 2012. The mandate issued on August 3, 2012. A Petition for Writ of Certiorari to this Court was filed on September 20, 2012, and denied on October 29, 2012.

Petitioners and codefendant Suggs timely filed separate Motions to Vacate their convictions pursuant to 28 U.S.C. § 2255 in the district court.

On November 24, 2015, the district court issued an Order denying the § 2255 Motion filed by codefendant Suggs, but did not deny the same motions

filed by Petitioners. *United States v. Suggs*, 146 F. Supp. 3d 151 (D.D.C. 2015). Instead, the district court appointed the Office of the Federal Public Defender as amicus, directing that office to file an additional pleading addressing Petitioners’ standing to challenge the legality of the electronic surveillance that was used against them at trial, including recorded conversations from a “Truck Bug.”¹ These matters were fully briefed.

On March 31, 2016, the district court entered a Memorandum Opinion and Order denying relief, and issued a Certificate of Appealability to the United States Court of Appeals for the D.C. Circuit. Petitioners filed timely Notices of Appeal. Petitioners’ appeals were consolidated (Nos. 16-3019; 16-3011), and eventually set for joint oral argument. Following oral argument, on October 10, 2017, a panel of the United States Court of Appeals for the D.C. Circuit issued a published opinion denying relief on all grounds. Petitioners jointly filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. On December 15, 2017, the Court of Appeals for the D.C. Circuit denied Petitioners’ request for rehearing and rehearing *en banc*.

REASONS FOR GRANTING THE PETITION

This proceeding involves two questions of exceptional constitutional and statutory importance. The decision of the United States Court of Appeals for the D.C. Circuit emphasized the unsettled nature of the law and also

¹ The Truck Bug was a listening device placed on the truck of another suspect in this conspiracy with the express purpose of trying to intercept communications of Petitioners and others.

conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed these issues.

The first issue is whether Title III “aggrieved person” standing differs from Fourth Amendment standing, and whether targets of electronic surveillance have Title III standing when they are named in the court orders authorizing the surveillance, and are implicated by the surveillance, but their voice is not actually intercepted and their property is not implicated. This Court should grant review of this issue because it has national importance and, as the D.C. Circuit noted, this area of the law is “deeply unsettled” with several other federal circuits having issued decisions that stand in material conflict with each other.

The second issue involves the Sixth Amendment standard for a criminal defense lawyer’s performance when litigating a Motion to Suppress extremely prejudicial evidence.

This Court should grant the instant Petition to clarify the state of the law regarding these two critical constitutional and statutory issues because the issues presented are likely to arise in numerous cases nationwide.

ARGUMENT

- I. This Court Should Grant the Instant Petition to Decide Whether, and to What Extent, Title III Statutory Standing Differs from Fourth Amendment Standing, Because There Is Currently an “Entrenched Disagreement” on This Issue Among the Circuits.

Before the D.C. Circuit, Petitioners argued that targets of surveillance have Title III “Aggrieved Person” standing when they are named in the court

orders authorizing the surveillance, and are implicated by the surveillance, even if their voice is not actually intercepted by the surveillance. 18 U.S.C. § 2510. Title III standing is broader than Fourth Amendment standing, as it has been interpreted by this Court, because the statute confers standing on persons against whom the electronic surveillance was “directed.” When unconstitutional electronic surveillance is directed at a defendant, that person arguably has statutory standing to challenge the admission of that illegal evidence,² even if the defendant does not have traditional Fourth Amendment standing because his voice was not captured and his property was not implicated. United States Courts of Appeals have issued conflicting decisions on this issue. *See United States v. Asker*, 676 Fed. Appx. 447, 455 (6th Cir. 2017); *United States v. Oliva*, 705 F.3d 390, 395 (9th Cir. 2012); *but see United States v. Cruz*, 594 F.2d 268, 273 (1st Cir. 1979); *United States v. Scasino*, 513 F.2d 47, 50 (5th Cir. 1975). A clarification by this Court regarding the breadth of Title III standing and a confirmation that Petitioners had Title III standing to challenge the Truck Bug evidence in this case are matters of exceptional importance, because this issue is “deeply unsettled” and is likely to arise in many cases across the nation.

The D.C. Circuit noted that the district court had “surveyed the case law, as well as the legislative history of Title III, and suggested that the

² It was conceded by both parties, and the lower courts, that the electronic “Truck Bug” surveillance at issue in this case was illegally obtained by the Government because the warrant was facially invalid.

better reading of Title III allows standing for surveillance targets.” *Glover*, 872 F.3d at 632. The panel found support for standing on these facts from at least two federal circuits: *Oliva*, 705 F.3d at 395; *Asker*, 676 F. App’x at 455. The panel also surveyed several decisions from the D.C. Circuit, which it concluded only addressed this issue in *dicta*, but “touched on” aggrieved person standing under Title III. *See Williams*, 580 F.2d at 583; *In re Evans*, 452 F.2d at 1244; *Bellosi*, 501 F.2d at 842 & n.22; *United States v. Scurry*, 821 F.3d 1, 7 (D.C. Cir. 2016).

The panel of the D.C. Circuit hearing this case refused to opine about whether Title III standing is, in fact, broader than Fourth Amendment standing, identifying only that there exists “an entrenched disagreement between jurisdictions” when it comes to this issue. *Glover*, 872 F.3d at 631. As the D.C. Circuit recognized, there are different readings and interpretations of this Title III standing law from other courts, making it critically important that this Court decide which interpretation is correct. The alternative interpretations issued by other courts have evolved from three sources: (1) statutory interpretation of the statutory standing provisions of the United States Code; (2) *dicta* in one of this Court’s footnotes in *Alderman v. United States*, 394 U.S. 165, 171-72 n.5 (1969); and (3) from the discussion of Fourth Amendment search and seizure standing addressed by *Rakas v. Illinois*, 439 U.S. 128, 135 (1978).

In *Alderman*, this Court held that those aggrieved by the introduction of damaging evidence derived from an illegal electronic surveillance, but not by the surveillance itself, do not have standing. 394 U.S. at 171-76. That 1969 decision contained a footnote where this Court noted in *dicta* that the legislative history of the Act indicates that “aggrieved person,” as identified in the Title III statutes, “should be construed in accordance with existent standing rules.” *Id.* at 175, n.9. Almost ten years later, this Court issued its decision in *Rakas*, and refused to extend Fourth Amendment standing to persons referred to as a mere “target” of a search or seizure, when those individuals did not have any reasonable expectation of privacy in the location that was searched. 439 U.S. at 135.

Referencing the federal circuits’ varying interpretations of the jurisprudence from this Court, the D.C. Circuit indicated that “[s]ome courts have understood this progression to undermine target standing under Title III.” *Glover*, 872 F.3d at 631. However, neither *Alderman* nor *Rakas* deny standing on the facts presented in Petitioners’ case, and the D.C. Circuit neither concluded that either case did, nor resolved the issue based on any other precedent.

The “target theory” discussed in *Rakas* is completely distinct from the statutory “directed at” standing Petitioners assert here. The discussion of a Fourth Amendment “target theory,” as stated in *Rakas*, used “target” differently, and in a way that includes a far broader group of people than the

statutory “directed at” language under Title III would cover. As cited by Petitioners, under Title III statutory standing, “target” refers to a distinct group of individuals, those named in an order authorizing the surveillance. Unlike the defendants who were unable to assert constitutional standing in *Rakas*, Petitioners are not merely people who happened to be subjected to a search that was initially justified by, and directed at, another person.

Further, more than forty years prior to the instant case, the D.C. Circuit addressed the *dicta* from *Alderman* and deemed the criterion of standing under § 2510(11) “unambiguous.” *United States. v. Bellosi*, 501 F.2d 833, 842. (D.C. Cir. 1974). In *Bellosi*, the D.C. Circuit explained that *Alderman* was “completely consistent with the § 2510(11) standard” which included standing for “a person against whom the interception was directed.” *Id.* at n.22. *Bellosi* cited other Supreme Court precedent supporting the statutory Title III “directed at” standing that Petitioners now ask the Court to recognize here. *Id.*

As referenced above, the panel of the D.C. Circuit hearing this case recognized that courts disagree on this critical issue. The Ninth Circuit has found standing under Title III where “[a defendant’s] conversations were the target of the surveillance,” *Oliva*, 705 F.3d at 395, and the Sixth Circuit suggested that being listed as a target or subject on a wiretap application would confer standing as an “aggrieved person” under 18 U.S.C. § 2510(11). *Asker*, 676 Fed. Appx. at 455 (noting that in the conversations the defendant

sought to suppress, “[defendant] was not a party. Nor was he a ‘person against whom the interception was directed’.... [T]he government's wiretap application listed eight ‘Target Subjects’ for monitoring, none of whom were [defendant].”). On the contrary, the First and Fifth Circuits seem less inclined to extend the purview of Title III standing beyond the narrow definition of Fourth Amendment standing. *See, e.g., Cruz*, 594 F.2d at 273 (stating “[w]e have also addressed the question of who is an ‘aggrieved person’ under [Title III]” and citing a case discussing Fourth Amendment standing); *see also Scasino*, 513 F.2d at 50 (reasoning that “[u]nder prestatutory fourth amendment law, one does not have standing to suppress an illegal wiretap unless his conversations were overheard or the conversations occurred on his premises”).

Petitioners’ case is an appropriate one for this Court to use to explain the difference between Title III standing and Fourth Amendment standing because these Petitioners were specifically named as targets in the Court’s Orders and Amended Orders that authorized the original surveillance and every subsequent extension of that surveillance. They were by no means individuals who just happened to be implicated by the surveillance while the government was investigating an unrelated matter or unrelated individuals. Rather, Petitioners were the targets of the investigation before the surveillance started, and the invalid warrant for surveillance was expressly directed at their conversations. The D.C. Circuit panel’s conclusion that this

question of standing is “deeply unsettled” could not be more accurate and justifies this Court granting the instant petition.

II. This Petition Should Be Granted to Address the D.C. Circuit’s Holding that Counsel’s Performance in Failing to File a Motion to Suppress Is Not Deficient Where the Law Is Unsettled, Which Is In Direct Conflict with Other Circuits.

The D.C. Circuit’s holding that counsel was not ineffective for failing to move to suppress the evidence from the unlawful surveillance conflicts with the law from other United States Courts of Appeals. Several other circuits have held that when a viable argument with a reasonable probability of successfully suppressing prejudicial evidence exists, a criminal defense attorney’s failure to act on it is objectively unreasonable and constitutes deficient performance under the *Strickland* standard. *Thomas v. Varner*, 428 F.3d 491, 500-02 (3d Cir. 2005) (noting that failing to file a motion to suppress would only be reasonable where the motion is “plainly without merit” or the evidence is of little probative value); *Tice v. Johnson*, 647 F.3d 87, 104 (4th Cir. 2011) (holding that for purposes of measuring counsel’s performance when failing to file a motion to suppress, it is enough to say counsel was deficient where the motion “would have carried some substance”); *Rodriguez v. Young*, 906 F.2d 1153, 1161 n.3 (7th Cir. 1990) (explaining that counsel’s failure to move to suppress was objectively unreasonable because “colorable grounds” for the motion existed);³ *see also*

³ The law in the Seventh Circuit is inconsistent on this issue. On the eve of oral argument before the D.C. Circuit, the Seventh Circuit decided

United States v. Molina, 934 F.2d 1440, 1447 (9th Cir. 1991) (addressing a different point, but noting unlike other areas of the law, defendants have “everything to gain and nothing to lose” in filing a motion to suppress).

Petitioners contended below that counsels’ performance in this case fell short of the Sixth Amendment’s standard for effective assistance when they failed to litigate a pretrial motion to suppress extremely prejudicial evidence. The suppression argument in this case is exclusively based on statutory standing under Title III, not the Fourth Amendment. As explained in Section I, Petitioners had statutory standing to move to suppress the extremely prejudicial Truck Bug evidence, which had been obtained illegally. As such, and because there was a reasonable probability Petitioners would have won suppression if their trial counsel had put the issue before the trial court, the D.C. Circuit’s finding was erroneous and in conflict with other jurisdictions.

In the instant case, the issue presented on appeal to the D.C. Circuit was whether Petitioners’ trial counsel provided ineffective assistance of counsel when they failed to move to suppress extremely prejudicial evidence collected from a Title III Truck Bug that was placed on a target’s vehicle to

Hicks v. Hepp, 871 F.3d 513 (7th Cir. 2017) and noted that to “successfully advance a claim of ineffective assistance of counsel based upon the failure to file a motion to suppress, a petitioner must demonstrate that there was both a reasonable probability that he would have prevailed on the motion to suppress and a reasonable probability that, if his confessions were suppressed, he would have been acquitted.” *Id.* at 526 (internal citation omitted). However, in issuing this decision, the Seventh Circuit did not explicitly overrule its earlier precedent in *Rodriguez v. Young*.

capture conversations in and around the truck. There is no question that the Title III Truck Bug was “unlawfully installed,” and there is no question that it would have been deficient performance for the attorney of any defendant with standing to fail to challenge the Truck Bug evidence in a motion to suppress. There was no question that the Truck Bug evidence offered against Petitioners was “highly incriminating.”

As discussed above, a question arose as to whether Petitioners had statutory Title III standing to challenge the Truck Bug evidence collected and offered against them. The question arose because neither Petitioner’s voice was captured by the Truck Bug, and the Truck Bug was not placed on either of their vehicles. But, the Truck Bug was nonetheless “directed at” Petitioners, and they were “aggrieved persons” because they were both persons “against whom the interception was directed.” 18 U.S.C. § 2510(11); *United States v. Williams*, 580 F.2d 578, 583 n.19 (D.C. Cir. 1978). Petitioners argued that standing “includes targets named in an application . . . [and] order for surveillance regardless of whether the surveillance actually captures said targets’ communication, since a named target is ‘a person against whom the interception was directed.’” *Glover*, 872 F.3d at 631. Pre-existing interpretations of statutory law, and case law, supported the conclusion that statutory “aggrieved person” standing under Title III included Petitioners because the government’s Truck Bug was directed at

them. *See Williams*, 580 F.2d at 583; *In re Evans*, 452 F.2d 1239, 1244 n.16 (D.C. Cir. 1971).

In the instant case, the D.C. Circuit concluded merely that there is “an entrenched disagreement between jurisdictions” as to whether Petitioner would have standing on these facts and found that the law was “deeply unsettled.” *Glover*, 872 F.3d at 631-33. At no time did any court conclude that Petitioners did or did not have standing.

By concluding that the law of standing is unsettled, the D.C. Circuit’s decision effectively acknowledged Petitioners had grounds upon which their lawyers should have acted, and should have placed the question of standing before the original trial court. In *Thomas v. Varner*, the Third Circuit held that because the argument in support of a suppression motion “was colorable,” counsel’s failure to act on it was objectively unreasonable. 428 F.3d at 502. The Fourth and Seventh Circuits have stood for that same principle. *Tice*, 647 F.3d at 104 (trial counsel is deficient for not filing a motion to suppress when it “would have carried some substance”); *see also Rodriguez*, 906 F.2d at 1161 n.3 (explaining that counsel’s failure to move to suppress was objectively unreasonable because “colorable grounds” for the motion existed).

The D.C. Circuit’s resolution of this issue – finding that trial counsel did not perform below the constitutional standard because the law was unsettled – conflicts with the authoritative decisions of other United States

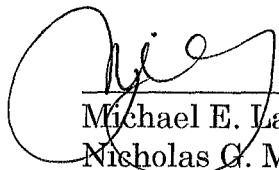
Courts of Appeals that have addressed the standard for effective assistance of counsel as it relates to challenging evidence with a motion to suppress.

Granting this Petition is warranted because, contrary to the D.C. Circuit's finding, other circuits indicate the standard of performance for a criminal defense lawyer, as it relates to the potential suppression of evidence, does not allow room for the lawyer to fail to act when the law is unsettled and the evidence is prejudicial. It is respectfully submitted that the D.C. Circuit's decision in this case is in direct conflict with the holdings of those circuits and, as such, justifies the granting of this Petition. For these reasons, Petitioners jointly request that these Petitions be granted.

CONCLUSION

For the reasons stated here, Petitioners jointly and respectfully request that this Honorable Court grant this petition, as the Court is presented with two questions of exceptional importance that underscore the unsettled nature of the law and conflict with the authoritative decisions of other United States Courts of Appeals that have addressed these issues.

Respectfully submitted,



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