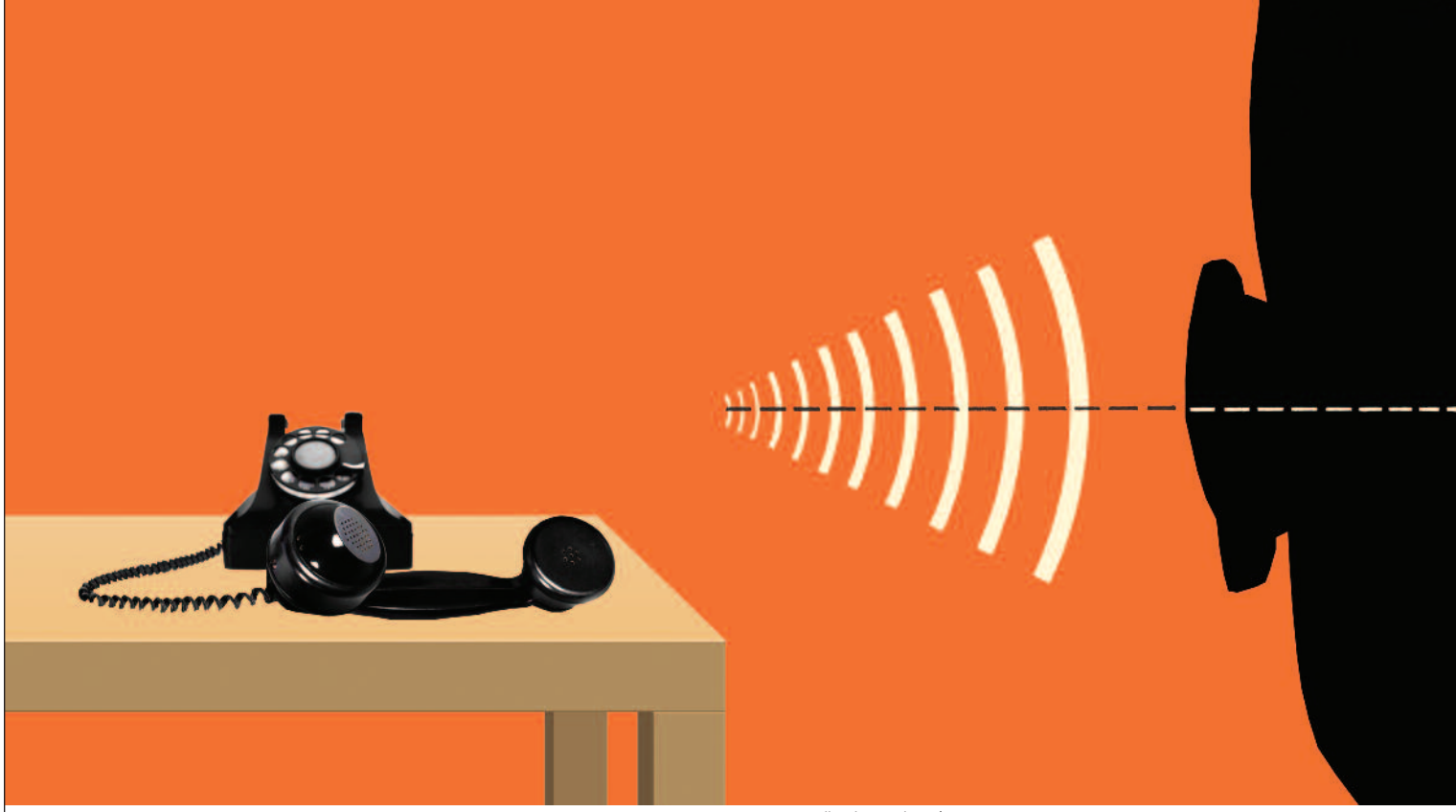

Challenging State Wiretaps: Who Asked for The Order? The Answer May Support Suppression

"The federal wiretapping statute comprehends an extraordinarily complex scheme for regulating electronic surveillance by state and federal law enforcement officials."[1] This complexity creates challenges for defense attorneys, but also provides fertile grounds for legal attacks. The same intricacies that make wiretapping law difficult to master provide numerous opportunities for government officials to err in ways that can lead to the suppression of critical evidence.

Some particularly intriguing challenges arise out of the relationship between federal and state wiretapping statutes. As discussed below, the federal Wiretap Act governs all wiretaps, including those used by state or local officials pursuant to state court authorizations, and establishes certain minimum requirements for state procedures. Surprisingly, notwithstanding these apparently unambiguous requirements, many states have enacted wiretap statutes that appear to be inconsistent with the federal law.

Perhaps the most common discrepancies are those regarding the categories of government attorneys who may apply for, or authorize applications for, wiretap orders. Although the federal statute narrowly defines the group of attorneys who may do so, many state statutes purport to create a broader group of permissible applicants, and officials in such states frequently rely on these more permissive state statutes. The result is that a significant number of wiretap orders issued by state courts may be vulnerable to attack.

Because criminal cases can involve several distinct categories of communication-related evidence, and those categories are governed by different legal frameworks, it is worth identifying at the outset the types of evidence that may be subject to the following analysis. The issues discussed below relate to the monitoring or capturing of the actual contents of telephonic (including mobile phone) communications and certain other oral communications.[2] They do not apply to evidence derived from pen registers, trap-and-trace devices, historical call records, cellphone tracking, or other means of determining "noncontent" data such as calling and receiving numbers, call times and durations, and participant locations.

Overview of the Wiretap Act

The federal Wiretap Act, 18 U.S.C. §§ 2510-2522, sets forth a detailed set of procedures to be followed whenever government officials want to use wiretaps. Of particular importance to this discussion, the federal legislation's scope is *not* limited to wiretaps authorized by federal judges, or to the use of wiretap evidence in federal cases. Section 2516 expressly sets forth minimum requirements for state-level

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wiretap applications and orders.[3] Section 2515, in turn, states that when communications are intercepted in violation of the federal statute, neither the intercepted communications nor any "evidence derived therefrom" may be admitted in any court or agency "of the United States, a state, or a political subdivision thereof."[4]

The result is that the Wiretap Act governs each of the four possible permutations: evidence from a state-authorized wiretap offered in state court, evidence from a state-authorized wiretap offered in federal court, evidence from a federally authorized wiretap offered in federal court, and evidence from a federally authorized wiretap offered in state court. Courts occasionally say that the federal statutory framework does not "preempt" state law,[5] and this is true, but only in a limited, unidirectional sense. Congress did permit the imposition of stricter state-level rules, and even provided for federal court suppression when such rules are violated.[6] States are not, however, free to adopt looser standards.[7] Under §§ 2515 and 2516, evidence obtained through a state procedure that does not satisfy the federally imposed "floor" may not be introduced in any state or federal prosecution.[8]

Only Certain Officials May Apply for Wiretap Orders

Some of § 2516's procedural rules relate to the types of government officials who may apply for, or authorize an application for, a wiretap order. Congress chose to limit such authority to certain high-level officials. The objective of this restriction, according to the legislative history and the courts interpreting § 2516, was to centralize decision making in this sensitive area in visible, politically accountable officials.[9]

A leading case on this issue is *United States v. Giordano*,[10] which involved a federal wiretap order issued based on an application authorized by the attorney general's executive assistant. At that time, the pertinent statutory language permitted federal wiretap applications to be authorized by "[t]he attorney general, or any assistant attorney general specially designated by the attorney general."[11] The U.S. Supreme Court concluded that the attempted delegation of this authority to the executive assistant was unlawful:

> Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. … The Act plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. *The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order.*[12]

The Court noted that "[t]he legislative history of the [Wiretap] Act support[ed]" mandating adherence to the specific list of authorized officials.[13] It discussed that legislative history at length, with particular emphasis on the detailed discussion of which officials should be empowered to authorize wiretap applications.[14] The Court concluded that it would "appear[] wholly at odds with the scheme and history of the Act to construe § 2516(1) to permit the attorney general to delegate his authority at will, whether it be to his executive assistant or to any officer in the Department other than an assistant attorney general."[15] The ultimate result in *Giordano* was the suppression of the unlawfully intercepted communications and other evidence derived from those communications.[16]

The Class of Permissible State-Level Applicants Is Even Narrower

The provision governing who may authorize an application for a federal wiretap order includes a long list of officials.[17] In contrast, the corresponding list in the provision governing state-issued wiretap orders is relatively brief. That provision states that "[t]he principal prosecuting attorney of any state, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by [state statute] … may apply" for such an order.[18] The natural reading — that this language refers to a state attorney general or county district attorney (or their equivalents in states with different terminologies or subdivision structures) — is supported by the legislative history.[19]

Unlike subsection (1), subsection (2) includes no provision allowing either of the listed officials to delegate this power to any subordinates.[20] The result is that, under § 2516(2)'s plain text, an official must satisfy two requirements in order to make a valid wiretap application. He or she must be the "principal prosecuting attorney" of the respective state or subdivision, *and* must be authorized by state statute to apply for wiretap orders.[21] Unless both of those requirements are met, 18 U.S.C. §§ 2515-2516 would appear to require suppression, just as in *Giordano*.

State Statutes Vary in Their Fidelity to § 2516(2)

Some state wiretap statutes generally mirror § 2516(2)'s class of permissible applicants, or, as permitted by Congress's unidirectional preemption approach, narrow the class still further.[22] Others, however, expand the class of permissible applicants beyond that permitted by the federal statute. These statutes may purport to allow applications to be made by certain other designated officials, or by subordinate prosecutors — sometimes, but not always, pursuant to specific grants of authority from the principal prosecuting attorneys or other supervisory officials.[23] Similarly, some state statutes are facially consistent with § 2516(2) but have been judicially construed to permit wiretap applications by subordinate prosecutors.[24]

This latter class — state statutes that allow (or have been, or may be, interpreted to allow) wiretap applications by officials not listed in 18 U.S.C. § 2516(2) — is the primary focus of this article. As might be expected, and as confirmed by reported court decisions and experience (including the author's), officials in states with more permissive wiretap statutes often follow those statutes notwithstanding the stricter federal provisions.

When a state-issued wiretap order is applied for by an applicant who is permissible under state law but not under § 2516(2), what is the result? Based on the plain text of § 2516(2) and § 2515, the answer seems obvious — the resulting evidence, and all fruits derived from it, should be suppressed. In fact, as discussed below, courts have varied in their answers to this question.

Judicial Rulings on State Wiretap Applications Made By Subordinate Officials

1. Courts Enforcing § 2516(2)'s Requirements

One judicial approach is to follow § 2516(2)'s plain text, and hold that a state court wiretap order issued on the

application of a subordinate prosecutor is invalid notwithstanding any contrary provision of state law. This was the Kansas Supreme Court's approach in *State v. Farha*.[25] In that case, the Kansas wiretap statute in effect at the time allowed applications to be made by "[t]he attorney general, an assistant attorney general or a county attorney."[26] The wiretap order at issue had been applied for by an assistant attorney general.[27] The court held that "[i]nasmuch as [the Kansas statute] was more permissive than [§ 2516(2)] in that it purported to authorize an assistant attorney general to make application for a wiretap order, [the Kansas statute] must be held invalid as in conflict with the federal act."[28]

The federal Wiretap Act governs all wiretaps. A significant number of wiretap orders issued by state courts may be vulnerable to attack.

A similar approach was taken, albeit with a different ultimate result, in *United States v. Perez-Valencia*.[29] In that Ninth Circuit case, which arose out of California, the wiretap application was authorized by an "acting" district attorney, i.e., a subordinate prosecutor assuming the district attorney's duties during the latter's absence. This was permitted by the California statute at issue, which allowed authorizations by "a district attorney, or the person designated to act as district attorney in the district attorney's absence."[30]

The defendant argued that an "acting" district attorney was not within the class of officials who may authorize applications under § 2516(2), notwithstanding any state statute to the contrary. The court concluded that if the prosecutor at issue was truly the "acting" district attorney at the time in question, the application was appropriate.[31] It emphasized, however, that for this process to result in a valid wiretap the "acting" district attorney "must [have been] acting in the district attorney's absence not just as an assistant district attorney designated with the limited authority to apply for a wiretap order, but as an assistant district attorney duly designated to act for all purposes as the district attorney of the political subdivision in question."[32] Importantly, the court apparently considered this requirement to be grounded not only in the California wiretap statute, but also in § 2516(2).[33]

The court remanded the case to the district court for consideration of these issues.[34] After confirming that the subordinate attorney was a true "acting" district attorney for purposes of its analysis, the court concluded that the wiretap order had been valid and affirmed the conviction.[35]

Although contrary arguments could certainly be made — for example, based on the comparison between § 2516(1), which expressly accounts for "acting" officials, and § 2516(2), which does not — the Ninth Circuit in *Perez-Valencia* may indeed have correctly applied the federal statute. When the titular official is absent or incapacitated and has delegated the authority of the office to a subordinate, that subordinate at least arguably *is* the "principal prosecuting attorney" of the relevant jurisdiction.[36] Such a construction also avoids the arguably implausible result that a state's or county's wiretap regime would necessarily stop completely during the chief prosecutor's absence or incapacity.

At the same time, by declining to endorse more limited delegations — specifically, delegations of the authority *to authorize wiretap applications* — that construction is faithful to the chief objective of § 2516(2). That objective, as discussed above, is to ensure that wiretap decisions are made by visible, politically accountable officials and not delegated to underlings.

2. Courts Excusing Noncompliance With § 2516(2)

Other courts have concluded that state wiretap statutes can validly allow (or be construed to allow) subordinate prosecutors to apply for wiretap orders, thus effectively reading out of § 2516(2) the designation of specific officials.

The rationales set forth by these courts have not been particularly persuasive. These decisions typically rely on some version of a "substantial compliance" analysis, concluding that the statutes at issue reasonably satisfy Congress's overall objectives.[37] The obvious flaw in this approach is that the only conceivable purpose for the "principal prosecuting attorney" requirement is to prevent this very result, i.e., subordinate prosecutors applying for wiretap orders.

Every prosecuting agency consists of a head official with deputies, assistants, or other subordinates. Presumably (and often by express state law), all of these subordinates are exercising powers delegated to them by these top officials. Accordingly, had Congress intended that wiretap applications could be made by chief prosecutors *or anyone exercising powers delegated by chief prosecutors*, there would have been no need to specify any officials in § 2516(2). The only logical purpose of specifying "principal prosecuting attorney[s]" would be to limit wiretap-related authority to those officials *and no one else*. It can hardly be "substantial compliance" to follow a procedure that Congress has clearly and deliberately excluded from its zone of permissibility.

This is true even if the designee is a high-ranking subordinate, as opposed to a rank-and-file assistant or deputy. Again, Congress was well aware that such subordinates tend to exist in prosecutors' offices, and in § 2516(1) permitted certain such subordinates to apply for federal wiretaps. The absence of any corresponding language in the immediately following provision addressing state wiretaps indicates that Congress deliberately chose not to allow such authority to be exercised by state-level subordinates.

Some of the courts adopting this approach have focused on an admittedly ambiguous sentence within the legislative history. The Senate Report quoted in *Giordano*, after describing the "principal prosecuting authority" provisions, goes on to state the following: "The issue of delegation by that officer would be a question of state law."[38] Although this language might on its face be read as supporting delegation of wiretap-related authority to subordinate prosecutors, that interpretation appears implausible. First, as noted above, it would essentially render superfluous the "principal prosecuting attorney" language in § 2516(2). In addition, the text surrounding the quoted sentence includes repeated indications of Congress's intent to permit *only* "principal prosecuting attorneys" to submit or authorize wiretap applications.[39]

3. Intermediate Approaches

Other courts have taken intermediate approaches. Some of these courts have held that the specific facts surrounding a particular wiretap application must be examined to determine whether, if the application was made by a subordinate prosecutor, the principal

prosecuting attorney nonetheless had sufficient involvement to satisfy the text (or at least the intent) of § 2516(2).

This was the Massachusetts Supreme Court's approach in *Commonwealth v. Vitello*.[40] The Massachusetts statute construed in that case permitted wiretap applications to be made by "[t]he attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney."[41] In light of § 2516(2), the court construed the Massachusetts statute to require the attorney general's or district attorney's personal involvement with each application for a wiretap order, even when the application itself was to be made by a subordinate.[42]

Other courts, in upholding wiretap orders applied for or authorized by subordinate prosecutors, have similarly noted the principal prosecuting attorney's personal involvement in the application process.[43] Such individualized involvement differs significantly from a broad delegation of authority purporting to enable subordinate prosecutors to apply for wiretap orders in general.[44]

Some of these cases highlight a curious difference in wording between § 2516(1) and § 2516(2). Subsection (1), dealing with federal applications, lists the officials who may "authorize an application" for a wiretap order. Subsection (2), addressing state applications, identifies officials who may "apply for" an order. This difference may have been intended to add another layer of constraints to state wiretapping, by forcing chief prosecutors to sign or submit all applications personally instead of permitting the type of "authorization" endorsed in cases such as *Vitello*.[45] Some courts, however, have declined to find a legally significant difference between "authorize" and "apply for" in this context.[46]

4. Summary of Available Arguments

As detailed above, there is wide diversity in the language of state statutes and in the level of strictness applied by reviewing courts. With that in mind, potential arguments — which, again, are generally available in both state and federal courts — include the following:

- ❖ If the state statute conflicts with § 2516(2) by allowing applications by anyone other than a "principal prosecuting attorney," any wiretap order issued on the application of a subordinate prosecutor should be invalid under federal law, even if valid under state law.

- ❖ When a state statute appears to comply with § 2516(2) but is subject to interpretation — as to, for example, whether "district attorney" includes deputy or assistant district attorneys — a court should interpret the state statute narrowly to harmonize it with the federal provision.[47] Regardless, even if the state provision is interpreted broadly to include subordinate prosecutors, a wiretap order issued on the application of a subordinate prosecutor should still be invalid under federal law.

- ❖ In states whose statutes clearly comply with federal law, noncompliance with the "principal prosecuting attorney" requirement creates a federal basis for suppression along with any available state law remedy.

- ❖ If a state's appellate courts have concluded that despite § 2516(2) subordinate prosecutors may apply for wiretap orders if authorized by state statute, the pertinent decisions may reference facts relating to the chief prosecutors' personal involvement in the particular wiretap applications at issue. If so, an evidentiary record demonstrating the lack of such involvement may provide a basis for distinguishing the unfavorable precedent.

- ❖ Similarly, the permissibility of a particular applicant may depend on certain facts. For example, if the applicant was purportedly an "acting" district attorney, it may be necessary to develop an evidentiary record regarding whether the titular district attorney was in fact absent or incapacitated, and whether the purported "acting" district attorney was in fact assigned all (or essentially all) of the district attorney's powers during the period in question.

- ❖ Even if a state's appellate courts have definitively rejected the arguments set forth above, those arguments may still be available in federal prosecutions and may, even in state cases, be worth preserving in case the U.S. Supreme Court ever addresses this issue.

Applicability of the Good Faith Exception

If a court concludes that a wiretap order was invalid because the applicant was not a principal prosecuting attorney, the result appears clear: "no part of the contents of [any intercepted] communication and no evidence derived therefrom may be received in evidence" in any proceeding.[48] The government will likely argue, however, that even if a wiretap order was invalid under § 2516(2), the resulting evidence can be salvaged through some version of a "good faith" exception. The availability of that exception in this context is far from clear.

A threshold question is whether a good faith exception applies in the wiretap context at all. There is at present a circuit split on this issue. The Eighth and Eleventh Circuits have held that a good faith exception does apply to suppression under § 2515, for essentially the same reasons as those underlying the good faith exception in Fourth Amendment cases.[49]

The Sixth Circuit, by contrast, has held that there is no good faith exception in the wiretap context.[50] That court's decision rested on several factors, including the legislative history of the wiretap statute and the contrast between the explicit, congressionally mandated statutory exclusion remedy in the wiretap statute and the judicially crafted good faith exception in the Fourth Amendment context.[51]

Even if some version of a good faith exception does apply in this context, it may not save a wiretap that is invalid because the applicant was an impermissible applicant under § 2516(2). The good faith exception was designed largely to extend leniency to law enforcement officers, not government attorneys.[52] And when it applies, it is often in the context of complex, highly fact-dependent determinations such as the sufficiency of a probable cause showing.

A prosecutor applying for a wiretap order is situated quite differently from an officer applying for and executing a search warrant. Of course, the prosecutor is a trained and licensed attorney who should be presumed to know the law — at least the core statute governing the particular, highly sensitive procedure that the prosecutor is setting in motion. Section 2516(2) unambiguously applies to, and sets forth minimum requirements for, wiretap applications in state courts. One such requirement is that the applicant be the principal prosecuting attorney of the relevant jurisdiction,

regardless of anything to the contrary in the state statute. If a subordinate prosecutor nonetheless makes an application, he or she is at best taking a calculated risk that a reviewing court will interpret § 2516(2) broadly to permit such an application. This does not appear to be the type of objectively reasonable reliance at the heart of the good faith exception, even if that exception is held to be available in the wiretap context.

Conclusion

In light of § 2516(2)'s unambiguous text, it is perhaps surprising that so many states have enacted wiretap statutes broadening the class of permissible applicants beyond "principal prosecuting attorneys." Having done so, however, these states have left the resulting wiretap orders vulnerable to attack. Because state and local officials can be expected to rely on their states' wiretap statutes, a large number of state-issued wiretap orders across the country may well be subject to some version of the challenge discussed above.

Notes

1. *Zagarino v. W.*, 422 F. Supp. 812, 817 (E.D.N.Y. 1976).

2. *See* 18 U.S.C. § 2510 (defining terms "intercept,""wire communication,""oral communication,""aural transfer," and other terms used throughout the Wiretap Act). The focus of this article is on the use of wiretaps to intercept telephonic communications, but the analysis is equally applicable to the interception of "oral communications" as defined in § 2510(2). Although some of the provisions at issue also refer to "electronic communications" (defined at 18 U.S.C. § 2510(12)), such communications are not encompassed within the statutory exclusion remedies discussed below. *See* 18 U.S.C. § 2515 (providing for suppression of improperly intercepted "wire or oral communication[s]"); *id.* § 2518(10)(a) (similar); *id.* § 2518(10)(c) ("The remedies and sanctions described in this chapter with respect to the interception of electronic communications [which do not include suppression] are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications."); *United States v. Steiger*, 318 F.3d 1039, 1052 (11th Cir. 2003) ("The omission of 'electronic communications' from Section 2515 is dispositive. The Wiretap Act does not provide a suppression remedy for electronic communications unlawfully acquired under the Act.").

3. *See* 18 U.S.C. § 2516(2).

4. *See also* 18 U.S.C. § 2518(10)(a) (setting forth the right of an "aggrieved person" to "move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that — (i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval").

5. *See, e.g.*, *Com. v. Vitello*, 327 N.E.2d 819, 835 (Mass. 1975).

6. *See, e.g.*, *United States v. Butz*, 982 F.2d 1378, 1382 (9th Cir. 1993) ("The other circuits to consider this issue have concluded that Section 2516(2) prohibits introduction of electronic surveillance evidence in federal court where state standards are violated [collecting cases]. We agree."). This is in contrast to the more typical rule that evidence obtained in violation of state law is not subject to exclusion in federal court. *See, e.g.*, *United States v. Cormier*, 220 F.3d 1103, 1111 (9th Cir. 2000) ("The general rule, therefore, is that evidence will only be excluded in federal court when it violates federal protections, such as those contained in the Fourth Amendment, and not in cases where it is tainted solely under state law."). Of course, because of the requirements set forth in 18 U.S.C. § 2516(2), purportedly state-authorized wiretap evidence obtained in violation of state law *is*, by definition, also obtained in violation of federal law.

7. *See, e.g.*, S. Rep. No. 1097, 90th Congress, 2d Sess., 2187 ("The state statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that states would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation."), *quoted in State v. Farha*, 544 P.2d 341, 347 (Kan. 1975).

8. *See, e.g.*, *Farha*, 544 P.2d at 348 ("If a state wiretap statute is more permissive than the federal act, any wiretap authorized thereunder is fatally defective and the evidence thereby obtained is inadmissible under 18 U.S.C. § 2515.").

9. *See, e.g.*, *United States v. Giordano*, 416 U.S. 505, 520 (noting that the legislative history "not only recognizes that the authority to apply for court orders is to be narrowly confined but also declares that it is to be limited to those responsive to the political process"); *State v. Daniels*, 389 So. 2d 631, 636 (Fla. 1980) ("Congress intended such authority [to apply for wiretap orders] to be limited to a narrow class of officials to ensure that such decisions come from a centralized, politically responsive source.").

10. 416 U.S. 505 (1974).

11. *Id.* at 508 (quoting 18 U.S.C. § 2516(1)).

12. *Id.* at 515-16 (emphasis added).

13. *Id.* at 516.

14. *See id.* at 516-22.

15. *Id.* at 523.

16. *Id.* at 529-33.

17. *See* 18 U.S.C. § 2516(1) ("The attorney general, deputy attorney general, associate attorney general, or any assistant attorney general, any acting assistant attorney general, or any deputy assistant attorney general or acting deputy assistant attorney general in the Criminal Division or National Security Division specially designated by the attorney general, may authorize an application. …") (footnoted omitted).

18. 18 U.S.C. § 2516(2).

19. *See* S. Rep. No. 1097, 90th Cong., 2d Sess., 98 (1968) ("In most states, the principal prosecuting attorney of the state would be the attorney general. … In most states, the principal prosecuting attorney at the next political level of a state, usually the county, would be the district attorney, state's attorney, or county solicitor."), *quoted in Giordano*, 416 U.S. at 522 n.11.

20. Notably, 18 U.S.C. § 2518(7), which permits emergency interceptions under certain circumstances, allows such interceptions to be initiated by "any investigative or law enforcement officer, specially designated by … the principal prosecuting attorney of any state or subdivision thereof acting pursuant to a statute of that state." Like the "specially designated by" language in § 2516(1), this demonstrates Congress's awareness of the concept of such delegation and its deliberate decision to authorize it in some situations but not in others.

21. Conceivably, the "if such attorney is authorized" language could be read to modify only "principal prosecuting attorney of [a] political subdivision," such that the federal law would not require that the "principal prosecuting attorney of [a] state" be specifically authorized by state statute to apply for wiretap orders. This is largely academic, as most state wiretap statutes list attorneys general as permissible applicants.

22. The analysis of individual states' wiretap statutes is complicated, and in some instances depends on particular states' interpretations of certain statutory terms. For example, some states may, by statutory definition or judicial construction, interpret terms such as "state attorney" or "district attorney" to include not only the chief officials but certain subordinates as well. A detailed analysis of each state's statute, properly accounting for such interpretive complexities, is beyond the scope of this article. With that caveat, state statutes that on their faces appear to permit a class of applicants as narrow or narrower than that in § 2516(2) include the following: Colo. Rev. Stat. 16-15-102(1)(a); Conn. Gen. Stat. § 54-41(b); Fla. Stat. 934.07(1); Ga. Code. Ann. 16-11-64; Haw. Rev. Stat. § 803-44; Idaho Code Ann. § 18-6706; Ind. Code Ann. § 35-33.5-2-1; Iowa Code Ann. § 808B.3; Kan. Stat. Ann. § 22-2515; Md. Code Ann., Cts. & Jud. Proc. § 10-406; Minn. Stat. Ann. 626A.05; Mo. Ann. Stat. § 542.404; Neb. Rev. Stat. § 86-291; Nev. Rev. Stat. Ann. § 179.460; N.J. Stat. Ann. § 2A:156A-8; N.M. Stat. Ann. § 30-12-2; Okla. Stat. Ann. tit. 13, § 176.7; 18 Pa. Cons. Stat. Ann. § 5708; Tenn. Code Ann. § 40-6-305; Wash. Rev. Code Ann. § 9.73.040; Wis. Stat. Ann. § 968.28; Wyo. Stat. Ann. § 7-3-705. This list includes statutes adding "acting" chief prosecutors to the list; this issue is discussed below.

23. Subject to the caveat noted in endnote 22, *see, e.g.*, Alaska Stat. § 12.37.010; Ariz. Rev. Stat. Ann. § 13-3010; Cal. Penal Code § 629.50; Mass. Gen. Laws Ann. ch. 272, § 99; N.H. Rev. Stat. Ann. § 570-A:7; N.Y. Crim. Proc. Law § 700.05; N.C. Gen. Stat. Ann. § 15A-291; N.D. Cen. Code Ann. § 29-29.2-02; Ohio Rev. Code Ann. § 2933.53; Or. Rev. Stat. § 133.724; R.I. Gen. Laws Ann. § 12-5.1-2; S.C. Code Ann. § 17-30-70; S.D. Codified Laws § 23A-35A-3; Utah Code Ann. § 77-23a-8; Va. Code Ann. § 19.2-66 (but see *id.* § 19.2-68); W. Va. Code Ann. 62-1D-8.

24. *See, e.g.*, *United States v. Davis*, CR.A. 01-282, 2003 WL 548910 (E.D. La. Feb. 25, 2003) (construing La. Rev. Stat. Ann. § 15:1308(A)); *State v. Marine*, 464 A.2d 872, 876-78 (Del. 1983) (construing 11 Del. C. § 1336(g)).

25. 544 P.2d 341 (Kan. 1975).

26. *Id.* at 348 (quoting K.S.A. 1971 Supp. 22-2513).

27. *Id.*

28. *Id.* at 350. The Florida Supreme Court reached a similar conclusion in *State v. Daniels*, 389 So. 2d 631 (Fla. 1980). In that case, the government argued that the Florida provision allowing applications to be authorized by "any state attorney" should be construed to permit authorizations by "assistant state attorneys," who were generally authorized under Florida law to exercise the state attorneys' powers. *See id.* at 632-34. The court held that, in light of § 2516, the Florida statute could not be construed "to empower assistant state attorneys to authorize applications for electronic eavesdropping orders." *Id.* at 636. This was not merely an issue of construing the state statute; the court made clear that if the legislature had intended so to authorize assistant state's attorneys, such authorization would have been invalid. *See id.* ("If the legislature were to include all assistant state attorneys in the class of officials who may authorize electronic surveillance applications, such inclusion would conflict with the federal standard and would be invalid.").

29. 744 F.3d 600 (9th Cir. 2014); *see also United States v. Perez-Valencia*, 727 F.3d 852 (9th Cir. 2013) (earlier opinion addressing the same issue).

30. *Perez-Valencia*, 727 F.3d at 854 (quoting Cal. Penal Code § 629.50).

31. *See id.* at 855.

32. *Id.* In a later opinion in the same case, the Ninth Circuit clarified that the titular district attorney's retention of certain powers, such as personnel decisions or the determinations of whether to seek the death penalty, would not prevent a conclusion that the "acting" district attorney was qualified to authorize applications for purposes of § 2516(2). *See Perez-Valencia*, 744 F.3d at 603-04.

33. *See* 727 F.3d at 855 ("[W]e require answers to the following questions. In DA Ramos's absence, was ADA Christy duly acting for all purposes as the 'principal prosecuting attorney' of San Bernardino County? 18 U.S.C. § 2516(2); Cal. Penal Code § 629.50. Specifically, did ADA Christy have all the powers of an acting district attorney or did he merely possess the limited authority to apply for state wiretaps?") (footnote omitted).

34. 727 F.3d at 855.

35. 744 F.3d 600.

36. This assumes that an "acting" chief prosecutor is a permissible applicant for purposes of the *state* statute. *See* 18 U.S.C. § 2516(2) (including the qualifying language "if such attorney is authorized by a [state] statute").

37. *See, e.g.*, *People v. Vespucci*, 553 N.E.2d 965, 967-69 (N.Y. 1990) (concluding that the New York wiretap statute, which permitted applications by "the deputy attorney general in charge of the organized crime task force," sufficiently satisfied the congressional concerns embodied in § 2516(2)); *State v. Verdugo*, 883 P.2d 417, 420 (Ariz. Ct. App. 1993) (concluding that Arizona's statute, which allowed wiretap applications by designated subordinate prosecutors, "substantially complies with the federal standard"); *Marine*, 464 A.2d at 877-78 (concluding that the defendant's proposed "narrow interpretation," which would prohibit applications by deputy prosecutors, "would be going beyond the purpose of the provision, the centralization of authorization authority in the attorney general, and defeating the obvious intent of the legislation to permit authorized electronic surveillance under reasonably controlled circumstances"); *Davis*, 2003 WL 548910 (E.D. La. Feb. 25, 2003) (similar).

38. S. Rep. No. 1097, 90th Cong., 2d Sess., 98 (1968); *see also Davis*, 2003 WL 548910 at *4 (concluding that "[t]his statement indicates that Congress's goal of centralization was not intended to limit the states' power to delegate the principal pros-

ecuting officer's authority").

39. *See* S. Rep. No. 1097, 90th Cong., 2d Sess., 98 (1968) ("The intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer of the state. … Where no such office exists, policymaking would not be possible on a statewide basis; it would have to move down to the next level of government. In most states, the principal prosecuting attorney at the next political level of a state, usually the county, would be the district attorney, state's attorney, or county solicitor. The intent … is to centralize area-wide law enforcement policy in him. … Where there are both an attorney general and a district attorney, either could authorize applications, the attorney general anywhere in the state and the district attorney anywhere in his county. The proposed provision does not envision a further breakdown.").

40. 327 N.E.2d 819 (Mass. 1975).

41. *Id.* at 837 (quoting Mass. G.L. c. 272, s 99F1).

42. *See id.* at 838-39 ("We construe the provision for special designation to mean that the attorney general or the district attorney is to determine whether a particular proposed use of electronic surveillance would be consistent with the over-all policy in respect to monitoring followed in his jurisdiction, and to this end the respective attorney must review and authorize each such application in writing.") (footnote omitted). In a section of its opinion providing "guidelines" intended to "forestall" future "difficulties," the court included specific guidance for situations in which subordinate prosecutors applied for wiretap orders. In those cases, the court stated, "the attorney general or the district attorney, as the case may be, should give full and fair review of the grounds asserted for seeking a wiretap warrant," and "[s]pecial designation to the assistant attorneys general and assistant district attorneys must be on a case-by-case basis only," with "[a]uthority to apply for each wiretap warrant … specifically granted in writing by the attorney general or the district attorney." *Id.* at 825; *see also United States v. Smith*, 726 F.2d 852 (1st Cir. 1984) (*en banc*) (concluding that "the Massachusetts statute, supplemented by the procedures required by the Massachusetts Supreme Judicial Court in [*Vitello*], does not conflict with or diminish federal requirements and is thus not facially invalid").

43. *See, e.g., United States v. Tortorello*, 480 F.2d 764, 776-78 (2d Cir. 1973) (wiretap valid where district attorney was personally involved with the applications at issue, although a subordinate appeared before the authorizing judge); *Marine*, 464 A.2d at 878 (noting that although the wiretap application was submitted by a subordinate, "[t]here was actual, personal authorization by the attorney general for the wiretap," and that the attorney general, who "was out of state at the time of authorization," had "discussed the matter in a long distance telephone conversation with his deputy" and "ordered the deputy to submit [the] wiretap application"); *State v. Peterson*, 841 P.2d 21, 24 (Utah Ct. App. 1992) ("Here, the Utah county attorney prepared a document specifically authorizing Deputy County Attorney Taylor to apply for the wiretap order, thus fulfilling the requirements of both the federal and state acts. Because the facts of this case do not present a conflict between the federal and state acts, we need not consider the effects of any potential conflict."); *cf. Smith*, 726 F.2d at 855 ("Because of the particular circumstances relating to the authorizations of the wiretaps in these cases and because of the failure to follow a procedure specifically recommended in *Vitello* we remand to the district court for further findings.").

44. As noted above, the latter practice was expressly disapproved in *Perez-Valencia*. *See* 727 F.3d at 855 (holding that for an "acting" district attorney to be a permissible wiretap applicant, that attorney "must be acting in the district attorney's absence not just as an assistant district attorney designated with the limited authority to apply for a wiretap order, but as an assistant district attorney duly designated to act for all purposes as the district attorney of the political subdivision in question"); *cf. Smith*, 726 F.2d at 858 (endorsing "detailed review by a district attorney of every application for a proposed use of electronic surveillance on a case-by-case basis").

45. *See Farha*, 544 P.2d at 403-04 (emphasizing that under § 2516(2) the principal prosecuting attorney must actually apply for, not merely authorize the application for, a wiretap order).

46. *See, e.g., United States v. Smith*, 726 F.2d 852, 858 (1st Cir. 1984) (*en banc*) ("The Senate report relating to § 2515(2) contains unmistakable clues to the meaning of 'apply,' indicating its equivalence with 'authorize.'"); *United States v. Tortorello*, 480 F.2d 764, 777 n.9 (2d Cir. 1973) (similar).

47. *See, e.g., O'Hara v. People*, 271 P.3d 503, 509-10 & n.3 (Colo. 2012) (citing § 2516(2) in concluding that "district attorney" in the Colorado wiretap statute means the elected district attorney and does not encompass deputies); *Daniels*, 389 So. 2d at 636 ("Because assistant state attorneys are not specifically mentioned [in the Florida wiretap statute], the national standard prevents us from construing the statute to say that the legislature meant to include them."); *State v. Cocuzza*, 301 A.2d 204, 208 (N.J. Cty. Ct. 1973) ("In light of the congressional concern for continued 'political' control over the persons authorized to invoke wiretaps, as a matter of policy, the New Jersey statute cannot be construed to allow such delegation of authority to an assistant.").

48. 18 U.S.C. § 2515.

49. *See United States v. Moore*, 41 F.3d 370 (8th Cir. 1994); *United States v. Malekzadeh*, 855 F.2d 1492 (11th Cir. 1988).

50. *See United States v. Rice*, 478 F.3d 704, 712-14 (6th Cir. 2007).

51. *See id.*; *see also United States v. Spadaccino*, 800 F.2d 292, 296 (2d Cir. 1986) (concluding, for similar reasons, that no good faith exception applies to suppression motions under a Connecticut wiretap statute). In *Scott v. United States*, 436 U.S. 128 (1978), the Supreme Court described the legislative history of the Wiretap Act as "declar[ing] that § 2515 was not intended 'generally to press the scope of the suppression role beyond present search and seizure law'" (quoting S. Rep. No. 1097, 90th Cong., 2d Sess., 96 (1968)). *Scott*, which predated *Leon* by several years, obviously did not involve the good faith exception and does not appear to cast much light on the issue of whether that exception applies to challenges under the Wiretap Act. *Cf. Giordano*, 416 U.S. at 524 (explaining, albeit also pre-*Leon*, that "[t]he issue does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III").

52. *See, e.g., People v. Jackson*, 129 Cal. App. 4th 129, 153-60 (2005) (discussing this distinction). ■

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