IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 10-00320-12-CR-W-DGK
	)	
DESHAUN L. CERUTI,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE TO DEFENDANT CERUTI'S SECOND MOTION TO SUPPRESS[1]

The United States of America, by David M. Ketchmark, Acting United States Attorney, and Bruce Rhoades, Assistant United States Attorney, both for the Western District of Missouri, respectfully submits this response to the defendant's Second Motion to Suppress, Document 466, filed August 31, 2012.

I. FACTUAL BACKGROUND

In 2009 and 2010, the Drug Enforcement Administration (DEA), through lead case agent DEA Special Agent (SA) Joseph Geraci ("Geraci"), conducted an investigation of Juan Marron's ("Marron") drug distribution ring through confidential informants, arranged buys, and Title III wire interceptions of Marron's phones. Through this investigation, it was discovered that Marron was the main supplier of various controlled substances for many individuals, including DeShaun Ceruti ("Ceruti"), the defendant.

[1] Despite the fact that the Government objects to the Court even considering this second motion for suppression (based on it being out of time with no good cause offered for the delay in filing [see Rule 12 and this Court's Stipulations and Orders]; it is a second motion; the first motion raised similar issues which were denied, and; the attached memorandum doesn't provide a basis to support the arguments in that it states that the defendant " . . . will demonstrate . . ." such basis indicating a failure to include the basis for suppression within the filed motion thereby prejudicing the Government in formulating a coherent response hereto, or worse, conducting motion practice by ambush), the Government, in the interest of judicial economy, chooses to proceed with its response, but does not waive said objections.

Beginning May 4, 2010, and going to June 15, 2010, telephone calls were intercepted indicating Marron was supplying drugs to Ceruti. (G.E.1)[2] As G.E.1 makes abundantly clear, contrary to Ceruti's so-called statement of facts, there are at least 22 transcribed calls between Ceruti and Marron. Based on the content of those calls and other investigative information, various law enforcement actions were undertaken, including surveillance and arrests.

One of those actions ultimately led to the arrest on June 1, 2010, of Ceruti and his brother, co-defendant Rollie, in possession of marijuana and crack cocaine. During subsequent hearings, the seizure of some of those controlled substances was suppressed by the Court.

In an effort to assist the Court, avoid arguments about what is and is not contained within the wiretap affidavits and orders at the heart of this second motion to suppress, and for judicial economy, the Government attaches hereto several wiretap documents. All of these exhibits were provided in discovery in March of 2011. They are as follows: Government's Exhibit 2 (G.E.2), Geraci's affidavit for the initial wiretap order in 10-WT-00006-GAF[3], Government's Exhibit 3 (G.E.3), Geraci's affidavit for the extension of that wiretap, Government's Exhibit 4 (G.E.4), Judge Fenner's initial amended[4] wiretap order in 10-WT-00006-GAF, and Government's Exhibit 5 (G.E.5), Judge Fenner's wiretap order for the extension of that wiretap. Additionally, Government's Exhibit 6 (G.E.6) is the minimization instructions[5] provided to all agents,

---

[2] "G.E. 1" refers to Government Exhibit 1 attached hereto. G.E.1 is a document created by Geraci that sets out calls between Marron and Ceruti from Title III interception information provided to the defense through voluntary discovery in December of 2010 and March of 2011.

[3] The defense refers also to wiretap 09-WT-00014-GAF. However, Ceruti is not named in that wiretap and the Government has no knowledge of having intercepted Ceruti during that wiretap and therefore does not address it here, not to mention that if not named or intercepted, Ceruti lacks standing to object to it.

[4] Judge Fenner's *initial* order was entered and then an *amended* order was entered before interception began due to a change in the ESN for Marron's telephone that was to be intercepted. They are otherwise identical.

[5] The *initial* minimization instructions were prepared and then immediately *amended* before being provided to the monitors to reflect the amended order due to a change in the ESN for Marron's telephone that was to be intercepted.

supervisors, and others monitoring the wire calls. The orders and minimization instructions are posted in the wire intercept room and everyone monitoring is instructed to be familiar with them and the affidavits. Finally, Government's Exhibits 7, 8, 9, and 10 (G.E. 7, G.E.8, G.E.9, G.E.10) are the reports to the court required by the wiretap orders.

II. EVIDENTIARY HEARING IS UNNECESSARY

Defendant Ceruti is not automatically entitled to an evidentiary hearing on this second motion to suppress. *See United States v. Mims*, 812 F.2d 1068, 1073-74 (8th Cir. 1987); *see also United States v. Kunkel*, No. 04-4040, 2004 WL 1598830, at *3 (N.D. Iowa July 14, 2004). An evidentiary hearing is only required, "if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact going to the validity of [the wiretap authorization] are in question." *Mims*, 812 F.2d at 1073-74 (quoting *United States v. Losing*, 539 F.2d 1174, 1177 (8th Cir. 1976)). "A hearing is also unnecessary if it can be determined that suppression is improper as a matter of law." *Id*. at 1074.

In this case, an evidentiary hearing is unnecessary. There are no contested issues of fact necessitating a hearing because the only facts the Court may rely on are those already contained within Geraci's affidavit. *See United States v. Milton*, 153 F.3d 891, 894 (8th Cir. 1998) ("In determining probable cause we are bound to consider only the facts contained within the four corners of the affidavit." (citing *United States v. Gladney*, 48 F.3d 309, 312 (8th Cir. 1995))); *see also United States v. Jackson*, 345 F.3d 638, 644 (8th Cir. 2003) ("Having reviewed the affidavit supporting the application, we find that the district court's necessity finding under §2518 was not clearly erroneous.") Defendant Ceruti does not challenge the facts included in the affidavit, only that those facts were sufficient to establish necessity. The Court reviews the necessity finding under a clearly erroneous standard. *See Jackson*, 345 F.3d at 644. An evidentiary hearing is unnecessary because the Court may rule, as a matter of law, whether necessity existed based on

the facts contained in Geraci's affidavit.

III. ARGUMENTS AND AUTHORITIES

The defendant argues in this second motion to suppress that any calls between Defendant Ceruti and co-defendant Marron should be suppressed based on allegations of various violations of the Title III wiretap statutes. However, all of Ceruti's arguments fail as they either misconstrue the Title III requirements or confuse the requirements for a valid Title III intercept of the target telephone (Marron) with any requirements for those (like Ceruti) intercepted communicating with the target telephone.

Insofar as Ceruti's second motion to suppress insinuates that it was required to show necessity specific to Ceruti in order to intercept Ceruti's calls to the target telephone, the statutes and case law don't support that. The wiretap orders issued by Judge Fenner specifically provided authorization to intercept any wire or electronic communications occurring over the target telephone related to drug trafficking. This included the authorization to intercept and record drug trafficking conversations between anyone and the user of the target telephone. A wiretap order is only required to identify the telephone to be tapped and the particular conversations to be seized. *United States v. Gaines*, 639 F.3d 423, 433 (8th Cir. 2011). Necessity is not required for each person intercepted, only the target telephone. The particularity requirements vis-à-vis persons of Title III are different than the particularity requirements vis-à-vis persons of the Fourth Amendment. *See United States v. Donovan*, 429 U.S. 413, 427 n. 15 (1977) and *United States v. Kahn*, 415 U.S. 143, 155 (1974)

Ceruti asserts that Geraci's affidavit did not sufficiently describe the reasons why the wiretap was necessary, as required by 18 U.S.C. §§2518(1)(c) and (3)(c). "To secure

authorization for a wiretap, the government must identify the investigative procedures it has employed (or identify for what reason none have been taken), 18 U.S.C. § 2518(1)(c), and the court must find that "normal investigative procedures' have failed, or are reasonably likely to fail, or are otherwise too dangerous to attempt, *id*. §2518(3)(C)." *United States v. Frazier*, 280 F.3d 835, 844 n.4 (8th Cir. 2002). "If law enforcement officers are able to establish that conventional investigatory techniques have not been successful in exposing the full extent of the conspiracy and the identity of each coconspirator, the necessity requirement is satisfied." *See Jackson*, 345 F.3d at 644. As noted by the Eighth Circuit, agents requesting wiretaps are not required to exhaust Aall possible investigative techniques' before a court can issue an order authorizing interception of wire communications." *Milton*, 153 F.3d at 895 (quoting *United States v. Falls*, 34 F.3d 674, 682 (8th Cir. 1994)). A reviewing court reviews the district court's finding of necessity under a clearly erroneous standard. *See id*. (citing *United States v. Davis*, 882 F.2d 1334, 1343 (8th Cir. 1989)); *see also United States v. Kennedy*, 427 F.3d 1136, 1140 (8th Cir. 2005) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. Sanders*, 341 F.3d 809, 818 (8th Cir. 2003))).

In this case, the district court did not clearly err in finding Geraci's affidavit established a wiretap was necessary, as defined under §§ 2518(1)(c) and (3)(c). In the affidavit, Geraci explained his extensive experience in narcotics investigations and his belief that a wiretap was likely the only investigative technique that would have a reasonable likelihood of achieving the investigative goals set out in the affidavit. Geraci indicated this was part of larger drug investigation, and that the wiretap was important for gathering information on subjects unable to

be identified under other investigative techniques. Geraci set out the plethora of problems law enforcement has with investigating drug traffickers, including the mobility of cell phones and the locations where they operate, both which make it difficult to conduct normal investigative steps. Regarding this case, he specifically noted that while law enforcement had been unsuccessful in developing a confidential sources, or sources of information, able or willing to supply information or conduct controlled transactions, those individuals were unable to go past Marron or possibly those very close to Marron and thus the investigation was stymied in efforts to determine the scope of the drug trafficking operation. Also, Geraci explained that it was unlikely an undercover officer would be able to infiltrate the operation because large-scale drug operations, like this one, tend to trust only family members or known associates within the organization. Further, even with sources able to make controlled purchases, the government does not have the financial resources to make constant large purchases and thus is unable to use that method to determine the resources of the organization or move up in the organization.

Geraci also pointed out that the target subjects were aware of the presence of law enforcement, causing them to be evasive and unusually cautious in their movements. This both diminished the effectiveness of surveillance and increased the chances that surveillance officers would be discovered. The affidavit explains agents did attempt surveillance; however, they were not able to fully identify the all of the target subjects, thus establishing that surveillance by itself was insufficient. Moreover, the affidavit explains why search warrants were not sought prior to the wiretap application, namely because he believed they would be ineffective and would tip off suspects that they were being investigated. Thus, seeking search warrants at that time would actually impede the investigation. Agents also conducted trash searches, but as the affidavit notes, at the time officers had identified only limited locations where the organization

operated. Conducting trash searches would be ineffective regarding most of the target subjects. Also, Geraci explained that in his experience, drug traffickers know law enforcement conduct trash searches and take precautions to limit what agents may find. Finally, Geraci set out that while interviews can be a useful investigative tool, because drug dealers and their customers fear for their and their families' lives, as well as their own culpability, it is often difficult or impossible to get complete information that way and that this technique tips off the organization.

The facts contained in the affidavit are more than enough to support §§ 2518(1)(c) and (3)(c)'s requirements. Even if some of Geraci's stated reasons are viewed as "boilerplate" and not related specifically to this case, the Eighth Circuit has approved the use of boilerplate language in wiretap affidavits. *See Milton*, 153 F.3d at 895 ("Although some of these assertions might appear boilerplate, the fact that drug investigations suffer from common investigative problems does not make these problems less vexing."). The Court of Appeals specifically noted that drug crimes are harder to detect than other crimes "because it is difficult to witness and does not create victims who are compelled to come forward and report the crime." *Id.*

Thus, in *Milton*, the Eighth Circuit recognized that in drug investigations, it is often impossible to use several traditional methods of investigation, and wiretaps should not be found unnecessary simply because of that fact. *Id.* In any event, contrary to Ceruti's claims, agents attempted several other investigative techniques before requesting the wiretap, and under Eighth Circuit law, they are not required to exhaust all possible techniques. *See id.* It is difficult to imagine how Geraci might have been any more specific without *actually attempting* those techniques he deemed too dangerous or unlikely to succeed. Nothing in the statute requires this. *See also United States v. Daly*, 535 F.2d 434, 438 (8th Cir. 1976) ("Merely because a normal investigative technique is theoretically possible it does not follow that it is likely."

(quoting legislative history)). In fact, requiring agents to actually attempt these investigative techniques before finding the necessity requirement met would run the risk of ruining or limiting the investigation, or even put agents and civilians in danger -- a result the statute attempts to avoid.

The entire evidence contained in the affidavit demonstrates that, as a matter of law, the district court was not clearly erroneous in determining that the wiretap was necessary under §§ 2518(1)(c) and (3)(c). Geraci's affidavit identified the investigative procedures he had employed (and identified for what reasons others were not employed) and the district court found that normal investigative procedures failed, or were reasonably likely to fail, or were otherwise too dangerous to attempt. Ceruti fails to meet his burden that the wiretap was unlawfully obtained. Because there was no clear error, the Court should deny Defendant Ceruti's second motion to suppress.

Defendant Ceruti next argues that the recorded telephone calls between Ceruti and Marron should be suppressed as they do not allude to any pending drug transaction. While the defendant attempts to couch this argument in terms of a violation of the minimization requirements, in actuality, Ceruti is merely offering a re-tread of his argument in his first motion to suppress that in his unsubstantiated belief, the evidence is unreliable. He provides no legal basis, outside the far-fetched argument of minimization, that the information in these calls should be suppressed simply because they are coded and do not plainly state "this is a drug transaction". His second motion to suppress the audio recording evidence should be denied as lacking any basis in law or support of facts.

As G.E.4 and G.E.5 clearly set out, and as required under the wiretapping statutes, the orders authorizing the interceptions in this case contained specific provisions for minimizing the

interception of communications not otherwise allowed to be intercepted. 18 U.S.C. § 2518(5) "does not forbid the interception of all nonrelevant conversation, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." *Scott v. United States*, 436 U.S. 128, 140 (1978). *Scott* calls for the compliance analysis to be determined by an objective, reasonableness standard. *See Scott* at 137-38.

What Ceruti argues is that unless there is some immediately blatantly obvious drug trafficking conversation, the call should be minimized. That is simply not the law. In *United States v. Macklin*, 902 F.2d 1320, 1328 (8th Cir.1990), the Eighth Circuit found that any court reviewing minimization ". . . must consider a variety of factors, including the scope of the enterprise, the agents reasonable expectation of the content of the call, the extent of judicial supervision, length and origin of a call, and use of **coded** or **ambiguous** language." (Emphasis added). The orders entered in this case also addressed this issue of "coded" calls. "However, should an intercepted conversation be in a code or a foreign language, and an expert in that code or foreign language is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception pursuant to 18 U.S.C. § 2518(5)." (G.E.4,5)

In these wiretaps, both the Spanish language and English language calls were taken by the same monitors. These monitors are supervised by employees and special agents of the DEA. Both the monitors and the supervising DEA employees were instructed about the minimization requirements as contained in the orders and the minimization instructions.

While the first order authorizing the wiretap named 17 persons (16 named and one "unknown male") expected to be intercepted, based on the investigation the DEA believed there were a multitude of individual's involved. If an intercepted call involved non-named interceptees

and was non-criminal in nature, the orders and instructions required that call to be minimized. That was the practice used by the DEA in monitoring these calls. Additionally, to ensure compliance with these minimization instructions, the orders also required reports to Judge Fenner on the 15th and 30th day of the interceptions.

Several of the calls Ceruti complains of were short in duration. The monitors barely had time before the calls terminated to determine who was calling (a listed interceptee or others?) much less sufficient time to decipher if the conversation was pertinent to the investigation. The agents were wiretapping the primary figure in a large multi-drug distribution conspiracy network and were therefore likely to intercept many calls that pertained to that operation. Nevertheless, the monitors did their best and in fact regularly minimized calls, as reflected in reports to the court. (G.E.7, 8, 9, 10)

Ceruti also alleges the calls recorded between he and Marron weren't drug trafficking related and therefore should have been minimized. The Government concedes these calls do not specifically state that the topic of conversation is drug trafficking. In fact, they might be considered ambiguous, although a plain reading certainly appears to be indicative of criminal activity afoot. These calls include language that the monitoring agents reasonably believed were in "coded language" and referred to drug trafficking. More extensive wiretapping is reasonable when "the conversations are in the jargon of the drug trade." *Macklin*, 902 F.2d at 1328. Therefore, pursuant to the standard set out in *Scott*, the monitoring agents acted reasonably while trying to comply with the orders to intercept and the minimization instructions and requirements of the orders and section 2518(5).

III. CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny Defendant Ceruti's Second Motion to Suppress.

Respectfully submitted,

David M. Ketchmark
Acting United States Attorney

By */s/ Bruce Rhoades*

Bruce Rhoades
Assistant United States Attorney

Charles Evans Whittaker Courthouse
400 E. 9th Street, Suite 5510
Kansas City, Missouri 64106
Telephone: 816- 426-3122

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on September 21, 2012, to the Electronic Filing System (CM/ECF) of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

Kelly M. Connor-Wilson
9393 W. 110th Street, Suite 500
Overland Park, KS 66210

/s/ Bruce Rhoades
_____
Bruce Rhoades
Assistant United States Attorney