UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA	:	
	:	
v.	:	No. 3:99cr85(EBB)
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RUDOLFO SEGURA, ET AL.	:	
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	:	
UNITED STATES OF AMERICA	:	
	:	No. 3:99cr113(EBB)
v.	:	
	:	
ROBERT VADAS; and CHRIS CONTI	:	

Omnibus Ruling on Defendants' Motions to Suppress Government's Electronic Surveillance

Defendants Carlos Davila, Jose Orlando Pena, Joselito Rotger, and Robert Vadas each move, pursuant to Fed. R. Crim. P. 12(b)(3) and 18 U.S.C. § 2518, to suppress all evidence, and the fruits thereof, derived from the Government's electronic surveillance.[1] [3:99cr85 doc. nos. 474, 488, 538, and 549; 3:99cr113 doc. no. 47].[2] Defendants William Lopez, Oscar Flores,

[1] Pena's and Rotger's motions are technically moot because each has since entered a plea of guilty -- Pena to the Superceding Indictment and Rotger to the Second Superceding Indictment. The Court rules on their motions, however, because several co-defendants had adopted them.

[2] In a related case arising out of the same electronic surveillance, Robert Vadas and Chris Conti were each charged with one count of Conspiracy to Possess with Intent to Distribute and Distribution of Cocaine in violation of 21 U.S.C. § 841(a)(1). [No. 3:99cr113]. Conti pleaded guilty to the Indictment. The evidence supporting these charges was obtained from the wiretaps placed on Vadas' home and cellular telephones during the course of the Segura investigation -- the same wiretaps that are the subject of Vadas' motion to suppress in the Segura case. [No. 3:99cr85]. Vadas filed an identical motion to suppress in the

Angel Rodriguez, John Elejalde, Jimmy Augusto Restrepo, and Carlos Yusti Bolanos have adopted Pena's motion, Defendant Evette Rodriguez has adopted Rotger's motion, and Defendants William Lopez and Angel Rodriguez have adopted Vadas' motion. For the reasons that follow, defendants' motions are DENIED as to the moving parties and as to all parties adopting such motions.

I. BACKGROUND

Defendants Davila, Pena, Rotger, and Vadas are four of thirty-six defendants indicted for an alleged drug conspiracy taking place in Fairfield, Connecticut, during 1998 and 1999. On June 3, 1999, a federal grand jury returned a twenty-one count Superseding Indictment charging, among others, Davila, Pena, Rotger, and Vadas with one count of Conspiracy to Possess with Intent to Distribute Cocaine and Cocaine-Base, in violation of 21 U.S.C. §§ 841(a)(1) and 846. On January 5, 2001, the grand jury returned a twenty-count Second Superceding Indictment, charging, among others, Davila, Vadas, and Rotger with one count of Conspiracy to Possess with Intent to Distribute Cocaine and Cocaine-Base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Davila, Pena, and Vadas were also each charged with various substantive offenses in some of the remaining counts.

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case with Conti. Because the motions challenge the same wiretaps and are based upon the same arguments (ver bedim), this ruling applies to and disposes of both motions; doc. no. 47 in case no. 3:99cr113 and doc. no. 549 in case no. 3:99cr85.

On October 13, 1998, in the course of investigating the activities of the alleged co-conspirators, the Government applied to the Honorable Alan H. Nevas in the United States District Court for the District of Connecticut, for authorization of a wiretap on two telephones and two pagers. Judge Nevas granted the application and authorized electronic surveillance [“Order I”] over cellular telephone number (203) 856-8418, utilized by Davila [“Target Telephone I”], over cellular telephone number (203) 984-6451, utilized by Lopez [“Target Telephone II”], over pager responding to (203) 501-9096, utilized by Davila [“Target Pager I”], and over pager responding to (203) 833-7742, utilized by Lopez [“Target Pager II”]. The scope of Order I authorized the interception of communications made by, among others, Segura, Davila, and Lopez [“Interceptees”] concerning narcotics trafficking being committed by them and other identified co-conspirators [“Violators”].

In support of Application I, the Government submitted the affidavit [“Affidavit I”] of Special Agent Jon S. Hosney, an FBI agent involved in the investigation. Affidavit I cites information received from three unidentified informants. The source identified as cooperating witness one [“CW-1"] is reported to have been cooperating with the Government for nine months, the source identified as cooperating witness two [“CW-2"] for two months, and the source identified as confidential informant three [“CI-3"] had reportedly been serving as an informant for four

years. Although two of the informants' track records were relatively brief, Affidavit I indicates that most of each source's information was corroborated by independent investigation and surveillance.

CW-1 is reported to have told FBI agents that he knew from personal knowledge of and association with the alleged organization, that, among others, Davila, Lopez, and Segura were involved in drug trafficking in Connecticut. Affidavit I recited three controlled and monitored transactions between Davila and CW-1 occurring on June 3, 1998, June 15, 1998, and September 24, 1998, and two controlled transactions between Lopez and CW-1 occurring on June 4, 1998, and September 8-9, 1998. Pen register data, consensually recorded conversations, videotapes, physical surveillance, and narcotics subsequently turned over by CW-1 all corroborated these reported transactions. Furthermore, each of the controlled transactions utilized Target Telephones I and II, and Target Pagers I and II. Finally, pen registers previously authorized in the investigation also reflected substantial communication among Target Telephones I and II, Target Pagers I and II, and the telephones of others associated with the alleged conspiracy and so identified in Affidavit I.

On November 13, 1998, the Government applied ["Application II"] for continued electronic monitoring of Target Telephones I and II, and Target Pagers I and II, and for additional authorization to place taps on home telephone number (203) 334-

7381, utilized by Davila [“Target Telephone III”], and pager responding to (203) 760-1633, utilized by Segura [“Target Pager III”]. On February 3, 1999, the Government applied [“Application III”] for continued electronic monitoring of Target Pager III, and for additional authorization to place taps on cellular telephone number (203) 943-5425 [“Target Telephone IV”] and cellular telephone number (203) 943-5219 [“Target Telephone V”], both utilized by Segura. On March 17, 1999, the Government applied [“Application IV”] for continued electronic monitoring over Target Telephone IV, and for additional authorization to place taps on home telephone number (203) 261-1077 [“Target Telephone VI”] and cellular telephone number (203) 209-4123 [“Target Telephone VII”], both utilized by Robert Vadas, and on cellular telephone number (203) 858-6640, utilized by Defendant Martin Torres [“Target Telephone VIII”]. On April 28, 1999, the Government applied [“Application V”] for continued monitoring over Target Telephones VI, VII, and VIII, and for additional authorization to place a tap on cellular telephone number (203) 943-5475, utilized by Segura [“Target Telephone IX”]. Finally, on May 11, 1999, the Government applied [“Application VI”] to re-start the tap on Target Telephone IV.

All of the subsequent applications were accompanied by additional affidavits from Agent Hosney, each of which incorporated the information from previous affidavits. The subsequent applications also included the additional

communications captured on the then existing wiretaps, further pen register information, additional controlled and monitored transactions, and information from three additional confidential informants, [“CI-4,” “CI-5,” and “CI-6"], each of whom had provided information to Agent Hosney on previous occasions in unrelated investigations, and each of whose information concerning this case was corroborated through independent investigative efforts. (Aff. III at 9-10.) The subsequent applications identified additional Interceptees and Violators, including, among others, Jose Orlando Pena, Joselito Rotger, and Robert Vadas. Judge Nevas, based upon findings of probable cause in each instance, granted all of the subsequent applications and issued orders accordingly.

Defendants each seek suppression of evidence derived from the wiretaps, challenging the factual bases for such authorization and claiming that the orders were substantively defective.

II. LEGAL STANDARDS

In requesting and carrying out electronic surveillance, the Government must comply with the basic commands of the Fourth Amendment which protects against warrantless search and seizure.[3]

[3] The Fourth Amendment provides “the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures” and that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST.

The Supreme Court has held "conversation" to be within the Fourth Amendment's protections and the use of electronic devices to intercept it as a "search" within the meaning of the Fourth Amendment. See Berger v. State of New York, 388 U.S. 41, 51, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967); see also United States v. Bianco, 998 F.2d 1112, 1124 (2d Cir. 1993). "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices." Berger, 388 U.S. at 63.

Because the evidentiary use of wiretap evidence is in question, the mandates of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. ["Title III"] also generally apply. Title III incorporates the Fourth Amendment's protections by placing probable cause and particularity conditions on the issuance of a wiretap. Therefore, "[s]urveillance that is properly authorized and carried out under Title III complies with the fourth amendment." Bianco, 998 F.2d at 1121.

The procedures for electronic surveillance are governed by 18 U.S.C. § 2518. To withstand scrutiny, a wiretap application must include a full and complete statement of the facts and circumstances regarding i) the particular offense; ii) the particular place or facility of communication interception; iii) the particular type of communication sought to be intercepted;

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amend. IV.

and iv) the identity of the person(s), if known, committing the offense and whose communications are to be intercepted. See 18 U.S.C. § 2518(1)(b). The application must also include a full and complete statement of i) the period of time for which interception is required; ii) all known previous wiretap applications involving any of the same persons, facilities, or places; and iii) why other investigative procedures are too dangerous, have failed, or are unlikely to succeed. See 18 U.S.C. § 2518(1)(c)-(e). A judge may authorize the intercept application provided she determines i) that probable cause exists as to person, crime, conversation, and place or facility of conversation; and ii) that normal investigative techniques are too dangerous, have failed, or are unlikely to succeed. See 18 U.S.C. § 2518(3). The order authorizing the wiretap must specify i) the identity of the person, if known, whose communications are to be intercepted; ii) the place or facility of communication where authority to intercept is granted; iii) the type of communication sought to be intercepted and the particular offense to which it relates; iv) the agency authorized to intercept the communications; and v) the period of time during which such interception is authorized. See 18 U.S.C. § 2518(4).

Section 2518(10)(a) allows for the suppression of evidence obtained in violation of the statutory provisions. The availability of the suppression remedy for statutory violations, as opposed to constitutional violations, turns on the provisions

of Title III, rather than on the exclusionary rule and the Fourth Amendment. See United States v. Donovan, 429 U.S. 413, 432 n.22, 97 S. Ct. 658, 50 L. Ed. 2d. 652 (1977). The grounds for suppression, as set forth in § 2518(10)(a), include i) that the communication was unlawfully intercepted; ii) that the order of authorization under which it was intercepted is insufficient on its face; or iii) that the interception was not made in conformity with the order of authorization.

III. DISCUSSION

A. Davila

Defendant Davila seeks to have the wiretap evidence, the consensually recorded conversations, and their fruits suppressed on the grounds that 1) Affidavit I was insufficient to establish probable cause for the issuance of a wiretap on Target Telephone I; and 2) the evidence utilized in Affidavit I was the result of "outrageous governmental conduct." Davila further claims that the resulting deficiencies in Order I infect the legality of Order II, which authorized the continued tapping of Davila's telephones, because Order II relied on evidence seized under Order I. The Government contends that probable cause existed, and that the alleged "outrageous conduct," even if true, is not attributable to the Government.

1. Probable Cause

The standard for probable cause governing electronic surveillance under section 2518 is the same as the standard for a

regular search warrant. See United States v. Diaz, 176 F.3d 52, 110 (2d Cir.), cert. denied, 528 U.S. 875 (1999); United States v. Gallo, 863 F.2d 185, 191 (2d Cir. 1988). In deciding whether the Government has established probable cause to support a search warrant, the issuing court must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found." Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). In other words, the "totality of the circumstances" must "indicate a probability of criminal activity." Diaz, 176 F.3d at 110.

A court's decision that there is probable cause to issue an order authorizing electronic surveillance is entitled to substantial deference by reviewing courts. See Gates, 462 U.S. at 236; Diaz, 176 F.3d at 110. A motion to suppress does not prompt de novo review, rather, the question raised is whether the issuing court had a "substantial basis" for concluding that probable cause existed. See United States v. Biaggi, 853 F.2d 89, 95 (2d Cir. 1988); United Stated v. Bellomo, 954 F. Supp. 630, 636 (S.D.N.Y. 1997); United States v. Orena, 883 F. Supp. 849, 860 (E.D.N.Y. 1995).

Here, the Court finds, after careful review, that the facts set forth in Affidavit I supported Judge Nevas' finding of

probable cause. Based on the combination of the three controlled and monitored transactions between Davila and CW-1, the consensually recorded conversations, pen register data, other information provided by CW-1, and physical surveillance, there existed a substantial basis for determining that Davila was utilizing his telephone in furtherance of narcotics trafficking, and that a wiretap on Target Telephone I, Davila's cellular telephone, would uncover evidence of criminal activity. See United States v. Rowell, 903 F.2d 899, 902-03 (2d Cir. 1990) (upholding finding of probable cause based on informants' statements, pen register records, prior narcotics conviction, and contact with others involved in narcotics activity). Therefore, with the proper deference accorded to Judge Nevas' decision, this Court concludes that he had before him sufficient evidence to support his finding of probable cause to authorize the wiretap on Target Telephone I.

2. "Outrageous Conduct"

Davila's second ground for suppression alleges that the Government engaged in "outrageous conduct" during the course of its investigation. In support of this claim, Davila asserts that between June 1998 and September 1998, he personally observed CW-1, (who at the time was serving as a government informant), selling crack-cocaine other than that provided by Davila, as a means of gaining Davila's trust and confidence. As a Government informant, Davila argues, CW-1's additional drug-related activity

was attributable to the Government. The Government denies any knowledge of illegal activity by CW-1, and argues that even if true, CW-1's other drug-related activity is not attributable to the Government.

In United States v. LaPorta, 46 F.3d 152, 160 (2d Cir. 1994), the Second Circuit stated:

> The due process requirement of fundamental fairness may have a special pertinence when [the] Government creates opportunities for criminal conduct in order to apprehend those willing to commit crimes. To violate due process, however, the government's conduct must reach a demonstrable level of outrageousness before it could bar conviction. Such a claim rarely succeeds.

(citations and quotations omitted); see also United States v. Carpentier, 689 F.2d 21, 25-26 (2d Cir. 1982). "[T]he existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it 'shocks the conscience,' regardless of the extent to which it led the defendant to commit the crime." United States v. Chin, 934 F.2d 393, 398 (2d Cir. 1991) (rejecting outrageous conduct claim where government informant created phony pen pal relationship in effort to win defendant's trust and friendship, and stating that "the Due Process Clause 'does not protect [the individual] from voluntarily reposing his trust in one who turns out to be unworthy of it" (quoting United States v. Simpson, 813 F.2d 1462, 1466 (9th Cir. 1987))); see also Hampton v. United States, 425 U.S. 484, 489-91, 96 S. Ct. 1646, 48 L. Ed. 2d 113 (1976) (finding no due process violation where government informant had

supplied the heroin petitioner was convicted of distributing). Before the issue of outrageousness is reached, however, the Court must address whether the challenged conduct is attributable to the Government.

Contrary to Davila's claim, the status of government informant, or even government agent, does not, as a matter of law, make all of that individual's conduct attributable to the government. For example, where the government is unaware of an informant's activities, that conduct is not necessarily attributable to the government. Rather, a determination must be made as to "whether the government actively or passively acknowledged or encouraged [the activity], and if so, to what extent, and for what purpose." United States v. Cuervelo, 949 F.2d 559, 568 (2d Cir. 1991) (finding that undercover agent's sexual relationship with target of investigation, thereafter indicted, was not necessarily attributable to government if agent acted on his own initiative, and government neither approved nor directed his conduct); see also United States v. Barrera-Moreno, 951 F.2d 1089, 1092 (9th Cir. 1991) ("Due process is not violated unless the conduct is attributable to and directed by the government. 'Passive tolerance . . . of a private informant's questionable conduct [is] less egregious than the conscious direction of government agents typically present in outrageous conduct challenges.'" (quoting Simpson, 813 F.2d at 1468)).

Here, as set forth above, CW-1 participated in five drug

transactions with Davila and Lopez between June and September 1998 that were controlled and monitored by federal agents. Davila points to no evidence, however, nor even alleges, that the Government had any knowledge or awareness of any additional illegal drug-related activity on the part of CW-1. Therefore, even assuming the additional activity by CW-1 took place, applying the above standards, the Court has no basis for finding such conduct attributable to the Government in this case since Davila fails to even allege that the Government either actively or passively acknowledged or encouraged CW-1's additional drug deals. Because the Court finds the challenged conduct not attributable to the Government, it does not reach the issue of whether the conduct, assuming it transpired, rose to the level of outrageous.

3. Consensually Monitored Conversations

Davila also seeks the suppression of consensually monitored conversations between himself and CW-1, but provides no legal basis for this request. The Supreme Court has held that "federal statutes impose no restrictions on recording a conversation with the consent of one of the conversants." United States v. Caceres, 440 U.S. 741, 750, 99 S. Ct. 1465, 59 L. Ed. 2d 733 (1979); see also United States v. Barone, 913 F.2d 46, 49 (2d Cir. 1990) ("Because the Government made the recording with the consent and cooperation of [the informant] there was no need to inform [the defendant] or obtain a court order."). Further, in

United States v. White, 401 U.S. 745, 751-53, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), the Supreme Court specifically held that the consensual monitoring and recording by use of a transmitter concealed on an informant's person, even though the defendant did not know he was speaking with a government informant, did not violate Fourth Amendment protections. Therefore, Davila's request to suppress these conversations based on the Fourth Amendment is without merit.

In sum, the Court concludes that Judge Nevas had a substantial basis for finding probable cause to authorize a wiretap on Target Telephone I, any additional drug activity by CW-1 was not attributable to the Government, and the consensually recorded conversations with CW-1 were lawfully obtained. Accordingly, Davila's motion to suppress is denied.

B. Pena

Defendant Pena seeks to have all wiretap evidence to which he is a party, obtained over Target Telephones IV (one of Segura's cell phones) and VIII (Martin Torres' cell phone), suppressed. Pena argues that the Government 1) failed to establish the requisite "necessity" for the wiretaps by failing to show the inadequacy of other investigative techniques; and 2) omitted material information in Affidavit I, thereby requiring a Franks hearing on this issue. Pena claims that these deficiencies in Affidavit I make the wiretaps secured over Target Telephones IV and VIII fruit of the poisonous tree because they

were secured based on evidence obtained under Order I.

1. Necessity - Traditional Investigative Techniques

Pena claims that the Government violated section 2518(c) by failing to justify the need for electronic surveillance by a showing that other, less intrusive, investigative procedures were too dangerous, had failed, or were unlikely to succeed. Specifically, Pena asserts that because the Government had active confidential informants and significant opportunity for physical surveillance, it fell short of making the requisite statutory showing. The Court disagrees.

The Supreme Court has found that the necessity requirement is "simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime," United States v. Kahn, 415 U.S. 143, 153 n.12, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974), and the Second Circuit has held that the statute does not "preclude resort to electronic surveillance," nor require that "any particular investigative procedures [] be exhausted before a wiretap may be authorized." United States v. Miller, 116 F.3d 641, 663 (2d Cir. 1997) (quoting United States v. Young, 822 F.2d 1234, 1237 (2d Cir. 1987)). Rather, the statute "only requires that agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of the normal law enforcement methods." Diaz, 176 F.3d at 111 (quoting United States v. Torres, 901 F.2d

205, 231 (2d Cir. 1990)).

The purpose of this requirement is "both to underscore the desirability of using less intrusive procedures and to provide courts with some indication of whether any efforts were made to avoid needless invasion of privacy." United States v. Lilla, 699 F.2d 99, 104 (2d Cir. 1983). In this respect, the Second Circuit rejects "generalized and conclusory statements that other investigative procedures would prove unsuccessful." Id. Wiretaps, therefore, are "neither a routine initial step nor an absolute last resort," id., and "the required showing is to be tested in a practical and commonsense fashion." Id. at 103. (citations omitted).

Here, Pena specifically questions why confidential informants, namely CW-1 and CW-3, could not have been used in lieu of a wiretap. The Government responds by reiterating that the stated goals of the investigation, set forth in the applications, included developing information on the sources of supply, the relationships between the targets, and the identifications and location of proceeds and proceeds-related assets. As Agent Hosney indicated in his affidavits, information available from use of confidential informants and physical surveillance was insufficient to achieve these goals.

For example, Affidavit I, incorporated into Affidavit III supporting the request for a wiretap over Target Telephone IV, indicated that although the use of CW-1 provided significant

information on Davila and Lopez, this technique was insufficient to collect evidence on their suppliers and on the full scope of the alleged organization. Affidavit I explained that CW-1 had limited contact with Davila and Lopez and no contact with Segura due to Davila's unwillingness to provide CW-1 with Segura's contact information. Moreover, in a June 15, 1998 conversation between Davila and CW-1, Davila accused CW-1 of setting him up. This admitted suspicion would likely impede CW-1's further infiltration, and posed a danger of exposure. Lastly, despite CI-3's four-year history of informing the Government and admitted personal knowledge of and association with the alleged drug organization, CI-3 and the other confidential informants were no longer involved in the day-to-day operation of the drug trade, and were never part of its leadership. They were not, therefore, privy to the location of the narcotics supply, the means of communication, or the full scope of the organization. (Aff. I ¶¶ 82-84, Aff. III at 39-40.) Although the use of confidential informants was fruitful, it provided insufficient evidence, without more, to support or justify prosecution.[4]

Similarly, Affidavit I stated that physical surveillance, while helpful, did not appear likely to lead to sufficient information and evidence regarding the full scope of the alleged

[4] According to the Government, the confidential informants did not agree to testify. (Gov't's Omnibus Resp. to Mot. challenging Electronic Surveillance at 19.)

drug organization. Conversations related by CW-1 indicated that Davila, Lopez, and others had detected the physical surveillance carried out on June 4, 1998 and June 15, 1998. In Affidavit I, Agent Hosney explained that because Davila and Lopez were conscious of the ongoing physical surveillance, they would make even more efforts to conceal their dealings, thereby impeding the investigation. The assistance of electronic surveillance, however, would make the technique of physical surveillance more precise, and thereby minimize the risk of detection. Finally, while physical surveillance was useful in identifying some of the participants, confirming meetings, and corroborating informant information, it was unable to provide sufficient evidence on the offenses, such as drug quantities, deliveries, and financial arrangements.

In cases such as this one, involving the investigation and prosecution of narcotics trafficking organizations, the Second Circuit has recognized the inadequacy of many of these normal investigative techniques and approved of the use of electronic surveillance. See Torres, 901 F.2d at 232 (confidential informants had minor role in overall scale of operation); Young, 822 F.2d at 1237 (physical surveillance impractical since it would likely be conspicuous and draw attention to the investigators); United States v. Martino, 664 F.2d 860, 868 (2d Cir. 1981) (use of pen register information and toll records failed to identify participants to the conversation or other co-

conspirators). Furthermore, in Young, the Second Circuit recognized that "wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation." Young, 822 F.2d at 1237 (quoting United States v. Steinberg, 525 F.2d 1126, 1130 (2d Cir. 1975)).

When reviewing the issuing judge's determination that normal investigative procedures have been tried, have failed, are too dangerous, or are unlikely to succeed, the court does not make a "de novo review of sufficiency as if it were the [issuing judge]," but rather, decides "if the facts set forth in the application were minimally adequate to support the determination that was made." Torres, 901 F.2d at 231 (quoting United States v. Scibelli, 549 F.2d 222, 226 (1st Cir. 1977)). In addition to extensive information on the use of confidential informants and physical surveillance discussed above, Affidavit I also detailed the use of consensually monitored conversations and pen registers, and explained the limitations and/or ineffectiveness of other techniques such as undercover police officers, search warrants, and grand jury subpoenas. Viewed in a practical and commonsense fashion, and with the deference properly accorded the issuing judge, the Court finds that the facts included in Application I were more than adequate to support Judge Nevas' determination that electronic surveillance was necessary since it related the extensive use of normal techniques, and showed that

the wiretap was far from an initial step and was necessary to complete the investigation. Therefore, under the conditions narrated and sworn to in Affidavit I and subsequent affidavits, the initial authorization of the wiretaps, and each subsequent authorization, was fully justified.

2. Failure to Disclose - Material Omission

In a related argument, Pena claims that the omission of material information in Affidavit I "may" have misled the court. Specifically, Pena asserts that the omission of information gathered during the Government's twelve-year investigation of Segura, and the depth of the Government's knowledge about Davila and Lopez gathered during its prior investigation of the Latin Kings, violated the Government's obligation to give a "full and complete statement" of the facts relied upon by the applicant and the alternative investigative measures used. Pena claims that these material omissions could have affected Judge Nevas' determination that a wiretap was necessary.

In Franks v. Delaware, 438 U.S. 154, 171, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)), the Supreme Court set a high standard for a defendant seeking a hearing on the veracity of an affidavit, holding that there is "a presumption of validity with respect to the affidavit supporting the search warrant." Under Franks and its progeny,

> if a search warrant contains a false statement or omission, and the defendant makes a substantial preliminary showing (1) that the false statement or omission was made knowingly

> and intentionally, or with reckless disregard for the truth, . . . (2) that the information was material, and (3) that with the affidavit's false or omitted material aside, the affidavit's remaining content is insufficient to establish probable cause, then the fruits of the search must be suppressed.

Bianco, 998 F.2d at 1125 (citing Franks, 438 U.S. at 155-56); see also Rivera v. United States, 928 F.2d 592, 604 (2d Cir. 1991).

To merit an evidentiary hearing, the challenger's attack

> must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient.

Franks, 438 U.S. at 171-72.

Here, Pena fails to meet these standards. Pena points to no evidence indicating deliberate falsehood or recklessness, and his claims of omissions are unaccompanied by any offer of proof. Moreover, contrary to Pena's claims, Affidavit I alerts the judge to the twelve-year investigation into Segura's drug activities and includes the fact that Davila and Lopez were formerly members of the Latin Kings.

Most significant, however, is that Pena makes no showing of how, if this information were included, it would have been material enough to make the resulting affidavit insufficient to support authorization of the wiretaps. There is no indication

that additional background information on Segura, Davila, and Lopez would cast any doubt on the existence of probable cause for believing that the target telephones were being used in the narcotics transactions under investigation, or that it would diminish the need for the use of wiretaps in this case. Accordingly, because Pena makes neither a substantial showing of knowing or reckless intent, nor of materiality, he is not entitled to a Franks hearing on the veracity of Affidavit I, and his motion to suppress on the ground of material omission is denied.

In sum, the Court finds that the affidavits supporting the applications for electronic surveillance justified Judge Nevas' finding that the wiretaps were necessary, and that Pena is not entitled to a Franks hearing regarding the alleged material omissions. Accordingly, Pena's motion to suppress is denied as to Pena, and as to all defendants adopting such motion.[5]

C. Rotger

Defendant Rotger challenges the interception of certain wiretap evidence on the grounds that 1) the initial application failed to identify him as an individual whose communications were likely to be intercepted; 2) there was no probable cause to support interception of communications involving him; 3) the

[5] The authority and analysis justifying the denial of the motion as to Pena does not differ as applied to the defendants adopting the motion. Individual discussion of those defendants, therefore, is unnecessary.

applications failed to establish the inadequacy of alternative investigative techniques; and 4) the Government failed to take steps to minimize the interception of communications not relevant to its investigation.

1. Identification

Section 2518(1)(b)(iv) requires the Government to specify "the identity of the person, if known, committing the offense and whose communications are to be intercepted." 18 U.S.C. § 2518(1)(b)(iv). The Supreme Court has held that a wiretap application must "name an individual if the Government has probable cause to believe that the individual is engaged in the criminal activity under investigation and expects to intercept the individual's conversations over the target telephone." Donovan, 429 U.S. at 428; see also United States v. Kahn, 415 U.S. 143, 155, 94 S. Ct. 977, 39 L. Ed. 2d 225 (1974). The requirements in section 2518(1)(b), including the identity of the person whose communications will be intercepted, "reflect . . . the constitutional command for particularization." Donovan, 429 U.S. at 427 (quoting S. Rep. No. 1097 at 101). The main caveat of this provision, however, is that the individual must be known. No statutory provision requires that all individuals eventually intercepted be named in the application prior to interception. See Kahn, 415 U.S. at 152-55; United States v. Milan-Colon, Nos. 52, 53 91cr685(SWK), 1992 WL 236218, *16 (S.D.N.Y. Sept. 8, 1992). Failure to identify individuals who were unknown at the

time of the application, therefore, does not require suppression of intercepted conversations to which they were a party, nor does it invalidate an otherwise valid wiretap authorization. See Donovan, 429 U.S. at 436 nn.23 & 24; United States v. Roberts, No. 90cr913(DNE), 1991 WL 221099, *6 (S.D.N.Y. Oct. 17, 1991).

Here, Rotger points to no evidence indicating that the Government knew his identity or had probable cause to suspect his involvement prior to or on October 13, 1998. Therefore, Rotger's absence from Order I does not invalidate the subsequent interception of communications between him and the named Interceptees because, as a "yet unknown," his identification was not required under section 2518(1)(b)(iv).

Moreover, even if there were evidence indicating the Government's awareness of Rotger's involvement, the omission of his identity would not necessarily require suppression. In Donavan, the Supreme Court held that

> not every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications unlawful. To the contrary, suppression is required only for a failure to satisfy any of those statutory requirements that directly and substantially implement congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.

Donovan, 429 U.S. at 433-34 (citations and quotations omitted). With respect to the identification provision, the Supreme Court has specifically held that while all Title III requirements are important, the failure to name additional targets likely to be

overheard does not invalidate an otherwise lawful judicial authorization, see id., 429 U.S. at 435-36, 437 & n.25, because nothing in the legislative history suggests that Congress intended "the identification requirement to play a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." Id. at 437. Therefore, even if the Government knew of Rotger's involvement, its failure to identity him as an additional target in the initial application is not fatal and would not necessarily mandate suppression.

To justify suppression for failure to identify, a defendant would need to show that the government "knowingly failed" to identify a subject, and that this knowing failure was intended to keep relevant information from the court that might have affected its finding of probable cause to authorize the wiretap. See Roberts, 1991 WL 221099, at *6; United States v. Ianniello, 621 F. Supp. 1455, 1472 (S.D.N.Y. 1985). Here, Rotger makes no showing that the Government knowingly failed to include him as an Interceptee on Application I. The absence of such motive is particularly apparent where, as here, the Title III order specifically authorized the interception of conversations between the named targets and "others as yet unknown." See United States v. Figueroa, 757 F.2d 466, 471 (2d Cir. 1985); Milan-Colon, 1992 WL 236218, at *17. Moreover, Rotger makes no showing of how his inclusion would have affected Judge Nevas' probable cause

determination. Accordingly, Rotger's motion is denied on this ground.

2. Probable Cause

Rotger next argues that the Government lacked probable cause in Application II to include him as a target (Violator and/or Interceptee) who had committed the identified crimes and whose conversations were likely to be intercepted. Rotger claims that this deficiency renders Order II, and all subsequent orders, invalid with respect to the interception of communications involving him.

The standards governing probable cause are set forth above in section III.A.1. The focus of the probable cause determination under Title III is on the facility of communication, and on the person primarily in control of that facility. A finding of probable cause as to every other potential interceptee, however, is not required under Title III. See Figueroa, 757 F.2d at 475 ("[T]he government need not establish probable cause as to all participants in a conversation. If probable cause has been shown as to one such participant, the statements of the other participants may be intercepted if pertinent to the investigation." (quoting United States v. Tortorello, 480 F.2d 764, 775 (2d Cir. 1973))).

Therefore, at issue in Application II was whether there was probable cause to support continued interception of Lopez' and Davila's conversations over Target Telephones I and II, and the

new interception of Davila's conversations over Target Telephone III. Rotger does not contest these findings. All of Rotger's drug-related conversations with Lopez, therefore, were lawfully intercepted.[6]

3. Necessity - Traditional Investigative Techniques

Rotger next argues that although Affidavits I and II justify the interception of Lopez and Segura's telephonic conversations due to their "higher level" in the alleged drug conspiracy which limits the effectiveness of traditional investigative methods, these rationales do not justify interception of conversations involving him. Because the Government alleges that Rotger is a street dealer, he argues, less invasive procedures would have sufficed. This argument is unavailing.

For the reasons set forth above in sections III.B.1 and III.C.2, Affidavit I justified the need for interception of

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[6] In any event, although Affidavit II does not include factual evidence specific to Rotger, by his own admission, communications involving him were intercepted under Order I, and reported in the Government's ten-day progress reports. Affidavit II incorporates by reference all information from Affidavit I, and all evidence gathered pursuant to Order I, including its ten-day progress reports. In addition, Affidavit II did include some information related to Rotger's alleged participation in the drug trafficking. (Aff. II ¶ 54.) "Any over-inclusion in naming such persons, far from establishing cause for suppression, furthers the statutory policy preventing unreasonable invasions of privacy by ensuring that such persons will be given notice of the Title III order and any interception pursuant to 18 U.S.C. § 2518(8)(d)." Milan-Colon, 1992 WL 236218, at *16; see also United States v. Martin, 599 F.2d 880, 885 (9th Cir. 1979).

communications over Target Telephone II, Lopez' cell phone. Therefore, any conversations involving Lopez that were related to the target criminal offenses were authorized for interception. Rotger cites no authority, and the Court finds no reason, why these conversations would be subject to suppression simply because the Government may have been able to gather evidence on the other party to the conversation by other means. Accordingly, Rotger's motion is denied on this ground.

4. Minimization

Rotger's claim based on the Government's failure to minimize the interception of irrelevant communications is also without merit. Section 2518(5) requires that every order authorizing electronic surveillance specify that the interception of communications "be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." Rotger claims that because he was not identified as an Interceptee in Affidavit I and Order I, and because the Government lacked probable cause to include him in Application II, the Government violated section 2518(5) by not minimizing his "irrelevant" conversations.

This argument is flawed because Order I specifically states (and Rotger quotes) that conversations not involving the "named intercepts or any of their confederates" be minimized as soon as possible, "unless it is determined during the portion of the conversation already overheard that the conversation is criminal

in nature." (Order I at 8 (emphasis added)). Here, Lopez' conversations with Rotger were "criminal in nature" and related to the target narcotics trafficking organization. Furthermore, as discussed above, Rotger, as a "yet unknown," did not need to be identified in Order I. Rotger's absence from Order I as an Interceptee, therefore, is not a proper ground claiming failure to minimize. Accordingly, the Court finds that the drug-related communications involving Rotger, intercepted pursuant to Order I, were legally and justifiably obtained, and do not constitute evidence of improper minimization.

In sum, the Court concludes that Rotger's identification in Application I was not necessary to make the interception of his conversations with Lopez lawful, a finding of probable cause by Judge Nevas specific to Rotger was unnecessary where he was merely named as an Interceptee and Violator, traditional investigative techniques were sufficiently utilized and explored, and there is no indication of improper minimization. Accordingly, Rotger's motion to suppress is denied as to Rotger, and as to Defendant Evette Rodriguez who adopted such motion.[7]

D. Vadas

Defendant Vadas indiscriminately challenges the wiretap authorizations on every available ground, some of which border on

[7] None of the above analysis as to Rotger changes as applied to Rodriguez, so again, individualized discussion is unnecessary.

frivolous. In his motions, Vadas recites virtually every requirement in section 2518 and then makes the conclusory statement that the Government, the issuing judge, and the executing agents failed to comply with every provision. The supporting memorandum narrows the arguments somewhat, but continues to make broad sweeping generalizations based on assumptions rather than pointing to actual evidence of deficiencies in the affidavits, applications, or orders.

The majority of the claims included in the motions do not warrant discussion. The claims argued in the memorandum, however, merit some analysis. Vadas asserts that 1) the Government failed to establish probable cause that Target Telephones VI and VII would be used by Vadas in connection to the target criminal activity; 2) the orders failed to set forth sufficient particularity as to the subject matter of the conversations to be monitored; 3) the Government failed to minimize the interception of conversations not authorized by judicial order, and failed to properly instruct and supervise monitoring agents on minimization; 4) the court improperly permitted monitoring by individuals who were not law enforcement officers as defined by Title III; 5) the government failed to establish the necessity of a wiretap and the inadequacy of other investigative techniques; and 6) the government improperly disclosed intercepted conversations without prior judicial approval.

1. Probable Cause

Vadas asserts that he was "named as a target for the first time in the March 17, 1999 affidavit," Affidavit IV, and that the Government lack probable cause, based on the February 3, 1999 affidavit, Affidavit III, to believe that Vadas would engage in criminal conversations over the subject telephones. This argument is flawed. First, contrary to Vadas' claims, he was named in Affidavit III both as an Interceptee and as a Violator. Therefore, although his telephones were not targets of Application III, he was certainly identified as a target of the investigation at that time. Second, the evidence obtained pursuant to Orders II and III, and included in Affidavits III and IV, provided a substantial basis for finding probable cause in Order IV as to Target Telephones VI and VII, Vadas' home and cellular telephones.

For example, Affidavit III included information from CI-5 and CI-6, corroborated by law enforcement officers through independent sources, regarding Vadas's alleged drug activities through December 1998, not merely his activities during 1996-97 as Vadas claimed. (Aff. III at 9-10.) Affidavit III also related calls from a number subscribed to Vadas, to Target Pager III, Segura's pager, and pen register and toll record analysis indicated four calls made from Target Telephone IV, Segura's cell phone, to Vadas, two calls made from Target Telephone V, Segura's other cell phone, and several calls made from Vadas to Target

Pager III. (Aff. III at 26, 29, 32.)

Affidavit IV, the one supporting the application for wiretaps over Vadas' phones, contained further evidence that Vadas was using his phones for narcotics trafficking business. For example, on February 23, 1999, intercepted calls over Target Telephone IV, Segura's cell phone, captured conversations with Vadas on Target Telephones VI and VII relating to drug transactions which were confirmed by physical surveillance. (Aff. IV at ¶¶ 77-78, 80, 82, 85-86.)

Applying the standards for probable cause set forth above in section III.A.1, the Court finds that, based on the numerous conversations detailed in Affidavit IV between Segura and Vadas intercepted on the wiretaps over Target Telephones IV and V (Segura's cell phones), Judge Nevas had before him a substantial basis for finding probable cause to believe that Vadas' phones were being used in furtherance of drug trafficking. Accordingly, Judge Nevas' order authorizing wiretaps over Target Telephones VI and VII was fully justified.

2. Particularity as to Subject Matter

Vadas next claims that the orders were over-broad because they authorized the interception of conversations involving "controlled substances," rather than specifying a particular drug, and, as such, violated the particularization requirements of Title III. Section 2518(4)(c) requires the order authorizing interception to specify the "type of communication" to be

intercepted and the "particular offense" to which it relates. "In determining whether the order and application are sufficiently particular, the papers as a whole must be considered, including especially those portions which recite facts intended to establish probable cause." United States v. Tortorello, 480 F.2d 764, 780 (2d Cir. 1973).

Vadas provides no legal support, and the Court finds none, for the claim that particularity under section 2518(4)(c) requires the naming of a specific controlled substance. The Second Circuit has held that

> a pragmatic approach has been taken with respect to the particularity requirement. A specific crime or a specific series of related crimes must be identified. Although the nature and type of the anticipated conversations must be described, the actual content need not and cannot be stated since the conversations have not yet taken place at the time the application is made and it is virtually impossible for an applicant to predict exactly what will be said concerning a specific crime.

Id. All controlled substances, whether cocaine or heroin or marijuana, are included under the same statutory provision, 21 U.S.C. § 841, and the unlawful distribution of all controlled substances share the same statutory elements. The orders, therefore, stated the offense with sufficient particularity.

Moreover, the Tortorello court held that such orders "must be broad enough to allow interception of any statements concerning a specific pattern of crime." Id. In this case, the target "pattern of crime" was the sale and distribution of narcotics, therefore, Judge Nevas' orders properly allowed for

the interception of any conversations relating to the sale of any controlled substances. Accordingly, Vadas' motion is denied on the ground of failure to particularize the subject matter.

3. Minimization & Supervision

As discussed above, section 2518(5) requires the authorizing order to direct the executing agents to minimize the interception of communications not subject to the order. Vadas begins his argument on this ground by stating that "in the absence of complete discovery in this case, the defendant cannot begin to address this issue." (Def.'s Prelim. Mem. in Supp. of Mot. to Suppress Electronic Surveillance at 9-10.) Vadas then makes the conclusory statement that "the mere fact that the series of interceptions expanded in scope and the number of target individuals multiplied suggests that the court did not curtail the use of electronic surveillance in any way." (Id. at 10.)

At this point, Vadas has had over a year to review further discovery, and has not submitted any supplemental memorandum identifying specific evidence of the Government's failure to properly minimize intercepted conversations, or failure to supervise the monitoring agents on proper minimization. In fact, Vadas fails to allege a single call which he claims should have been minimized. Moreover, the Government's statistics demonstrate significant minimization. During the course of approximately sixty days of interception over Target Telephone VI, Vadas' home phone, 154 calls were minimized. During the

course of approximately sixty days of interception over Target Telephone VII, Vadas' cell phone, 81 calls were minimized. (Gov't's Omnibus Resp. to Mot. Challenging Electronic Surveillance at 22.)

Vadas also claims that the Government's interception of conversations involving Vadas pursuant to Order III demonstrates the Government's failure to properly minimize conversations since he was not yet named as a target. However, because the Court finds that Vadas was named both as an Interceptee and as a Violator in Order III, and because, based on the reasoning set forth in sections III.C.1 and III.C.4 above, Vadas did not need to be identified for his conversations with Segura to be intercepted since probable cause existed as to Segura and Segura's phones, Vadas' conversations with Segura were lawfully intercepted pursuant to Order III, and do not indicate a failure to minimize.

4. Unauthorized Monitoring Agents

Vadas next claims that the wiretap evidence should be suppressed because “unauthorized” individuals were permitted to monitor the wiretaps. Vadas, however, fails to cite any authority, and the Court finds none, supporting this claim. Although section 2510(7) defines “investigative or law enforcement officer” as an “officer of the United States or of a State . . . thereof, who is empowered by law to conduct investigations of or make arrests for offenses enumerated in this

chapter," 18 U.S.C. § 2510(7), nowhere does section 2518 require that only investigative or law enforcement officers as defined in section 2510(7) be permitted to conduct interception once it is authorized. Section 2518(1)(a) does require that an investigative or law enforcement officer make and authorize the application, but section 2518(5) states 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 law enforcement officer authorized to conduct the interception." 18 U.S.C. § 2518(5).

Therefore, the fact that the orders allowed local police department officers, as designated by the FBI, to conduct monitoring under the direct supervision of the FBI, does not appear to violate the plain language of Title III. While the Government does not deny that local police officers and others assisted with the monitoring, it maintains that all of the monitors and interpreters used were under contract with the federal government, and under the direct supervision of Special Agent Hosney. (Gov't's Supplemental Resp. to Defs.' Mots. Challenging Title III Evidence at 2.) Vadas points to no evidence to the contrary. Therefore, the Court has no basis for finding any statutory violations on the ground of unauthorized monitoring agents.

5. Necessity - Traditional Investigative Techniques

Vadas next argues that the Government failed to establish the necessity for utilizing electronic surveillance as oppose to traditional investigative techniques. Specifically, Vadas argues that the existing number of confidential informants and cooperating witnesses negated the need for electronic surveillance. For the reasons set forth in section III.B.1 above, the Court disagrees. Affidavit IV, supporting the Government's request for wiretaps on Vadas' phones, similar to Affidavit I discussed above in section III.B.1, contained a detailed explanation for why traditional investigative techniques, including the use of informants, were insufficient to reveal the scope of Vadas' drug-related activities, risked compromising the investigation, and were otherwise ineffective. (Aff. IV ¶¶ 97, 103-04.) Therefore, based on the authority and analysis set forth in section III.B.1 above, the Court finds that Judge Neves' finding of necessity for the use of wiretaps over Target Telephones VI and VII was fully justified.

6. Post-interception Disclosure

Lastly, Vadas cites section 2517(5) for the proposition that in order to disclose any intercepted conversations relating to offenses other than those specified in the order of authorization, the Government must first obtain judicial approval. Vadas then claims that the Government violated this provision by disclosing conversations related to “gaming offenses.” This argument is without merit. Section 2517(5) only

requires prior judicial authorization for disclosure under section 2517(3) -- that is, for giving testimony under oath regarding an unrelated offense. Otherwise, section 2517(5) allows for disclosure under subsections (1) and (2) as appropriate in accordance with official duties. There is no indication, and Vadas points to no evidence, that government agents disclosed any conversations other than in accordance with their official duties. Accordingly, the Court has no basis for finding that the Government made improper disclosures in violation of Title III.

For all of the foregoing reasons, Vadas' motions to suppress are denied as to Vadas, and as to all defendants adopting such motions.[8]

IV. Conclusion

In sum, the Court finds that the affidavits accompanying the various applications provided a substantial basis for finding probable cause to issue the wiretaps. Further, the Court finds that the Government complied with Title III requirements in its application for and execution of the electronic surveillance. Accordingly, for the reasons set forth above, defendants' motions

[8] None of the Defendants adopting Vadas' motion [doc. no. 549] have standing to challenge the finding of probable cause authorizing the wiretaps over Vadas' phones, and none of the analysis on the remaining arguments differs as applied to the defendants adopting the motion. Individualized discussion, therefore, is unnecessary.

to suppress the wiretap evidence [3:99cr85 doc. nos. 474, 488, 538, and 549; 3:99cr113 doc. no. 47] are DENIED as to the moving parties, and as to all parties adopting such motions.

So Ordered.

Ellen Bree Burns,
Senior District Judge

Dated at New Haven, Connecticut, this ___ day of February 2001.