STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 12, 2022)

STATE OF RHODE ISLAND	**:**	
	:	
VS.	**:**	
	:	
JANSSYE TOUCET	**:**	**P1/2019-6258AG**
TATIANA FLORES	**:**	**P1/2019-6258BG**
BRANDOR MENDOZA	**:**	**P1/2019-6258CG**
JAYSON ROSARIO	**:**	**P1/2019-6258FG**
MOISES ELIVO TRINIDAD	**:**	**P1/2019-6258GG**
NATHAN GETER	**:**	**P1/2019-6258LG**
FRANCISCO TORRES	**:**	**P1/2019-6258QG**
VICTOR ST. HILL	**:**	**P1/2019-6258ZG**
KEVIN HERNANDEZ	**:**	**P1/2020-1884AG**

DECISION

KRAUSE, J. Janssye Toucet strives to persuade this Court that the Presiding Justice overvalued the affidavits which the state submitted in support of a wiretap on his cell phone. He says that the Presiding Justice impermissibly relied on conclusory and factually barren statements to find probable cause linking him to criminal activity. He therefore claims that any information acquired from the wiretap was unlawfully intercepted and should be suppressed.

The Court disagrees.[1]

[1]The 2019 multi-defendant indictment, consolidated with the 2020 Hernandez indictment, originally totaled twenty-seven defendants. Nine have resolved their cases; one has not been apprehended. Eight of the remaining seventeen defendants, identified above, joined Toucet's suppression motion and adopted his memoranda. They submitted no additional briefs, nor did they participate in the July 11, 2022 suppression hearing. All of the suppression motions were referred to this Court pursuant to G.L. 1956 § 12-5.1-12(c).

The Relevant Statutory Wiretap Provisions

The portions of the Rhode Island wiretap statutes relevant to Toucet's suppression motion include the following provisions:

> **§ 12-5.1-2. Application for orders**
> (a) The attorney general…may apply ex parte to the presiding justice … for an order authorizing the interception of any wire, electronic, or oral communications. Each application ex parte for an order must be in writing, subscribed and sworn to by the applicant.
> (b) The application must contain:
> ***
> (2) A full and complete [sworn] statement of the facts and circumstances relied upon by the applicant to justify his or her belief that an order should be issued, including:
> (i) Details as to the particular designated offense that has been, is being, or is about to be committed;
> ***
> (iv) The identity of the person, if known, committing the offense and whose communications are to be intercepted;
> (3) 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;
> ***
> (d) Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the fact alleged, it must be so stated. If the facts establishing reasonable cause are derived in whole or in part from the statements of persons other than the applicant, the sources of the information and belief must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informant, or the reliability of the information supplied by the informant. The application must also state, so far as possible, the basis of the informant's knowledge or belief. If the applicant's information and belief is derived from tangible evidence or recorded oral evidence, a copy or detailed description of the evidence should be annexed to or included in the application. Affidavits of persons other than the applicant must be submitted in conjunction with the application if they tend to support any fact or conclusion alleged in the application. Accompanying affidavits may be based either on personal knowledge of the affiant, or information and belief with the source of the information and reason for the belief specified.

> **§ 12-5.1-4. Issuance of orders**
> (a) Upon the application as provided in § 12-5.1-2 the presiding justice of the superior court…may enter an ex parte order… authorizing the interception of wire, electronic, or oral communications if [he or she] determines on the basis of the facts submitted by the applicant that:
> (1) There is probable cause for belief that an individual is committing, has committed, or is about to commit a particular designated offense;
> (2) There is probable cause for belief that particular communications concerning that offense will be obtained through the interception;
> (3) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried, or to be too dangerous[.]

The Rhode Island wiretap statutes are patterned after the federal legislation (18 U.S.C. §§ 2510-2520). *State v. Maloof*, 114 R.I. 380, 381, 333 A.2d 676, 677 (1975) ("carbon copy"), but the requisite compliance with the respective enactments differs. Federal courts generally allow the government a modicum of flexibility, permitting "substantial compliance" with the intercept laws. Although our state Supreme Court has not adopted a rigid approach and has said that statutory observance need not be "formal" or "hypertechnical," *State v. Campbell*, 528 A.2d 321, 324 (R.I. 1987), the Court does expect stricter conformity than its federal counterpart. *State v. McGuire*, 273 A.3d 146, 154 (R.I. 2022). As held herein, the state has adhered to *McGuire's* admonitions.

Probable Cause Needed to Support a Wiretap Order

Toucet first contends that the wiretap order is flawed because it fails to comply with §§ 12-5.1-4(a)(1) and (2). Those provisions preclude the Presiding Justice from approving the wiretap application unless she first "determines on the basis of the facts submitted by the applicant that . . . [t]here is probable cause" to believe that Toucet "is committing, has committed, or is about to commit" the controlled substance and conspiracy charges alleged in the application. Toucet claims that Detective Corporal Derek G. Melfi's ("Melfi") sworn narrative is inadequate to support such a probable cause finding.

‘“With the possible exception of ‘due process,’ there is probably no two-word term in American law that has produced as much confusing commentary as ‘probable cause,’ largely because it has such a roving context.”’ *State v. Flores*, 996 A.2d 156, 161 (R.I. 2010) (quoting *Holmes v. State*, 796 A.2d 90, 98 (Md. 2002)). That said, certain rules have emerged which courts follow to work their way through the probable-cause circuitry.

First is the advisement that the standard of proof must correspond to what must be proved, which “means less than evidence which would justify . . . conviction.” *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949). Thus, the quantum of proof to establish probable cause “is significantly different from the degree needed to establish guilt,” requiring “only the probability, and not a prima facie showing, of criminal activity.” *State v. Pratt*, 641 A.2d 732, 736 (R.I. 1994) (internal quotation omitted); *State v. Spaziano*, 685 A.2d 1068, 1069 (R.I. 1996) (“Probability of criminal activity is the benchmark.”). Applying the “totality-of-the-circumstances test,” the court makes a “practical, commonsense decision whether, given all the circumstances set forth in the affidavit” there is a fair probability that there exists evidence of criminal activity. *Pratt*, 641 A.2d at 736.

When deciding if there is probable cause to support a wiretap, courts employ the same analysis used to ascertain if probable cause exists to justify a search or an arrest. *Campbell*, 528 A.2d at 326 (“[T]he standard set by the United States Supreme Court for reviewing an affidavit in support of a search warrant in *Illinois v. Gates*, 462 U.S. 213 [] (1983), applies in electronic surveillance situations as well.”); *Flores*, 996 A.2d at 161 (“It is generally assumed by the Supreme Court and the lower courts that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search.”).

It is said that the existence of probable cause must be found within the "four corners" of the affidavit, *State v. Joseph*, 114 R.I. 596, 603, 337 A.2d 523, 527 (1975), which includes the totality of the circumstances within that framemark. *Gates*, 462 U.S. at 238; *State v. King*, 693 A.2d 658, 661 (R.I. 1997); *Pratt*, 641 A.2d at 736. Accordingly, examination of the affidavit is "not subject to rigorous and hypertechnical scrutiny," because the court may draw reasonable inferences from it and interpret it "in a realistic fashion that is consistent with common sense[.]" *State v. Byrne*, 972 A.2d 633, 638 (R.I. 2009). "In *Verrecchia*, 880 A.2d at 94, we declared in the clearest of terms that 'the approach to the probable cause question should be pragmatic and flexible.'" *Id.* at 639. *See Gates*, 462 U.S. at 235-39 (directing courts to apply a practical approach for determining whether an affidavit supplies sufficient probable cause). Consistent with this pragmatic and flexible approach, the judge may consider hearsay information received through an informant, particularly where, as here, that information is corroborated by other facts and circumstances. *State v. Hudgen*, 272 A.3d 1069, 1082 (R.I. 2022).

In *Flores*, our Supreme Court renewed Justice Rehnquist's observation that "probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules." *Flores*, 996 A.2d at 161 (quoting *Gates*, 462 U.S. at 230, 232). A reviewing court's duty is "simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." *Pratt*, 641 A.2d at 736-37 (internal quotation omitted).

And, since '"[t]here is, of course, a presumption of validity with respect to the affidavit supporting the search warrant,"' *State v. Verrecchia*, 880 A.2d 89, 99 (R.I. 2005) (quoting *Franks v. Delaware*, 438 U.S. 154, 171–72 (1978), that presumption is also accorded to court-ordered wiretaps. *E.g.*, *United States v. Portillo-Uranga*, 28 F.4th 168, 174 (10th Cir. 2022) ("Once a

wiretap has been authorized, it is presumed proper and the defendant bears the burden of proving that a wiretap is invalid."); *United States v. Williams*, 827 F.3d 1134, 1147 (D.C. Cir. 2016) ("An affidavit offered in support of a wiretap application enjoys a 'presumption of validity.'") (citing *United States v. Maynard*, 615 F.3d 544, 550 (D.C. Cir. 2010) and quoting *Franks*, 438 U.S. at 171); *United States v. Dahda*, 853 F.3d 1101, 1111 (10th Cir. 2017) (noting that the wiretap authorization is presumed valid and that the defendant "incurred the burden to show otherwise").

The Affiant and the Wiretaps in this Case

Melfi authored all of the affidavits which were submitted by the state in support of the wiretap applications in this case. Toucet does not dispute his credentials. (*See* Toucet affidavit, 1-2.) He is a seven-year veteran of the Rhode Island State Police High Intensity Drug Trafficking Area (HIDTA) Task Force, firmly grounded in narcotics investigations. He is thoroughly familiar with the usual tools of the illicit drug trade, including firearms, other weapons, and the extensive use of cell phones to carry out such operations. He is also well aware of the manner and means by which offenders attempt to avoid detection. Having been involved in numerous such investigations, he is completely informed of and experienced with the typical investigative methods and techniques which may (or may not) be helpful to identify and dismantle those criminal organizations.

The wiretaps which the Presiding Justice authorized in this case include:

- **April 5, 2019**: Luis Munoz Mercado wiretap - (401) 300-7891. Designated offenses: violations of the controlled substance statutes and conspiracy.

- **April 19, 2019**: Janssye Toucet wiretap - (305) 613-7938. Designated offenses: violations of the controlled substances statutes and conspiracy.

- **May 3, 2019**: Mercado wiretap extended but terminated by the state on May 15, 2019.

- **May 15, 2019**: Toucet wiretap extended thirty days. Designated offenses expanded to include felony assault, firearm violations, kidnapping and conspiracy to commit those acts.

- **June 13, 2019**: Toucet wiretap extended thirty days but terminated by the state on June 17, 2019 after violent confrontations and gunfire at the El Patio nightclub, leading to the arrests of Toucet and others, and ultimately to the indictments in this case.

In his initial 64-page Mercado affidavit, Melfi recounted and described an investigation which the HIDTA Task Force, along with several other state and federal law enforcement agencies, had commenced ten months earlier in June 2018. By the beginning of April 2019, the investigation had disclosed a widespread, sophisticated narcotics distribution enterprise, which the investigators believed was principally directed by Toucet and multiple confederates including Luis Munoz Mercado, one of his trusted followers. The state obtained the Mercado wiretap on April 5, 2019.

By the time the Toucet wiretap was requested, the investigators had benefitted a bit from some of the conversations recorded from Mercado's phone. Gathering additional hard evidence about Toucet, however, was difficult, and customary efforts had not been productive. Ultimately, on April 19, 2019, after some ten months of legwork, surveillance, inquiries, and disappointment with and concern about the risks of deploying other strategies, the state applied for the Toucet wiretap.

Although the investigators believed that Toucet and his confederates were involved in weapon violations, assaults, robberies, and other violent offenses, the state limited its April 19, 2019 wiretap application to the drug trafficking offenses and conspiracy to commit those crimes. The application was accompanied by Melfi's 74-page supporting affidavit, along with his earlier Mercado affidavit. Consistent with §§ 12-5.1-2(b)(3) and 12-5.1-4(a)(3), the state, supported by

Melfi's affidavits, advised the Presiding Justice in its application that normal investigative methods had not only been unhelpful, but, if implemented further, those and other customary investigative techniques would be ineffective or unduly dangerous. Agreeing with that assertion, and having concluded that within the 140 pages of Melfi's April 5 and 19, 2019 affidavits there was adequate probable cause to connect Toucet to criminal narcotics activity, the Presiding Justice granted the application, and the wiretap on Toucet's phone commenced that day.[2]

Probable Cause Supports the Toucet Wiretap

In his initial suppression memorandum, Toucet attempted to minimize the significance of Melfi's April 19, 2019 affidavit by extracting and criticizing a few portions of it. At the July 11, 2022 suppression hearing, he readjusted his focus and picked at the rest of the affidavit, branding all 74 pages conclusory, factually barren, and incapable of connecting Toucet with criminal activity.

In both his first memorandum and at the suppression hearing, Toucet failed to take into account Melfi's 64-page April 5, 2019 Mercado affidavit, a conspicuous omission which the state justifiably criticized at the hearing and in its July 27, 2022 supplemental brief. After all, the Toucet wiretap application expressly incorporated Melfi's Mercado affidavit.[3]

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[2] The Toucet wiretap targeted a cell phone with Florida number (305) 613-7938, subscribed to by "Hector Lopez" in Florida. Melfi's investigation disclosed that Toucet had used "Hector Lopez" cell phones and/or that alias on previous occasions and that Toucet was again using a Hector Lopez phone to carry out the criminal activities alleged in Melfi's affidavits. Accordingly, that cellular device will be referred to as "Toucet's phone" herein. The Court notes that the defense has also referred to that mobile device as "Toucet's phone." (Mem. at 1, Aug. 1, 2022.)

[3] The state's Toucet wiretap application explicitly stated:

> "The information that constitutes the basis for the facts alleged herein is the Affidavit of Detective Corporal Derek G. Melfi, dated April 19, 2019, attached hereto and incorporated herein by reference, and the Affidavit of Detective Corporal Derek G. Melfi, dated April 5, 2019, attached to the April 19, 2019 Affidavit and incorporated herein by reference. The circumstances of the offenses

Toucet has now conceded that both affidavits must be considered in the probable cause equation, and says that although the two affidavits "speak for themselves," they "mandate suppression." He dismisses their combined import as "a game of smoke and mirrors." (Mem. at 2, 4, Aug. 1, 2022.) Although the two affidavits may speak for themselves, they must also be flexibly analyzed and in the context of all their facts and circumstances.

* * *

The Court begins its probable-cause analysis within the four corners of the affidavit, *Gates*, 462 U.S. at 238, *King*, 693 A.2d at 661, but as the two affidavits do "speak for themselves," they must also be read together because they comprise the "full and complete statement of the facts and circumstances" from which the Presiding Justice determined probable cause. *See* §§ 12-5.1-2(b)(2); 12-5.1-4 (a).

Although the Court's review does not extend beyond the edges of Melfi's Toucet/Mercado disquisition, this Court, like the issuing justice, considers those 140 pages not rigidly, but flexibly and in common sense fashion. "[T]he approach to the probable cause question should be pragmatic and flexible," and the issuing justice is entitled to draw reasonable inferences from the facts and totality of the circumstances within the affidavits to make the probable-cause determination. *Verrecchia*, 880 A.2d at 94; *Byrne*, 972 A.2d at 638; *Flores*, 996 A.2d at 162.

It is unnecessary to expand the pages of this Decision by parsing through 140 pages of Melfi's affidavits. Suffice to say that they are overwhelmingly chockablock with facts and circumstances which readily support the Presiding Justice's determination that there was probable cause to connect Toucet with illicit drug trafficking. Portions of Melfi's account do, however, merit particular attention.

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and this Application have been discussed with Detective Corporal Derek G. Melfi, and the Affidavits have been examined." (Wiretap application 2, Apr. 19, 2019.)

Melfi has chronicled disclosures from four of his key sources, whose information has been confirmed and corroborated by the investigators – from the cars Toucet drove (replete with color, make, model, and state of registration), the identity of many of his confederates, a locus of much of the drug trafficking (Mercado's barbershop), the manner and means by which he allegedly conducted his illicit business, the lengths he went to avoid detection, and a narcotics source as far away as Florida.

Rather than separate and attribute to each source the particular information Melfi received from each of them, it is sufficient, unless otherwise noted, to recount their disclosures collectively, as there is some overlap among and between them.

At the outset, it is significant that Melfi attested to the credibility of each of the sources. The dependability of three of them had already been substantiated, each having previously provided reliable information about large-scale drug trafficking operations, leading to an arrest. *See United States v. Sutton*, 742 F.3d 770, 775 (7th Cir. 2014) (observing that the informant's accurate information leading to an earlier arrest and drug seizure weighs in favor of his credibility, and "the fact that he did this only once is not indicative of a lack of credibility"). In addition to his prior displays of reliability, Source 3's confession to Melfi that during the past year he had bought thousands of dollars' worth of cocaine directly from Toucet also heightens his credibility. An informant's trustworthiness may be enhanced not only by his demonstrated reliability, but as well from the level of detail he recounts, the basis of his knowledge, and also by "the extent to which his statements are against his interest." *United States v. Tanguay*, 787 F.3d 44, 50 (1st Cir. 2015), *aff'd. after remand*, 811 F.3d 78 (1st Cir. 2016). *See State. v. Grossi*, 588 A.2d 607, 608 (R.I. 1991) (first-time informant who had implicated himself in a drug-smuggling scheme provided significant information which the police verified). In this case, Source 3 had already showcased his reliability

by making two monitored, controlled drug purchases, at personal risk, in February and March 2019 from "the Barber" (Mercado affidavit, 22-23), who the informant knew was one of Toucet's trusted drug dealers (and who Melfi knew was Luis Mercado, who operated a drugs stand for Toucet from his barber shop).

A fourth source, although without a history of reliability like the other three informants, by April 5, 2019, he had nonetheless demonstrated that his information was accurate, as it was consistent with data which Melfi and his investigators had also identified. That Source 4 was a "first-time informant" is not concerning. Such sources have been assigned dependability under the totality-of-circumstances test, particularly where, as here, the detective believed him to be "a reliable person in terms of truthfulness and veracity." *State v. Germano*, 559 A.2d 1031, 1035 (R.I. 1989); *Grossi*, 588 A.2d at 608; *State v Ricci*, 472 A.2d 291, 297 (R.I. 1984).

Melfi's informants told him that they feared Toucet, who they knew was a dangerous drug trafficker with a history of firearm use and a leader of the Hartford Avenue and Trinitarios gangs in Providence, which were principally involved in large-scale drug distribution and violent crimes. They told Melfi that Toucet operated the most violent "stick up crew" in the city, committing violent home invasions and "drug rips," robbing other dealers of their drugs, money and other valuables, all of which confirmed what Melfi and his team suspected.

The sources also accurately identified several of Toucet's associates. For example, they told Melfi about "Muscles," who Melfi confirmed was Jonathan Garrido, who had a history of drug distribution, resisting arrest, and assaults. They also identified Mercado as "the Barber," who they said was selling drugs from Mamby's Barbershop.

Melfi confirmed that Mercado's barber shop was, in fact, a drug hub where Toucet had been traced. Any suggestion that perhaps Toucet was simply there for a haircut is not persuasive.

On April 10, 2019 at 6:51 p.m. and 7:05 p.m. two conversations between Toucet and Mercado were intercepted from Mercado's phone, in which the word "haircut" was mentioned. The discussions, however, clearly involved unlawful distribution of pills and their expected cost. Within nine minutes of the second call, a customer, Francisco Torres, called Mercado looking for drugs. (Toucet affidavit, 24-25.) By that time, Torres had already collected four felony drug convictions (one of them with a firearm), and three lesser offenses, including obstruction and resisting arrest. During that conversation, corroborating Melfi's sources who recounted that Toucet was intent on insulating himself from others, Toucet emphatically instructed Mercado to make certain that whomever Mercado was dealing with asked no questions whatsoever about Toucet.

The informants were justifiably in fear of Toucet, his gangs, and his dangerous associates. Melfi was well aware of the Hartford Ave. and Trinitarios gangs, and he knew that their feuds with rival groups frequently resulted in violent retaliations. Melfi's team was also cognizant of all of the individuals identified by Melfi's sources and confirmed, as described by the informants, that they were involved in drug trafficking, possession of firearms, and assaultive conduct. Melfi included in the Toucet affidavit a list of those and other Toucet followers, all of whom had criminal histories, especially in the narcotics trade. (Toucet affidavit, 42-49.)

Case law is replete with observations that a suspect's criminal history and reputation, and that of his associates, are relevant grist for the probable-cause mill. *United States v. Tramunti,* 513 F.2d 1087, 1100-01 (2d Cir. 1975); *United States v. Cohn*, 472 F.2d 290, 292 (9th Cir. 1973); *United States v. Marshall*, 526 F.2d 1349, 1357 (9th Cir. 1975). In *United States v. Harris*, 403 U.S. 573, 583 (1971), the Supreme Court wrote:

> "We cannot conclude that a policeman's knowledge of a suspect's reputation—something that policemen frequently know and a factor that impressed such a 'legal technician' as Mr. Justice Frankfurter—is not a 'practical consideration of everyday life' upon which an

> officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that *Spinelli* prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."

In *State v. Storey*, 8 A.3d 454, 465 (R.I. 2010), our Supreme Court was equally expansive, inviting issuing magistrates and judges to take into account all manner of criminal history when assessing an affidavit:

> "We see no error in the affidavit's inclusion of Storey's non-drug-related criminal background as some justification for finding probable cause. Regardless of admissibility at trial, the magistrate may consider all criminal information as part of the totality of the circumstances, even if the crimes are unrelated to the subject matter of the warrant. *See United States v. Conley*, 4 F.3d 1200, 1207 (3d Cir. 1993) (holding that the inclusion of 'prior arrests and convictions' in a warrant is 'permissible' though 'especially' helpful at establishing probable cause where the prior crimes involved the 'same general nature as the one which the warrant is seeking to uncover')."

One of Melfi's sources provided him with social media images depicting Toucet brandishing handguns, and Melfi knew that Toucet's criminal record precluded him from possessing firearms. Hearing from his sources that they knew that Toucet was usually armed confirmed Melfi's experience that firearms are normal accoutrements of drug dealers. [4]

[4] Courts have consistently recognized that "[i]n the narcotics business, 'firearms are as much "tools of the trade" as are most commonly recognized articles of narcotics paraphernalia.'" *State v. Pratt*, 641 A.2d 732, 741 (R.I. 1994), citing *State v. Alamont*, 577 A.2d 665, 668 (R.I. 1990) (adopting Justice Rehnquist's observation in *Ybarra v. Illinois*, 444 U.S. 85, 106 (1979); *United States v. Rivera*, 825 F.3d 59, 65 (1st Cir. 2016) (noting "the everyday understanding of the drug trade's violent nature" and "that guns are common in the drug trade") (citing *United States v. Rivera–González*, 776 F.3d 45, 51 (1st Cir. 2015); *United States v. Crespo*, 834 F.2d 267, 271 (2d Cir. 1987) *cert. denied*, 485 U.S. 1007 (1988) (taking judicial notice that, to substantial narcotics dealers, firearms are common tools of the trade).

The informants' reports that Toucet himself was a hardened drug dealer and firearm user was readily confirmed. Toucet had been on law enforcement's radar for criminal activity long before the 2018 HIDTA investigation was under way, having been arrested and convicted of drug and gun offenses dating from 2010.

In February 2010, when Toucet was arrested for unlawfully possessing a firearm, he told the police, "Every time I get arrested detectives want to talk to me and I never tell you guys shit. I got caught with a gun, that's the way it is. I'm out there on the street doin' what I gotta do." Toucet acknowledged that the gun was probably stolen and that he had traded drugs to obtain it. (Toucet affidavit, 50- 51.) Toucet additionally told a federal agent that he was a fixture in the narcotics business and did not expect to get out of it. He bragged that he was "the baddest person" on the streets, and that when released from prison, he would pick up where he had left off. (Toucet affidavit, 51.)

Source 3 provided Melfi with telling information about Toucet, including Toucet's illicit Florida connections. He told Melfi that Florida was reportedly a significant source of Toucet's supply of narcotics. Additionally, he also said that Toucet often utilized heavily window-tinted Florida vehicles to avoid Rhode Island registration requirements and local inspection rules, which squared with Melfi's own experience that drug traffickers typically used out-of-state vehicles for such purposes. Rhode Island authorities advised Melfi that no vehicles in the state were registered to Toucet.

Melfi recounted that, on January 15, 2019, Toucet apparently thought he was being followed while driving a white Mercedes with heavily tinted windows and Florida plates. He pulled into a driveway, got out, and nervously paced around, peering through the yard and down the street, apparently looking for anyone who might have been following him. He bent down and,

as was his wont to avoid surveillance and detection at all costs, thoroughly checked the undercarriage of the Benz, apparently looking for a tracking device and then immediately made some cell phone calls. Responding to what must have been Toucet's urgent summons, Jason Hernandez and William Cintron, another known Toucet accomplice, shortly arrived in separate vehicles.[5] Toucet took a passenger seat in Cintron's vehicle, Hernandez, whom Melfi's sources had previously identified, then led the caravan into the street, followed by Toucet in Cintron's vehicle. An unknown confederate drove the Mercedes, protecting the rear, providing motorcade security for Toucet. (Toucet affidavit, 37-38.)

A call detail analysis showed that Toucet was communicating with Cesar Lopez in Florida. Cesar Lopez (along with a female) owned the white Florida Mercedes.[6] Cesar Lopez was also the subject of a federal money laundering investigation in Florida and had already been convicted in Rhode Island and was on parole for kidnapping, robbery, conspiracy, and unlawfully using a firearm during a violent crime.

Melfi was well aware that Toucet was using the "Hector Lopez" Florida cellphone, which became the subject of the Toucet wiretap application. He also knew that Toucet had used the Hector Lopez alias on prior occasions, and through his experience also knew that it was typical for drug traffickers to use more than one telephone to coordinate their drug trafficking. Additionally, Melfi learned from his sources that Toucet, steadfastly intent on insulating himself from others

[5] Hernandez had a history of five drug offenses and three assaults. Cintron had accumulated convictions for two robberies, possession of a sawed-off shotgun, breaking into a dwelling, escaping from custody, larceny (twice), five separate charges of obstruction, and a number of other misdemeanors.

[6] Source 3 told Melfi that Toucet also had access to a burgundy Jeep Grand Cherokee and a black BMW, both with Florida registrations, as well as a white Jaguar SUV from Maine. Melfi reported that surveillance had confirmed "Toucet's connection to and operation of all [three of those] vehicles." (Mercado affidavit, 17.)

except his most trusted allies, strategically disseminated the phone numbers sparingly and typically according to the levels of trust he assigned to his crew.

Source 3 also told Melfi that at one point Toucet was "laying low" in Florida fearing that he was "hot" in Rhode Island after some of his confederates had been arrested locally. (Toucet affidavit, 9, 38.) At the suppression hearing, defense counsel did not dispute that Toucet had left town and was "laying low" in Florida. Instead, he minimized the information, suggesting that because Rhode Island investigators could not have observed him locally, his connection to a Rhode Island drug venture was thereby diminished. (Hr'g Tr. 9, July 11, 2022; Toucet affidavit, 9, 38.) Toucet's presence in Florida, however, did not decrease his attachment to the narcotics enterprise; rather, it increased it. Melfi's investigation had already connected Toucet to Florida – e.g., his "Hector Lopez" alias, Florida vehicles he drove in Rhode Island (one owned by Rhode Island parolee Cesar Lopez and a Miami DEA target), and to a suspected large supplier of Toucet's drugs.

According to Melfi's narrative, Toucet was resolutely disposed to run his business, as much as possible, through cell phone directives rather than engaging in face-to-face encounters. *See United States v. Stewart*, 306 F.3d 295, 305–06 (6th Cir. 2002) ("We have previously recognized that 'wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation.' *United States v. Landmesser,* 553 F.2d 17, 20 (6th Cir. 1977), [*cert. denied,* 434 U.S. 855 (1977)] (quoting *United States v. Steinberg,* 525 F.2d 1126, 1130 (2d Cir. 1975))."

Melfi's sources also described, and Melfi's investigators confirmed through their own surveillance, Toucet's constant counter-surveillance measures. He randomly changed locations, positions, meeting spots, vehicles, and patterns; engaged in aimless circuitous routes, U-turns, and other evasive maneuvers - always apprehensive of being followed by his enemies or by law

enforcement and their use of GPS and tracking devices affixed to vehicles he drove or in which he was a passenger.

Apart from Toucet's demonstrated reliance on telephones to avoid exposure, and consistent with his commitment to shroud his illicit activity, Melfi also recounted his experience that drug dealers take useful advantage of deficient illumination to transact business. (*See* Mercado affidavit, 27-29.) On April 13, 2019, a telephone call was intercepted from Mercado's phone in which he says that he is in "Woony" (Woonsocket) "doing a play with Janssye" (a "play," per Melfi, is slang for a drug transaction), and that they are going to the "Dollhouse," a shorthand reference to The Rhode Island Dolls strip club. Strip clubs, Melfi knew, are favored by drug traffickers because they are dimly lit and prevent investigators from observing drug transactions.

At the suppression hearing Toucet criticized that conclusion is "totally meaningless in terms of establishing probable cause." (Hr'g Tr. 19, July 11, 2022.) Toucet's assertion is much too sanguine, as it fails to account for the clandestine hallmark nature of the drug trade, which is typically veiled by as much secrecy as possible. *See In re Dunn*, 507 F.2d 195, 197 (1st Cir. 1974) (noting that courts may consider the very nature of the alleged crime and give weight to the opinion of those who investigate it). *See United States v. Feliz*, 182 F.3d 82, 88 (1st Cir. 1999) ("The nexus between the objects to be seized and the premises searched need not, and often will not, rest on direct observation, but rather 'can be inferred from the type of crime, the nature of the items sought, the extent of an opportunity for concealment and normal inferences as to where a criminal would hide [evidence of a crime]"' *United States v. Charest*, 602 F.2d 1015, 1017 (1st Cir. 1979).") As stated in *United States v. Bain*, 874 F.3d 1, 23 (1st Cir. 2017):

> '"When it comes to nexus, common sense says that a connection with the search site can be deduced 'from the type of crime, the nature of the items sought,' plus 'normal inferences as to where a criminal would hide' evidence of his crime." *United*

> *States v. Rivera*, 825 F.3d 59, 63 (1st Cir. 2016) (quoting *United States v. Feliz*, 182 F.3d 82, 88 (1st Cir. 1999)). This court has, "with a regularity bordering on the echolalic, endorsed the concept that a law enforcement officer's training and experience may yield insights that support a probable cause determination."' (quoting *United States v. Floyd*, 740 F.3d 22, 35 (1st Cir. 2014)).

Although the information provided by Melfi's sources comprises comparatively few pages of Melfi's 140-page account, by themselves they readily provide, even for any random reader, more than a reasonable belief that Toucet was a paramount participant in a large and violent narcotics operation. When those pages are coupled with the rest of Melfi's narrative - for which there is no clamant need to neatly list or catalogue here - the Court is presented with an assemblage of facts and circumstances which cumulatively demonstrate a clear nexus between Toucet and significant criminal activity.

Toucet complains that Melfi's unidentified sources are not credible, that they offer nothing but conclusory uncorroborated information, and that the state has not disclosed the nature of the promises, rewards and inducements given to Melfi's unidentified sources. (Initial Mem. at 4-5; Suppl. Mem. at 5.)

First, as set forth above, much of the informants' information was corroborated, and they had also demonstrated their reliability on prior occasions. As to Toucet's complaint that Melfi did not identify his sources, the short answer is that, without more, he is simply not entitled to such disclosure. As said by Judge Bruce M. Selya:

> "Federal courts long have recognized that the government, in the due performance of its law enforcement functions, must rely to some extent on informants. But tattling on criminals is risky business, and confidentiality sometimes is a matter of life or death. Identifying an informant (as, say, by calling him to the witness stand) not only may expose that person to harm but also may be seen as a breach of trust by others (making them reluctant to cooperate with the government in future cases). It is, therefore, widely acknowledged that the government has a 'privilege to withhold from disclosure the identity

> of persons who furnish information of violations of law to officers charged with enforcement of that law.'" *United States. v. Perez*, 299 F.3d 1, 3 (1st Cir. 2002) (citing *Roviaro v. United States*, 353 U.S. 53, 59 (1957)).

Furthermore, Melfi's sources feared that exposure would lead to violent retaliation by Toucet and his gang members.[7] They would not sign witness statements or testify before a grand jury or publicly. That reluctance, however, does not affect the weight of the probable cause determination but, instead, augments the state's argument that a wire intercept of Toucet's phone was necessary to further the investigation.

Moreover, Toucet's criticism that Melfi has not provided sufficient background information of the sources misses the mark by a wide shot. As the United States Supreme Court has remarked more than once:

> "Informants' tips doubtless come in many shapes and sizes from many different types of persons. As we said in *Adams v. Williams*, 407 U.S. 143, 147 [] (1972), 'Informants' tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability.' Rigid legal rules are ill-suited to an area of such diversity. 'One simple rule will not cover every situation.'" *Gates*, 462 U.S. at 232.

It is a given, of course, that informants come with familiar baggage, and they are not "merely angels with dirty faces." *United States v. Hanhardt*, 157 F. Supp. 2d 978, 995 (N.D. Ill. 2001). Nevertheless, "[i]t is often people involved in criminal activities themselves that have the most knowledge about other criminal activities." *United States v. Martin*, 920 F.2d 393, 398-99 (6th Cir. 1990). However, omitting their criminal history from affidavits, or excluding their expectations, the prosecutors' promises, or an informant's anticipated rewards seldom affects probable cause findings.

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[7] At the time of the wiretap application, Toucet had been convicted of two firearms offenses, a felony assault charge, and three felony drug offenses.

Indeed, such encumbrances are commonplace and frequently *presumed* by issuing judges without any explicit discussion of their history. *United States v. Veloz*, 948 F.3d 418, 428 (1st Cir. 2020). *United States v. Hall*, 171 F.3d 1133, 1143 (8th Cir. 1999) (noting "as a matter of law, that courts issuing search warrants are aware of the possibility that a confidential informant may be seeking leniency in his or her own situation"); *United States v. Fowler*, 535 F.3d 408, 416 (6th Cir. 2008) ("[I]t is no surprise that most confidential informants are engaged in some sort of criminal activity. It would unduly hamper law enforcement if information from such persons were considered to be incredible simply because of their criminal status."). As the Ninth Circuit observed:

> "It would have to be a very naive magistrate who would suppose that a confidential informant would drop in off the street with such detailed evidence and not have an ulterior motive. The magistrate would naturally have assumed that the informant was not a disinterested citizen. While the magistrate was not informed of the informant's probity, the magistrate was given reason to think the informant knew a good deal about what was going on[.]" *United States v. Strifler*, 851 F.2d 1197, 1201 (9th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989).[8]

Here, however, there has been no obfuscation at all. Melfi has openly acknowledged that his sources "either have criminal histories, were compensated financially for their assistance in this matter, and/or have been given assistance with a pending criminal prosecution." (Toucet affidavit, 7.) Those informants, however, offered a wealth of information, and, as Melfi recounted, "law enforcement has been able to corroborate much of the information provided by these

[8] The Court notes that Toucet has not alleged that Melfi has made any intentional falsehoods or any statements in reckless disregard for the truth, nor has Toucet filed a requisite offer of proof in that regard or explained his failure to do so. In short, he has not requested nor is he entitled to a so-called "*Franks*" hearing under federal or state law. *Franks v. Delaware*, 438 U.S. 154 (1978); *State v. DeMagistris*, 714 A.2d 567 (R.I. 1998); *State v. Hudgen*, 272 A.3d 1069 (R.I. 2022); *State v. Tejeda*, 171 A.3d 983 (R.I. 2017); *State v Verrecchia*, 880 A.2d 89 (R.I. 2005).

sources." (Mercado affidavit, 7-15.) *See State v. Cosme*, 57 A.3d 295, 303 (R.I. 2012) (noting that the "totality-of-the-circumstances approach also recognizes the probative value of the 'corroboration of details of an informant's tip by independent police work.'" (Quoting *Gates,* 462 U.S. at 233, 241.)

The scores of pages in Melfi's affidavits reflect a careful analysis by a savvy, extremely knowledgeable law enforcement officer, who has spent many years examining, dissecting, and investigating the very kind of criminal narcotics activity which he attributes to Toucet and his associates, and courts have consistently accorded significant weight to the opinions, inferences, and experience of affiants like Melfi in the probable cause formula. Thus, the United States and the Rhode Island Supreme Courts have directed us to view the totality of the facts and circumstances in affidavits "cumulatively through the eyes of a reasonable, cautious police officer guided by his or her experience and training[.]" *State v. Brennan*, 526 A.2d 483, 485 (R.I. 1987).

"'[T]he evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.'" *Flores*, 996 A.2d at 162 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)); *Byrne*, 972 A.2d at 639 (noting that a reviewing court '"should take care…to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers"') (quoting *Ornelas v. United States,* 517 U.S. 690, 699 (1996)). S*ee Veloz*, 948 F.3d at 426 (noting that courts consider that "a law enforcement affiant [has] assessed, from his professional standpoint, experience, and expertise, the probable significance of the informant's provided information").

Lastly, Toucet's shortsighted view of Melfi's submissions fails to recognize that probable cause is not analyzed merely by counting its pieces and dispatching them one by one, as he attempted at the suppression hearing. Quite to the contrary, there is a decided synergistic effect

when considering the accumulation of all of the facts and circumstances, which underscores the apothegm that the whole is greater than its individual parts. "While 'each piece of information may not alone be sufficient to establish probable cause and some of the information may have an innocent explanation, 'probable cause is the sum total of layers of information and the synthesis of what the police have heard, what they know, and what they observed as trained officers.'" *State v. Tejeda*, 171 A.3d 983, 999 (R.I. 2017) (quoting *Storey*, 8 A.3d at 462); *accord*, *Cosme*, 57 A.3d at 303. *See United States v. Alfano*, 838 F.2d 158, 162–63 (6th Cir. 1988) (noting that "[t]here is probable cause if a 'succession of superficially innocent events ha[s] proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one'") (citations omitted).

Simply put, the components of a clock have no value unless they are combined to create the timepiece.

As stated by Mr. Justice Rehnquist in *Gates*, 462 U.S. at 231-32, applying the "particularized suspicion" standard from *Cortez* to the probable cause analysis:

> "The [probable-cause] process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same - and so are law enforcement officers."

And so are the judges who are tasked with carrying out that process.

Withal, upon completion of the analysis, the issuing judicial officer should be able to say with assurance that from the totality of the facts and circumstances, the mosaic presented readily supports a finding of probable cause. The Presiding Justice concluded that it did, and that determination is entitled to great deference. *Tejeda*, 171 A.3d at 996; *Byrne*, 972 A.2d at 637; *see Spaziano*, 685 A.2d at 1069 (assigning "great deference" to the magistrate's appraisal of the

supporting affidavit to issue a warrant, and noting that the Supreme Court will countermand the magistrate's decision only if there is "no 'substantial basis' for finding that probable cause existed") (citing *Pratt*, 641 A.2d at 737).

This Court's own review of the state's application alters the issuing justice's determination not at all. To say that the coincidence of information assembled by Melfi was sufficient to support a reasonable belief that Toucet was illegally involved in drug trafficking is "to indulge in understatement." *Ker v. California,* 374 U.S. 23, 36 (1963); *Gates,* 462 U.S. at 232, n.7.

Necessity for the Wiretap

The state passes the final wiretap sentry if it can demonstrate that normal investigative methods have been unproductive or that continued reliance on that portfolio will most likely be ineffective or unduly dangerous. *See* §§ 12-5.1-2(3), 12-5.1-4(a)(3). This statutory construct frames the "necessity requirement," which underwrites the presiding justice's determination that deploying customary strategies emblematic of investigations have not been and, predictably, will not be effective or may endanger participants. [9]

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 (1974); *accord, United States v. Abou–Saada,* 785 F.2d 1, 11 (1st Cir. 1986). "Thus, wiretaps are not to be used thoughtlessly or in a dragnet fashion . . . [W]hat is needed is to show that wiretaps are not being 'routinely employed as the initial step in

[9] It is noteworthy that with respect to §§ 12-5.1-2(3) and 12-5.1-4(a)(3), referencing the inefficiency of non-electronic methods, each provision is written in the disjunctive, *viz*.: "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." Although the state is not obliged to rely on all of them, it has, with Melfi's substantiation, invoked them all, which, in this Court's view, makes the state's necessity showing even stronger. *See United States v. Steinberg,* 525 F.2d 1126, 1130 (2d Cir. 1975) (approving a wiretap where the government had relied on one of the options).

criminal investigation.'" *Alfano*, 838 F.2d at 163 (quoting *Landmesser*, 553 F.2d at 20 and *United States v. Giordano*, 416 U.S. 505, 515, (1974)).

Satisfying the necessity component is not earned by pedestrian or gratuitous intimations that antecedent investigative efforts appear inadequate. More than that is needed. On the other hand, impractical Sisyphean tenacity is neither expected nor required. *See Williams*, 827 F.3d at 1147 ("[T]he statutory [necessity] command was not designed to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted. It is sufficient for the Government to show that other techniques are impractical under the circumstances and that it would be unreasonable to require pursuit of those avenues of investigation.") (Internal citations and quotation marks omitted.)

As our state Supreme Court has said: "Strict compliance with the statute does not mean, as contended by defendants, that a wiretap may not issue except upon a showing of absolute necessity. All that must be strictly complied with is the requirement that the state provide a full statement setting forth why investigative procedures have failed or are reasonably likely to fail or that they are too dangerous." *State v. Ahmadjian*, 438 A.2d 1070, 1083 (R.I. 1981). *Accord*, *Alfano*, 838 F.2d at 164 ("We believe that the [necessity] standards contained in the Act do not require proof of the absolute impossibility of all other means. Instead, a reasonable statement of the consideration or use of other investigative means is adequate."); *Commonwealth v. Fenderson*, 571 N.E.2d 11, 12-13 (Mass. 1991) ("The Commonwealth need not show that traditional investigative techniques were wholly unsuccessful or that the police had exhausted all other investigative procedures before filing its application for a warrant authorizing a wiretap . . . The affidavit will be adequate if it indicates a reasonable likelihood that normal investigative techniques have failed in gathering evidence, or would fail if attempted.").

Simply because a conventional investigative approach or practice might theoretically or hypothetically be possible does not mean that it is also likely to succeed. *See United States v. Scibelli*, 549 F.2d 222, 227 (1st Cir. 1977), *cert. denied*, 431 U.S. 960 (1977) ("[W]e adhere to [the] view, that in deciding whether an application for a wiretap satisfied the statutory requirement, the court may 'consider the nature of the alleged crimes.'") (quoting *In re Dunn*, 507 F.2d at 197). *See also Steinberg*, 525 F.2d at 1130 ("When one endeavors to prove a negative, it is difficult to be very specific about it; and we are loathe to set impossibly burdensome standards.").

In sum, and consistent with *Ahmadjian's* holding, when law enforcement seeks a wiretap order, it need not prove the impossibility of other means of obtaining information. Instead, the necessity provisions merely require that state officials give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and inform the court of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate. *United States v. Gardner*, 32 F.4th 504, 516 (6th Cir. 2022).

That's exactly what the state did here. In the Toucet affidavit, Melfi presented a familiar array of investigative measures which had been used and/or considered during the ten-month investigation leading up to the wiretap applications. He quite sensibly explained why those methods were insufficient and would not be effective going forward, and that they would also be very risky or unduly dangerous.

Without repeating the entire content here, the Court refers to Melfi's assessments at pages 59-69 of the Toucet affidavit, where he carefully went through and outlined his concerns with standard investigative strategies, e.g., inserting undercover operatives, static electronic surveillance, re-energizing confidential sources, convening grand jury proceedings, trying to

interview and obtain statements from percipient witnesses, physical surveillance, attaching GPS and tracking devices to Toucet's vehicles, trash searches, and some other tired measures.

He also discounted search warrants because the investigators had not been able to identify the locations where Toucet and his accomplices were secreting their contraband and firearms, one of which (narcotics) was likely as far away as Florida. Grand jury proceedings would be of little help, as they would assuredly alert the targets, and witnesses would be scarce anyway. Immunity offers were essentially off the table, too, as the state was disinclined to extend that process to someone like Toucet, a target of the investigation, or to his cohorts who had lengthy criminal records, and he also noted the lack of incentive for Mercado to cooperate.

As to GPS or tracking devices, Melfi knew that Toucet was cagey, notoriously phobic about being followed, and that he employed all manner of counter-surveillance measures. *See United States v. Lambert*, 771 F.2d 83, 91 (6th Cir. 1985), *cert. denied*, 414 U.S. 1034 (1985) (necessity requirement satisfied, noting the target's "extreme (and correct) suspicion that his activities were being monitored" and that alternative investigative procedures "would likely alert the subjects to the presence and scope of the investigation"); *United States v. Woods*, 544 F.2d 242, 257 n.11 (6th Cir. 1976) (similar holding, crediting the affiant's observation that the subjects "are extremely surveillance conscious").

Melfi also noted that if a suspect interrupted an officer while he was attempting to install a tracking device, it could not only compromise the investigation but, much worse, jeopardize the officer's safety. Even if successfully installed, a tracking mechanism would have been of marginal assistance, because it would likely be quickly discovered. As seen earlier, Toucet was always worried about such devices, and investigators had already observed him apparently checking his vehicle for a tracking mechanism. Curbside trash searches were susceptible to being seen by

residents or caught on a surveillance camera, also potentially compromising the investigation. Besides, the investigators were unable to ascertain where Toucet might be on any given day.

Melfi also concluded that trying to infiltrate the operation with undercover agents would afford little assistance. Toucet had gone to great lengths to insulate himself from everyone in the enterprise, especially his lower level workforce, limiting direct contact only to a few of his trusted associates. A newcomer would be distanced and would likely invite danger to himself. Toucet would refuse to deal with a new arrival, anyway. The prospect of surreptitiously planting one of Melfi's already anxious informants, who were already fearful and intimidated by Toucet and a violent crew, was unquestionably not an option.

The Court need go no further. The several referenced pages in Melfi's affidavit demonstrate the rational and sound reasons of a veteran narcotics detective who recognized that the shopworn playbook had to be shelved. In all, Melfi and his seasoned assortment of experienced state and federal agents were essentially at an impasse, to a point where Melfi, after careful and detailed reflection, concluded that the only way to effectively continue the investigation and dismantle the enterprise was via a wiretap.

When assessing the sufficiency of the affidavit as to the required showing of antecedent efforts, the issuing judge may take into account the nature of the alleged crimes and consider "the craftiness and wariness of the intended targets [as] a significant factor[.]" *United States v. Ashley*, 876 F.2d 1069, 1072-73 (1st Cir. 1989); *In re Dunn*, 507 F.2d at 197 ("The court could consider the nature of the alleged crimes, and could give weight to the opinion of those investigating [the target] that in the described circumstances other means were too dangerous and might be counterproductive if pursued."); *see Landmesser*, 553 F.2d at 20 (noting the relevance of the

officer's prior experience in the court's determination that other investigative procedures are unlikely to succeed).

When deciding if there has been an adequate showing of necessity, the First Circuit, in language particularly relevant here, stated that "we have not hesitated to uphold wiretap orders based on an agent's plausible, good faith "assert[ion of] a well-founded belief that the techniques already employed during the course of the investigation had failed to establish the identity of conspirators, sources of drug supply, or the location of drug proceeds." *United States v. Gordon*, 871 F.3d 35, 46 (1st Cir. 2017) (citations omitted) (Selya, J.). And, Judge Selya further remarked in *Gordon*:

> "In the [wiretap] lexicon, necessity is not an absolute. Rather, it must be viewed through the lens of what is pragmatic and achievable in the real world…Such a showing should demonstrate that the government has made a reasonable, good faith effort to run the gamut of normal investigative procedures before resorting to means so intrusive as electronic interception of phone calls...This does not mean, though, that the government is required to show that other investigatory methods have been completely unsuccessful…Nor does it mean that the government is forced to run outlandish risks or to exhaust every conceivable alternative before resorting to electronic surveillance." *Id.* at 45-46 (internal citations excluded).

It is understood that prosecutors may not, as cautioned in *Alfano,* seek wiretaps "thoughtlessly or in a dragnet fashion" and that they must demonstrate that wire intercepts are not routinely sought as the initial step in criminal investigation. *Alfano,* 838 F.2d at 163. Nothing like that happened here. The state, through Melfi's narrative, illustrated the unproductive use of deploying customary investigative methods. This Court readily finds, as did the Presiding Justice, that before the state sought the Toucet wiretap, Melfi had tirelessly run the *Gordon* gamut for almost a year before finally turning in his vintage playbook.

Support for the instant wiretap is notably comparable to the observations recently expressed by the Sixth Circuit in *Gardner:*

> "Investigators didn't use wiretaps as an initial, or even an intermediate, step. Instead, they spent more than a year diligently using traditional techniques. Still, after a full year of working with confidential sources, executing controlled buys, using pen registers and toll records, installing GPS tracking devices, engaging in physical surveillance, and watching pole camera footage, the government lacked key pieces of the drug-trafficking puzzle. To be sure, these techniques established the existence of Mayfield's organization, identified Gentry as a cocaine supplier, and found new target subjects. But investigators wanted to discover enough evidence to dismantle the entire organization and 'fully prosecute all members,' not just arrest a few participants. In a litany of cases, this Court has affirmed the use of wiretaps in similar circumstances. This is because 'nothing requires the government to call off its investigation after it achieves only some of its goals.' *United States v. Castro*, 960 F.3d 857, 864 (6th Cir. 2020). Here, investigators waited an appropriate time, one year, to apply for wiretaps that fulfilled an appropriate goal, taking down the whole drug-trafficking ring. So the wiretap requests were far from an initial step." *Gardner*, 32 F.4th at 515.

Viewing the Toucet and Mercado affidavits as a whole, it is plain that they contain more than enough facts and circumstances from which to conclude that, absent a wiretap, antecedent investigative procedures simply would not suffice. *Tanguay*, 811 F.3d at 82; *Alfano*, 838 F.2d at 163-64. A wiretap was the last and, by necessity, the right resort likely to establish the full scope of the enterprise and eliminate it.

Again, it must be borne in mind that court-ordered wiretaps and their underlying affidavits enjoy a presumption of validity, and a protesting defendant incurs the burden of proving otherwise. *Portillo-Uranga*, 28 F.4th at 174; *Williams*, 827 F.3d at 1147; *Dahda*, 853 F.3d at 1111. Toucet has provided no grounds to diminish that presumption.

For all of the foregoing reasons, Toucet's motion to suppress is denied, along with those of his codefendants who subscribed to it.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island v. Janssye Toucet, et al.**
CASE NO:	**P1/2019-6258AG**
COURT:	**Providence Cunty Superior Court**
DATE DECISION FILED:	**September 12, 2022**
JUSTICE/MAGISTRATE:	**Krause, J.**

ATTORNEYS:

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