UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA v. AMADO LOPEZ a/k/a LUIS, RENALDO LOPEZ a/k/a RICHIE, ENRIQUE MELENDEZ a/k/a KIRIKIRI, a/k/a KIKI, PAUL W. MOUNTS, EFRAIN SANTANA, LUIS DELHOYO a/k/a LOCO, HEIDI A. CHAFFEE, EDWIN VEGA, WENDALL CASLER, ROBERT L. DALL, JAMES W. DALL, KIRK OWEN, NINA PYE, JAMES R. RIGGS, JR., DONALD A. SMITH a/k/a SONNY, LAURIE SMITH, ANTHONY C. STILKEY, II, JENNIFER C. STILKEY, Defendants	Criminal No. 99-79-P-C

GENE CARTER, District Judge

MEMORANDUM OF DECISION

On November 17, 1999, Chief Judge Hornby, in response to the Government's Application for Interception of Wire Communications ("the Application") (attached as Exhibit 1A to Government's Consolidated Objections to Defendants' Motions and Incorporated Memorandum of Law ("Government's Objections") (Docket No. 151)), issued an Order Authorizing the Interception of Wire Communications ("the Order") (attached as Exhibit 1C to Government's Objections). The Order was issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 *et seq*. ("Title III"). The Government

sought this wiretap as part of its investigation of an alleged drug distribution conspiracy. The fruits of that investigation led to this criminal indictment. Currently before the Court are several motions to suppress (collectively "Defendants' Motions") the wire intercepts made pursuant to the Order. In particular, Defendant Mounts has filed a Motion (Docket No. 111), Defendant Donald Smith has filed a Motion (Docket No. 116), Defendant Amado Lopez has filed a Motion (Docket No. 118), Defendant Chaffee has filed a Motion (Docket No. 126), Defendant Melendez has filed a Motion (Docket No. 127), Defendant Anthony Stilkey has filed a Motion (Docket No. 131), and Defendant Santana has filed a Motion (Docket No. 134).[1]

Collectively, Defendants' Motions raise three distinct issues. First, Defendants contend that the Application and the Order failed to comply with the necessity requirements of Title III. Second, Defendants argue that the Government's minimization efforts – as required by Title III – were insufficient. Finally, Defendants challenge the adequacy of the Government's efforts to seal the wiretap recordings at the conclusion of the wiretap on December 7, 1999. On April 24, 2000, this Court issued an order denying all of Defendants' Motions without explanation (Docket No. 179). This Memorandum of Decision sets forth the legal and factual grounds upon which the Court denied Defendants' Motions.

I. Failure of the Wiretap Application to Satisfy the Necessity Requirement

18 U.S.C. section 2518(1)(c) requires that an application for a wiretap include an affidavit that contains "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." Similarly, the statute allows a judge to issue a wiretap order only if he or she finds – among other things – that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C.

[1] In addition, Defendant Vega filed a similar motion (Docket No. 122), but Defendant Vega's attorney withdrew his motion immediately prior to the hearing held with respect to Defendants' Motions. Defendant Vega's withdrawal of his motion has since been submitted to the Court in writing (Docket No. 172).

§ 2518(3)(c). Collectively, these two provisions are referred to as the "necessity" requirement of Title III. The Court of Appeals for the First Circuit outlined the necessity requirement as follows:

> As the Supreme Court has stated, sections 2518(1)(c) and 2518(3)(c) are simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime. Prior to granting authorization for a wiretap, the issuing court must satisfy itself that the government has used normal techniques but it has encountered difficulties in penetrating a criminal enterprise or in gathering evidence – to the point where (given the statutory preference for less intrusive techniques) wiretapping becomes reasonable. Accordingly, the government is not required to show that other methods have been wholly unsuccessful. Nor is the government forced to run outlandish risks or to exhaust every conceivable alternative before requesting authorization for electronic surveillance.

United States v. Ashley, 876 F.2d 1069, 1072 (1st Cir. 1989) (internal citations and quotations omitted).

Pursuant to the Government's effort to comply with section 2518(1)(c), Drug Enforcement Administration ("DEA") Special Agent Boyle provided Judge Hornby with a thirty-nine-page affidavit ("the Boyle Affidavit" or "the Affidavit") (Government's Exhibit 1B).[2] By the Order, Judge Hornby found that "[t]he application and supporting affidavit [the Boyle Affidavit] have adequately demonstrated that normal investigative techniques have been tried and have failed or had limited success, and are [sic] reasonably appear unlikely to further succeed if continued." Order at 2, ¶ 4. Thus, Judge Hornby complied with section 2518(3)(c). Defendants contend that the Boyle Affidavit, on its face, failed to satisfy the requirements of section 2518(1)(c) and, therefore, that Judge Hornby's finding pursuant to section 2518(3)(c) was erroneous.

The Court of Appeals for the First Circuit has established that a district court considering a suppression motion, such as this one, that challenges the findings of the issuing judge shall

[2] An effort to comply with section 2518(1)(c) was just one of several purposes for which the Boyle Affidavit was submitted. For example, it also set forth the basis upon which the Government argued that there was probable cause to grant a wiretap order.

follow the same standard of review as the appellate court would follow. *Ashley*, 876 F.2d at 1074. Accordingly, this Court, just as the Court of Appeals for the First Circuit would, "must determine the sufficiency of the affidavit on its face." *See id.* (citing *United States v. Abou-Saada*, 785 F.2d 1, 13 (1st Cir.), *cert. denied*, 477 U.S. 908, 106 S. Ct. 3283 (1986)). Furthermore, this Court must determine "whether the facts are reasonably adequate to support the issuing judge's implicit determination that other procedures reasonably appear to be unlikely to succeed." *Ashley*, 876 F.2d at 1074.

Turning to the Boyle Affidavit, under the heading "Alternative Investigative Techniques," Special Agent Boyle sets forth six specific investigative techniques that he swears fall within the parameters of section 2518(1)(c). First, Special Agent Boyle indicates that physical surveillance has "proven valuable" thus far, but that it is unlikely to accomplish the "objectives of the investigation." Boyle Affidavit at 34, ¶ a. This is true, Special Agent Boyle avers, because the likelihood of detection by the targets is growing. In support of this proposition, Special Agent Boyle notes that "Paul Mounts told Agent Shafir on May 26, 1999 that he was concerned about the 'heat' in the area, and refused to speak with Agent Shafir when he attempted to reach him on August 24, 1999."[3] Boyle Affidavit at 34, ¶ a.

Next Special Agent Boyle testifies that grand jury subpoenas are unlikely to succeed and that those witnesses that could provide grand jury testimony are either members of the conspiracy themselves or have limited knowledge of the conspiracy. In particular, Special Agent Boyle swore that:

> The confidential informant (CI-1) who introduced Agent Shafir to Anthony Stilkey was on the fringe of the conspiracies, and has had no direct contact with many of the higher level members. The informant (CI-2) who has recently provided information to me, and the informants who have provided information to Lieutenant Young during the investigation, also have limited information concerning the overall scope of the operation and the individual roles of the conspirators.

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[3] DEA Special Agent Uri Shafir conducted numerous undercover drug purchases as part of this investigation.

Boyle Affidavit, at 35, ¶ b.

Special Agent Boyle next proclaims that there are no means to conduct further undercover drug purchases from the targets of the investigation. CI-1, who had previously introduced Agent Shafir to Anthony Stilkey, has had no further contacts within the conspiracy. Furthermore, "CI-2 has advised me that he/she recently had a chance meeting on the street with Orlando Santana, who questioned him/her closely about whether he/she was working with the authorities, in order to resolve unrelated state charges CI-2 currently faces." Boyle Affidavit, at 35-36, ¶ c. Special Agent Boyle goes on to testify that

> [a]ll indications are that the group will refuse to conduct any further business with Agent Shafir based on his failure to contact Paul Mounts or James Riggs until August 24, 1999, after Riggs sold him a counterfeit substance on July 21, 1999. From the tenor of the call to Mounts on August 24, it is clear that Mounts, and in all likelihood the other members of the conspiracies, have become suspicious and thus unwilling to communicate further with him.

Boyle Affidavit at 36, ¶ d. Accordingly, efforts to infiltrate the group have failed or are likely to fail, according to Special Agent Boyle.

Finally, Special Agent Boyle swears that pen registers and trap and trace devices have been employed, but have been of limited use. Boyle Affidavit at 36-37, ¶ e. Additionally, Special Agent Boyle testifies that search warrants are not a viable investigative tool at the time of the application for a wiretap. Boyle Affidavit at 37, ¶ e.

The Court will examine Special Agent Boyle's efforts to satisfy the necessity requirement, beginning with Special Agent Boyle's contention that physical surveillance would no longer be an effective tool because of the likelihood of detection as a result of "what appears to be the conspirators' increasing skills at conducting counter-surveillance." Boyle Affidavit at 34, ¶ a. The Court is satisfied that the facts presented throughout the Boyle Affidavit – not merely those factual averments within the Affidavit's "Alternative Investigative Techniques" section – are adequate to reasonably support this particular proposition.

Turning next to Special Agent Boyle's sworn statement that grand jury subpoenas would not be an effective means – at that time – to achieve the goals of the investigation, the Court is troubled by this assertion. The Boyle Affidavit demonstrates that both Anthony Stilkey and Stanley Piper made unsolicited offers to provide, and did provide, investigators with information about the target conspiracy. Boyle Affidavit at 13, ¶ e, and 17, ¶ b(i). To the extent that these two are believed to be lower-level members of the conspiracy, perhaps it was reasonable for Special Agent Boyle to conclude that their testimony would not be sufficient to indict the targeted conspiracy members. Special Agent Boyle goes on to say, however, that "[t]he informant (CI-2) who has recently provided information to me . . . [has] limited information concerning the overall scope of the operation and the individual roles of the conspirators." Boyle Affidavit at 35, ¶ b. After a careful review of the entire Affidavit, the Court disagrees with Special Agent Boyle's characterization of CI-2's knowledge of the alleged conspiracy as "limited."

According to Special Agent Boyle's Affidavit, CI-2 provided the following information:

> (1) In early 1999, an individual known to CI-2 only as O.J., Enrique Melendez, and individual known to CI-2 only as Luis, several other Hispanics, and Paul Mounts (who CI-2 believes is originally from Connecticut), began coming to Maine to distribute cocaine. Although they initially used James Riggs (who CI-2 believes is related to Mounts' girlfriend, Heidi Chaffee), to set them up with drug customers, they recently threw Riggs out of the operation for smoking too much crack cocaine. Approximately two months earlier, they threw Mounts out for the same reason, but recently allowed him to return.
>
> (2) CI-2 has purchased crack cocaine from Mounts at the residence he (Mounts) and Chaffee share on the Fosters Point Road in Bath. The other members of the organization have been attempting to rent motel rooms to distribute drugs, but are constantly getting kicked out. As a result, Donald "Sonny" Smith of 14 Swett Street in Brunswick allowed them to use his residence as a base of operations.
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> (3) Approximately six months earlier, CI-2 and his/her spouse attended a meeting in Connecticut with Mounts, Chaffee, and O.J. At the meeting, O.J. provided approximately four ounces of cocaine to Mounts for distribution in Maine. As of October 5, 1999, Mounts, O.J., and the other members of the group were traveling to Connecticut and/or New Jersey approximately every three days, purchasing four to six ounces of cocaine for $700-$800 an ounce, and selling it in the Bath-Brunswick area at the rate of $100 for .4 grams of crack cocaine. In addition, they were purchasing heroin on these trips for $5 per bag and reselling it in Maine for

> $30 per bag. On several of these trips, CI-2 was paid $300 for the use [sic] his/her vehicle. CI-2 observed when his/her vehicle was returned that approximately 1,000 miles had been added to the odometer. . . .
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> (4) Around the beginning of September 1999, O.J. provided CI-2 with two cellular telephone numbers to call in order to order drugs: 207-841-2208 and 207-841-2419. CI-2 has called both of these numbers at different times and ordered drugs from whomever answered the call. The most recent calls placed by CI-2 to both of these numbers to order drugs occurred within the week preceding our interview [October 5, 1999]. . . .
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> CI-2 told me during our interview on October 5, 1999 that [Theresa] Rubinstein allowed the group to stay at her house, park their cars there, and, like CI-2, use her car to make drug runs. . . .
>
> On October 18, 1999, I was advised by CI-2 that he was told that the member of the conspiracies he knows only as Luis purchased the trailer located at this address from [Timothy] Theberge, and that the group will be using it at some point in the future as their base of operations. . . .
>
> During our interview on October 5, 1999, CI-2 told me that Theberge had recently received an insurance settlement and was using the money to purchase ounces quantities of crack cocaine from the conspirators. . . . During our interview on October 5, 1999, CI-2 identified Lena Pelkey as a "big" drug customer of Paul Mounts and O.J. . . . During our interview on October 5, 1999, CI-2 told me that Jason Bishop is purchasing two ounce quantities of cocaine from the conspirators and reselling them in the Bath-Brunswick area. . . .

Boyle Affidavit at 19-21, 27-31. Additionally, CI-2 helped Special Agent Boyle directly identify "Luis" and "Richie," both of whom are identified as targets in this investigation. Boyle Affidavit at 33.[4] The Boyle Affidavit names seventeen target subjects.[5] Boyle Affidavit at 3. According to the Boyle Affidavit, CI-2 provided detailed information regarding twelve of these seventeen

[4] This represents perhaps the most troubling portion of Special Agent Boyle's Affidavit. On page 3 of the Affidavit, Agent Boyle swears that "an individual identified only as 'Luis' . . . [and] an individual identified only as 'Richie'" are the only two of the seventeen "target subjects" who are unidentified. Yet on page 33 of the Affidavit, Special Agent Boyle explains how, with the assistance of CI-2, he has identified both "Luis" and "Richie" – although the Affidavit fails to disclose their full names. The Court would wish that this discrepancy is the result of an oversight on the part of Special Agent Boyle, but the Court fears otherwise.

[5] The target subjects are Stanley Piper, Anthony C. Stilkey, Paul W. Mounts, Heidi A. Chaffee, James R. Riggs, Jr., Cindi Neale, Jason Bishop, Jennifer C. Stilkey, Orlando Santana Jr. (a.k.a. "O.J."), Enrique Melendez, an individual identified only as "Luis," Donald "Sonny" Smith, Theresa Rubinstein, Timothy Theberge, David Casler, Lena Pelkey, and an individual identified only as "Richie." Boyle Affidavit at 3.

target subjects. Two of the remaining five target subjects are Stanley Piper and Anthony Stilkey, each of whom volunteered to provided similar information about the conspiracy. Special Agent Boyle's testimony that "[t]he informant (CI-2) who has recently provided information to me, [has] limited information concerning the overall scope of the operation and the individual roles of the conspirators" is simply not supported by the facts set forth in his Affidavit.

The Court also questions Special Agent Boyle's conclusion that future undercover drug purchases are unlikely to be successful as a result of the August 24, 1999, phone call from Special Agent Shafir to Paul Mounts.[6] When Special Agent Shafir attempted to contact Paul Mounts on August 24, 1999, a female answered the phoned and relayed – apparently from Paul Mounts – that he did not wish to speak to Special Agent Shafir. In particular, the woman relayed that "He says he's not doing anything." Boyle Affidavit at 18-19. As Defendants point out, this relayed statement is by no means a definitive dead end with respect to possible future undercover drug purchases. Defendants suggest that Paul Mounts may merely have been indicating that he did not have any drugs to sell at that time, rather than, as Special Agent Boyle concludes, a declaration that Special Agent Shafir was *persona non grata* within the alleged conspiracy. Although this Court is not convinced that his is the best conclusion to be drawn from these facts, Special Agent Boyle's conclusion is a reasonable one, and Judge Hornby's reliance on it would, therefore, be reasonable as well.

Defendants raise a similar query regarding the apparent failure of Special Agent Shafir to contact Orlando Santana directly in an attempt to purchase drugs from him. Defendants point out that the Affidavit reveals that both Anthony Stilkey and Jennifer Stilkey provided Special Agent Shafir with Orlando Santana's cellular phone number and encouraged Special Agent Shafir to purchase drugs directly from Santana, as opposed to purchasing from Defendant Mounts. Boyle

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[6] During oral argument regarding Defendants' Motions, the Government indicated that the phone call August 24, 1999, represented the keystone of the Government's broader necessity argument.

Affidavit at 17, 18. Furthermore, Special Agent Boyle never explains in the Affidavit why CI-2 was never employed either to conduct monitored drug purchases from Orlando Santana – as CI-2 had apparently purchased drugs from Santana within the week preceding CI-2's conversation with Special Agent Boyle on October 5, 1999 – or to introduce Special Agent Shafir to Orlando Santana, so that Special Agent Shafir could conduct undercover drug purchases from Santana.[7] Indeed, this exact investigative procedure was used successfully at the initiation of this investigation when CI-1 conducted a monitored drug purchase from Anthony Stilkey, and CI-1 subsequently successfully introduced Special Agent Shafir – in his undercover persona – to Anthony Stilkey for the purpose of conducting further controlled drug purchases. Bolye Affidavit at 4-6. Again, however, despite Defendants' and this Court's concerns about the contents and deficiencies of Special Agent Boyle's Affidavit, this Court cannot use speculation – about what more could have been done – to vitiate the Order so long as the Order is reasonably supported by facts within the Affidavit.

However troubling this Court finds various omissions and conclusions in the Boyle Affidavit, the standard set forth by the Court of Appeals for the First Circuit in *Ashley* dictates that this Court must not disturb the Order in this case. With respect to this Court's disagreement with Special Agent Boyle's characterization of CI-2's knowledge of the alleged conspiracy, the facts upon which this Court reaches its conclusion are plainly set forth within the four corners of the Affidavit. This Court must assume that Judge Hornby was familiar with those very same

[7] Special Agent Boyle indicated in the Affidavit that "CI-2 has advised me that he/she recently had a chance meeting on the street with Orlando Santana, who questioned him/her closely about whether he/she was working with the authorities, in order to resolve unrelated state charges CI-2 currently faces." Boyle Affidavit at 35-36. That statement demonstrates that at some point, it presumably became unfeasible to use CI-2 to conduct undercover drug purchases from Santana. However, the Court cannot determine what Special Agent Boyle means by the term "recently." The Court infers that "recently" in this context means closer to November 17, 1999, when the Affidavit was signed, then to October 5, 1999, when CI-2 indicated to Special Agent Boyle that he/she had been in contact with Santana to purchase drugs within the week preceding October 5, 1999. Accordingly, the Court must conclude that there was at least some time period between October 5, 1999, and November 17, 1999, during which the DEA could have used CI-2 to conduct monitored drug purchases from Santana.

facts. Further, this Court's conjecture regarding the ability of DEA agents to conduct further undercover drug purchases, either from Paul Mounts or directly from Orlando Santana, is merely speculation. Again, the Court must assume either that Judge Hornby considered such possibilities and dismissed them, or that Judge Hornby reasonably relied – based on other facts within the Affidavit – on Special Agent Boyle's conclusion that further undercover purchases were not feasible. Despite this Court's criticisms of the Boyle Affidavit, the Court finds that it contains facts that "are reasonably adequate to support the issuing judge's implicit determination that other procedures reasonably appear to be unlikely to succeed." *Ashley*, 876 F.2d at 1074. Accordingly, the Court has denied those of Defendants' Motions that challenge the sufficiency of the Affidavit on its face.

II. Failure to Properly Minimize Conversations Outside the Scope of the Wiretap Order

Title III provides that all wiretap orders "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." 18 U.S.C. § 2518(5). The statute provides no further guidance, however, as to what such minimization requires. The Court of Appeals for the First Circuit dictates that the minimization requirement must be analyzed on a case-by-case basis looking to the reasonableness of the interceptor's conduct. *United States v. Hoffman*, 832 F.2d 1299, 1308 (1st Cir. 1987). Further, the reasonableness must be assessed in the context of the entire wiretap as opposed to a chat-by-chat analysis. *See id.* More recently, the Court of Appeals for the First Circuit has held that

> In assessing whether the government's minimization efforts pass muster under 18 U.S.C. § 2518(5), we make an objective assessment in light of the facts and circumstances known to the government at the relevant points in time. When making this assessment, we tend to focus on (1) the nature and complexity of the suspected crimes; (2) the thoroughness of the government's precautions to bring about minimization; and (3) the degree of judicial supervision over the surveillance process.

United States v. London, 66 F.3d 1227, 1236 (1st Cir. 1995) (internal citations omitted).

Although the Court of Appeals for the First Circuit has apparently not yet decided who bears the burden when minimization efforts are challenged, a common rule has developed among

other circuits. Specifically, it is widely held that once the issue of minimization has been raised, the Government must then make a *prima facie* showing that its minimization efforts were reasonable. Once such a showing has been made, the burden shifts to the defendant to demonstrate that more effective minimization could have taken place. *United States v. Torres*, 908 F.2d 1417 (9th Cir. 1990); *United States v. Willis*, 890 F.2d 1099 (10th Cir. 1989); *United States v. Armocida*, 515 F.2d 29, 45 (3rd Cir.), *cert. denied*, 423 U.S. 858, 96 S. Ct. 111 (1975); *United States v. Rizzo*, 491 F.2d 215, 217 n.7 (2nd Cir.), *cert. denied*, 416 U.S. 990, 94 S. Ct. 2399 (1974). Given the strong support for this burden approach in other circuits, and in the absence of any argument from the Government to the contrary, the Court adopts the burden scheme set forth in the cases collected above.[8]

To demonstrate that its minimization efforts were sufficient, the Government elicited testimony from Sulamit Garrido. Ms. Garrido, along with Sandra Ameris, were employees of International Language Services, which had apparently contracted with the DEA to provide translation and monitoring service for this wiretap.[9] Garrido Transcript at 2-3, 6. Prior to commencing her duties, Assistant United States Attorney Jonathan A. Toof read to Ms. Garrido the Instructions for Electronic Interception ("the Instructions") (attached as Exhibit 2 to the Government's Objections (Docket No. 151)). Garrido Transcript at 8. Ms. Garrido signed the Instructions as proof of her understanding thereof. Garrido Transcript at 9. Ms. Garrido testified that she had participated in over one hundred wiretaps over the course of seven years, and that

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[8] In fact, the Court indicated in the conference of counsel preceding the hearing on this matter that the Court understood the Government to bear the burden of demonstrating *prima facie* reasonable minimization efforts. The Government offered no objection, and the hearing proceeded with that understanding.

[9] Section 2518(5) expressly contemplates the use of tranlators:

> In the event the intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception.

the Instructions she received for this wiretap were similar to instructions she had seen in the one hundred other wiretaps in which she had participated. Garrido Transcript at 3, 10.

Ms. Garrido and Ms. Ameris worked in tandem sixteen hours per day, seven days per week – the listening plant was closed for the remaining eight hours each day. Garrido Transcript at 7. They prepared "line sheets," which are a log of each call including date, time, length, and a summary of the contents of the call. Garrido Transcript at 7-8. Ms. Garrido testified that most of the calls were in English and did not require translation. Garrido Transcript at 10-11.
Ms. Garrido indicated that her minimization efforts included listening to the first two minutes of each call to identify the parties and determine if the conversation related to the target of the investigation. Garrido Transcript at 12-14. If, within the first two minutes, the conversation included target material, Ms. Garrido testified that she would continue to record the call. If, however, the call did not include suspect subject matter within the first two minutes, Ms. Garrido testified that she would then shut off the recorder and conduct periodic spot checks. Garrido Transcript at 12. Ms. Garrido indicated that if spot monitoring was necessary, she would shut the recorder off for two minutes and turn it back on to determine if the conversation had shifted to suspected criminal activity. Garrido Transcript at 12. If the conversation was suspect, she would continue to monitor the call. If the conversation remained innocent, she would shut off the recorder and repeat the spot-monitoring process. Garrido Transcript at 12-13. Ms. Garrido also explained that she would attempt to discern patterns of innocence and patterns of involvement and would adjust her minimization efforts accordingly. Garrido Transcript at 14. Finally, Ms. Garrido testified that there was an unusually high number of drug-related calls – on a percentage basis – during the course of this wiretap compared with the other wiretaps she has monitored. Garrido Transcript at 17.

In addition to the Instructions and Ms. Garrido's testimony, the Court is aware that the issuing judge received two updates from the Government during the course of this wiretap. Copies of these two reports are attached to the Government's Objections (Docket No. 151) as

Exhibits 3A and 3B. The first report, Exhibit 3A, is a twenty-three-page document prepared after roughly the first ten days of the wiretap, and it includes extensive excerpts from the line sheets prepared by Ms. Garrido and Ms. Ameris. The second report, Exhibit 3B, is a similar twelve-page document prepared after the first twenty days of the wiretap. Although not a complete copy of all the line sheets for all monitored calls, these progress reports afforded the issuing judge a reasonable means to review the minimization efforts to that date.[10]

Given the complexity of the suspected crime – a large interstate conspiracy to distribute drugs – the detailed Instructions and Ms. Garrido's efforts to follow them, as well as the status reports provided to the issuing judge, the Court is satisfied that the Government has met its *prima facie* burden established in *London*, 66 F.3d at 1236. Accordingly, the burden shifts to Defendants to demonstrate that the monitoring efforts, as a whole, were improper.

Following Ms. Garrido's testimony, Defendants introduced a typed transcript of the line sheets prepared during the course of this wiretap. Defendants' Exhibit 5. Defendants identified six calls that they contend were not minimized properly, although Defendants failed to indicate, specifically, the grounds for challenging each call. Therefore, the Court will review each of the six calls, speculating as best it can as to the specific objections Defendants have to each call. Defendants first draw the Court's attention to call number 007. Call 007 is a 6-minute-59-second call between Debbie and two unknown males. The Defendants' selection of call 007 is confounding to the Court. First, as this was just the seventh call intercepted, the monitors were

[10] The one concern this Court has with these reports is that they include parenthetical notes that have apparently been added since the original line sheet entries were created. These notes are justifications provided to the issuing judge as to why certain calls were not minimized. It is not clear who prepared these parenthetical comments, although nothing in Ms. Garrido's testimony, or the transcript of the line sheets, indicate that these notes represent the decision-making process carried out by Ms. Garrido. The Court notes, in particular, the parenthetical note added to call 011 on page 6 of Exhibit 3A. The Court is concerned that the sophistication of the legal analysis in this note may have misled the issuing judge to believe that the note was written by the person who actually decided not to minimize the call, as opposed to an after-the-fact justification created by the AUSA or a law enforcement officer, which the Court now believes it to be. *See, infra*, footnote 14.

entitled to some leeway in order to identify the voices of the parties involved. Second, although call 007 does appear to contain nontargeted conversations, according to the line sheet entry, the monitor minimized the call by shutting off the recorder after two minutes and spot monitoring thereafter. Despite Defendants' criticism of the monitoring of call 007, the Court finds the minimization efforts with respect to call 007 to be entirely proper.

Defendants next point to call 011. This call is just 54 seconds in length. Although the conversation includes a discussion about a lawyer, nothing in the line sheet suggests the conversation is privileged. Further, this call, like call 007, is on the first day of the wiretap, when the monitors are still identifying the parties. Given the brief duration of this call and that it was only the eleventh call intercepted, the Court finds that call 011 was properly monitored.

The third call identified by Defendants is call 662, a 1-minute-58-second call between Luis and an unknown female. This was apparently an outgoing call to Lawrence, Massachusetts. Additionally, the monitor noted in the line sheet entry that Luis had spoken with this unknown female four previous times, presumably in conversations that represented a pattern of involvement allowing for relaxed minimization. Given the brevity of this call and the notation indicating a pattern of involvement, the Court finds that call 662 was properly monitored.

Defendants next highlight call 746, a 2-minute-29-second call between Luis and "Kikiri (Enrique)." Ms. Garrido was questioned on cross-examination regarding what Defendants characterize as her failure to properly minimize this call.[11] Garrido Transcript at 29. Ms. Garrido testified that she did not minimize this call because she believed the statement "I got something pretty to show you. Real pretty." referred to drugs. Given that the participants in this call were known to be deeply involved in the alleged conspiracy, and given that the call was placed to Hartford, Connecticut, a suspected source of drugs for this alleged conspiracy, Ms. Garrido's

[11] The Court notes that this is the only instance in which Defendants' counsel examined Ms. Garrido about a particular call. The six calls Defendants' identified to the Court were introduced into evidence – as part of all the line sheets – after Ms. Garrido had completed her testimony.

conclusion is reasonable. Accordingly, the Court concludes that the decision to monitor all of call 746, without minimization, was appropriate.[12]

Defendants also challenge the failure to minimize call 817. Call 817 is a 7-minute-29-second call apparently between Melissa and Luis. The line sheet entry for this call is brief relative to the length of entries for calls that lasted much shorter periods of time. This is apparently the result of the monitor's use of bracketed – and therefore the Court assumes abbreviated – information summarizing social conversation. Here, the social conversation would seem to be of the type that should be minimized. For example, the parties talk about how they spent Thanksgiving and about Luis being sick. At some point, the conversation appears to turn to drugs, with Melissa saying "smoke one?" and Luis responding "Come roll it for me. I'll teach you." The problem for the Court is that given this shorthand form of transcribing the call, it is impossible to determine at what point during the call the conversation apparently turned to drugs. The apparent drug reference could be in the second minute of the call or in the seventh minute of the call – the Court simply cannot tell. Given the number of social subjects that the parties spoke about before the reference to smoking arose, however, the Court surmises that this call should have been minimized. The Court is satisfied that the monitoring of call 817 was improper.

Defendants finally point to call 824, a 6-minute-56-second conversation between Talin, O.J. Santana's girlfriend,[13] and both Luis and O.J. Again, like call 817, the brevity of the line sheet entry for call 824 is incongruous with the actual length of the telephone call. For example,

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[12] Defendants expressed concern that this and other calls were one-sided; that is, that only one of the participants was audible. Ms. Garrido testified that she reported this problem to agents and police officers present, and that something was done to correct the problem, but it persisted throughout the wiretap. Garrido Transcript at 27-28. At some point later in the hearing, it was suggested, perhaps by AUSA Toof, that the problem was with the cellular telephone company, as opposed to the recording device operated by Ms. Garrido. Obviously, it would be preferable to hear both sides of a conversation in order to determine if it should be minimized. However, the Court cannot find fault with the actions of the Government given that it seems that there was an effort to remedy the problem.

[13] The Government elicited testimony from Ms. Garrido that she had concluded that Talin was O.J. Santana's girlfriend. Garrido Transcript at 15.

this nearly seven minute call was summarized in the line sheets with just four typed lines, while the next call, 818, a call of less than two minutes, was summarized in seven typed lines. The Court agrees with Defendants that this unbalanced system of line sheet entries is troubling, as it suggests that a summary is short because it omits social or other nontargeted conversations that should properly have been minimized. Indeed, the monitoring of call 824 appears to support this suggestion. Call 824 appeared to be entirely social in nature, and finally, it was minimized by shutting off the recorder for less than one minute. However, the minimization did not occur until six minutes into what appears to be an entirely social conversation. Again, the Court agrees with Defendants that the monitoring of call 824 was improper. According to the line sheet, call 824 should have been minimized sooner.

Despite the Court's conclusion that two of the six calls identified by Defendants were improperly minimized, the Court finds that Defendants have failed to meet their burden that the monitoring, as a whole, was improper. The limited examination of Ms. Garrido coupled with the selection of six calls – without further elaboration – simply does not create a sufficient record upon which the Court may find that the minimization efforts were improper. The Court, based on its independent review of all of the line sheet entries, is by no means satisfied that the minimization efforts were perfect or that they could not have been improved significantly. Again, however, the Court of Appeals for the First Circuit has made clear that perfection is not required.

> We are also mindful that Title III does not forbid the interception of all nonrelevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to minimize the interception of such conversations. This means that the government is held to a standard of honest effort; perfection is usually not attainable, and is certainly not legally required.

London, 66 F.3d at 1236 (internal citations and quotations omitted). With this standard in mind, the Court is satisfied that the Government has demonstrated an honest effort to properly

minimize all intercepted conversations, and Defendants have failed to demonstrate otherwise.

Accordingly, Defendants' Motions based on improper minimization efforts have been denied.[14]

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[14] During the course of reviewing Title III, and the record generated by Defendants' Motions, the Court discovered troubling issues neither raised by Defendants nor addressed by the Government. While these issues are related to the Government's minimization efforts, they are much broader than the minimization arguments raised by Defendants. Indeed, these issues call into doubt the validity of this entire wiretap.

Title III provides that:

> An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

18 U.S.C. § 2518(5). The Order states:

> Wherefore, it is hereby Ordered that special agents of the United States Drug Enforcement Administration and other investigative and law enforcement officers, assisted, if necessary, by qualified translators, pursuant to the application of the Assistant United States Attorney Jonathan A. Toof, are authorized to intercept and record wire communications to and from the cellular telephone . . . assigned and billed to Orlando Santana, Jr. . . . .

Order at 2-3. The Order does not contemplate – either explicitly or implicitly – the use of civilian contract employees to conduct the interception of calls. Furthermore, nowhere in the Government's Application is a request – either explicit or implicit – to use civilian contract employees to conduct the interceptions. Both the Order and the Application specifically acknowledge the use of translators "if necessary" to "assist" law enforcement officers in conducting the wiretap. Order at 2-3; Application at 5. At the hearing regarding the Government's minimization efforts, Ms. Garrido, a civilian contract employee, testified that her job was to translate Spanish conversation intercepted pursuant to the Order into English. Garrido Transcript at 2. Her role as a translator was entirely consistent with the Order. Yet Ms. Garrido testified that most of the conversations that were intercepted were in English. Garrido Transcript at 10-11. Furthermore, there is nothing in Ms. Garrido's testimony to suggest that, in her role as a translator, she "assist[ed]" law enforcement officials only "if necessary." On the contrary, Ms. Garrido's testimony, taken as a whole, demonstrates that Ms. Garrido, and presumably her coworker Ms. Ameris, conducted the entire wiretap in this instance. They operated the recording device, and they filled out the line reports summarizing each call. Most important, it is unquestionable from Ms. Garrido's testimony that the discretion of whether or not to minimize incoming calls was left solely to her and Ms. Ameris. Garrido Transcript at 24. There was no testimony to suggest that anyone other than Ms. Garrido or Ms. Ameris minimized a call. Furthermore, Ms. Garrido did not specifically indicate – or even suggest – that her decision to minimize – or not to minimize – a call was ever scrutinized by law enforcement officers either contemporaneously or after the fact. Finally, Ms. Garrido admitted that she had no training with respect to identifying code words, and the Court infers (from her testimony and from the fact that

(continued...)

[14](...continued)
she has been working as a translator since age 18) that she had no law enforcement training whatsoever. Garrido Transcript at 40.

The Court is deeply concerned that the Application failed to request authority from the Court to use civilian contract employees as Title III permits. That the Application did request the use of translators – as needed – demonstrates that the Government believed it necessary to seek explicit authority for the use of translators despite specific authorization in Title III for their use. Why did the Government not also specifically request permission from the Court to use a civilian monitor? The Government's failure to request permission to use monitors resulted in an Order that does not contemplate their use. As a result, the employment of Ms. Garrido and Ms. Ameris to intercept these calls is a violation of the plain language of the Order. The Order unequivocally sets forth that "special agents of the United States Drug Enforcement Administration and other investigative and law enforcement officers, assisted, if necessary, by qualified translators" are the only people authorized to intercept calls to Santana's cell phones. Order at 2-3. While the Order plainly anticipates that translators, such as Ms. Garrido and Ms. Ameris, will assist law enforcement officers as "necessary," Ms. Garrido's testimony demonstrates that her role far exceeded that of a translator assisting as "necessary."

As a result of the Government's failure to specifically request authority to use civilian monitors, it is unlikely that Judge Hornby was aware that all of the interceptions, and therefore all minimization efforts, would be conducted by civilian contract employees with no law enforcement training. If he had been aware of that fact, Judge Hornby may have modified the Order to add safeguards to ensure that civilian monitors were properly supervised by law enforcement officers as Title III requires. Further, Judge Hornby may have scrutinized with greater care the periodic reports he received from the Government had he known that the minimization decisions were being made by civilian contract employees.

The Court remains deeply disturbed that the Government did not disclose the intended use of such monitors to the issuing judge. Additionally, the Court is disconcerted by the fact that the use of these civilian monitors contradicts the express terms of Judge Hornby's Order. Furthermore, beyond the terms of the Application and Order, there appears to be an additional problem with the use of civilian monitors in this case. As set forth above, Title III permits the use of civilian monitors "acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception." 18 U.S.C. § 2518(5). Aside from evidence that a law enforcement officer was present at the plant at all times of operation, the Government provided no evidence that Ms. Garrido and Ms. Ameris operated "under the supervision of an investigative or law enforcement officer" as Title III explicitly demands. Indeed, Ms. Garrido's testimony indicated that the opposite was true – that all minimization decisions were left up to her. Garrido Transcript at 24.

Although the Court cannot find any previous judicial interpretation of this provision, the Court reads the "supervision" requirement of Title III to be *meaningful* supervision – not merely the presence of a law enforcement officer at the listening plant. The Court adopts this reading of "supervision" from the general scheme and purpose of Title III. Congress, in enacting Title III, understood a wiretap to be one of the most invasive forms of court-approved investigation. Accordingly, Title III includes numerous safeguards above and beyond those present in a typical search warrant, including United States Attorney General approval prior to application, the necessity requirement, and the minimization requirement. The minimization requirement is particularly important in that it – unlike the other special requirements set forth in Title III – is the only safeguard that works after an order has been issued. Once a judge has issued a wiretap order, only law enforcement officers – by following the minimization instructions – may

(continued...)

III. Failure to Seal the Recordings Immediately

Defendants have also challenged the propriety of the sealing of the tapes at the conclusion of this wiretap. Section 2518(8)(a) requires that "[i]mmediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his direction." Defendants' challenge to the post-wiretap sealing focuses on a six-day delay between the termination of the wiretap on December 7, 1999, and Judge Hornby's receipt of the tapes on December 13, 1999, for sealing. Although section 2518(8)(a) states that the tapes will be submitted to the judge "immediately" following the conclusion of the wiretap, Title III jurisprudence is more forgiving. The Court of Appeals for the First Circuit in *United States v. Mora*, 821 F.2d 860 (1st Cir. 1987), explained that a delay in sealing wiretap recordings requires suppression of those recordings unless the Government presents a "satisfactory explanation" for the delay. *Id.* at 867. In assessing whether the

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[14](...continued)
effectively protect the privacy of individuals by deciding not to listen to or record conversations beyond the scope of the investigation.

The decision to minimize – or not to minimize – an intercepted conversation represents the front-line execution of the broad concept of privacy protection embodied in Title III. Given the fundamental importance of minimization, the Court must conclude that the Congress intended Title III's requirement of "supervision" of civilian contract employees to be *meaningful* and *active* "supervision" especially in the area of minimization. The Court's position is bolstered by the fact that minimization issues raise complex legal problems – such as instantly identifying and minimizing all varieties of privileged conversations – and Congress presumably wanted law enforcement officers with at least some training in this field to be actively supervising any presumably untrained civilian contract employees. The Government has failed to demonstrate that Ms. Garrido and Ms. Ameris received any form of meaningful supervision with respect to the minimization of intercepted telephone conversations. Indeed, Ms. Garrido's testimony indicates that the opposite was true.

These issues, however, were neither generated by Defendants' Motions, nor addressed or explored at the hearing conducted by this Court. Further, it is uncertain whether the Government – absent a specific challenge from Defendants – bears a generalized burden to demonstrate that all provisions of the Order and Title III have been satisfied. In addition, the proper resolution of these issues would require an additional evidentiary hearing as well as additional briefing from both sides, which would unquestionably force a lengthy delay in this trial. Accordingly, despite the fact that the Court is deeply troubled that the Order does not contemplate the use of civilian monitors, and that it appears that such monitors were not actively supervised by law enforcement officers as Title III directs, the Court declines to generate and decide these issues *sua sponte*.

Government's explanation is satisfactory, this Court must weigh several factors. First, the Court must determine "whether the government has established by clear and convincing evidence that the integrity of the tapes had not been compromised." *Id.* Next, "the government must then demonstrate that the delay in presenting the tapes for judicial sealing came about in good faith." *Id.* at 868. This "good faith" requirement includes two distinct elements: "First, the delay must not have caused any cognizable prejudice to the accused." *Id.* Second, the Government must "prove it did not benefit unfairly from the lapse – most particularly, that no tactical advantage accrued to the prosecution in consequence of the lack of immediacy." *Id.* Next, the Court will examine the "length of any particular delay." *Id.* And finally, *Mora* dictates that the Court examine the cause of the delay. *Id.* at 869.

Special Agent Boyle testified that the delay in presenting the tape recordings to Judge Hornby following the completion of this wiretap resulted from Judge Hornby's unavailability during the six days between December 7, 1999, and December 13, 1999. Throughout the period of this delay, Special Agent Boyle testified that all the tapes were under DEA seal either at the listening plant in a locked locker – to which he had the only key – or in the DEA evidence room in Portland, Maine – to which he and one other DEA agent had a key.

Based on Special Agent Boyle's testimony, the Court is satisfied that the requirements of *Mora* have been met, such that suppression, based on the delay in sealing the recordings, is unnecessary. *Mora*, 821 F.2d at 867-69. Specifically, the Court is satisfied that the Government has met its burden of establishing that the tapes are unadulterated. Further the Court is convinced that the delay occurred in good faith – in that it neither unfairly prejudiced Defendants or provided a tactical benefit to prosecutors. Finally, the Court is satisfied that the cause and length of the delay are reasonable.[15] Accordingly, the Court finds the Government's explanation

[15] The Court notes, however, that despite the statutory language indicating that only the issuing judge may seal the tapes upon completion of the wiretap, case law suggests that it is not improper to have the tapes sealed by another judge if the issuing judge is unavailable. *Cf. United* (continued...)

to be satisfactory, and therefore, the Court has denied Defendants' motions to suppress the wiretap recordings because of a delay in their sealing.

IV. Conclusion

Based on the foregoing legal and factual conclusions, the Court has denied, by its Order of April 24, 2000 (Docket No. 179), all of Defendants' Motions referenced therein.

GENE CARTER
District Judge

Dated at Portland, Maine this 28th day of April, 2000.

U.S. District Court
District of Maine (Portland)

CRIMINAL DOCKET FOR CASE #: 99-CR-79-ALL

USA v. LOPEZ, et al Filed: 12/15/99

AMADO LOPEZ (1) aka LUIS defendant	PETER E. RODWAY, ESQ. [COR LD NTC cja] RODWAY & HORODYSKI PO BOX 874 PORTLAND, ME 04104 773-8449
RENALDO LOPEZ (2) aka RICHIE defendant	JUDITH M. WOHL, ESQ. [COR LD NTC cja] ATTORNEY AT LAW 103 EXCHANGE ST PORTLAND, ME 04101 774-5288

[15](...continued)
States v. Poeta, 455 F.2d 117, 122 (2nd Cir.), *cert. denied* 92 S. Ct. 2041 (1972). Indeed, the Court believes such a practice would be prudent, as the statutory directive that tapes be sealed "immediately" far outweighs any secondary concern that the issuing judge should also be the sealing judge.

ENRIQUE MELENDEZ (3) aka KIRIKIRI aka KIKI defendant	BRUCE M. MERRILL, ESQ. [COR LD NTC cja] 225 COMMERCIAL STREET SUITE 401 PORTLAND, ME 04101 775-3333
PAUL W MOUNTS (4) defendant	DAVID R. BENEMAN 775-5200 [COR LD NTC cja] LEVENSON, VICKERSON & BENEMAN P. O. BOX 465 PORTLAND, ME 04112 775-5200
EFRAIN SANTANA (5) defendant	JOEL VINCENT, ESQ. [COR LD NTC cja] VINCENT & KANTZ P.O. BOX 6630 635 FOREST AVENUE PORTLAND, ME 04101-6630 761-1914
LUIS DELHOYO (6) aka LOCO defendant	KAREN L. MORGAN, ESQ. [COR LD NTC cja] PO BOX 4661 92 EXCHANGE STREET PORTLAND, ME 04112 828-3994
HEIDI A CHAFEE (7) defendant	WILLIAM MASELLI, ESQ. [COR LD NTC cja] SHEILA A. COOK, ESQ. [term 12/20/99] [COR LD NTC cja] LAW OFFICE OF WILLIAM MASELLI 98 COURT STREET AUBURN, ME 04241 (207) 783-4800
EDWIN VEGA (8) defendant	NEALE A. DUFFETT, ESQ. [COR LD NTC cja] CLOUTIER, BARRETT, CLOUTIER & CONLEY 465 CONGRESS STREET 8TH FLOOR PORTLAND, ME 04101

775-1515

WENDALL CASLER (9)
defendant

MARY A. DAVIS, ESQ.
[COR LD NTC cja]
TISDALE & DAVIS
P.O. BOX 572
PORTLAND, ME 04112
879-9177

ROBERT L DALL (10)
defendant

JAMES R. BUSHELL, ESQ.
[COR LD NTC cja]
P. O. BOX 7485
PORTLAND, ME 04112
871-0036

JAMES W DALL (11)
defendant

ANTHONY J. SINENI, III, ESQ.
[COR LD NTC cja]
701 CONGRESS ST
PORTLAND, ME 04101
772-9053

KIRK OWEN (12)
defendant

JOSEPH M. WROBLESKI, JR., ESQ.
[COR LD NTC cja]
P.O. BOX 350
SACO, ME 04072-0350
(207) 284-1976

NINA PYE (13)
defendant

E. JAMES BURKE
[COR LD NTC cja]
621 MAIN STREET
LEWISTON, ME 04240
783-4050

JAMES R RIGGS, JR (14)
defendant

JOHN E. GEARY
[COR LD NTC cja]
PO BOX 6129
FALMOUTH, ME 04105
878-9020

DONALD A SMITH (15)
aka
SONNY
defendant

WALTER F. MCKEE, ESQ.
[COR LD NTC cja]
GREGG D. BERNSTEIN, ESQ.
[COR cja]
LIPMAN & KATZ
P.O. BOX 1051
AUGUSTA, ME 04332-1051

207-622-3711

LAURIE SMITH (16)
defendant

MICHAEL J. WAXMAN, ESQ.
[COR LD NTC cja]
377 FORE STREET
PO BOX 375
PORTLAND, ME 04104-7410
772-9558

ANTHONY C STILKEY, II (17)
defendant

JEFFREY W. LANGHOLTZ, ESQ.
[COR LD NTC cja]
260 MAIN STREET
BIDDEFORD, ME 04005
283-4744

JENNIFER C STILKEY (18)
defendant

ROBERT A. LEVINE, ESQ.
[COR LD NTC cja]
17 SOUTH ST.
PORTLAND, ME 04101
871-0036

BENET POLS, ESQ.
[term 01/06/00]
[COR LD NTC cja]
P.O. BOX 791
56A MAINE ST.
BRUNSWICK, ME 04011-0791
729-5154

U. S. Attorneys:

JONATHAN A. TOOF
780-3257
[COR LD NTC]
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257