

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

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UNITED STATES OF AMERICA)
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 Plaintiff)
) Criminal Action No. 3:04CR-83-R
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 v.)
)
)
)
 REGINALD RICE, et. al.)
)
 Defendants)

POST-HEARING REPLY IN SUPPORT OF DEFENDANTS'
JOINT MOTION TO SUPPRESS WIRETAP EVIDENCE

Come the Defendants, Reginald Rice, Derrick Smith, Marshall Evans, Terrell Gray, Yolanda Walker, Terry Middleton, Demetrius Crenshaw and James Crenshaw, by counsel, and file their Post-Hearing Reply in support of their Joint Motion to suppress wiretap evidence.

I. INTRODUCTION

The Defendants believe that their Post-Hearing Brief adequately addresses all issues and arguments identified by the Government in its Post-Hearing Response. However, the Government makes several statements in its post-hearing response requiring further comment, particularly the Government's discussion of the necessity and sealing

requirements. As such, the Defendants will focus only on the necessity and sealing issues in this Reply and incorporate by reference all arguments previously made in their Post-Hearing Brief and Joint Motion to Suppress.

II. THE GOVERNMENT CANNOT AVOID THE NECESSITY REQUIREMENT FOR THE REGINALD RICE WIRETAPS MERELY BECAUSE THE GOVERNMENT ESTABLISHED NECESSITY FOR THE SHAWN BULLITT WIRETAP.

The crux of the Government's argument regarding necessity can be summarized as follows:

“Defendants characterize [the June 23, 2004 Affidavit] as ‘ a recycled boilerplate version of a previous Application and Affidavit in support of a wiretap order on may 26, 2004 pertaining to the investigation of Shawn Bullitt and the targeted cell phone number utilized by him, (502) 817-0594.’ This characterization is an attempt to disassociate Bullitt from Rice and treat the two as separate investigations. This approach ignores that which is obvious, that is, that this was an ongoing investigation of the same group of targets via the interception of another telephone which had already been identified in the previous affidavit....It is only natural that the information would be ‘recycled’ from the previous affidavit since it is the basis of the probable cause finding related to Rice, which the court made when the first interception order was signed on May 26, 2004.” (Emphasis added).

(Government's Response to Joint Motion to Suppress, p. 5; Government's Post-Hearing Response, p. 6).

In summary, the Government attempts to convince this Court that necessity may be “bootstrapped” from one target to the next so long as both targets are labeled part of the

same investigation. However, such an argument is not supported by the uniform case law and the credible facts in this case.

Undersigned counsel have exhaustively researched the case law in this area. The cases from all circuits clearly demonstrate that the Government must allege specific factual circumstances that render normal investigative techniques particularly ineffective for the specified target or the application must be denied. Such specificity prevents the Government from making general allegations about classes of cases or persons thereby sidestepping the necessity requirement altogether. As such, the use of conclusory or boilerplate statements to make a showing of necessity constitutes inadequate compliance with the statute. United States v. Landmesser, 553 F.2d 17, 20 (6th Cir) *cert. denied* 434 U.S. 855 (1979). There is no exception or license to dispense with the necessity requirement simply because the Government avers that two targets are “associated” or alleged to be “co-conspirators.”

As observed by the District of Columbia Circuit:

“we must be careful not to permit the government merely to characterize a case as a ‘drug conspiracy’ ... that is therefore inherently difficult to investigate. The affidavit must show with specificity why in *this particular investigation* ordinary means of investigation will fail.”

United States v. Robinson, 698 F.2d 448, 453 (D.C. Cir. 1983) (per curiam)
(Emphasis in original); *see also* Ippolito, 774 F.2d at 1486.

Accordingly, case law requires that the Government must establish a separate showing of necessity for each target. This is true regardless of whether a new target is an associate or

co-conspirator of a monitored target. The following observations highlight the strict standard by which the government must establish necessity as to each such target:

“The DEA failed to conduct an investigation of Harty prior to applying for authority to tap his telephone. Instead, it appears that the DEA sought the wiretap simply because Harty was believed to be a member of the conspiracy under investigation. *A suspicion that a person is a member of a conspiracy, however, is not a sufficient reason to obtain a wiretap.* [Citing United States v. Abascal, 564 F.2d 821 (9th Cir. 1977)] (the government must do more than show that the telephone subscribers they wish to tap are all part of one conspiracy). *cert. denied* 435 U.S. 953 (1978); [Citing United States v. Brone, 792 F.2d 1506 (9th Cir. 1986)] (*the government may not dispense with the necessity showing with regard to one conspirator simply because it has proved necessity for another*); [Citing United States v. Santora, 600 F.2d 1317 (9th Cir. 1979) (same). Rather, *the government must satisfy the necessity requirement every time that it seeks a wiretap.* Abascal, 564 F.2d at 826 (government must show that each wiretap separately satisfied the necessity requirement.” (Emphasis added).

United States v. Carneiro, 861 F.2d 1171, 1181 (9th Cir. 1988).

In its Post-Hearing Response, the Government failed to cite a single case contrary to the above-referenced authority.

Moreover, the manner in which the June 23, 2004 Affidavit was prepared flies in the face of the Government’s own argument. If the Government truly believed that necessity could be indiscriminately transplanted between affidavits, it would have simply incorporated by reference the necessity language of the Bullitt Affidavit and attached a copy to the Rice Affidavit. Such a format would have placed the issuing Judge on notice that the Government wholly transplanted the statements regarding necessity from the Bullitt

Affidavit to the Rice Affidavit. Instead, the deliberate method by which the Government formatted the Rice Affidavit gave the false impression that investigative techniques were considered specific to Rice. The Government's chosen format is affirmative proof that the Government knew a showing of necessity had to be made for each target - even targets within the same investigation.

Though the Government criticizes the Defendants' citation to case law from other circuits, the Government cites no case law from the Sixth Circuit or any other circuit which permits necessity to be wholly transplanted from one affidavit to the next and between different targets. Instead, the Government relies on three Sixth Circuit cases (also discussed in Defendants' Post-Hearing Brief) which do not deal with this issue. *See e.g., United States v. Stewart*, 306 F.3d 295 (6th Cir. 2002); *United States v. Alfano*, 838 F.2d 158, 163 (6th Cir. 1988); *United States v. Landmesser*, 553 F.2d 17 (6th Cir. 1977). These cases involved the use of *some* boilerplate language *on a single target* and not the wholesale transfer of necessity from one target to a different target. Additionally, in the previous cases, many traditional investigative techniques were actually employed against the targets prior to Government's application for the wiretaps; not so for Mr. Rice.

The best and most recent cases which address bootstrapped or transplanted necessity like the present case are *United States v. Blackmon*, 273 F.3d 1204 (9th Cir. 2001) and *United States v. Gonzales*, – F.3d –, 2005 WL 1459569 (9th Cir. June 22, 2005) (discussed fully in the defendants' post-hearing brief). Therefore this Court should give considerable

weight to these decisions.

Furthermore, omitted from the Government's Response is the Sixth Circuit's recognition that "wiretaps are not to be used thoughtlessly or in a dragnet fashion." Alfano, 838 F.2d at 163 (Emphasis added). There is no better example of a thoughtless or dragnet tactic than the Government's use of plagiarized boilerplate language taken from one wiretap affidavit and wholly transplanted in subsequent wiretap affidavits of "associates" or "co-conspirators" as in the present case. If such a practice is condoned, it would most certainly eviscerate the requirements of 18 U.S.C. §2518(1)(c) and 18 U.S.C. §2518(3)(c).

III. AGENT WENTHER'S TESTIMONY REGARDING NECESSITY WARRANTS SUPPRESSION UNDER *FRANKS V. DELAWARE.*

A comparison of the relevant portions of the May 26, 2004 and June 23, 2004 Affidavits conclusively reveals that traditional investigative techniques were not meaningfully considered or employed for the Reginald Rice investigation. This comparison alone is enough to warrant suppression. However, the boilerplate language of the Affidavits together with the testimony of Agent Wenther at the June 20, 2005 Hearing also warrants suppression under Franks v. Delaware, 438 U.S. 154 (1978).

In Franks v. Delaware, 438 U.S. 154 (1978), the Supreme Court held that if an affiant "knowingly and intentionally, or with reckless disregard for the truth" includes a false statement in a search warrant affidavit, same will under certain circumstances invalidate the

warrant. The Franks analysis has been applied to the “other investigative procedures” showing to demonstrate necessity required by 18 U.S.C. §2518(1)(c) and 3(c). *See e.g. Ippolito*, 774 F.2d at 1485-1487; United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987), *cert.denied* 484 U.S. 898, *appeal after remand* 927 F.2d 1088 (9th Cir. 1991); United States v. Blackmon, 273 F.3d 1204 (9th Cir. 2001); ; United States v. Gonzales, – F.3d –, 2005 WL 1459569 (9th Cir. June 22, 2005).

Both Gonzales and Blackmon, discussed extensively in Defendant’s Post-Hearing Brief, authorize a Franks hearing when boilerplate language used to demonstrate necessity for a wiretap is transplanted from one wiretap affidavit to another *even within the same investigation* as in the present case.

The rationale for a Franks hearing is that use of transplanted boilerplate language is misleading and misrepresents the true nature of the affiant’s consideration of traditional investigative techniques in order to demonstrate necessity. The Ninth Circuit in Gonzales held that use of such boilerplate language by the affiant supports a finding of intent or recklessness. The Court in Gonzales stated:

“Given the affiant's key role in the investigation, we can conclude that he knew or should have known the veracity of the challenged statements in his affidavit because these statements all concerned the potential of traditional investigative techniques to gather information on the role any individuals at the Blake Avenue office played in the alleged conspiracy.”

Id. at *5.

A Franks hearing was properly conducted in the present case on the limited issue of

necessity for the wiretap because the misrepresentations in the June 23, 2004 affidavit are material provisions of the affidavit. Meaningful consideration of traditional investigative techniques is not a mere recital; the Government must *actually consider or utilize* such techniques and provide a full and complete statement of such consideration or use specific to the proposed target. The Gonzales Court held as much:

“The defendants also adequately pled materiality. Each of the alleged misrepresentations and omissions related to the ability of customary investigative tools to produce the evidence sought by the government in its investigation into the Blake Avenue office. Therefore, any finding of a material misrepresentation or omission would undermine the government's ability to prove the need for the Blake Avenue wiretap. Because the defendants made an adequate initial showing of intentional or reckless material misrepresentations or omissions in the wiretap application, the district court did not err in holding a *Franks* hearing.”

Id. at *6.

Given the previous, Defendants made an adequate preliminary showing warranting a Franks hearing where a comparison of the May 26, 2004 and June 23, 2004 Affidavits reveals wholly transplanted boilerplate representations regarding use or consideration of traditional investigative techniques.¹ Though disguised as meaningful and complete statements specific to Rice, the June 24, 2004 Affidavit reveals that no traditional avenues of investigation were actually pursued before the Government applied for the Rice Wiretap.

¹ Though the Government incorrectly argues that the Defendants only challenged “four specific instances” in the Rice Affidavit (See Government’s Post-Hearing Response, p. 16), it is clear that the Defendants challenged the entirety of the “Alternative Investigative Techniques” section of the affidavit given the boilerplate language transposed from the Bullitt Affidavit.

Furthermore, at the June 20, 2005 hearing, Agent Wenther testified at length on cross-examination as to alleged consideration of traditional investigative techniques for the Reginald Rice investigation. Contrary to the boilerplate assertions in the Affidavit regarding confidential sources, physical surveillance, trash pulls, search warrants, and grand jury investigations, Agent Wenther's testimony, as explained in more detail in Defendant's Post-Hearing Brief, revealed that these traditional investigative techniques were not meaningfully considered or employed before he prepared the June 23, 2004 Affidavit.

Given Agent Wenther's testimony, it is clear that the evidence supports a Franks violation. There is no evidence that Agent Wenther or other law enforcement officials meaningfully considered traditional investigative techniques specific to Rice before applying for the June 23, 2004 Wiretap. This testimony directly contradicts the boilerplate generic assertions in the Affidavit that necessity for the wiretap had been established.

Agent Wenther's testimony coupled with the language in the Affidavits conclusively reveals that the section of the Affidavit regarding traditional investigative techniques was transplanted almost wholly from the Bullitt Affidavit without regard for its truth in the context of the new affidavit or its relation to the Rice investigation specifically.

In light of the Franks violations, suppression of any evidence obtained from as a result of the June 23, 2004 wiretap should be granted. Additionally, any evidence obtained from the extension of the June 23, 2004 Order (issued on July 21, 2004) and the wiretap of telephone number (502) 432-8405 must be suppressed as tainted by the original wiretap.

**IV. THE UNITED STATES HAS NOT PROVEN A SATISFACTORY
EXPLANATION FOR DELAY IN SEALING
THE OPTICAL DISC IN THIS CASE.**

Prior to filing its Post-Hearing Response Brief, the Government provided at least five (5) different and inconsistent excuses as to why the Government delayed sealing the optical disc beyond the one or two days required by controlling case law. These excuses were detailed in both the Government's Response to Defendants' Motion to Suppress and the hearing conducted on June 20, 2005. The Government now provides *new reasons* for delay via an Affidavit filed by the Assistant United States Attorney.

The Defendants have filed an objection to any consideration of the Affidavit together with this Reply. The Defendants object to the Affidavit for at least three reasons: (1) the Government gave no notice that it intended to file the Affidavit, even though the Government could have been filed the Affidavit as part of the Government's Response to Defendants' Joint Motion to Suppress or at any time before the June 20, 2005 hearing; (2) the Government and Defendants filed a detailed Stipulation regarding the sealing issue prepared in lieu of questioning the Assistant United States Attorney at the June 20, 2005 hearing; and (3) by filing the Affidavit at this late date, the Government has effectively foreclosed any opportunity to cross-examine the Assistant United States Attorney in violation of the Defendants' Sixth Amendment rights.

However, even if the Affidavit is considered, the reasons alleged for the delay identified in the Affidavit do not satisfy the Government's burden of proof to establish a

satisfactory explanation for the delay in sealing the optical disc.

As explained in Defendants' Post-Hearing Brief, the Supreme Court in United States v. Ojeda Rios, 495 U.S. 257 (1990) held that the Government bears the burden of proof regarding a "satisfactory explanation" for any delay in sealing. Such a "satisfactory explanation" consists of two components: the Government must "not only explain why a delay occurred but also why it is excusable." Id. at 265. This requirement has been re-cast as a two-prong test: "first, whether the proffered explanation was the *actual reason for the delay*; second whether it is *objectively reasonable*." United States v. Maldonado-Rivera, 922 F.2d 934, 950 (2d Cir. 1990) (Emphasis added); United States v. Pedroni, 958 F.2d 262, 265 (9th Cir. 1992); *see also* United States v. Wilkinson, 53 F.3d 757, 760 (6th Cir. 1995).

First, the Affidavit fails to prove that AUSA Chance's alleged belief or misunderstanding of the law was the *actual reason for the delay* in sealing the optical disc. The Affidavit merely alleges that AUSA Chance believed that the "one or two day" sealing requirement meant one or two *business* days. However, there is no evidence which suggests that Agent Wenter relied on AUSA Chance's alleged misunderstanding of the law when Agent Wenter delayed presentation of the optical discs for sealing. Indeed, Agent Wenter testified at the June 20, 2005 hearing that he had no conversations with AUSA Chance regarding sealing prior to removal of the optical disc at 4:00 p.m. on August 9, 2004. Instead, Agent Wenter repeatedly testified that he simply thought "immediate" meant "soon" or comparable to his 10 day report filings. (TR, 6/20/05, p. 139-140, 269, 332-333, 335).

Simply put, if Agent Wenther did not know of the “one or two day” requirement before sealing, and if there is no evidence that AUSA Chance communicated the requirement to Agent Wenther before sealing occurred, the Government’s alleged belief that the “one or two day” requirement meant one or two “business” days cannot be the *actual reason for the delay*.

Second, the Affidavit fails to set forth sufficient facts which reveal that AUSA Chance’s belief was objectively reasonable. The Affidavit merely states that AUSA Chance “...believed then and continue[s] to believe that presenting and sealing the disc within two business days of the termination of the wiretap also complies with the immediacy requirement.” (Affidavit of AUSA Chance, ¶ 7). However, case law requires much more than a simple statement that the Government’s attorney “misunderstood” the law. The belief must be *objectively reasonable*. In order to prove that the misunderstanding of the law is objectively reasonable, the Government must show that the *conduct of the attorney* in reaching the misunderstanding is reasonable. *See e.g. United States v. Vastola*, 989 F.2d 1318, 1327 (3d Cir. 1993). Noticeably absent from AUSA Chance’s Affidavit is any explanation or detail as to how or whether AUSA Chance researched the law prior to sealing the optical disc or discussed the requirement with other attorneys prior to arriving at his conclusion that the one or two day requirement meant one or two *business* days. The same can be said for AUSA Chance’s belief that only the issuing Judge could seal the optical disc. (Affidavit of AUSA Chance, ¶ 8). Indeed, such a belief is directly contradicted by case law

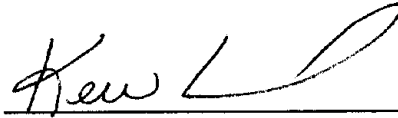
cited by the Government in its Response to Defendants' Joint Motion to Suppress. The case law clearly reveals that the Government may present optical discs or recordings to a Judge other than the issuing Judge. *See e.g. United States v. Burford*, 755 F.Supp. 607 (S.D.N.Y. 1991)(cited by the Government at page 23 of its Response to Defendants' Joint Motion to Suppress); *see also United States vs. Lawson*, 535 F. 2d 557 (7th Cir.1975) (Permissible for tapes to be sealed by a different Judge than the Judge who granted the authorization order); *In the Matter of Special February 1977 Grand Jury*, 570 F. 2d 674 *cert denied* 437 U.S. 904 (1978) (same). It is difficult to imagine how the Government's belief is reasonable where no case law can be found which requires that only the issuing Judge should seal the optical disc or recordings.

Based on the above, and for the reasons detailed in Defendants' Post-Hearing Brief, the Government has failed to prove a satisfactory explanation for the delay in presenting the optical disc to Judge Heyburn.

V. CONCLUSION

WHEREFORE, based on the previous and for the reasons identified in Defendants' Joint Motion to Suppress and Defendants' Post-Hearing Brief, Defendants respectfully request that the Court enter an Order suppressing all wiretap evidence in the present case.

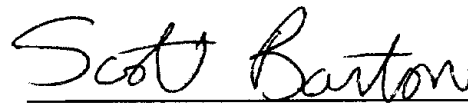
Respectfully submitted,



KEITH KAMENISH
239 South Fifth Street, 19th Floor
Louisville, Kentucky 40202
(502) 584-1402
COUNSEL FOR DEFENDANT
DERRICK SMITH



ALEX DATHORNE
239 South Fifth Street, 19th Floor
Louisville, Kentucky 40202
(502) 584-1402
COUNSEL FOR DEFENDANT
DEMETRIUS CRENSHAW



SCOTT BARTON
239 South Fifth Street, 19th Floor
Louisville, Kentucky 40202
(502) 584-1402
COUNSEL FOR DEFENDANT
JAMES CRENSHAW

Stan Chauvin

L. STANLEY CHAUVIN, III
235 South Fifth Street, Suite 300
Louisville, Kentucky 40202
(502) 584-6394
COUNSEL FOR DEFENDANT
TERRY MIDDLETON

Steven Romines

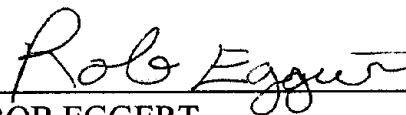
STEVEN R. ROMINES
ROMINES WEIS & YOUNG P.S.C.
600 West Main Street, 2nd Floor
Louisville, Kentucky 40202
(502) 587-8822
COUNSEL FOR DEFENDANT
YOLANDA WALKER

Frank Mascagni

FRANK MASCAGNI III
701 West Jefferson Street
Louisville, Kentucky 40202
(502) 583-2831
COUNSEL FOR DEFENDANT
MARSHALL EVANS

Scott Cox

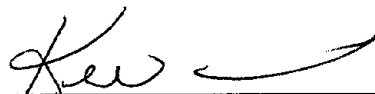
SCOTT C. COX
730 West Main Street
200 Hart Block Building
Louisville, Kentucky 40202
(502) 589-6190
COUNSEL FOR DEFENDANT
REGINALD RICE



ROB EGGERT
730 West Main Street
200 Hart Block Building
Louisville, Kentucky 40202
(502) 589-6190
COUNSEL FOR DEFENDANT
TERRELL GRAY

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing post-hearing reply was served, via U.S. Mail, on: Hon. Phillip Chance, Assistant United States Attorney, Bank of Louisville Building, 10th Floor, 510 West Broadway, Louisville, Kentucky 40202; Hon. R. Kenyon Meyer, 1400 PNC Plaza, 500 West Jefferson Street, Louisville, Kentucky 40202; Hon. E. Brian Davis, Two Paragon Centre, 6040 Dutchmans lane, Suite 220, Louisville, Kentucky 40205; Hon. Richard Louis Receveur, 730 West Main Street, Suite 490, Louisville, Kentucky 40202; Hon. Jamie Hayworth, Federal Defender's Office, Suite 200, 629 South Fourth Avenue, Louisville, Kentucky 40202 this 29 day of August, 2005.



COUNSEL FOR DEFENDANT