No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MAYEL PEREZ-VALENCIA, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, through counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed in forma pauperis. Counsel was appointed in the court of appeals under the Criminal Justice Act, 18 U.S.C. § 3006A(b). This motion is brought pursuant to Rule 39.1 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

June ____, 2014

_____
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MAYEL PEREZ-VALENCIA, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

ON WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

A. Whether This Court Should Resolve a Significant Split in the Lower Courts Over Whether and/or When 18 U.S.C. § 2516(2)'s Limitation of State Wiretap Applicants to "Principal Prosecuting Attorneys" Allows an Application By a Mere Assistant District Attorney.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Mayel Perez-Valencia petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

I.
OPINIONS BELOW

The two published opinions of the United States Court of Appeals for the Ninth Circuit, the first remanding for further findings, and the second affirming the district court's denial of Petitioner's motion to suppress evidence, are attached as Appendix 1 and Appendix 2. The district court's initial oral denial of the motion and its further findings and reaffirmation of that ruling on remand are attached as Appendix 3 and Appendix 4.

II.
JURISDICTION

The judgment of the United States Court of Appeals for the Ninth

Circuit was entered on March 3, 2013, App. A010, and a timely petition for rehearing en banc was denied on April 18, 2014, App. A029. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISION INVOLVED

18 U.S.C. § 2516 provides in pertinent part:

> **(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 to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of–
>
> . . .
>
> **(e)** any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;
>
> . . .
>
> **(2)** The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law

> enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

IV.

STATEMENT OF THE CASE

A. JURISDICTION IN THE COURTS BELOW.

The district court had jurisdiction under 18 U.S.C. § 3231. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

B. FACTS MATERIAL TO CONSIDERATION OF THE QUESTION PRESENTED.

Petitioner came to the attention of law enforcement authorities in a wiretap approved by the San Bernardino County Superior Court which was aimed at one Patricia Vargas. App. A045. Several calls in early April between Petitioner – using the name "Miguel" – and Ms. Vargas identified both Petitioner and his phone and served as the basis for a warrant for a federal wiretap on Petitioner's phone. App. A045. Conversations monitored under that federal wiretap were used to obtain search warrants in May which led to

the discovery of a large quantity of methamphetamine attributed to Petitioner. App. A045. This in turn led to further wiretaps and an additional seizure of methamphetamine from Petitioner in October. *See* App. A045-46. Petitioner was eventually arrested and charged in a multi-defendant indictment with conspiracy to distribute and possession with intent to distribute methamphetamine. App. A043.

The application for the original state court wiretap was made not by the San Bernardino County District Attorney himself but by an assistant district attorney who described himself as "the person designated to act in [the District Attorney's] absence pursuant to Penal Code section 629.50(a)." App. A046-47. The referenced statute, California Penal Code § 629.50(a), is a state wiretap statute which authorizes "a district attorney, or the person designated to act as the district attorney in the district attorney's absence" to apply for a wiretap. *Id.* The assistant district attorney who submitted this application was one of three whom a July 1, 2009 District Attorney memo "designate[d] . . . to act in [the District Attorney's] absence." App. A047. The assistant had submitted the application in this instance because the District Attorney himself had been out of the office for a three-day period from March 29, 2010 through March 31, 2010, "attending to a member of [his] immediate family who had undergone surgery at a local hospital for a serious health condition." App. A047.

After Petitioner was charged, the defense filed motions to suppress evidence. One argument made in the motions was that the state wiretap application by an *assistant* district attorney violated the provision in 18 U.S.C. § 2516(2) that requires state wiretap applications to be made by "*[t]he*

principal prosecuting attorney" of the state or "any political subdivision thereof," *supra* p. 2 (emphasis added). The district court rejected this argument and denied the motion, App. A021, after which Petitioner entered a conditional guilty plea and appealed, App. A044.

The court of appeals also rejected Petitioner's arguments, however, at least in part. It chose to follow a Second Circuit opinion, *United States v. Fury*, 554 F.2d 522 (2d Cir. 1977), which relied largely on policy concerns and legislative history.[1] *See* App. A007. That opinion first reasoned that "Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the officials specifically named in § 2516(2)." *Fury*, 554 F.2d at 527 n.4 (quoting *State v. Travis*, 308 A.2d 78, 82 (N.J. Super. Ct. Law Div. 1973), *aff'd*, 336 A.2d 489 (N.J. Super. Ct. App. Div. 1975)). The opinion then looked to a Senate committee report which stated, somewhat ambiguously, that "the issue of delegation by (the Attorney General or District Attorney) would be a question of state law." *Fury*, 554 F.2d at 527 n.4 (quoting S. Rep. No. 90-1097, at 70 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2187 (hereinafter "Senate Report")).

The court of appeals in the present case, in its words, "agreed with our

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[1] Petitioner had acknowledged *Fury* in his briefing in both the district court and court of appeals, but noted it conflicted with the case of *United States v. Smith*, 726 F.2d 852 (1st Cir. 1984), and argued that *Smith* was the better reasoned opinion. *E.g.*, App. A057-64. *Smith* is further discussed *infra* pp. 9-11.

colleagues in the Second Circuit." App. A007 (citing and quoting *Fury*).[2] The court then held that an assistant district attorney could apply for a wiretap in some circumstances. App. A007. The court did limit those circumstances, however, apparently based on § 2516(2)'s use of the word, "the":

> We hold also, however, that "*the*" attorney designated to act in the district attorney's absence . . . 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.

App. A007-08 (emphasis in original). The panel then remanded for further findings on, inter alia, whether the assistant district attorney who applied for the wiretap in the present case "was . . . duly acting *for all purposes* as *the* 'principal prosecuting attorney'" and whether he "ha[d] all the powers of an acting district attorney." App. A008 (emphasis in original).

On remand, the district court made the supplemental findings requested. First, it found, in response to another of the panel's questions, that power to act in the District Attorney's absence was not divided among the three assistants listed in the District Attorney's memo. App. A025. Second, the district court found that the assistant district attorney had authority to exercise many, but not all, of the District Attorney's powers. Specifically, it found:

> During the absence of the DA, [the assistant DA] is fully empowered to act as the DA for any matters that might arise in the day to day operations of the office, including, but not limited to, making an application for a wiretap. There are certain policy and procedural decisions that can await the return of the DA that are not delegated by DA Ramos and are not made by the acting DA. Those

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[2] The court did not address the views of its First Circuit colleagues in the *Smith* case noted *supra* p. 5 n.1.

> decisions, which include whether to seek the death penalty in a capital case and personnel decisions in which an employee is to be terminated, are not of an exigent nature and are personally made by DA Ramos upon his return to the office.

App. A026.

After receiving the supplemental findings, the court of appeals ordered the parties to file supplemental briefs. Petitioner filed a supplemental brief arguing that the assistant district attorney had not been "designated to act for *all* purposes as the district attorney," because he did not have authority over matters which could "await the return of the DA" and "are not of an exigent nature." App. A102-07. The government argued that it was sufficient that the assistant district attorney had been designated to exercise all of the powers the District Attorney chose to delegate when he was gone. App. A123-27.

The court of appeals then issued a second opinion in which it agreed with the government and disagreed with Petitioner. In so doing, it modified the requirement established in its first opinion.

> Now that we have the benefit of a complete record, we find it appropriate to qualify our use in our first opinion of the word "all." We now use that word to refer to the routine standard daily functions of the prosecutor's office, which does not include administrative matters involving budgets, personnel, or even the unique penalty decision in a capital case.

App. A108.

V.

REASONS FOR GRANTING THE WRIT

This case presents the issue of how to interpret and apply "the principal

prosecuting attorney" language in 18 U.S.C. § 2516(2). First, there is the plain language to consider, which includes both the word, "the," suggesting a single person, and, "principal," which contrasts with, for example, "assistant." Second, there is another contrast to consider, namely, the contrast between the narrow language of § 2516(2) and the broader language in the first subsection of § 2516 governing federal wiretaps, which allows applications by the Attorney General *and* "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." 18 U.S.C. § 2516(1). *Supra* p. 2. Third, there is the need to consider a concern Congress demonstrated for limiting the authority to apply for wiretaps "to those responsive to the political process." *United States v. Giordano*, 416 U.S. 505, 520 (1974) (quoting Senate Report, *supra* p. 5, at 69). On the other side of the coin, there is the need to decide what, if any, weight to give to the practical considerations which drove the Second Circuit's decision in *Fury* and the Ninth Circuit's decision here.

The writ should be granted for three reasons. First, there is a split in the lower courts which has generated no less than five different approaches to applying § 2516(2). Second, the question presented is an important one, because multiple states have expanded state wiretap authority, and wiretaps are one of the most fundamental of intrusions on personal privacy. Third, the Second Circuit's decision in *Fury* and the Ninth Circuit's decision in the present case, in their focus on legislative history and policy concerns in lieu of the statutory language, are fundamentally inconsistent with the correct

approach to statutory construction.

A. THE LOWER COURTS ARE IN DISARRAY OVER WHETHER AND IN WHAT CIRCUMSTANCES AN ASSISTANT DISTRICT ATTORNEY OR ASSISTANT ATTORNEY GENERAL CAN APPLY FOR A WIRETAP UNDER 18 U.S.C. § 2516(2).

The first reason to grant the writ in this case is because the lower courts are not just split, but in complete disarray, over whether and in what circumstances an assistant district attorney or assistant attorney general can apply for a wiretap under 18 U.S.C. § 2516(2). The lower courts have taken at least five different approaches, of varying restrictiveness.

1. Absolute Bar on Applications by Assistants.

Initially, there is the most restrictive approach, taken by the First Circuit and Massachusetts courts – in *United States v. Smith*, 726 F.2d 852 (1st Cir. 1984), and *Commonwealth v. Vitello*, 327 N.E.2d 819 (Mass. 1975). The Massachusetts statute considered in those cases authorized an "assistant district attorney specially designated by the district attorney" to apply for wiretaps. *Smith*, 726 F.2d at 857 (quoting Mass. Gen. Laws, ch. 272, § 99 F(1)); *Vitello*, 327 N.E.2d at 837 (same). The defendant in *Smith* made the same argument being made by Petitioner here – that the state statute did not comply with federal law because "the federal law recognizes only one applicant, the district attorney[, but] the state statute would allow a second

applicant, as here, the assistant district attorney." *Smith*, 726 F.2d at 857.

The First Circuit responded not by flatly rejecting this argument, but by acknowledging its "formidable force." The court explained:

> If this were the complete statutory framework, appellants' argument would have formidable force: we would be confronting a state statute that gave an assistant district attorney power equal to that of a district attorney in initiating a request for court authority to intercept a telephonic communication. Such an expansion would run counter both to § 2516(2), reposing application responsibility in one state official, and to the ample legislative history underscoring the need for centralization of policy relating to electronic surveillance in one top prosecutor at county and state levels. *See* [Senate Report, *supra* p. 5, at 70].

Smith, 726 F.2d at 857.

The court then explained the "If this were the complete statutory framework" caveat with which it began its explanation, however. It noted that the Massachusetts Supreme Court had adopted a narrowing construction of the statute in *Vitello* to bring it into compliance with § 2516(2). *See Smith*, 726 F.2d at 857; *Vitello*, 327 N.E.2d at 838-39. Specifically, the state court had construed the statute to require (1) that the assistant district attorney "bring the matter for examination before his senior officer, the actual district attorney"; (2) that the district attorney make a determination of whether to seek the wiretap and do so only after a "full examination . . . of the application"; and (3) that the district attorney "authorize each such application in writing." *Smith*, 726 F.2d at 857 (quoting *Vitello*, 327 N.E.2d at 838-39 & nn.16, 17).

This construction, the First Circuit held, brought the statute into compliance with the federal law. *See Smith*, 726 F.2d at 858-59. And the saving construction was clearly critical to the First Circuit's decision, for it did

not simply affirm. It remanded the case to make sure the conditions the state supreme court had read into the statute were satisfied in the case at bar. *See Smith*, 726 F.2d at 859-60.

Several state court opinions suggest the same view as *Smith*, by emphasizing the concern for centralization in a politically responsive official that was expressed in *Smith* and also by this Court in *United States v. Giordano*, *see supra* p. 8; *infra* pp. 21-22. The Kansas Supreme Court has rejected a statute permitting delegation to any and all assistants, because "legislative assemblies, including the Congress, have carefully restricted the right to apply for the use of electronic bugging devices to a very select coterie of public officers," *State v. Farha*, 544 P.2d 341, 349 (Kan. 1975), and because of the "considerably narrower" language of § 2516(2), for state wiretaps, compared to § 2516(1), for federal wiretaps,[3] *State v. Bruce*, 287 P.3d 919, 922 (Kan. 2012).[4] The Maryland courts have similarly pointed to the contrasting language of § 2516(2) and § 2516(1), *see Poore v. State*, 384 A.2d 103, 111-12 (Md. App. 1978), and rejected delegation to a prosecuting official other than the Attorney General and/or principal county prosecuting

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[3] This difference is noted *supra* p. 8 and discussed in more depth *infra* pp. 23-24.

[4] Consistent with the discussion of the other conflicting standards *infra* pp. 12-19, the Kansas court recognized "that not every court confronting this issue would agree with our resolution of it." *Bruce*, 287 P.3d at 925 (citing Annot., *Who May Apply or Authorize Application for Order to Intercept Wire or Oral Communications Under Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.A. §§ 2510 et seq.)*, 169 A.L.R. Fed. 169 (2001) as collecting "conflicting decisions").

attorney, *see State v. McGhee*, 447 A.2d 888, 891 (Md. App. 1982).[5] The Minnesota Supreme Court has rejected the argument that delegation to an assistant is permissible on a theory that the assistant is the County Attorney's "alter ego," *State v. Frink*, 206 N.W.2d 664, 672-73 (Minn. 1973), because "it is [the County Attorney], and not the assistant county attorney, who is politically responsible to his constituents," *id.* at 674. The Nevada Supreme Court has stated that "all the reasons the federal courts have given for confining the power to request wiretap authorizations to those persons specifically enumerated by law" "appear sound." *Price v. Goldman*, 525 P.2d 598, 599 (Nev. 1974).[6] That court then quoted Senate hearing testimony suggesting the need to "involve someone in the process . . . who is politically responsible, that is, someone who must return to the people periodically and be reelected," so that "the people have a very quick and effective remedy at the next election." *Id.* at 600 n.4 (quoting testimony of Senate hearing witness quoted in *United States v. Chavez*, 416 U.S. 580, 593 (1974) (Douglas, J., concurring in part and dissenting in part)).

These cases suggest a bright line rule that reads § 2516(2) consistently with its plain language. "Principal" means "principal," not an assistant, and "the" means a single person, not that person and whomever he or she may choose to delegate his authority to. *See infra* p. 23 (further discussing plain meaning of statutory language).

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[5] In Maryland the local principal prosecuting attorney is called a "State's attorney." *See id.*

[6] The federal decisions which existed at this point in time included *Giordano* but did not include *Fury*.

2. Limitation of Applications by Assistants to Applications by "Acting District Attorneys" When Actual District Attorney Cannot Be Consulted and There Are Exigent Circumstances.

Still fairly restrictive, but one step down the proverbial slippery slope, is the approach taken by the New Jersey courts in *State v. Travis*, 308 A.2d 78 (N.J. Super. Ct. Law Div. 1973), *aff'd*, 336 A.2d 489 (N.J. Super. App. Div. 1975). Those courts opined, as noted in the *Fury* case relied upon by the court of appeals here, *see supra* p. 5, that "Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the officials specifically named [in § 2516(2)]," *Travis*, 308 A.2d at 82, *quoted in Fury*, 554 F.2d at 527 n.4. The courts then held that assistants who were acting as the District Attorney in the District Attorney's absence could apply for wiretaps in certain circumstances. *See Travis*, 308 A.2d at 82.

But the New Jersey courts placed strict limitations on this authority, which *Fury* ignored. First, they created a requirement that the assistant acting as the District Attorney first attempt to get approval from the actual District Attorney, so as to "prevent[ ] the unfettered diffusion or dilution of authority with which the Legislature and the United States Congress were so concerned." *Id.* at 82. Second, the New Jersey courts held there must be exigent circumstances and that "a temporary absence of the prosecutor without a showing of emergent or exigent circumstances would not warrant exercise of the prosecutor's power . . . even by a duly appointed and qualified acting prosecutor." *Id.* at 83.

Another court – the Florida Supreme Court in *State v. Daniels*, 389 So. 2d 631 (Fla. 1980) – has suggested in dictum that it would follow *Travis* if it had to consider a comparable statute. That court, albeit without explaining how it would be consistent with § 2516(2), stated:

> This is not to say that the legislature may not authorize state attorneys to delegate their authority to an assistant state attorney so long as such provision for delegation is narrowly confined to ensure centralization and uniformity of policy. *Commonwealth v. Vitello*, 367 Mass. 224, 327 N.E.2d 819 (1975). *But see, Poore v. State*, 39 Md. App 44, 384 A.2d 103 (Md. 1978). Thus a provision for delegation of the authority cannot be unlimited in scope, *see, State v. Cocuzza*, 123 N.J. Super. 14, 301 A.2d 204 (N.J. Cty. Ct. 1973), but can be designed to allow for continuity of administration when the state attorney is absent for an extended period of time. *State v. Travis*, 125 N.J. Super. 1, 308 A.2d 78 (N.J. Cty. Ct. 1973), *aff'd*, 133 N.J. Super. 326, 336 A.2d 489 (N.J. Super. Ct. App. D. 1975).

Daniels, 389 So. 2d at 636.

These cases recognize at least a limited practical exception to the plain language of § 2516(2). There can be an "acting" district attorney who steps in for the actual district attorney, but the "acting" district attorney can act on wiretaps only when it is absolutely necessary.

3. Limitation of Applications by Assistants to Assistants Who Are "Acting District Attorneys" for All Purposes.

The next least restrictive view is represented by the Second Circuit's *Fury* opinion, which the court of appeals in the present case at least initially followed. That opinion concluded, as noted *supra* p. 5, that a New York statute allowing certain assistants to apply for wiretaps in certain

circumstances did not violate § 2516(2). The court based this conclusion on (1) its view that "Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the officials specifically named [in § 2516(2)]," *Fury*, 554 F.2d at 527 n.4 (2d Cir. 1977) (quoting *Travis*, 308 A.2d at 82), and (2) a statement in the Senate committee report that "the issue of delegation by [the Attorney General or District Attorney] would be a question of state law," *Fury*, 554 F.2d at 527 n.4 (quoting Senate Report, *supra* p. 5, at 70).

Fury is at least somewhat limited, however, by both its reasoning and the state statute it approved. As the court explained:

> The delegation is only made to assure that someone can make the application and it does not change the fact that, like the federal law, the New York law "centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques," [Senate Report, *supra* p. 5, at 69]. In this case the District Attorney is responsible for and names his replacement when he is absent. And "should abuses occur, the lines of authority lead to an identifiable person," *id.*, the acting district attorney.

Fury, 554 F.2d at 527 n.4.

The New York statute requires a formal designation of the assistant as acting district attorney, as was noted in the New York case of *People v. Fusco*, 348 N.Y.S.2d 858 (Nassau Cty. Ct. 1973), which *Fury* cited. *See Fusco*, 348 N.Y.S.2d at 863 (describing requirement that District Attorney make designation in writing and file it in Office of the County Clerk and with Clerk of the Board of Supervisors), *cited in Fury*, 554 F.2d at 527 n.4. The statute also provides, without exception, that the assistant acting in the district attorney's place "shall perform the powers and duties of the office of district

attorney." N.Y. County Law § 702(3). This provision – and another comparable provision within the same statute, *see* N.Y. County Law § 702(5) – make the assistant district attorney "acting district attorney to all intents and purposes." 1962 N.Y. Op. Att'y Gen. 95 (quoting 1928 N.Y. Op. Att'y Gen. 229) (emphasis added), *available at* 1962 WL 114784. *See also People v. Lester*, 48 N.Y.S.2d 409, 410 (App. Div. 1944) (quoting predecessor statute enabling assistant district attorney to "discharge any duties imposed by law upon, or required of the district attorney . . .").

Fury and the New York case upon which it relied therefore stand for the proposition that an assistant district attorney who is formally made the acting district attorney for all purposes qualifies as "the principal prosecuting attorney" under § 2516(2). This acting district attorney has unlimited authority to apply for wiretaps as long as he or she is "acting." This creates a different bright line rule, requiring a complete and formal substitution of one "principal prosecuting attorney" for another "principal prosecuting attorney."

4. Limitation of Applications by Assistants to Assistants Who Are "Acting District Attorneys" Not for All Purposes, but Merely for "Routine Standard Daily Functions."

The court of appeals below, in its first opinion, arguably simply adopted the standard established by *Fury*. Albeit without the formal statutory designation required by the New York statute, it did require that the assistant district attorney be "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Supra* p. 6 (emphasis in original).

The second opinion creates a different, grayer standard, however. It not only allows an assistant to be "acting district attorney" without any formal statutory designation but allows the assistant to be "acting" only with respect to "routine standard daily functions," *supra* p. 7. How many functions must be "routine," "standard," and "daily" is left completely unclear. And on the facts of this case, it is sufficient that that role was assumed for a mere three days. *See supra* p. 4 (District Attorney absent for only three days).

The standard established by the second court of appeals opinion also incorporates no requirement of exigent circumstances like that required in the *Travis* case discussed *supra* p. 13. An assistant can become the supposedly politically responsive "principal prosecuting attorney" and then approve any and all wiretap applications simply because the District Attorney wants to take a short three-day weekend and does not want to be disturbed.[7] The District Attorney must simply make sure that enough functions are delegated during his or her absence that they include all the ones a court might label "routine," "standard," and "daily."

Where *Travis* took a short step down the slippery slope of when an "acting" district attorney can apply for wiretaps, the court of appeals in the present case takes a step – perhaps short and perhaps not – down the slippery slope of how much must be delegated to create an "acting district attorney."

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[7] The District Attorney's absence here was not for such a frivolous reason but was due to a family member's apparently serious medical condition. *See supra* p. 4. Nothing in the court of appeals opinion restricts its holding to absence for this reason rather than for a short vacation, however.

5. Allowance of Applications by Any Assistant Designated to Make Applications.

The second court of appeals opinion in the present case, while close to the least restrictive interpretation of § 2516(2), is unfortunately not quite the least restrictive. At least one court has gone even further. The Arizona Court of Appeals – in *State v. Verdugo*, 883 P.2d 417 (Ariz. App. 1993) – considered a statute that broadly allows wiretap applications by the Attorney General, a county attorney, or, without any limitation at all, "such prosecuting attorneys as they may designate in writing." *Id.* at 420 (quoting Ariz. Rev. Stat. § 13-3010(A)). The Arizona court expressly rejected the Kansas Supreme Court decision in *State v. Farha*, 544 P.2d 341 (Kan. 1975) which is cited *supra* p. 11 and held the Arizona statute "substantially complies with the federal statute and, therefore, is constitutional." *Verdugo*, 883 P.2d at 420.[8]

In sum, different lower courts have construed § 2516(2)'s authorization of applications by only "principal prosecuting attorney[s]" in all of the following inconsistent ways:

1. It never allows assistants to attorney generals and district attorneys (or their equivalent) to apply for wiretaps.

2. It allows an assistant to apply for wiretaps only when the assistant is "acting" as Attorney General or District Attorney, *and* the assistant is

[8] In so holding, the court claimed to be following *Commonwealth v. Vitello*, *supra*, *see Verdugo*, 883 P.2d at 420, but it entirely ignored the requirements which the Massachusetts Supreme Court read into the statute in *Vitello*.

not able to consult with the actual Attorney General or District Attorney, *and* there are exigent circumstances.

3. It allows an assistant to apply for wiretaps without limitation so long as the assistant is "acting" as Attorney General or District Attorney for all purposes.

4. It allows an assistant to apply for wiretaps without limitation even if the assistant is "acting" as Attorney General or District Attorney only as to the "routine standard daily functions" of the office and only for a few days.

5. It allows any assistant to apply for wiretaps so long as the assistant is designated to make such applications by the Attorney General or District Attorney.

This multitude of differing approaches and standards demands a resolution, and the Court should grant this petition to provide that resolution.

B. THE ISSUE PRESENTED IS AN IMPORTANT ISSUE, BOTH BECAUSE WIRETAPS ARE ESPECIALLY INTRUSIVE AND BECAUSE A SIGNIFICANT NUMBER OF STATES ALLOW MERE ASSISTANTS TO APPLY FOR WIRETAPS.

Another reason to grant the writ is that the issue presented here is an important one. To begin, the problem is not just a theoretical problem which rarely arises. A significant number of state statutes authorize applications by assistants in addition to the state attorney general and district attorneys, county attorneys, or their equivalents. These include not only the California, New

York, New Jersey, and Arizona statutes considered in this case, *Fury*, the New Jersey *Travis* case, and the Arizona *Verdugo* case just discussed, but also statutes in Colorado, *see* Colo. Rev. Stat. § 16-15-102(1)(a); Hawaii, *see* Haw. Rev. Stat. § 803-44; Ohio, *see* Ohio Rev. Code Ann. § 2933.53; Rhode Island, *see* R.I. Gen. Laws § 12-5.1-2; South Dakota, *see* S.D Codified Laws § 23A-35A-3; and Utah, *see* Utah Code Ann. § 77-23a-8.

Both the state legislatures which have enacted – or may in the future enact – such statutes, and the lower courts which must judge and apply the statutes, need guidance. They need to know whether unlimited delegation is allowed as the Arizona Court of Appeals held in *Verdugo*. They need to know if an "acting" District Attorney or Attorney General can be designated, and, if so, how he or she must be designated and how fully he or she must be "acting." With the disarray in the case law as it now stands, legislatures have no idea what is permissible and what is not.

The interests affected are fundamental, moreover. Monitoring a citizen's private phone conversations is an extremely serious matter. This Court has opined that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63 (1967). And Justice Brandeis warned long before that, in a dissenting opinion that subsequently became the view of the Court:

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a

> means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.

Olmstead v. United States, 277 U.S. 438, 475-76 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 352-53 (1967).

When it created the statutory scheme governing wiretaps, Congress also recognized these concerns. It was keenly concerned about "protecting the privacy of individual thought and expression." *United States v. United States Dist. Court*, 407 U.S. 297, 302 (1972). It limited the use of wiretaps to only those "classes of crimes carefully specified in 18 U.S.C. § 2516." *Id.* at 301-02. It spelled out in elaborate and restrictive detail the process by which wiretaps could be applied for and authorized, in order to insure that wiretaps are limited "to those situations clearly calling for the employment of this extraordinary investigative device." *United States v. Giordano*, 416 U.S. at 527-28. Procedural safeguards required for a wiretap, in contrast to the requirements for the more ordinary investigative tool of a search warrant, include, among others, a showing not only of probable cause but also of necessity, *see* 18 U.S.C. § 2518(1)(c),(3)(c); special sealing and notification requirements, *see* 18 U.S.C. § 2518(8); and in the case of federal wiretap applications, review by an Article III judge rather than a mere magistrate judge, *see* 18 U.S.C. §§ 2510(9), 2518(1).

The statutory safeguards also include the provision at issue in this case, limiting the executive branch officials who may authorize the application for a wiretap. This safeguard is equally important; indeed, this Court has characterized it as one of the "important preconditions to obtaining any intercept authority at all." *Giordano*, 416 U.S. at 515. The Court has further

indicated that this safeguard, just as much as the others, evidences Congress's "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." *Id.* *Compare United States v. Chavez*, 416 U.S. 562, 571 (1974) (distinguishing ministerial error of failing to correctly identify authorized official who had in fact approved application). Given the importance of this safeguard, it is important that it be properly enforced.

C. THE COURT OF APPEALS DECISION IN THE PRESENT CASE AND THE SECOND CIRCUIT *FURY* OPINION WHICH IT FOLLOWED MISAPPLY BASIC PRINCIPLES OF STATUTORY CONSTRUCTION AND THEREBY MISCONSTRUE § 2516(2).

As noted *supra* pp. 5, 16-17, the court of appeals in this case followed the Second Circuit opinion in *Fury* and then ultimately went a step further. This warrants review because *Fury* is a poster child for how *not* to interpret a statute.

To begin, *Fury*'s first rationale – that "Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the officials specifically named [in § 2516(2)]," *supra* p. 5 – is not a proper approach to statutory construction. As this Court has repeatedly emphasized, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See also Ransom v. FIA Card*

Services, N.A., 131 S. Ct. 716, 723 (2011); *Dean v. United States*, 556 U.S. 568, 572 (2009); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991). And where a word is not specifically defined, the Court looks to its ordinary meaning. *E.g., Ransom*, 131 S. Ct. at 724.

The statute here refers to "the" principal prosecuting attorney of the state or one of its political subdivisions, and the ordinary meaning of "the" suggests one, not some group. Then, the ordinary meaning of the next word, "principal," is "first or highest in rank, importance, value, etc.; chief; foremost." *Webster's Encyclopedic Unabridged Dictionary* 1539 (1986). This meaning contrasts with the ordinary meaning of "assistant," which is "serving in an immediately subordinate position; of secondary rank." *Id.* at 126.

This initial, controlling inquiry based on the statutory language also includes the principle that "when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 452 (2002) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) and *United States v. Wong Bo Kim*, 472 F.2d 720, 722 (5th Cir. 1972)). *See also Dean*, 556 U.S. at 573. The parallel provision for federal wiretap applications expressly includes other prosecutorial officials in addition to the federal Attorney General, by listing "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." 18 U.S.C. §

2516(1). The state official provision is completely silent as to delegation to assistants, however. Under the principle of construction just stated, it should be presumed that Congress acted intentionally and purposely in excluding delegation language from the provision for state officials.

Further, "where the statutory language provides a clear answer, [the analysis] ends there as well." *Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 254 (2000) (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). Part of the reason for this is that divining what Congress intended beyond what it actually said is often, if not usually, more speculative than objective, and there is too much room to differ in that speculation. *See Magwood v. Patterson*, 130 S. Ct. 2788, 2798 (2010) (focusing on "actual text" rather than "speculation as to Congress' intent"); *see also Zuni Public School District No. 89 v. Dept. of Education*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting) (expressing concern that "what judges believe Congress 'meant' (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, i.e., *should* have meant" (emphasis in original)). The very argument being considered here actually illustrates this latter point. While the Second Circuit could not believe that Congress intended to allow gaps in wiretap application authority, a witness who actually authored model legislation and whose Congressional testimony has been quoted by this Court suggested exactly the opposite:

> It may very well be that in some number of cases there will not be time to get the Attorney General to approve [the wiretap]. I think we are going to have just [sic] to let those cases go, ... If we cannot make certain cases, that is going to have to be the price we will have to pay.

Hearings on Anti-Crime Program Before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess. 1379 (1967) (testimony of Professor G. Robert Blakey), *quoted in United States v. Giordano*, 416 U.S. at 518-19.[9]

Fury's reliance on legislative history – to wit, the statement in the Senate committee report that "the issue of delegation by [the Attorney General or District Attorney] would be a question of state law," *supra* p. 5 – is similarly out of step with the preferred approach to statutory interpretation. More recent cases make clear – if there was ever any doubt – that courts should look to legislative history only when necessary to clarify an ambiguity. And the language-based principles of construction discussed above make clear that, whatever variation there may be in the various states' different labeling of their "principal prosecuting attorneys," there is no ambiguity in the statutory limitation of wiretap application authority to just "the principal prosecuting attorney."

In any event, *Fury* relies on only one sentence of the Senate committee report, and it takes that sentence out of context. A more complete quote clarifies that it was not whether there could be delegation that was to depend on state law, but what label the state used for "the principal prosecuting attorney" of its "political subdivision[s]."

> Paragraph (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney

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[9] The present case was not a case where the District Attorney's brief unavailability meant letting the case go, however. The wiretap at issue here would have been just as efficacious had it been authorized three days later when the District Attorney returned.

> of any political subdivision of a State may authorize an application to a State judge of competent jurisdiction, as defined in section 2510(9), for an order authorizing the interception of wire or oral communications. The issue of delegation by that officer would be a question of State law. In most States, the principal prosecuting attorney of the State would be the Attorney General. The important question, however, is not name but function. The intent of the proposed revision 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. *Who that officer would be would be a question of state law.* Where no such officer 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 of the proposed provision is to centralize area wide law enforcement policy in him. *Who he is would also be a question of state law.* Where there are both an Attorney General and the 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.* Although city attorneys may have in some places limited criminal prosecuting jurisdiction, the proposed provision is not intended to include them.

Senate Report, *supra* p. 5, at 70 (emphasis added).

This full quote from the committee report and the murkiness it creates makes apposite this Court's broader discussion of legislative history in the case of *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546 (2005).

> [L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" *See* Wald, *Some Observations on the Use of Legislative History and the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to attempt

> strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Exxon Mobil, 545 U.S. at 568.

The bottom line is that the *Fury* opinion – and hence the court of appeals opinions in the present case – have it wrong. The plain language of the statute requires that state wiretaps be authorized by the principal prosecuting attorney of the State or a political subdivision thereof, not an assistant; Congress knew how to expressly provide for delegation when it wanted to do so, as evidenced by the fact that it did so in the subsection governing federal wiretaps; and the legislative history, which is ambiguous at best, cannot add something which is not in the statute.

VI.

CONCLUSION

The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

DATED: June ____, 2014

_____
CARLTON F. GUNN
Attorney at Law

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

MAYEL PEREZ-VALENCIA, PETITIONER,

vs.

UNITED STATES, RESPONDENT.

CERTIFICATE OF SERVICE

I, Carlton F. Gunn, hereby certify that on this ___ day of June, 2014, a copy of the Petitioner's Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit were mailed postage prepaid, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001, counsel for the Respondent.

Respectfully submitted,

June ____, 2014

_____
CARLTON F. GUNN
Attorney at Law

A P P E N D I X 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MAYEL PEREZ-VALENCIA, AKA Santos Irizarry Castillo, AKA Miguel Martinez, AKA Miguel Angel Martinez-Marquez, AKA Miguelito, AKA Mayel Valencia Perez, *Defendant-Appellant*.	No. 12-50063 D.C. No. 2:11-cr-00442-PA-2 OPINION

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued & Submitted
February 4, 2013—Pasadena, California

Filed July 16, 2013

Before: Diarmuid F. O'Scannlain, Stephen S. Trott,
and Richard R. Clifton, Circuit Judges.

Opinion by Judge Trott

SUMMARY*

Criminal Law

The panel remanded a criminal case for the limited purpose of full development of the factual record with respect to the authority of an assistant San Bernardino County district attorney as the person who applied for a state wiretap, and for a second issue should it become ripe.

The panel held that the language "the principal prosecuting attorney" found in 18 U.S.C. § 2516(2) can include a state assistant district attorney who has been duly designated to act in the absence of the district attorney, and that compliance with § 2516(2) necessarily requires an analysis of the applicable state wiretap statute, here California Penal Code § 629.50.

The panel also held that "the" attorney designated to act in the district attorney's absence – as § 629.50 specifies – 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.

Because the record is insufficient for the panel to determine the precise nature of the assistant district attorney's authority at the time he applied for the disputed wiretap, the

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

panel remanded for development of the factual record as to that authority.

The panel did not address the government's argument that the evidence subject to the defendant's suppression motion was so attenuated from the alleged statutory violation that it need not be excluded, an issue that will only become ripe if the district court invalidates the wiretap on the ground that the assistant district attorney lacked authority to apply for it.

The panel stated that it retains jurisdiction over any further appeals.

COUNSEL

Carlton F. Gunn, Kaye, McLane, Bednarski & Litt, LLP, Pasadena, California, for Defendant-Appellant.

Jennie L. Wang, Assistant United States Attorney, United States Department of Justice, Violent and Organized Crime Section, Los Angeles, California, for Plaintiff-Appellee.

OPINION

TROTT, Circuit Judge:

Mayel Perez-Valencia appeals his conviction following a conditional plea of guilty to conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 846. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we remand for the limited purpose of full development of the factual record with respect to the authority of Assistant District Attorney

Dennis Christy ("ADA Christy") as the person who applied for the state wiretap at issue, and for a second issue should it become ripe.

I

Perez-Valencia entered his plea after the district court denied his motion to suppress evidence obtained as a result of a wiretap authorized by the San Bernardino County Superior Court on March 30, 2010. The application was filed by ADA Christy, who was purportedly "designated" pursuant to California Penal Code § 629.50(a) by the county district attorney to apply for the wiretap in the district attorney's absence. Perez-Valencia argues that the wiretap application was invalid because 18 U.S.C. § 2516(2) allows only "the principal prosecuting attorney" of a political subdivision — here, the official district attorney of San Bernardino County — to apply to a state court for a wiretap.

II

District Attorney Michael Ramos ("DA Ramos") was out of his office from March 29 to March 31, 2010, attending to an ill family member who had just undergone surgery for a serious health condition. The previous year, DA Ramos had issued an internal memorandum, which stated:

> I, Michael A. Ramos, District Attorney of San Bernardino County, *pursuant to [California] Penal Code section 629.50(a)* hereby designate the following individuals to act in my absence.

1. Dennis Christy, Assistant District Attorney

2. James B. Hackleman, Assistant District Attorney

3. Clark Hansen III, Chief Deputy District Attorney.

(emphasis added). Therefore, when the need arose on March 30, 2010, ADA Christy applied to the San Bernardino County Superior Court for the wiretap.

In the wiretap application, ADA Christy stated that "Michael Ramos is the District Attorney of San Bernardino County, and I am the person designated to act in his absence pursuant to Penal Code section 629.50." As noted, however, Christy was not the *only* person so designated, but one of three persons on the list. The San Bernardino County Superior Court approved the application the same day it was filed.

The wiretap produced evidence that Perez-Valencia, known at that time only as "Miguel," was involved in the methamphetamine organization. Multiple other wiretaps, searches and seizures, and a confidential informant later, Perez-Valencia and 29 other conspirators were indicted.

III

Wiretaps issued by state courts are regulated by 18 U.S.C. § 2516(2):

> *The principal prosecuting attorney* of any State, or the principal prosecuting attorney of any political subdivision thereof, *if such attorney is authorized by a statute of that State* to make application to a State court judge . . . *may apply* to such judge for . . . an order authorizing, or approving the interception of wire, oral, or electronic communications . . . .

18 U.S.C. § 2516(2) (emphasis added). California Penal Code § 629.50 is the California statute that authorizes wiretap applications within the State. At the county level, the statute states that "a district attorney, or *the* person designated to act as district attorney in the district attorney's absence," may apply to a superior court "for an order authorizing the interception of a wire or electronic communication." *Id.* § 629.50(a) (emphasis added).

IV

The primary contention raised by Perez-Valencia is that the language "the principal prosecuting attorney" found in § 2516(2) cannot and should not be read to include a state assistant district attorney, whether or not that assistant has been duly designated to act in the absence of the district attorney. We disagree. As noted, § 2516(2) also says with respect to the language Perez-Valencia highlights, "if such attorney is authorized by a statute of that State to make application to a State court judge . . . for an order authorizing or approving the interception of wire, oral, or electronic communications." Thus, we agree with the government that compliance with § 2516(2) necessarily requires an analysis of the applicable state wiretap statute, here California Penal

Code § 629.50. That statute in turn plainly authorizes "*the* person designated to act as district attorney in the district attorney's absence" to apply for such an order.

In this respect, we agree with our colleagues in the Second Circuit:

> Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the official specifically named (in § 2516(2)). This conclusion is supported by the legislative history. The Senate Report states that "the issue of delegation (by the Attorney General or District Attorney) would be a question of state law." S. Rep. No. 1097, 90th Cong. 2d Sess. (1968).

United States v. Fury, 554 F.2d 522, 527 n.4 (2nd Cir. 1977) (internal quotation marks & first citation omitted).

We hold also, however, that "*the*" attorney designated to act in the district attorney's absence — as § 629.50 specifies — 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.

V

The record as it now stands, however, is insufficient for us to determine the precise nature of ADA Christy's authority at the time he applied for the disputed wiretap. Because of

ambiguity in DA Ramos's designation memo, we require answers to the following questions.[1] 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? What was DA Ramos's purpose in designating three people to act in his absence? Did the memo give all three of the listed individuals simultaneously the power to apply for wiretaps in the district attorney's absence? Or was it a progressive, hierarchical designation of power, meaning that, at any given time, only one person on the list could exercise the powers of district attorney and the others did not have any powers unless those above them in the hierarchy were absent and unavailable?

VI

We do not address the government's argument that the evidence subject to the defendant's motion to suppress is so attenuated from the alleged statutory violation that it need not be excluded. *See United States v. Smith*, 155 F.3d 1051, 1060 (9th Cir. 1998) ("[A]t *some* point, even in the event of a direct and unbroken causal chain, the relationship between the unlawful search or seizure and the challenged evidence

[1] Ordinarily, we would remand for answers to these questions before holding that an assistant district attorney to whom plenary power had been properly delegated could lawfully apply for a wiretap order. Here, however, judicial economy dictates that we do so now to avoid asking the district court to answer questions and to make a decision without any assurance that the district court's work would be relevant to the outcome of this case on appeal. Also, our chosen sequence may well avoid the need for a decision on the issue of attenuation. *See infra* Part VI.

becomes sufficiently weak to dissipate any taint resulting from the original illegality."). This second issue will only become ripe if the district court invalidates the wiretap on the ground that ADA Christy lacked the authority to apply for it. Should the court so decide, however, then the court shall address the government's attenuation argument as part of this limited remand.

Accordingly, we remand for the limited purpose of findings of fact as required by these questions. This panel retains jurisdiction over any further appeals.

REMAND to the District Court.

A P P E N D I X 2

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. MAYEL PEREZ-VALENCIA, AKA Santos Irizarry Castillo, AKA Miguel Martinez, AKA Miguel Angel Martinez-Marquez, AKA Miguelito, AKA Mayel Valencia Perez, *Defendant-Appellant*.	No. 12-50063 D.C. No. 2:11-cr-00442-PA-2 OPINION

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted
February 4, 2013
Limited Remand
July 16, 2013
Pasadena, California

Filed March 3, 2014

Before: Diarmuid F. O'Scannlain, Stephen S. Trott,
and Richard R. Clifton, Circuit Judges.

Opinion by Judge Trott

SUMMARY*

Criminal Law

The panel affirmed the district court following remand wherein the panel had asked the district court to examine and to determine the precise nature of San Bernardino County District Attorney Michael Ramos's delegation of authority in his absence to Assistant District Attorney Dennis Christy, who, as designee of Ramos, applied for and obtained a state wiretap.

The record developed by the district court on remand left the panel with no doubt that in Ramos's absence, Christy was "running the office," satisfying the panel's concern that the delegation might have been only for wiretap applications. The panel also found it noteworthy that the narrow powers Ramos retained were not delegated to anyone else.

With the benefit of a complete record, the panel found it appropriate to qualify its use in its first opinion of the word "all." In the new opinion, the panel used that word to refer to the routine standard daily functions of a prosecutor's office, which does not include administrative matters involving budgets, personnel, or even the unique penalty decision in a capital case.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

Carlton F. Gunn, Kaye, McLane, Bednarski & Litt, LLP, Pasadena, California, for Defendant-Appellant.

Jennie L. Wang, Assistant United States Attorney, United States Department of Justice, Violent and Organized Crime Section, Los Angeles, California, for Plaintiff-Appellee.

OPINION

TROTT, Circuit Judge:

I

After we heard oral argument in this case, we remanded it to the district court for further proceedings. *United States v. Perez-Valencia*, 727 F.3d 852 (9th Cir. 2013). Specifically, we asked the district court to examine and to determine the precise nature of District Attorney Michael Ramos's delegation of authority in his absence to Assistant District Attorney Christy. We were principally concerned that Christy might have been acting with only the limited authority to apply for a wiretap order. We were also concerned that the three persons on Ramos's delegation list might each have simultaneously had the power to apply for wiretaps in Ramos's absence. We no longer have these reservations. Thus, we affirm.

II

After conducting a plenary hearing as we requested, the district court memorialized its findings of fact and conclusions of law.[1] *United States v. Perez-Valencia*, No. CR 11-442 PA, 2013 WL 6385264 (C.D. Cal. Dec. 6, 2013). The following is a quotation from those findings of fact.

1. On March 30, 2010, government authorities obtained a state wiretap from a San Bernardino County Superior Court Judge. The state wiretap was obtained by application of San Bernardino County Assistant District Attorney ("ADA") Dennis Christy, who declared under penalty of perjury that "Michael Ramos is the District Attorney of San Bernardino County, and I am the person designated to act in his absence pursuant to Penal Code section 629.50(a)." The state court judge signed the order authorizing the March 30, 2010, wiretap, finding that "Dennis Christy, Assistant District Attorney, who is the designee of Michael Ramos, District Attorney for the County of San Bernardino, State of California, made application to this Court requesting authorization to intercept [wire and electronic communications]." The state court found that "The Assistant District Attorney, who is the designee of the District Attorney of San Bernardino County, State of California, is the applicant for this interception."

2. At all relevant times, the elected district attorney of San Bernardino County was Michael A. Ramos ("DA Ramos").

[1] We thank our district court colleague for his prompt and thorough attention to our request.

3. Beginning in mid-2003 through the relevant time period, during the absence of DA Ramos, it was the practice of the San Bernardino County District Attorney's Office ("SBCDA"), to delegate the duties of the District Attorney to the Assistant District Attorney ("ADA") for Criminal Operations, Dennis Christy. Specifically, ADA Christy would become the acting District Attorney in DA Ramos' absence. In the event that DA Ramos and ADA Christy were both absent, the ADA for Administration, James B. Hackleman, would assume the duties of acting DA. In the event that DA Ramos, ADA Christy and Hackleman were all absent, the Chief Deputy District Attorney for the Central Division, Clark Hansen, III, would assume the duties of acting DA.

4. On July 1, 2009, DA Ramos executed an internal office memorandum (the "Designation Memorandum") codifying this policy and practice. The Designation Memorandum designated three individuals to act in his absence, in the following order of succession: first, ADA Christy; second, Mr. Hackleman; and third, Mr. Hansen. These three individuals were to assume the position of acting DA in successive order, that is ADA Christy was to assume the duties of acting DA in DA Ramos' absence; ADA Hackleman was to assume the duties of the acting DA only in the absence of both DA Ramos and ADA Christy; and Mr. Hansen was to assume the duties of the acting DA only in the absence of DA Ramos, ADAs Christy and Hackleman. At no time was more than one person at the SBCDA office authorized to be the acting DA in DA Ramos' absence.

5. The purpose of the delegation of power was to provide a clear and linear chain of command within the office which could be accessed to provide guidance and policy making decisions to members of law enforcement and deputy

district attorneys working within the office during the absence of the DA. Although the Designation Memorandum referenced California Penal Code § 629.50(a), the acting DA's authority to act in DA Ramos' absence was not limited to only applying for wiretap orders. The reference to . . . [s]ection 629.50(a) was to establish a written record of compliance with California state wiretap law.[2]

7. ADA Christy's job description specifies that his duties include, but are not limited to "act for the District Attorney during absences" and to "make interim policy and procedural decisions in the absence of the District Attorney."

8. Except for certain non-exigent policy and procedural decisions, the acting DA assumes all the powers, duties, and responsibilities of the District Attorney. During the absence of the DA, he or she is fully empowered to act as the DA for any matters that might arise in the day to day operations of the office, including, but not limited to, making an application for a wiretap. There are certain policy and procedural decisions that can await the return of the DA that are not delegated by DA Ramos and are not made by the acting DA. Those decisions, which include whether to seek the death penalty in a capital case and personnel decisions in which an employee is to be terminated, are not of an exigent nature and are personally made by DA Ramos upon his return to the office. The SBCDA's process of determining whether to seek the death penalty is made by a committee comprised of DA Ramos and five assistant district attorneys and chief deputy district attorneys over a prolonged period of time.

[2] Paragraph six has been combined with paragraph five for the reader's convenience.

Death penalty committee meetings are schedule for when the DA is available.

9. DA Ramos was absent from the SBCDA office on March 29, 30 and 31, 2010, because he was in the hospital attending to his wife, who had undergone surgery for a serious health condition. While in the hospital, DA Ramos was not in communication with anyone from the office on March 29 and 30, 2010, during work hours. During that time, DA Ramos could not have exercised any of the duties of the district attorney due to his absence. On March 31, DA Ramos was involved in transitioning his wife from the hospital to their home and could not communicate with anyone from the office during business hours. DA Ramos does not recall communicating with anyone from the office on that day, but if he did speak to anyone from the office, it would have been after he and his wife returned home. Accordingly, DA Ramos was absent from and unavailable to the SBCDA office for the entire period of March 29, 2010, through March 31, 2010.

10. While DA Ramos was absent and unavailable on March 29, 30, and 31, 2010, ADA Christy was the acting DA of San Bernardino County. As acting DA, ADA Christy assumed all the delegable powers, duties and responsibilities of the District Attorney during that period. Neither ADAs Hackleman or Hansen assumed the duties of the acting DA during that time.

11. On March 30, 2010, ADA Christy, while performing the duties of the acting DA during DA Ramos' absence from the office, authorized the wiretap application at issue in defendant Mayel Perez-Valencia's Motion to Suppress. In the wiretap application, ADA Christy invoked the language

of the Designation Memorandum and expressly stated that he was making the application as "the District Attorney Designee" and that "Michael Ramos is the District Attorney of San Bernardino County, and I am the person designated to act in his absence pursuant to California Penal Code section 629.50(a)."

12. DA Ramos' testimony concerning the delegation of power in the SBCDA office in the event of his absence was credible and consistent with the evidence before the Court.

13. Accordingly, the Court finds that on March 30, 2010, no one other than ADA Christy was authorized to apply for wiretaps pursuant to Section 629.50(a). Nor was any other person authorized to exercise any of the responsibilities and duties of the District Attorney during DA Ramos' absence. The Court therefore finds that at that time, ADA Christy had all the powers of an acting district attorney.

14. The Court additionally concludes that ADA Christy was duly acting as "the" "principal prosecuting attorney" of San Bernardino County for all purposes within the meaning of 18 U.S.C. § 2516(2) and California Penal Code section 629.50 when he authorized the wiretap application at issue in this case.

III

The record developed by Judge Anderson leaves no doubt that in Ramos's absence, Christy was "running the office." No one else was authorized to do so. This finding satisfies our concern that the delegation might have been only for wiretap applications. It was not. Christy was functioning as the principal prosecuting attorney for all regular decisions the

office made, without exception. The circumscribed areas of authority retained by Ramos were in and of themselves exceptions to the daily normative activities of a district attorney's office. We also find it noteworthy that the narrow powers Ramos retained were not delegated to anyone else.

Now that we have the benefit of a complete record, we find it appropriate to qualify our use in our first opinion of the word "all." We now use that word to refer to the routine standard daily functions of a prosecutor's office, which does not include administrative matters involving budgets, personnel, or even the unique penalty decision in a capital case. As explained by Ramos, such a decision is made by a committee over a prolonged period of time. Such committee meetings are simply not scheduled in Ramos's absence.

AFFIRMED.

A P P E N D I X 3

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE PERCY ANDERSON, JUDGE PRESIDING

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	No. CR 11-442 PA
	)	
MAYEL PEREZ-VALENCIA,	)	
	)	
Defendant.	)	

REPORTER'S TRANSCRIPT OF MOTION HEARING

LOS ANGELES, CALIFORNIA

MONDAY, OCTOBER 17, 2011; 3:25 P.M.

LEANDRA AMBER, CSR 12070, RPR
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A P P E A R A N C E S

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CLAUDIA LANCASTER, SPANISH LANGUAGE INTERPRETER

So, number one, principal prosecuting attorney can vary from day to day or week to week or three-day period to three-day period; and, two, it can't be designated as assistant -- as assistant prosecuting attorney specifically for wiretap purposes for one of three options.

So that's I think what the Government's argument -- the Government's argument flounders. And I think the New Jersey case is not -- the New Jersey case was just concerned about delegation during lunch breaks. It was concerned about delegation in circumstances potentially very similar to here where it was entirely unnecessary.

THE COURT: All right. In this case the defendant contends that the California law authorizing wiretaps conflicts with the federal law in that the California statute impermissibly permits the delegation authority to seek wiretap orders to a subordinate in the absence or disability of the district attorney.

I find in this case there was no violation of state law and that the California statute comports with federal wiretap law, and therefore the motion is denied.

All right. As I understand it, there was a plea agreement in this case. Have the parties arrived at a date when they want to have a hearing on the plea agreement or to take the defendant's plea?

MS. WANG: We have not discussed it, your Honor.

CERTIFICATE OF REPORTER

COUNTY OF LOS ANGELES)
) ss.
STATE OF CALIFORNIA)

I, LEANDRA AMBER, OFFICIAL FEDERAL COURT REPORTER, REGISTERED PROFESSIONAL REPORTER, IN AND FOR THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT TO SECTION 753, TITLE 28, UNITED STATES CODE, THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

DATE: _____

_____/s/_____

LEANDRA AMBER, CSR 12070, RPR

FEDERAL OFFICIAL COURT REPORTER

A P P E N D I X 4

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. MAYEL PEREZ-VALENCIA, Defendant.	No. CR 11-442 PA FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant Mayel Perez-Valencia was convicted following his conditional guilty plea to conspiracy to distribute methamphetamine in violation of Title 21 United States Code Section 841. Prior to entry of the plea, Perez-Valencia moved to suppress a state wiretap which culminated in the seizure of over 76 kilograms of actual methamphetamine from Perez-Valencia and his co-conspirators. Perez-Valencia contended that the application for the wiretap was not authorized by the "principal prosecuting attorney" of the state or the "principal prosecuting attorney" of any political subdivision of the state as required by Title 18, United States Code, Section 2516(2). After reviewing the submissions of the parties and hearing argument, this Court denied the motion to suppress.

An appeal followed and the Ninth Circuit Court of Appeals remanded this action for the limited purpose of developing a factual record of the authority of San Bernardino County

Assistant District Attorney ("ADA") Dennis Christy to apply for a state wiretap in the absence of San Bernardino County District Attorney ("DA") Michael A. Ramos. Specifically, the Court of Appeals asked the following questions: (1) 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; (2) What was DA Ramos' purpose in designating three people to act in his absence; (3) Did the memorandum give all three of the listed individuals simultaneously the power to apply for state wiretaps in DA Ramos' absence or was it a progressive, hierarchical designation of power, meaning that, at any given time, only one person on the list could exercise the powers of the district attorney and the others did not have any powers unless those above them in the hierarchy were absent and unavailable?

The Ninth Circuit additionally instructed this Court to address the Government's attenuation argument only if this Court invalidated the wiretap on the ground that ADA Christy lacked the authority to apply for it.

After reviewing and considering the supplemental declaration and testimony of DA Ramos, the evidence, and the submissions of the parties, the Court submits its Findings of Fact and Conclusions of Law:

1. On March 30, 2010, government authorities obtained a state wiretap from a San Bernardino County Superior Court Judge. The state wiretap was obtained by application of San Bernardino County Assistant District Attorney ("ADA") Dennis Christy, who declared under penalty of perjury that "Michael Ramos is the District Attorney of San Bernardino County, and I am the person designated to act in his absence pursuant to Penal Code section 629.50(a)." The state court judge signed the order authorizing the March 30, 2010 wiretap, finding that "Dennis Christy, Assistant District Attorney, who is the designee of Michael Ramos, District Attorney for the County of San Bernardino, State of California, made application to this Court requesting authorization to intercept [wire and electronic communications]." The state court found that "The Assistant District Attorney, who is the designee of the District Attorney of San Bernardino County, State of California, is the applicant for this interception."

2. At all relevant times, the elected district attorney of San Bernardino County was Michael A. Ramos ("DA Ramos").

3. Beginning in mid-2003 through the relevant time period, during the absence of DA Ramos, it was the practice of the San Bernardino County District Attorney's Office ("SBCDA"), to delegate the duties of the District Attorney to the Assistant District Attorney ("ADA") for Criminal Operations, Dennis Christy. Specifically, ADA Christy would become the acting District Attorney in DA Ramos' absence. In the event that DA Ramos and ADA Christy were both absent, the ADA for Administration, James B. Hackleman, would assume the duties of acting DA. In the event that DA Ramos, ADA Christy and Hackleman were all absent, the Chief Deputy District Attorney for the Central Division, Clark Hansen, III, would assume the duties of acting DA.

4. On July 1, 2009, DA Ramos executed an internal office memorandum (the "Designation Memorandum") codifying this policy and practice. The Designation Memorandum designated three individuals to act in his absence, in the following order of succession: first, ADA Christy; second, Mr. Hackleman; and third, Mr. Hansen. These three individuals were to assume the position of acting DA in successive order, that is ADA Christy was to assume the duties of acting DA in DA Ramos' absence; ADA Hackleman was to assume the duties of the acting DA only in the absence of both DA Ramos and ADA Christy; and Mr. Hansen was to assume the duties of the acting DA only in the absence of DA Ramos, ADAs Christy and Hackleman. At no time was more than one person at the SBCDA office authorized to be the acting DA in DA Ramos' absence.

5. The purpose of the delegation of power was to provide a clear and linear chain of command within the office which could be accessed to provide guidance and policy making decisions to members of law enforcement and deputy district attorneys working within the office during the absence of the DA. Although the Designation Memorandum referenced California Penal Code § 629.50(a), the acting DA's authority to act in DA Ramos' absence was not limited to only applying for wiretap orders. The reference to

. . . .

6. Section 629.50(a) was to establish a written record of compliance with California state wiretap law.

7. ADA Christy's job description specifies that his duties include, but are not limited to "act for the District Attorney during absences" and to "make interim policy and procedural decisions in the absence of the District Attorney."

8. Except for certain non-exigent policy and procedural decisions, the acting DA assumes all the powers, duties, and responsibilities of the District Attorney. During the absence of the DA, he or she is fully empowered to act as the DA for any matters that might arise in the day to day operations of the office, including, but not limited to, making an application for a wiretap. There are certain policy and procedural decisions that can await the return of the DA that are not delegated by DA Ramos and are not made by the acting DA. Those decisions, which include whether to seek the death penalty in a capital case and personnel decisions in which an employee is to be terminated, are not of an exigent nature and are personally made by DA Ramos upon his return to the office. The SBCDA's process of determining whether to seek the death penalty is made by a committee comprised of DA Ramos and five assistant district attorneys and chief deputy district attorneys over a prolonged period of time. Death penalty committee meetings are schedule for when the DA is available.

9. DA Ramos was absent from the SBCDA office on March 29, 30 and 31, 2010 because he was in the hospital attending to his wife, who had undergone surgery for a serious health condition. While in the hospital, DA Ramos was not in communication with anyone from the office on March 29 and 30, 2010 during work hours. During that time, DA Ramos could not have exercised any of the duties of the district attorney due to his absence. On March 31, DA Ramos was involved in transitioning his wife from the hospital to their home and could not communicate with anyone from the office during business hours. DA Ramos does not recall communicating with anyone from the office on that day, but if he did speak to anyone from the office, it would have been after he and his wife returned home. Accordingly,

DA Ramos was absent from and unavailable to the SBCDA office for the entire period of March 29, 2010 through March 31, 2010.

10. While DA Ramos was absent and unavailable on March 29, 30, and 31, 2010, ADA Christy was the acting DA of San Bernardino County. As acting DA, ADA Christy assumed all the delegable powers, duties and responsibilities of the District Attorney during that period. Neither ADAs Hackleman or Hansen assumed the duties of the acting DA during that time.

11. On March 30, 2010, ADA Christy, while performing the duties of the acting DA during DA Ramos' absence from the office, authorized the wiretap application at issue in defendant Mayel Perez-Valencia's Motion to Suppress. In the wiretap application, ADA Christy invoked the language of the Designation Memorandum and expressly stated that he was making the application as "the District Attorney Designee" and that "Michael Ramos is the District Attorney of San Bernardino County, and I am the person designated to act in his absence pursuant to California Penal Code section 629.50(a)."

12. DA Ramos' testimony concerning the delegation of power in the SBCDA office in the event of his absence was credible and consistent with the evidence before the Court.

13. Accordingly, the Court finds that on March 30, 2010, no one other than ADA Christy was authorized to apply for wiretaps pursuant to Section 629.50(a). Nor was any other person authorized to exercise any of the responsibilities and duties of the District Attorney during DA Ramos' absence. The Court therefore finds that at that time, ADA Christy had all the powers of an acting district attorney.

14. The Court additionally concludes that ADA Christy was duly acting as "the" "principal prosecuting attorney" of San Bernardino County for all purposes within the meaning of 18 U.S.C. § 2516(2) and California Penal Code section 629.50 when he authorized the wiretap application at issue in this case.

. . . .

15. For all of the foregoing reasons, the Court does not invalidate the wiretap on the ground that ADA Christy lacked the authority to apply for it. As a result, the Court does not address the Government's attenuation argument.

DATED: December 6, 2013

Percy Anderson
UNITED STATES DISTRICT JUDGE

A P P E N D I X 5

FILED

APR 18 2014

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. MAYEL PEREZ-VALENCIA, AKA Santos Irizarry Castillo, AKA Miguel Martinez, AKA Miguel Angel Martinez-Marquez, AKA Miguelito, AKA Mayel Valencia Perez, Defendant - Appellant.	No. 12-50063 D.C. No. 2:11-cr-00442-PA-2 Central District of California, Los Angeles ORDER

Before: O'SCANNLAIN, TROTT, and CLIFTON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges O'Scannlain and Clifton have voted to deny the petition for rehearing en banc and Judge Trott so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

A P P E N D I X 6

CA NO. 12-50063

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAYEL PEREZ-VALENCIA, Defendant-Appellant.	DC# CR 11-442-PA

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE PERCY ANDERSON
United States District Judge

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CA NO. 12-50063

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAYEL PEREZ-VALENCIA, Defendant-Appellant.	DC# CR 11-442-PA

I.

STATEMENT OF ISSUES PRESENTED

A. DOES THE REQUIREMENT IN 18 U.S.C. § 2516(2) THAT THE APPLICATION FOR A STATE WIRETAP BE BY "THE PRINCIPAL PROSECUTING ATTORNEY" BAR AN APPLICATION BY AN ASSISTANT DISTRICT ATTORNEY WHO HAS BEEN "DESIGNATED" TO "ACT IN THE DISTRICT ATTORNEY'S ABSENCE" WHEN THE DISTRICT ATTORNEY IS ABSENT FOR ONLY TWO DAYS AND THERE ARE NO EMERGENCY CIRCUMSTANCES REQUIRING THE APPLICATION TO BE MADE IMMEDIATELY?

1. Does the Requirement that the Application Be by "the Principal Prosecuting Attorney" Bar an Application by an Assistant District Attorney in All

Circumstances?

2. Assuming Arguendo There Are Some Circumstances in Which There May Be an Application by an Assistant District Attorney Who Has Been "Designated" to "Act in the District Attorney's Absence," Are Those Circumstances Limited to Emergency Circumstances Which Did Not Exist in the Present Case?

B. IS THERE A GOOD FAITH EXCEPTION TO THE STATUTORY EXCLUSIONARY RULE FOR EVIDENCE OBTAINED THROUGH AN UNLAWFUL WIRETAP?

C. WERE A LATER WIRETAP APPLICATION, ITS SUBSEQUENT EXTENSION, AND METHAMPHETAMINE SUBSEQUENTLY FOUND IN A CAR MR. PEREZ WAS DRIVING FRUITS OF THE STATE WIRETAP?

1. Were These Wiretap Recordings and This Methamphetamine Fruits of the State Wiretap Because the Arrest of the Informant Who Provided the Information the Government Claims Is Sufficient to Justify the Later Wiretap Was a Fruit of the State Wiretap?

2. Were These Wiretap Recordings and This Methamphetamine Fruits of the State Wiretap Because the Informant's Information Did Not Establish Probable Cause and Necessity Without Other Evidence Which Was a Fruit of the State Wiretap?

3. Are These Wiretap Recordings and This Methamphetamine Subject to Suppression Because the Government Argued Only that It *Could* Have Gotten the Later Wiretap Even Without the Information from the State Wiretap but Failed to Claim and Establish that It in Fact *Would* Have Gotten the Later Wiretap Even Without the Information from the State Wiretap?

II.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION.

This appeal is from a judgment of conviction for conspiracy to distribute methamphetamine, in violation of 21 U.S.C. § 846. Mr. Perez was sentenced on January 31, 2012, to serve 210 months in custody and 5 years of supervised release. ER 463-67.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. A timely notice of appeal was filed on February 9, 2012. ER 468-73.

B. COURSE OF PROCEEDINGS.

An indictment charging Mr. Perez and multiple other defendants was filed on May 17, 2011. ER 24-77; CR 3. Mr. Perez was arraigned on the indictment and pled not guilty on May 27, 2011. CR 121.

On September 12, 2011, the defense filed a Motion to Suppress Fruits of

March 30, 2010 State Court Wiretap, seeking to suppress recordings of telephone conversations made during the wiretap and various fruits of the wiretap, including, inter alia, recorded conversations obtained during subsequent wiretaps based on the first wiretap and two seizures of methamphetamine resulting from the wiretaps. CR 257.[1] The government filed an opposition to the motion on September 26, 2011, CR 284, and the defense filed a reply to that opposition on October 3, 2011, CR 288.

Related to the motion to suppress, the government and the San Bernardino County District Attorney's office filed, on October 4, 2011, motions to quash a subpoena served on the District Attorney in conjunction with the defense reply to the opposition to the motion to suppress evidence. CR 289, 291. The defense filed an opposition to the motions to quash on October 6, 2011. CR 300.

The district court held a status conference and a hearing on the motions to quash on October 5, 2011 and October 12, 2011, respectively, and granted the motion to quash after admitting a declaration which the District Attorney had filed. ER 425-45, 446-62. It held a hearing on the motion to suppress and denied that motion on October 17, 2011. ER 1-23.

Mr. Perez subsequently entered a conditional guilty plea, pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. CR 331; *see also* CR 269, at 3 (plea agreement reserving right to appeal denial of motion). He was sentenced on January 30, 2012. ER 463-67.

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[1] Three other motions to suppress were filed at the same time, but those were withdrawn before being ruled upon, as part of a plea agreement. *See* CR 269, 271.

C. BAIL STATUS OF DEFENDANT.

Mr. Perez is presently serving the 210-month sentence imposed by the district court. His projected release date is September 19, 2026.

III.

STATEMENT OF FACTS

Mr. Perez came to the attention of law enforcement authorities during an extended drug trafficking investigation arising out of multiple wiretaps stretching as far back as January, 2009. *See* ER 97-100. The particular wiretap which identified Mr. Perez as a suspect was a wiretap aimed at one Patricia Vargas, which was approved by the San Bernardino County Superior Court on March 30, 2010. *See* ER 90-131, 132-42. Several calls in early April between Mr. Perez – using the name "Miguel" – and Ms. Vargas identified both Mr. Perez and his phones and served as the basis for a federal wiretap warrant obtained on May 3, 2010. *See* ER 143-231, 232-45. The identification of Mr. Perez and cell phone location data obtained through the federal wiretap then led to search warrants which uncovered a large quantity of methamphetamine on May 6, 2010. *See* ER 246-57, 258-64, 265-78.[2] Mr. Perez was arrested when the methamphetamine was seized on May 6, but held for only a few hours and then told he could either "leave or be charged." ER 238.

Mr. Perez did go to Mexico for a time after being released, but had returned

[2] Mr. Perez is identified in these materials under the alias of Irizarry Santos.

by August. ER 328. He came to the attention of the authorities that month when another individual who had been arrested agreed to cooperate with law enforcement officers. ER 328, 340. The arrest of that individual was "based primarily" on telephone calls intercepted during a wiretap which was "based primarily" on an earlier wiretap that was "based primarily" on the March 30, 2010 state wiretap. ER 417-19.

The information provided by the individual who agreed to cooperate included information about Mr. Perez. The individual claimed that (1) he had previously purchased methamphetamine from Mr. Perez and (2) Mr. Perez had recently come by and left his phone number, the two had subsequently spoken, and that Mr. Perez told him to call if he needed "anything." ER 328. Based on this – and what it already knew about Mr. Perez from the prior wiretaps and methamphetamine seizure – the government applied for a wiretap on Mr. Perez's new phone. *See* ER 279-371. The affidavit in support of this application described both the new information the informant had provided, *see* ER 328, 340, and the earlier wiretaps and seizure of methamphetamine, *see* ER 314, 329, 333, 335, 338, 341. The new wiretap was approved and commenced on August 25, 2010, *see* ER 372-85, extended in September, *see* ER 386-400, and bore fruit in the form of both additional recorded incriminating conversations and the discovery of another large quantity of methamphetamine when law enforcement officers stopped a vehicle Mr. Perez was driving on October 13, 2010, *see* ER 401-15.

The original state court wiretap aimed at Ms. Vargas was authorized in response to an application not by the San Bernardino County District Attorney himself but by an assistant district attorney who described himself as "the person

designated to act in [the District Attorney's] absence pursuant to Penal Code section 629.50(a)." ER 82. It was subsequently revealed that this assistant district attorney was one of three whom a July 1, 2009 District Attorney memo "designate[d] . . . to act in [the District Attorney's] absence." ER 424. A declaration by the District Attorney that was filed with the motions to quash the subpoena noted *supra* p. 4 indicated the District Attorney had been out of the office for a three-day period from March 29, 2010 through March 31, 2010 because he was "attending to a member of [his] immediate family who had undergone surgery at a local hospital for a serious health condition." ER 422.

IV.
SUMMARY OF ARGUMENT

Both the courts and Congress have recognized that wiretapping is a very intrusive investigative technique. That concern is reflected in the significantly more stringent requirements that are placed on the use of wiretaps. Included in those requirements are narrow limits on the officials who may apply for wiretaps. On the federal side, the statute permits only certain very high-level federal Department of Justice officials to file wiretap applications. On the state side, only "the principal prosecuting attorney" of the state or a political subdivision of the state may file a wiretap application.

This language – "the principal prosecuting attorney" – cannot and should not be read to include an assistant district attorney, whether or not that assistant has been designated to act in the absence of the District Attorney. This follows from some of the most basic principles of statutory construction.

The first principle of statutory construction is that a court must start – and in most instances end – with the plain language of the statute. Here that includes the word, "the" – which implies a single individual, not that individual and his assistant – and the word, "principal" – which generally means highest in rank, and contrasts with the meaning of "assistant," which is someone of secondary rank. The plain language also includes the complete absence of any suggestion that "the principal prosecuting attorney" may delegate authority to some assistant.

This leads to a second applicable principle of statutory construction. That is the principle that omission of language in one section of a statute which is included in another section is generally presumed to be intentional. The parallel provision for federal wiretap applications expressly lists other officials in addition to the federal Attorney General, including Assistant Attorney Generals, Deputy Assistant Attorney Generals, and those acting in those capacities. This stands in stark contrast to the absolute silence of the provision for state wiretap applications, which lists only "the principal prosecuting attorney[s]" of the state and its political subdivisions and is conspicuously silent about "assistants."

There is one federal court of appeals opinion which has suggested in a footnote that a county district attorney must be able to delegate his wiretap application authority, but there is another court of appeals which has suggested the contrary. And the adverse court of appeals opinion is more than 30 years old and takes an approach that is inconsistent in at least two respects with the modern approach to statutory interpretation. First, it focuses on legislative history more than statutory language and, second, it relies upon a result-oriented concern that there could be a suspension of local wiretapping activity if a district attorney cannot delegate authority. The state case which is the source of the federal case's

result-oriented concern allows delegation of authority only when there are emergency circumstances, moreover. Such emergency circumstances did not exist in the present case because here the district attorney was absent for only three days and there was no emergency requiring the wiretap application to be filed immediately.

Finally, two alternative arguments the government made in the district court do not save it. The government cannot rely upon the good faith exception recognized by the Supreme Court in the Fourth Amendment context because the exclusionary rule for evidence from unlawful wiretap applications is a *statutory* exclusionary rule. The plain language of the provision does not allow for any good faith exception, and the courts have no power to modify it since it is a statute rather than a court-created rule.

Second, a government argument that the August wiretap, its subsequent extension, and the methamphetamine found in Mr. Perez's car as a result of those wiretaps were not fruits of the poisonous tree must fail. Case law the government cited for the proposition that courts should more readily find the connection between an illegality and live witness testimony to be attenuated because live witnesses may come forward on their own is inapposite. The live witness at issue here was an individual who cooperated with the government only when he was arrested after the earlier wiretaps revealed his involvement in drug trafficking activity. This Court's precedents consistently reject applying the attenuation rule in this context.

In any event, the August wiretap application offered not just the new information provided by the informant to establish the statutorily required probable cause and necessity. The application combined that information with the

information from the earlier wiretaps and the search warrants based on those earlier wiretaps. The August wiretap was thus a fruit regardless of whether the informant and the information he provided was a fruit.

V.

ARGUMENT

A. THE MARCH 30, 2010 STATE WIRETAP WAS UNLAWFUL BECAUSE 18 U.S.C. § 2516(2) REQUIRES AN APPLICATION FOR A STATE WIRETAP BE BY THE "PRINCIPAL PROSECUTING ATTORNEY," THAT REQUIREMENT ABSOLUTELY BARS AN APPLICATION BY AN ASSISTANT DISTRICT ATTORNEY, AND IT CERTAINLY DOES NOT ALLOW AN APPLICATION BY AN ASSISTANT DISTRICT ATTORNEY WHEN THE DISTRICT ATTORNEY IS ABSENT FOR ONLY THREE DAYS.

1. Reviewability and Standard of Review.

The defense argued in its moving papers and at the hearing that the statutory language of 18 U.S.C. § 2516 limited wiretap applications by California state officials to applications by the Attorney General and/or a county district attorney. ER 6-12; CR 257, at 7-15; CR 288, at 3-6. The defense also argued in the alternative that if 18 U.S.C. § 2516(2) ever permitted applications by an assistant district attorney, it permitted them only in emergent or exigent circumstances which did not exist here. ER 10, 431-35, 441-42, 457-58; CR 257, at 12 n.8; CR 288, at 4 n.2. The district court rejected the arguments and denied the motion. ER

20. Such statutory construction of the wiretap statute, like any other statutory construction, is subject to de novo review. *United States v. Forrester*, 616 F.3d 929, 934 (9th Cir. 2010).

2. The 18 U.S.C. § 2516(2) Requirement that the Application for a State Wiretap Be by "the Principal Prosecuting Attorney" Bars an Application by an Assistant District Attorney in All Circumstances.

a. Both the Supreme Court and Congress have recognized the greater intrusiveness of wiretaps, and the wiretap statute places elaborate restrictions on their use as a result.

The Supreme Court has opined that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices." *Berger v. New York*, 388 U.S. 41, 63 (1967). And Justice Brandeis warned long before that, in a dissenting opinion that subsequently became the view of the Court:

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.

Olmstead v. United States, 277 U.S. 438, 475-76 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 352-53 (1967).

When Congress created the statutory scheme governing wiretaps, it

recognized "the grave threat to privacy that wiretaps pose." *United States v. Staffeldt*, 451 F.3d 578, 580 (9th Cir. 2006), *amended in part*, 523 F.3d 983 (9th Cir. 2008). And because of that,

> it spelled out "in elaborate and generally restrictive detail" the process by which wiretaps may be applied for and authorized. *United States v. King*, 478 F.2d 494, 498 (9th Cir. 1973). It did so in order to insure that wiretaps are limited "to those situations clearly calling for the employment of this extraordinary investigative device." *United States v. Giordano*, 416 U.S. 505, 527-28, 94 S. Ct. 1820, 40 L. Ed. 2d 341 (1974). The statutory scheme created by Congress relies on a uniquely rigorous bifurcated system of authorization involving review and approval by both the executive and judicial branches. The Supreme Court has explained that this system evinces Congress's "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." *Id.* at 515.

Staffeldt, 451 F.3d at 580.

Congress's concern "is evident from the Act's text," moreover. *United States v. Callum*, 410 F.3d 571, 574 (9th Cir. 2005). The wiretap statute both "restricts the criminal offenses that can justify a wiretap or bug" and "includes a host of procedural safeguards to regulate interception of communications." *Id.* Those safeguards include, but are by no means limited to:

1. A requirement that the government show not only probable cause but also necessity for the wiretap, *see* 18 U.S.C. § 2518(1)(c),(3)(c), which this Court has characterized as creating "a statutory presumption against granting a wiretap application," *United States v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985).
2. Special sealing and notification requirements. *See* 18 U.S.C. § 2518(8).
3. In the case of federal wiretap applications, review by an Article III

district or court of appeals judge rather than a mere magistrate judge. *See* 18 U.S.C. §§ 2510(9), 2518(1).

The rules governing wiretaps are thus far more restrictive than the rules governing, for example, search warrants. *Compare* Fed. R. Crim. Pro. 41.

b. Included in the elaborate restrictions the wiretap statute places on the use of wiretaps is a limitation of those who may apply for a wiretap to only certain federal Department of Justice officials and the "principal prosecuting attorney" of a state or political subdivision thereof.

The statutory safeguards also include provisions limiting the executive branch officials who may authorize the application for a wiretap. *See Staffeldt*, 451 F.3d at 580 (noting the "uniquely rigorous bifurcated system of authorization involving review and approval by both the executive and judicial branches"), *quoted supra* p. 12. It is not just any law enforcement officer who can apply for a wiretap, or even just any prosecuting attorney, but only very high prosecutorial officials. The statute provides that the only federal officials who may authorize an application are "[t]he 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." 18 U.S.C. § 2516(1). Then, in a parallel provision for state wiretaps, the statute limits the officials who may file applications to "[t]he principal prosecuting attorney" of the state and "the principal

prosecuting attorney of any political subdivision thereof." 18 U.S.C. § 2516(2).[3]

The importance of this safeguard in particular was discussed in one of the earliest Supreme Court cases considering the wiretap statute – *United States v. Giordano*, 416 U.S. 505 (1974). The Court suppressed wiretap evidence in that case because the wiretap application had been approved not by the federal Attorney General or one of the other federal officials specifically listed in § 2516(1), but by the executive assistant to the federal Attorney General. The Court characterized the statutory authorization requirement as one of the "important preconditions to obtaining any intercept authority at all" that evinced Congress's "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." *Id.* at 515. The Court then held that violation of the authorization requirement required suppression. It stated: "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id*. at 527.

* * *

[3] The statutory language is quoted more fully in the Statutory Appendix to this brief.

c. An assistant district attorney cannot qualify as the "principal prosecuting attorney" of a state or political subdivision thereof.

i. The statutory language and purpose.

The term which is used in the subsection for authorizing applications by state executive officials for wiretaps – "the principal prosecuting attorney" – is not specifically defined in the statute, but was explained in the Senate Report for the bill. As one would expect, the report indicated that "[i]n most States," "the principal prosecuting attorney of the State would be the attorney general" and "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." S. Rep. No. 90-1097, at 70 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2187 (hereinafter "Senate Report"). Notably absent is any statement that an *assistant* to a state attorney general or district attorney could exercise this authority.

What is actually controlling, moreover, is the statutory language itself. As both the Supreme Court and this Court have emphasized, "the starting point for interpreting a statute is the language of the statute itself." *United States v. Gossi*, 608 F.3d 574, 577 (9th Cir. 2010) (quoting *United States v. Hackett*, 311 F.3d 989, 991 (9th Cir. 2002), and *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). The statute here refers to "the" principal prosecuting attorney of the state or one of its political subdivisions, and the ordinary meaning of "the" suggests one, not some group. Then, the ordinary meaning of the next word, "principal," is "first or highest in rank, importance, value, etc.; chief; foremost." *Webster's Encyclopedic Unabridged Dictionary* 1539 (1986). This

meaning contrasts with the ordinary meaning of "assistant," which is "serving in an immediately subordinate position; of secondary rank." *Id.* at 126.

There is also a second basic principle of statutory construction which applies here. That is that "when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress act[ed] intentionally and purposely' in so doing." *In the Matter of Consolidated Freightways Corp. of Delaware*, 564 F.3d 1161, 1165 (9th Cir. 2009) (quoting *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 452 (2002)). The parallel provision for federal wiretap applications expressly includes other prosecutorial officials in addition to the federal Attorney General, by listing "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." 18 U.S.C. § 2516(1). The state official provision is completely silent as to delegation to assistants, however. Under the principle of construction just stated, it should be presumed that Congress acted intentionally and purposely in excluding delegation language from the provision for state officials.

Finally, drawing the line between a district attorney and his assistants is consistent with the concern Congress demonstrated in 1968 for limiting the authority to apply for wiretaps "to those responsive to the political process." *United States v. Giordano*, 416 U.S. 505, 520 (1974) (quoting Senate Report, *supra* p. 15, at 69). All of the various federal officials authorized to make applications by subsection (1) of § 2516 in the form in which it was first enacted with subsection (2) are subject to appointment by the President and confirmation

by the Senate. *See Giordano*, 416 U.S. at 520-21 n.9 (citing 28 U.S.C. § 503 and 28 U.S.C. § 506).[4] A district attorney is similarly "responsive to the political process" by virtue of being an elected official. But a district attorney's assistants are not elected – or subject to any sort of legislative approval – and so are not responsive to the political process in the way the district attorney and federal officials are.

ii. The case law.

Only two published court of appeal opinions have considered the question – and then in only a relatively passing fashion – of whether a state attorney general or district attorney can delegate his wiretap application authority to an assistant.[5] One is *United States v. Smith*, 726 F.2d 852 (1st Cir. 1984) (en banc), in which the

[4] Additional federal officials have been added since the original enactment in 1968, but those additions by a later Congress show little about interpretation of the language of subsection (2), which was adopted in 1968 and has remained unchanged ever since. *See Bilski v. Kappos*, 130 S. Ct. 3218, 3250 (2010) ("'[T]he views of a subsequent Congress,' however, 'form a hazardous basis for inferring the intent of an earlier one.'" (Quoting *United States v. Price*, 361 U.S. 304, 313 (1960))).

[5] There is also an unpublished Fifth Circuit opinion in *United States v. Davis*, No. 03-30918, 2005 WL 548935 (5th Cir. March 7, 2005), which held that an assistant attorney general at the state level could apply where specifically authorized by state law, but that decision (1) is nonprecedential because it is unpublished and (2) offers no analysis or consideration of the arguments presented here. Another published Fifth Circuit case noted in a footnote – without itself considering the question, but also without suggesting any criticism – that the wiretaps whose fruits were being considered had been held unlawful in the court below because the applications were signed only by an assistant district attorney. *See United States v. Houltin*, 566 F.2d 1027, 1029 n.1 (5th Cir. 1978).

en banc First Circuit considered a state wiretap statute that, like the California wiretap statute, authorized an "assistant district attorney specially designated by the district attorney" to apply for wiretaps. *Smith*, 726 F.2d at 857 (quoting Mass. Gen. Laws Ann., ch. 272, § 99 F(1)).[6] The defendant there made the same argument being made by the defense here – that the state statute did not comply with the federal law because "the federal law recognizes only one applicant, the district attorney [but] the state statute would allow a second applicant, as here, the assistant district attorney." *Smith*, 726 F.2d at 857.

The First Circuit responded not by flatly rejecting this point, but by acknowledging its "formidable force." The court explained:

> If this were the complete statutory framework, appellants' argument would have formidable force: we would be confronting a state statute that gave an assistant district attorney power equal to that of a district attorney in initiating a request for court authority to intercept a telephonic communication. Such an expansion would run counter both to § 2516(2), reposing application responsibility in one state official, and to the ample legislative history underscoring the need for centralization of policy relating to electronic surveillance in one top prosecutor at county and state levels. *See infra,* S. Rep. No. 1097, *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, at 2187.

Smith, 726 F.2d at 857.

The court then explained the "If this were the complete statutory framework" caveat with which it began its explanation, however. It noted that the state statute "has been fortified by the carapace of deliberate judicial interpretation and supplementary requirements imposed by the Massachusetts Supreme Judicial

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[6] The California statute, as the government pointed out below, provides that state wiretap applications may be made by "a district attorney, or the person designated to act as district attorney in the district attorney's absence." CR 284, at 16 (quoting Cal. Penal Code § 629.50(a)).

Court in *Commonwealth v. Vitello*, 367 Mass. 224, 327 N.E.2d 819 (1975)." *Smith*, 726 F.2d at 857. In particular, the state supreme court had construed the statute to require (1) that the assistant district attorney "bring the matter for examination before his senior officer, the actual district attorney"; (2) that the district attorney make a determination of whether to seek the wiretap and do so only after a "full examination . . . of the application"; and (3) that the district attorney "authorize each such application in writing." *Id*. at 857 (quoting *Vitello*, 367 Mass. at 256-57 & nn.16, 17). This construction, the First Circuit held, brought the statute into compliance with the federal law. *See Smith*, 726 F.2d at 858-59. And the saving construction was clearly critical to the First Circuit's decision, for it did not simply affirm. Rather, it remanded the case to make sure the conditions the state supreme court had read into the statute were satisfied. *See Smith*, 726 F.2d at 859-60.

The Second Circuit has taken a different view than the First Circuit. That court concluded, in a three-paragraph footnote[7] in *United States v. Fury*, 554 F.2d 522 (2nd Cir. 1977), that a New York statute allowing certain assistants to apply for wiretaps in certain circumstances did not violate 18 U.S.C. § 2516(2). The Second Circuit based this conclusion on (1) its view that "Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the officials specifically named [in § 2516(2)]," *Fury*, 554 F.2d at 527 n.4 (quoting *State v. Travis*, 125 N.J. Super. 1, 308 A.2d 78, 82 (1973), *aff'd*, 133 N.J. Super. 326, 336 A.2d 489 (1975)), and (2) a statement in

[7] The main issue addressed in *Fury* and discussed at more length in the text of the opinion was whether the wiretap application had complied with the New York state statute's provisions. *See id*. at 526-27.

the Senate committee report that "the issue of delegation by [the Attorney General or District Attorney] would be a question of state law," *Fury*, 554 F.2d at 527 n.4 (quoting Senate Report, *supra* p. 15, at 70).

Fury does not save the government here, however. Initially, *Fury*, as a Second Circuit case, is not controlling on this Court. Indeed, it is arguably dictum that is not controlling even in the Second Circuit, for after setting forth its analysis of § 2516(2), it held: "In any case, Fury is barred from asserting this claim now because he failed to assert it in the pre-trial suppression hearing." *Id.*, 554 F.2d at 527 n.4. This may be why the Court addressed the question only in a passing fashion in a footnote.

Secondly, it is *Smith* which is the better reasoned case and the reasoning in *Smith* which this Court should adopt. There are several reasons for this.

To begin, *Fury*'s first rationale – that "Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the officials specifically named [in § 2516(2)]," *supra* p. 19 – is not a proper approach to statutory construction, at least as courts have approached statutory construction in more recent jurisprudence. Recent case law especially – in both the Supreme Court and the Ninth Circuit – emphasizes, as noted *supra* p. 15, that "the starting point for interpreting a statute is the language of the statute itself." Further, "where the statutory language provides a clear answer, [the analysis] ends there as well." *United States v. Harrell*, 637 F.3d 1008, 1010 (9th Cir. 2011). And this initial, controlling inquiry based on the statutory language includes "consider[ing] not only the words used in a particular section but also the statute as a whole." *Id.* Here, that includes the express authorization of other officials in the parallel subsection for federal wiretap

applications and the implications of that which are discussed *supra* p. 16.

Part of the reason the inquiry generally ends with the statutory language is that divining what Congress intended beyond what it actually said is often, if not usually, more speculative than objective, and there is too much room to differ in that speculation. *See Magwood v. Patterson*, 130 S. Ct. 2788, 2798 (2010) (focusing on "actual text" rather than "speculation as to Congress' intent"); *see also Zuni Public School District No. 89 v. Dept. of Education*, 550 U.S. 81, 117 (2007) (Scalia, J., dissenting) (expressing concern that "what judges believe Congress 'meant' (apart from the text) has a disturbing but entirely unsurprising tendency to be whatever judges think Congress *must* have meant, i.e., *should* have meant" (emphasis in original)). The very argument being considered here actually illustrates that point. While the Second Circuit could not believe that Congress intended to allow gaps in wiretap application authority, a witness who actually authored model legislation and whose Congressional testimony has been quoted by the Supreme Court suggested exactly the opposite:

> It may very well be that in some number of cases there will not be time to get the Attorney General to approve [the wiretap]. I think we are going to have just [sic] to let those cases go, ... If we cannot make certain cases, that is going to have to be the price we will have to pay.

Hearings on Anti-Crime Program Before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess. 1379 (1967) (testimony of Professor G. Robert Blakey), *quoted in Giordano*, 416 U.S. at 518-19.[8]

Fury's reliance on legislative history – to wit, the statement in the Senate committee report that "the issue of delegation by [the Attorney General or

[8] The present case was not a case where the District Attorney's brief unavailability meant letting the case go, however, as discussed *infra* pp. 24-27.

District Attorney] would be a question of state law," *supra* p. 20 – is similarly out of step with the now preferred approach to statutory interpretation. More recent cases emphasize that courts should look to legislative history only when necessary to clarify an ambiguity. And the language-based principles of construction discussed *supra* pp. 15-16 make clear that, whatever variation there may be in the various states' different labeling of their "principal prosecuting attorneys," there is no ambiguity in the statutory limitation of wiretap application authority to just "the principal prosecuting attorney." As explained by the Ninth Circuit in a case involving a different statute but in language that is pertinent here:

> [It] is correct that consideration of legislative history is appropriate where statutory language is ambiguous. Ambiguity, however, is at least a necessary condition. (Citations omitted.)
>
> In this instance, the statute is not ambiguous. Instead, it is entirely silent as to the burden of proof on removal. Faced with statutory silence on the burden issue, we presume that Congress is aware of the legal context in which it is legislating.

Abrego Abrego v. Dow Chemical Co., 443 F.3d 676, 683-84 (9th Cir. 2006). By analogy and more pertinent here, courts should presume that Congress is aware of contrasting language in another subsection of the very same statute. *See also Bonneville Power Admin. v. FERC*, 422 F.3d 908, 920 (9th Cir. 2005) (noting that "[l]egislative history cannot trump the statute").

In any event, *Fury* relies on only one sentence of the Senate committee report, and it takes that sentence out of context. A more complete quote clarifies that it was not whether there could be delegation that was to depend on state law, but what label the state used for "the principal prosecuting attorney" of its "political subdivision[s]."

> Paragraph (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision of a State may authorize an

> application to a State judge of competent jurisdiction, as defined in section 2510(9), for an order authorizing the interception of wire or oral communications. The issue of delegation by that officer would be a question of State law. In most States, the principal prosecuting attorney of the State would be the Attorney General. The important question, however, is not name but function. The intent of the proposed revision 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. *Who that officer would be would be a question of state law.* Where no such officer 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 of the proposed provision is to centralize area wide law enforcement policy in him. *Who he is would also be a question of state law.* Where there are both an Attorney General and the 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.* Although city attorneys may have in some places limited criminal prosecuting jurisdiction, the proposed provision is not intended to include them.

Senate Report, *supra* p. 15, at 70 (emphasis added).

This full quote from the committee report and the murkiness it creates make also apposite the Supreme Court's broader discussion of legislative history in the case of *Exxon Mobil Corp. v. Allapattah Services, Inc*., 545 U.S. 546 (2005), which this Court cited in the *Abrego Abrego* opinion quoted above, *see Abrego Abrego*, 443 F.3d at 683.

> [L]egislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" *See* Wald, *Some Observations on the Use of Legislative History and the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members – or, worse yet, unelected staffers and lobbyists – both the power and the incentive to

> attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Exxon Mobil, 545 U.S. at 568. *See also United States v. Harrell*, 637 F.3d at 1012 (referencing "the deep mud of legislative history").

The bottom line is that the *Smith* opinion has it right and the *Fury* opinion has it wrong. The plain language of the statute requires that state wiretaps be authorized by the principal prosecuting attorney of the State or a political subdivision thereof, not an assistant; Congress knew how to expressly provide for delegation when it wanted to do so, as evidenced by the fact that it did so in the subsection governing federal wiretaps; and the legislative history, which is ambiguous at best, cannot add something which is not in the statute. Since neither the state Attorney General nor a county district attorney authorized the wiretap here, it was unlawful under the federal wiretap statute.[9]

3. Even if the Concern About the Need for Wiretap Evidence Justifies Applications by an Assistant District Attorney in Some Circumstances, Those Circumstances Are Limited to Emergent or Exigent Circumstances Which Were Not Present Here.

Application by an assistant district attorney was not proper here even if the Court were to agree that interpretation of the wiretap statute could be based on

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[9] Whether it complied with the state statute is therefore irrelevant, for § 2516(2) requires "conformity with . . . this chapter *and* with the applicable State statute." *United States v. Butz*, 982 F.2d 1378, 1382 (9th Cir. 1993) (quoting 18 U.S.C. § 2516(2)) (emphasis added). Put another way in the same opinion, it is "*further* authorization by state statute" which is required. *Butz*, 982 F.2d at 1382 (emphasis added).

Fury's result-oriented concern about the complete suspension of local wiretapping activity during the absence or disability of the District Attorney. This is made clear by the limitations placed on assistant prosecutor authority in the very case *Fury* actually quotes as authority – the New Jersey case of *State v. Travis*, 125 N.J. Super. 1, 308 A.2d 78 (1973), *aff'd*, 133 N.J. Super. 326, 336 A.2d 489 (1975).[10] The allowance for assistant prosecutor authority in that case carried an important limitation. Specifically, the opinion stated:

> [A] temporary absence of the prosecutor without a showing of emergent or exigent circumstances would not warrant exercise of the prosecutor's power, under this statute, even by a duly appointed and qualified acting prosecutor.
>
> In such instances, it will be the burden of the State to establish that the exercise of the power by a surrogate was necessary and warranted when tested against the aims and purposes of the legislation permitting wiretap intrusions.

Id. at 10.

This was not just a gratuitous condition placed on the court's recognition of limited application authority in assistants, moreover. It was driven by the very considerations that underlie the federal statutory limitations and Supreme Court cases interpreting and applying them. The court explained:

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[10] *Fury* also cited another state case – *People v. Fusco*, 75 Misc. 2d 981, 248 N.Y.S.2d 858 (Nassau Cy. Ct. 1973) – but did not quote any of the reasoning from *Fusco* as it did from *Travis*. *See Fury*, 554 F.2d at 527-28 n.4. *Fusco*'s main reason for upholding the wiretap before it does not appear to extend to the present case, moreover. *Fusco* found the designated assistant district attorney there to be "the principal prosecuting attorney" because he was designated to act in the District Attorney's absence or disability pursuant to a county law that required formal filing of the designation in writing with the County Clerk and the Clerk of the County Board of Supervisors. *See Fusco*, 75 Misc. 2d at 984. There is no indication that there was this sort of formal filing and designation with the county legislative body pursuant to a county law in the present case. There was only what appears to be an internal office memo. *See* ER 424.

> Only by imposing such a burden upon the State will there be prevented the unfettered diffusion or dilution of authority with which the Legislature and the United States Congress were so concerned. Only by adherence to such a standard of conduct will there be fostered the restraint in the use of wiretaps sought by those bodies, reflecting the United States Supreme Court's treatment of the subject in *Berger* and *Katz*. The Legislature did not and could not have intended that a prosecutor could cavalierly parcel out this power on a case-by-case basis or empower an acting prosecutor to act merely for convenience or to relieve some of the burdens of his office.

Travis, 125 N.J. Super. at 9-10 (citations omitted).

There were not the sort of emergent or exigent circumstances required by *Travis* in the present case – for two reasons. First, given that this wiretap was part of an investigation which had been ongoing for more than a year, there is no apparent reason why the wiretap had to be rushed for approval on March 30, 2010 rather than waiting two or three days until the family medical concerns which made the San Bernardino District Attorney unavailable had passed. The defense does not wish to be inconsiderate of a high political official's family life, but one expects that other important policy decisions were made to wait for his return. The restrictions written into the wiretap law demonstrate that wiretap applications are to be classed with those sort of important policy decisions, not the more ordinary, day-to-day administrative decisions which must be made in a public prosecutor office.

Second, the wiretap here was part of a joint federal/state investigation and the affiant was a federal Drug Enforcement Administration agent, not a local San Bernardino County officer. *See* ER 91. This suggests there were other options which could have been explored if the officers did not want to wait for two or three days, namely, using the federal authorities and/or another county district attorney to seek the wiretap. This makes the use of the San Bernardino County

authorities seem even more a matter of the "mere[ ] . . . convenience" which the *Travis* court held was insufficient.

In sum, this is a case where "the aims and purposes of the wiretap legislation," *supra* p. 25, could and should have been given precedence. The officers seeking the wiretap could and should have either waited until the San Bernardino District Attorney returned or sought help from federal or other county officials.

B. THE GOVERNMENT CANNOT RELY UPON A GOOD FAITH EXCEPTION BECAUSE THERE IS NO GOOD FAITH EXCEPTION TO THE STATUTORY EXCLUSIONARY RULE FOR EVIDENCE OBTAINED THROUGH AN UNLAWFUL WIRETAP.

1. Reviewability and Standard of Review.

The government argued as an alternative ground for denying the defense motion that the good faith exception to the exclusionary rule applied. CR 284, at 20-22. The district court did not address this issue, so there is no ruling to review. But de novo review would be appropriate in any event, for two reasons. First, that is the standard of review for applicability of the good faith exception in general. *United States v. Krupa*, 658 F.3d 1174, 1179 (9th Cir. 2011) (quoting *United States v. Crews*, 502 F.3d 1130, 1135 (9th Cir. 2007)). Second, whether there is even an exception to consider here turns largely on the correct interpretation of the wiretap statute and interpretation of that statute is subject to de novo review, *see supra* p. 11.

2. There Is No Good Faith Exception for Unlawful Wiretaps Which Applies Here.

The exclusionary rule which applies to evidence which is obtained through or as a result of an unlawful wiretap is a statutory, not a constitutional, rule. It is codified in 18 U.S.C. § 2515:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

On its face, this statute does not incorporate a good faith exception, and this Court cannot and should not write such an exception into the statute – for reasons given by the Second Circuit in *United States v. Spadaccino*, 800 F.2d 292 (2nd Cir. 1986) and the Sixth Circuit in *United States v. Rice*, 478 F.3d 704 (6th Cir. 2007). As the Second Circuit explained, in interpreting a similar state wiretap statute, there is an important difference between a judicially crafted exclusionary rule and a statutorily established exclusionary rule.

> [*United States v.*] *Leon* [, 468 U.S. 897 (1984)] . . . is a judicially crafted exception to an exclusionary rule that is a judicial creation. The Fourth Amendment exclusionary rule is based on the Supreme Court's weighing of the costs and benefits of the exclusion of evidence as a deterrent to police conduct that violates certain federal constitutional rights. In the present case, in contrast, suppression is required by a statutory mandate. Thus, in determining such matters as the nature of the rights to be protected, the conduct that constitutes a statutory violation, and the remedy warranted by a violation, it is appropriate to look to the terms of the statute and the intentions of the legislature, rather than to invoke judge-made exceptions to judge-made rules. (Citations omitted.)
>
> Here, the balancing of interests and the weighing of costs and benefits to determine whether evidence obtained without

> compliance with the Connecticut statute should be suppressed even where the law enforcement officers have proceeded in good faith has already been done by the Connecticut legislature.

Spadaccino, 800 F.2d at 296.

The Sixth Circuit directly considered the federal wiretap statutory exclusionary rule and came to the same conclusion as the Second Circuit, for several reasons. First, the Court pointed to the language of the statute:

> [T]he language in Title III provides that exclusion is the exclusive remedy for an illegally obtained warrant. In contrast to the law governing probable cause under the Fourth Amendment, the law governing electronic surveillance via wiretap is codified in a comprehensive statutory scheme providing explicit requirements, procedures, and protections. (Citation omitted.) Section 2515 of Title III provides that "[w]henever any wire . . . communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial. . . . (Citations omitted.) The statute is clear on its face and does not provide for any exception.

Rice, 478 F.3d at 712.

The court then explained how the legislative history was consistent with the clear language of the statute.

> Second, the Senate Report discussing Title III indicates no desire "to press the scope of the suppression role beyond *present* search and seizure law." S. Rep. No. 90-1097 (1968), 1968 U.S.C.C.A.N. 2112, 2185 (emphasis supplied). Title III was passed in 1968; *Leon* was decided in 1984. Congress obviously could not know that Fourth Amendment search and seizure law would embrace a good faith exception sixteen years after the passage of Title III, and the language from the Senate Report indicates a desire to incorporate only the search and seizure law that was in place at the time of the passage of Title III.

Rice, 478 F.3d at 713.[11]

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[11] This portion of the Senate Report reads in full as follows:

> [Section 2515] largely reflects existing law. It applies to

Finally, the court made the same point made by the Second Circuit in *Spadaccino* about the problem with extending a judicially created exception to a legislatively created rule.

> Finally, as mentioned, the Supreme Court's *Leon* decision is the product of judicial balancing of the social costs and benefits of the exclusionary rule. The judicial branch created the exclusionary rule, and thus, modification of that rule falls to the province of the judiciary. In contrast, under Title III, Congress has already balanced the social costs and benefits and has provided that suppression is the sole remedy for violations of the statute. The rationale behind judicial modification of the exclusionary rule is, thus, absent with respect to warrants obtained under Title III's statutory scheme.

Rice, 478 F.3d at 713.

Rice also explained why contrary holdings by the Eleventh and Eighth Circuits in *United States v. Malekzadeh*, 855 F.2d 1492 (11th Cir. 1988) and *United States v. Moore*, 41 F.3d 370 (8th Cir. 1994) were poorly reasoned. It noted that *Malekzadeh* merely "recites the rationale of Leon" and "made no attempt to explain why reasoning from a Fourth Amendment exclusionary-rule case was appropriately imported into a Title III case." *Rice*, 478 F.3d at 714. And, indeed, *Malekzadeh* offers only one three-sentence paragraph on the issue. *See Malekzadeh*, 855 F.2d at 1497.

> suppress evidence directly or indirectly obtained in violation of this chapter. There is, however, no intention to change the attenuation rule. Nor generally to press the scope of suppression beyond present search and seizure law. But it does apply across the board in both Federal and State proceeding [sic]. And it is not limited to criminal proceedings.

Senate Report, *supra* p. 15, at 68. The "existing" and "present" law at the time the report was written – 1968 – of course did not include a good faith exception. *See United States v. Leon*, 468 U.S. 897, 913 & n.11 (1984) (acknowledging that Court had not recognized good faith exception to date and citing just one 1980 court of appeals decision urging such a rule).

The Eighth Circuit's opinion in *Moore* does offer somewhat more analysis, but it is very poor analysis. As summarized by the Sixth Circuit in *Rice*:

> [*Moore*] found that *Leon* applied for two reasons. First, it determined that § 2518(10)(a) "is worded to make the suppression decision discretionary ('If the motion is granted') . . . ." *Id.* Second, it determined that the "legislative history [of Title III] expresses a clear intent to adopt suppression principles developed in Fourth Amendment cases." *Id.* (citing S. Rep. No. 90-1097 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2185).

Rice, 478 F.3d at 714.

Rice then explained how neither of these rationales was persuasive. With respect to the first rationale, it explained that *Moore* "took the statement 'if the motion is granted' out of context." *Rice*, 478 F.3d at 714. It explained:

> Of course, the district court decides whether or not to grant a motion to suppress, but that does not give it unbridled discretion in making that decision. Section 2518(1) sets forth what a valid application for a wiretap warrant must contain. Section 2515 requires that evidence obtained in violation of the provisions of the Act must be suppressed. When read as a whole, it is clear that the suppression must be made within the strict confines of Title III itself and is far from "discretionary" in the sense which the Eighth Circuit implies.

Rice, 478 F.3d at 714.[12]

Rice then explained how *Moore* had misinterpreted the legislative history

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[12] The sentence of § 2518(10)(a) in question reads in full: "If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as obtained in violation of this chapter." Nowhere does the statute say that the decision on whether to grant the motion turns on discretion rather than being mandated like any other suppression decision by the court's findings of fact and conclusions of law. The court is to grant the motion if its findings of fact and conclusions of law establish that there was a violation of the wiretap statute and deny the motion if its findings of fact and conclusions of law establish that there was not a violation of the wiretap statute. That is all that the word "If" means.

upon which it relied:

> [T]he legislative history does not clearly express an intent to import Fourth Amendment principles such as those arising from *Leon* into Title III; in fact, it does the very opposite. If anything, the meaning of the Senate Report is that it intends Title III to incorporate only what Fourth Amendment jurisprudence existed at the time of the Act's passage (which was before *Leon*) and nothing more.

Rice, 478 F.3d at 714. *See also supra* p. 29-30 & n.11 (quoting *Rice*, 478 F.3d at 713 and relevant portion of report).[13]

The question here is not the policy question which was presented when the Supreme Court decided *Leon* under the Fourth Amendment, but a question of statutory interpretation. That means that one must begin with the plain language of the statute. *See supra* p. 15. And the language of § 2515 plainly states that "no part of the contents of such communication and no evidence derived therefrom may be received in evidence" when there has been an unlawful wiretap.

There is simply no way to read a good faith exception into this provision. It is sweeping not only in its failure to recognize any exceptions, but also in its extension beyond the Fourth Amendment exclusionary ruling – to "any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof." 18 U.S.C. § 2515. *Compare INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984) (declining to apply exclusionary rule in deportation proceedings); *United States v. Janis*, 428 U.S.

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[13] The California Court of Appeals – in a lengthy analysis which tracks that in *Rice* – has also disagreed with *Malekzadeh* and *Moore*. *See People v. Jackson*, 129 Cal. App. 4th 129, 153-60, 28 Cal. Rptr. 3d 136 (2005). Indeed, even an Eleventh Circuit district court has questioned the Eleventh Circuit decision. *See United States v. Ward*, 808 F. Supp. 803, 807-08 (S.D. Ga. 1992).

433, 454 (1976) (declining to apply exclusionary rule in civil tax proceeding); *United States v. Calandra*, 414 U.S. 338, 350 (1974) (declining to apply exclusionary rule in grand jury proceeding); *Giordenello v. United States*, 357 U.S. 480, 484 (1958) (declining to apply exclusionary rule in preliminary hearing). And while the Supreme Court may develop and modify the judicially created Fourth Amendment exclusionary rule – as it did when it decided *Leon* in 1984 – the courts cannot modify a statutory provision written by Congress. That is the province of Congress. *See CFTC v. Schor*, 478 U.S. 833, 841 (1986) (noting that courts may not "judicially rewrite" statute even where necessary to save it from constitutional invalidation); *Heckler v. Matthews*, 465 U.S. 728, 741 (1984) (same).

The government did cite two Ninth Circuit cases below that it claimed held there is a good faith exception for wiretap statute violations, but those cases actually do not so hold, and they consider none of the arguments just discussed. One of the cases was *United States v. Reed*, 575 F.3d 900 (9th Cir. 2009), in which the Court first found that there was no statutory violation in the first place and then added in a passing one-sentence dictum, "We also note that suppression would not be warranted, because the Government relied in good faith on its interpretation of the law." *Id*. at 917. The other case – *United States v. Butz*, 982 F.2d 1378 (9th Cir. 1993) – dealt with pen registers, which are not governed by the wiretap statute, *United States v. New York Tel. Co.*, 434 U.S. 159, 165-66 (1977); *United States v. Kail*, 612 F.2d 443, 448 (9th Cir. 1979), but by a separate statutory provision which does not include a statutory exclusionary rule, *see* 18 U.S.C. § 3121 *et seq*.

Neither of these cases is a holding that overrides the compelling arguments

set forth in *Rice* and the other statutory interpretation arguments set forth above. The comment in *Reed* was, as noted, a one-sentence passing dictum. And it is flatly inconsistent with this Court's *holdings* on the irrelevance of an officer's good faith misinterpretation of the law. One example of those holdings is *United States v. King*, 244 F.3d 736 (9th Cir. 2001), in which the Court held that "[e]ven a good faith mistake of law by an officer cannot form the basis for reasonable suspicion, because 'there is no good faith exception to the exclusionary rule for police who do not act in accordance with governing law.'" *Id*. at 739 (quoting *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000)).

The *Butz* case similarly is not the holding the government tried to make it. Not only did it deal with pen registers that are covered by a different statute than wiretaps, but it is a case about retroactive application of expanded Fourth Amendment case law more than good faith. *See id.*, 982 F.2d at 1383 (noting Idaho's expansion of state constitutional limitations and officer's good faith reliance on Idaho law existing at time of their application for pen register orders). The importance of this distinction was made clear in the Second Circuit case that the Ninth Circuit followed in *Butz*, which dealt with a similar situation. What the Second Circuit held in that case was that:

> [W]hen the more stringent requirements result from new state court interpretations of state laws governing evidence-gathering, and when the state officer, prior thereto, relies in good faith on pre-existing less stringent state court interpretations, we will not apply the new interpretations retroactively, at least when to do so would not serve the interests of justice.

United States v. Aiello, 771 F.2d 621, 627 (2nd Cir. 1985), *quoted in Butz*, 982 F.2d at 1383. *See also United States v. Sotomayor*, 592 F.2d 1219, 1224-26 (9th Cir. 1979) (discussing and summarizing earlier cases).

In any event, the present case is not a case of law enforcement officers' simple good faith failure to anticipate a change in state law – or where a state law has become invalid because of new developments in Fourth Amendment law. It is a case of an application by an *attorney* presumably long trained and experienced in the law.[14] And it is a case of whether a state law and wiretap application violated 18 U.S.C. § 2516(2) as it has always existed. Ever since 1968, the statute has plainly stated that a wiretap application by state officials must be made by "the principal prosecuting attorney." An "assistant" district attorney is plainly not "the principal" prosecuting attorney, and the assistant who made the application in this case should have known this.

* * *

[14] This is another reason not to extend the good faith exception to wiretap applications. As the California Court of Appeals recognized in *People v. Jackson*, *supra*, there is a vast difference between adding a layer of the *Leon* good faith exception to a magistrate's approval of a search warrant application submitted by a police officer who "is not an attorney much less a criminal law specialist," *Jackson*, 129 Cal. App. 4th, at 158, and a wiretap application that requires review and approval by high prosecutorial officials, *see id.* at 159. *See also United States v. Giordano*, 416 U.S. 505, 515-16 (1974) (noting that "[t]he mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial [wiretap] order"), *quoted in Jackson*, 129 Cal. App. 4th at 159.

C. THE AUGUST 25, 2010 WIRETAP APPLICATION, ITS SUBSEQUENT EXTENSION, AND THE METHAMPHETAMINE SUBSEQUENTLY FOUND IN THE CAR MR. PEREZ WAS DRIVING ARE FRUITS OF THE STATE WIRETAP JUST AS MUCH AS THE OTHER WIRETAPS AND THE FIRST SEIZURE OF METHAMPHETAMINE.

1. Reviewability and Standard of Review.

Another backup argument made by the government below was that some of the evidence, namely, the recordings of conversations from the new wiretaps commenced in August of 2010 and the subsequent seizure of methamphetamine from Mr. Perez's car in October of 2010, were not fruits of the earlier wiretaps and seizure because the connection was overly attenuated. CR 284, at 23-25.[15] As with the good faith issue, there is no ruling to review because the district court did not reach this issue. De novo review applies to the issue of attenuation just as it does to good faith, however. *See, e.g., United States v. $186,416.00 in U.S. Currency*, 590 F.3d 942, 949, 951 (9th Cir. 2010); *United States v. Ortiz-Hernandez*, 427 F.3d 567, 575-76 (9th Cir. 2005) (quoting *United States v. Johns*, 891 F.2d 243, 244 (9th Cir. 1989)); *United States v. Washington*, 387 F.3d 1060, 1071 n.11 (9th Cir. 2004) (also quoting *Johns*).

[15] Section 2515 excludes both the wiretapped conversations themselves and all "evidence derived therefrom" and thereby "codifies the 'fruits of the poisonous tree' doctrine." *United States v. Spagnuolo*, 549 F.2d 705, 711 (9th Cir. 1977). *See also United States v. Smith*, 155 F.3d 1051, 1059 (9th Cir. 1998).

2. The Later Wiretap Recordings and Methamphetamine Which Was Discovered Were Fruits of the State Wiretap Because the Arrest of the Informant Who Provided the Information the Government Claims Is Sufficient to Justify the August 25, 2010 Wiretap Was a Fruit of the State Wiretap.

It is true that that "a closer, more direct link" with the illegality is required where it is "the discovery of a live witness" which the defendant contends is a fruit. *United States v. Smith*, 155 F.3d 1051, 1061-62 (9th Cir. 1998) (quoting *United States v. Ceccolini*, 435 U.S. 268, 278 (1978)). Still, "the Supreme Court has rejected a per se rule of admission or exclusion." *United States v. Rubalcava-Montoya*, 597 F.2d 140, 143 (9th Cir. 1978). The "appropriate inquiry when dealing with live witnesses is whether '[t]hey testified without coercion' and whether "the fruits of the [illegality] . . . induce[d] their testimony.'" *Smith*, 155 F.3d at 1062 (quoting *United States v. Kandik*, 633 F.2d 1334, 1336 (9th Cir. 1980)).

What this means in circumstances comparable to the cooperation of the informant who provided the additional information that was used in the August wiretap application in the present case is illustrated by three Ninth Circuit cases. The first is *United States v. Rubalcava-Montoya*, *supra*, in which an unlawful search at a border checkpoint led to the discovery of three illegal aliens in the trunk of the defendant's car. *See id*., 597 F.2d at 142. The court found the testimony of the illegal aliens to be a fruit, reasoning as follows:

> The illegal aliens who testified against appellants not only were discovered as a direct result of the illegal search but were implicated thereby in illegal activity. The record does not show the substance or extent of any conversations or negotiations between the Government and the witnesses, and thus the Government has not rebutted the logical inference on

> these facts that the incriminating "evidence" discovered in the course of the illegal search was used to persuade these witnesses to testify. . . .
>
> This case must also be distinguished from *Ceccolini* in that there is no indication that the connection between the crime and the witnesses would have been discovered.

Id. at 143-44.

The second case is the very similar case of *United States v. Ramirez-Sandoval*, 872 F.2d 1392 (9th Cir. 1989). There, an illegal search of the defendant's van led to the discovery of documents which in turn led to questioning of the passengers in the van that revealed they were illegal aliens. *See id*. at 1392. The court rejected a government argument of attenuation just as it had in *Rubalcava-Montoya*:

> First, the illegally obtained documentary evidence was clearly used by [the officer] in questioning the witnesses. Second, no time elapsed between the illegal search and the initial questioning of the witnesses. Third, the identities of the witnesses were not known to those investigating the case. In all likelihood, the police and the INS would never have discovered these witnesses except for [the officer's] illegal search. Finally, although the testimony was voluntary in the sense that it was not coerced, it is not likely that these witnesses would have come forward of their own volition to inform officials that they were illegally transported into the country by the appellant. It seems clear that their testimony was induced by official authority as a result of the illegal search.

Ramirez-Sandoval, 872 F.2d at 1397.

The third case is *United States v. Padilla*, 960 F.2d 854 (9th Cir. 1992), *rev'd on other grounds*, 508 U.S. 77 (1993), which was a drug case with a cooperating defendant like the present case. In *Padilla*, an unlawful search led to the discovery of cocaine in a vehicle being driven by a drug courier, and the courier agreed to cooperate against the defendants. *See id.* at 856. The court rejected the government's argument that the courier's cooperation separated his

information from the unlawful arrest, based on *Rubalcava-Montoya* and *Ramirez-Sandoval*.

> We find such a direct link [between the illegality and the testimony] here. First, we recognize the heavy weight upon a man's shoulders who has just been arrested with hundreds of pounds of drugs in the car he was driving. The significance of this pressure is critical, not just for its emotional impact but because we previously have studied the amount of time that elapsed between the illegal search and the questioning. *United States v. Ramirez-Sandoval*, 872 F.2d 1392, 1397 (9th Cir. 1989). The discovery of the cocaine and the questioning of [the courier] were virtually simultaneous events.
>
> . . . Also, as in *Ramirez-Sandoval* and *Rubalcava-Montoya*, there is no indication that the informant would have come forward of his own accord. In fact, it would be ludicrous to suggest that he would. We stated in *Ramirez-Sandoval*, "[o]n the contrary, [the witnesses] had every incentive not to do so because they participated in the illegal activity." 872 F.2d at 1398. (Footnote omitted.)
>
> We conclude that [the courier's] cooperation was the direct result of his arrest and his position as a putative defendant.

Padilla, 960 F.2d at 862-63.[16]

The informant here was just like the witnesses discovered in these three cases. His cooperation was, as in *Ramirez-Sandoval*, "induced by official authority as a result of the illegal [wiretap]." As were the witnesses in *Rubalcava-Montoya*, the informant was "discovered as a direct result of the illegal [wiretap] [and] w[as] implicated in the illegal activity," and "there is no indication that the connection between the crime and [the informant] would have been discovered from a source

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[16] The record does not reveal whether the informant here cooperated as quickly as the drug courier in *Padilla* did, but this is "a relatively insignificant factor" that "should count for very little." 6 Wayne R. LaFave, *Search and Seizure* 372 (4th ed. 2004). The factors to which the Ninth Circuit has given the most weight are the logical ones – that the unlawfully obtained evidence is used to confront or locate the witness and that it is unlikely the witness would have come forward otherwise.

independent of [the fruits of] the illegal [wiretap]." As in *Padilla*, "there is no indication that the informant would have come forward of his own accord" and "[i]n fact, it would be ludicrous to suggest that he would." As with the testimony and information provided by the witnesses in all three of the other cases, the information provided by the informant is not attenuated but is a fruit of the poisonous tree.

3. The Later Wiretap Recordings and Methamphetamine Which Was Discovered Were Fruits of the State Wiretap Because the Informant's Information Did Not Establish Probable Cause and Necessity Without Other Evidence Which Was a Fruit of the State Wiretap.

The August 25, 2010 wiretap must be found to be a fruit even if the confidential informant was not a fruit of the earlier wiretaps. That is because the information the informant provided was not sufficient by itself to establish the probable cause and necessity which are both required for approval of a wiretap. The government also used – and needed – evidence from the May 3, 2010 wiretap and the May 6, 2010 search warrants which the government acknowledged are fruits.

a. Probable cause.

Initially, the other evidence was crucial to establishing probable cause – in two ways. The first was in providing corroboration of the information provided by the informant. There were questions about the informant's reliability which were

expressly recognized in the affidavit. Specifically, the affidavit explained:

> [S]ince I just came upon the knowledge of CS-3, at this time, any information CS-3 has provided to law enforcement is still being corroborated through other avenues for its credibility. Until CS-3 establishes himself/herself as fully credible to law-enforcement, there will necessarily be limitations to the utility of his/her information.

ER 343. *See also* CR 259-3, Joint Exhibit O, at 46 (subsequent affidavit in support of application for extension stating that CS-3 in fact "has proven to be unreliable").

Given these doubts, at least some corroboration of the informant's claims about what Mr. Perez had told him was critical. *See, e.g., Alabama v. White*, 496 U.S. 325, 330, 332 (1990) (noting that "if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion than would be required if the tip were more reliable" and that in case at bar "independent corroboration by the police of significant aspects of the informer's predictions imparted some degree of reliability"); *Garcia v. County of Merced*, 639 F.3d 1206, 1212 (9th Cir. 2011) (recognizing that "the word of a jailhouse informant alone – any jailhouse informant – is suspect and ordinarily requires corroboration before it can be accepted as probable cause"); *United States v. Rowland*, 464 F.3d 899, 908 (9th Cir. 2006) (finding reasonable suspicion even though informant was "not of proven reliability" where agents corroborated informant's tip in various ways); *United States v. Alvarez*, 358 F.3d 1194, 1203 (9th Cir. 2004) ("Even if the reliability of the confidential source is not clearly established, the credibility of the statement is 'enhanced' when the statement gives a detailed account of events that is corroborated by the statements of other confidential informants."); *United States v. Huggins*, 299 F.3d 1039, 1046 (9th Cir. 2002) (finding that "the informant's desire for favorable treatment does not

seem material *in light of the partial corroboration of his statement*" (emphasis added)).

The affidavit recognized this need for corroboration, and the corroboration it provided was all based on evidence that was a fruit of the earlier wiretaps. Highlighting the fact that it was offered to corroborate the informant, this evidence was described in the subparagraph directly following the summary of the information the informant had provided, as follows:

> Based on my training, experience, *and knowledge of this investigation*, I believe MIGUEL spoke to CS-3 on **Target Telephone #10** regarding his arrest with DEA in early May 2010. I believe when MIGUEL told CS-3 ICE agents had ripped him off, he mistook the arresting DEA agents for ICE agents. When MIGUEL spoke about 38 pounds of methamphetamine being seized, that information is *consistent with the overall seizure of 49 pounds in gross weight and approximate 39 pounds in net weight from the seizure on May 6, 2010*. In addition, MIGUEL spoke to CS-3 about four of his houses being hit and $370,000 being seized. In fact, only *three houses were hit and approximately $131,000 was seized on May 6, 2010*. I believe there may have in fact been an additional house associated with MIGUEL that agents were unaware of where the remainder of the money was located. I believe MIGUEL may have just told CS-3 that $370,000 was seized knowing that agents had missed the fourth location. Based on my training and experience, I know that often times, narcotics traffickers will embellish their experiences with law enforcement in their favor. I believe MIGUEL may have actually taken the remainder money for himself and is just notifying others in the drug trafficking community that all of it was seized. I believe that when MIGUEL told CS-3 that he was back now and that if CS-3 needed "anything," MIGUEL was letting CS-3 know that he was back to trafficking methamphetamine and could supply CS-3 with methamphetamine.

ER 329 (italics added; bold in original).

Evidence derived from the other wiretaps was also used to provide meaning to the telephone toll record evidence which was summarized in the affidavit. Of three areas of toll record information described, two had meaning *only* because of

the May 3, 2010 wiretap which the government acknowledges was a fruit. First, the affidavit stated that one of the telephone numbers called by Target Telephone #10 had been called during the May 3, 2010 wiretap and went on to provide a detailed description of an apparent drug-related conversation which had been recorded in that earlier wiretap. ER 333. Second, the affidavit stated that there were six additional telephone numbers called from Target Telephone #10 that had also been called by the phone which was the subject of the prior wiretap, including one that was a Mexico-based number that had been identified – through the prior wiretap – as belonging to Mr. Perez's mother. ER 335.

b. Necessity.

An application for a wiretap must establish not only probable cause, but also that "normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518(3)(c). Courts have labeled this the "necessity" requirement. *See, e.g., United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001); *United States v. Ippolito*, 774 F.2d 1482, 1485 (9th Cir. 1985). *See also supra* p. 12.

The application for the August wiretap relied upon evidence obtained through and/or as a result of the earlier wiretaps and search warrants to show necessity in at least two ways. As one somewhat specific example, the earlier events were used to explain why physical surveillance would not work as an investigative technique. First, the affiant explained that surveillance would not work in part because "I know that MIGUEL has multiple locations assisted with his narcotics trafficking activity," ER 333, which the affiant knew only because of

the prior search warrants. Second, the affiant highlighted Mr. Perez's use of countersurveillance during surveillance based on the earlier wiretaps. *See* ER 333.

There was also a more general use of the previously discovered evidence. Among the most important reasons the agents gave for needing to use a wiretap was their knowledge that Mr. Perez had or was part of a "large-scale methamphetamine trafficking organization," ER 338, and their belief that he had "sources of supply (including those in Mexico), in addition to new stash houses linked to [him] and his organization, as well as other members of his [drug trafficking organization]," ER 341. This knowledge or belief was based on the prior seizure of kilograms of methamphetamine and the prior wiretap which included calls to Mexico about drugs. All there was without this additional information was a cooperating defendant's description of one past supplier who had lost all of his stash houses and drug money, but was willing to provide drugs again, without any knowledge about additional stash houses, sources in Mexico, or the supplier's role as part of a large-scale organization rather than a one-man operation.

In sum, the additional evidence provided by the earlier wiretaps and searches was critical to establishing both probable cause and necessity. That makes the August 25, 2010 wiretap a fruit even if the confidential informant himself was not a fruit.

4. The Later Wiretap Recordings and Methamphetamine Which Was Discovered Are Subject to Suppression Because the Government Argued Only that It *Could* Have Gotten the August 25, 2010 Wiretap Even Without the Information from the State Wiretap but Failed to Claim and Establish that It in Fact *Would* Have Gotten the August 25, 2010 Wiretap Even Without the Information from the State Wiretap.

The fact that the government *could* have taken some other action that would have led it to the same evidence is not enough by itself to avoid application of the exclusionary rule. That principle is made clear by this Court's opinion in *United States v. Duran-Orozco*, 192 F.3d 1277 (9th Cir. 1999). There, officers obtained a search warrant for a house based in part on observations during an unlawful intrusion into the backyard. *See id.* at 1280, 1281. The Court held that the fact that the officers *could* have gotten the search warrant even without the information from the earlier unlawful intrusion was not enough. It explained:

> The government, however, does have a further hurdle to surmount. The agents might not have applied for a search warrant if they had not made their warrantless search at the back of the house and incorporated its fruits in the application for a warrant. We are not in a position to determine what they would have done. That is the job of the district court, which, after an evidentiary hearing, must make an explicit finding on this question. (Citations omitted.) . . . If the district court determines that the agents would not have sought the warrant, the evidence obtained under its authority must be suppressed and the defendants given a new trial.

Id. In other words, the government had to claim – and prove – that the agents not only *could* have gotten the search warrant without the information from the earlier

unlawful intrusion but that they *would* have gotten it.[17]

The burden of making this showing is a significant one, moreover. As one commentator has put it:

> The significance of the word "would" cannot be overemphasized. It is not enough to show that the evidence "might" or "could" have been otherwise obtained. Once the illegal act is shown to have been, in fact, the sole effective cause of the discovery of certain evidence, such evidence is inadmissible unless the prosecution severs the causal connection by an affirmative showing that it *would* have acquired the evidence in any event. In order to avoid the exclusionary rule, the government must establish that it *has not* benefitted by the illegal acts of its agents; a showing that it *might not* have benefitted is insufficient.

6 Wayne R. LaFave, *Search and Seizure* 276 (4th ed. 2004) (quoting Maguire, *How to Un-Poison the Fruit – the Fourth Amendment and the Exclusionary Rule*, 55 J. Crim. L.C. & P.S. 307, 315 (1964)) (emphasis in original).

No claim that the government *would* have gotten the warrant in addition to

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[17] The Supreme Court stated a comparable rule in the "independent source" case of *Murray v. United States*, 487 U.S. 533 (1988), where the search warrant itself was not directly tainted. In *Murray*, officers had made an initial illegal warrantless search of a warehouse, but then, apparently realizing their mistake, obtained a search warrant in which they did not refer to any evidence tainted by the prior illegal search and conducted a second search using that warrant. *See id*. at 535-36. The Supreme Court held that even in this context:

> The ultimate question . . . is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, ...

Id. at 542. *See also United States v. Holzman*, 871 F.2d 1496, 1513-14 (9th Cir. 1989) (remanding for further findings because "[i]t is not so clear . . . whether [the officer's] decision to seek the warrant was prompted by his observations during the unlawful entry").

the claim that it *could* have gotten the warrant was made in either the agent declaration or the memorandum of points and authorities in support of the government's opposition in district court. Without such a claim, the government's attenuation argument is a mere theoretical possibility, and theoretical possibilities are not what establish attenuation.

VI.

CONCLUSION

The state wiretap violated 18 U.S.C. § 2516(2) because the applicant was an assistant district attorney, not the "principal prosecuting attorney" which the statute requires. The good faith exception cannot be relied upon to avoid suppression because it does not apply to the statutory wiretap exclusionary rule in general and does not apply in the particular circumstances here in any event. Finally, the August wiretap evidence and the October seizure of methamphetamine from Mr. Perez's car are fruits of the poisonous tree just as much as the earlier evidence.

Respectfully submitted,

DATED: May 24 , 2012

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF RELATED CASES

Counsel for appellant certifies that he is unaware of any pending case presenting an issue related to those raised in this brief.

DATED: May 24 , 2012

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,724 words.

DATED: May 24 , 2012

s/ Carlton F. Gunn
CARLTON F. GUNN

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1. 18 U.S.C. § 2515

2. 18 U.S.C. § 2516

18 U.S.C. § 2515

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2516

§ 2516. Authorization for interception of wire, oral, or electronic communications

(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 to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of--

. . .

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

. . .

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing such interception, or any conspiracy to commit any of the foregoing offenses.

(3) . . .

Certificate of Service

I hereby certify that on May 24, 2012, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: s/ Carlton F. Gunn
CARLTON F. GUNN

A P P E N D I X 7

CA NO. 12-50063

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAYEL PEREZ-VALENCIA, Defendant-Appellant.	DC# CR 11-442-PA

APPELLANT'S SUPPLEMENTAL BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE PERCY ANDERSON
United States District Judge

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CA NO. 12-50063

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MAYEL PEREZ-VALENCIA, Defendant-Appellant.	DC# CR 11-442-PA

I.

INTRODUCTION

The final resolution of this case is controlled by a comparison of (1) the key legal requirement established by this Court's initial opinion with (2) a key factual concession by the district attorney who testified in the proceedings on remand and the district court finding based on that testimony. The key legal requirement is that

> "*the*" attorney designated to act in the district attorney's absence . . . 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.

United States v. Perez-Valencia, 727 F.3d 852, 855 (9th Cir. 2013) (emphasis in

original).[1]

The Court can then compare this legal requirement with the following testimony by the district attorney at the hearing on remand.

> THE COURT: And during your absence, did [the assistant district attorney] assume all of your powers and responsibilities?
> THE WITNESS: Not all of my powers and responsibilities.
> THE COURT: And what powers did he not assume during that period?
> THE WITNESS: The final decision as indicated seeking death in a special circumstance murder case, the final decision on a personnel matter if it reached the level of a lawsuit or a termination, something that could be calendared til I was available.
> THE COURT: Did he assume all of your powers and responsibilities for matters that couldn't be calendared for a time when you were available?
> THE WITNESS: Yes.

SER 32.[2] Consistent with this testimony, the district court found:

> During the absence of the DA, [the assistant DA] is fully empowered to act as the DA for any matters that might arise in the day-to-day operations of the office, including, but not limited to, making an application for a wiretap. There are certain policy and procedural decisions that can await the return of the DA that are not delegated by DA Ramos and are not made by the acting DA. Those decisions, which include whether to seek the death penalty in a capital case and personnel decisions in which an employee is to be terminated, are not of an exigent nature and are personally made by DA Ramos upon his return to the office.

SER 39.

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[1] The defense argued in its initial briefing that an assistant district attorney can *never* be "the principal prosecuting attorney" authorized to seek a wiretap under 18 U.S.C. § 2516(2), *see* Appellant's Opening Brief, at 11-24, but this Court rejected that broader argument. That is still the defense position, but this supplemental brief applies the Court's opinion as it presently stands.

[2] "SER" refers to the supplemental excerpt of record being filed simultaneously with this brief.

This testimony and district court finding establish that the legal requirement set out in the Court's opinion is not satisfied. The requirement established in the Court's opinion is not that an assistant district attorney acting in the district attorney's stead merely have those "powers and responsibilities for matters that couldn't be calendared for a time when [the district attorney is] available." *Supra* p. 2. It is not, to use the language in the district court's findings of facts, that the assistant district attorney merely be "empowered to act as the DA for any matters that might arise in the day-to-day operations of the office" that cannot "await the return of the DA." *Supra* p. 2. The requirement is that the assistant district attorney be "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Supra* p. 1 (emphasis in original). The assistant district attorney here was not designated to act as district attorney for *all* purposes.

II.

ARGUMENT

The legal requirement established by this Court and the testimony and finding just set forth are dispositive. The opinion establishes the legal requirement that the assistant district attorney be "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Supra* p. 1 (emphasis in original). The testimony and finding establish that there are some purposes for which the assistant district attorney cannot act as district attorney, including at the very least final decisions about whether to seek the death penalty and personnel decisions in which an employee is to be terminated.

The district court and the government – and the district attorney by

implication in his testimony – tried to avoid the shortfall in what the testimony established from what this Court's opinion requires in two ways. First, the government argued and the district court implicitly agreed that this Court's opinion requires that the assistant district attorney have assumed only "all the *delegable* powers, duties and responsibilities of the District Attorney." SER 40 (emphasis added). As put by the government, "[w]hether there are certain powers that the DA never delegates to whomever is acting as the DA when the DA is absent, as a matter of policy or practice or both, is irrelevant." CR 653-2 (government's objections to defendant's proposed findings of fact), at 2.[3]

Second, the district court and the government – and the district attorney in his testimony – implied that it is enough if only power over exigent matters on which decisions cannot be delayed is delegated. The district court's findings suggest this in a distinction it draws between "matters that might arise in the day to day operations of the office" and decisions that "can await the return of the DA" and "are not of an exigent nature." SER 39. The government's proposed findings of fact and the district attorney's testimony similarly suggest this rationale, in (1) the district attorney's agreement with the prosecutor during redirect examination that "there are some powers . . . that are not delegated pursuant to the policy and

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[3] The government based this argument on this Court's phrasing of one of the questions it posed for the hearing on remand as "did [the assistant district attorney] have all the powers of an acting district attorney or did he merely possess the limited authority to apply for state wiretaps?" CR 653-2, at 2 (quoting *United States v. Perez-Valencia*, 727 F.3d at 855). The government overlooked that the opinion nowhere states that the "acting district attorney" referenced in this question can satisfy something less than the requirement set forth in the preceding paragraph of the opinion that the assistant district attorney be "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Id.* (emphasis in original).

practice of your office . . . based on the exigency of the decisions," SER 32-33, and (2) a proposed finding proffered by the government that the policy and procedural decisions that are not delegated "are both important and not of an exigent nature," CR 647-1 (government's proposed findings of fact), at 2-3. The government then went on to claim that decisions about wiretaps fall within the class of exigent matters because "wiretaps are exigent in nature, involving potentially life-or-death issues that affect that [sic] public's and law enforcement officers' safety." CR 647-1, at 3. As expressed by the district attorney in his testimony:

> When you have a wiretap, the law enforcement tool of a wiretap, you have exigent circumstances. You have peace officers' lives possibly on the line. You have got sometimes informants' lives on the line. You have got criminal activity that is ongoing 24 hours a day. It is not something that you can calendar and put off until I am available such as making a decision like seeking death.

SER 30.

Unfortunately for the government, neither of these rationales passes muster.

A. THE "DELEGABLE POWERS" RATIONALE.

What might be labeled the "delegable powers" rationale is neither a fair reading of this Court's opinion nor consistent with the underlying statute which the Court interpreted, 18 U.S.C. § 2516(2). The Court's opinion clearly states that the assistant district attorney must be "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Supra* p. 1 (emphasis in original). This is consistent with the statutory requirement that the person who applies for the wiretap be "the principal prosecuting attorney," 18 U.S.C. §

2516(2). It is not an assistant prosecuting attorney who temporarily has *some* of the principal prosecuting attorney's powers.

This "delegable powers" rationale creates a highly problematic slippery slope, moreover. If the assistant district attorney acting as the district attorney only needs to have those powers which the district attorney chooses to make delegable, the assistant could potentially have hardly any powers at all in addition to the power to authorize wiretaps. In the present instance, the powers which are not delegated appear to be relatively few. They possibly consisted of only the final decision to seek the death penalty and personnel decisions in which an employee is to be terminated, though the district attorney's testimony suggested it might be any powers that did not have to be exercised exigently, *see* SER 32-33 (testimony suggesting that the powers delegated are "based on the exigency of the decisions"), and the district court's finding spoke of unspecified "certain policy and procedural decisions that can await the return of the DA," which "include[d]," but by implication might not be limited to, "whether to seek the death penalty in a capital case and personnel decisions in which an employee is to be terminated," SER 39.

And the powers not delegated could have included much more if the district attorney had so chosen. The district attorney could have chosen to also not delegate all or some indictment decisions, all or some case assignment decisions, all or some plea bargaining decisions, and a multitude of other decisions, depending on what the district attorney believed could and should await his return. The district attorney could potentially have left little more than the decision of whether to seek a wiretap in the category of "delegable powers," which would be directly contrary to this Court's holding that the designated assistant district

attorney must have more than "just . . . the limited authority to apply for a wiretap order." *Supra* p. 1.

The New York state statute that controlled the delegation to an assistant district attorney which the Second Circuit considered in *United States v. Fury*, 554 F.2d 522 (2d Cir. 1977) is a good example of what must be required if an assistant district attorney can apply for wiretaps. That statute provides, without exception, that the assistant acting in the district attorney's place "shall perform the powers and duties of the office of district attorney." N.Y. County Law § 702(3).[4] This provision – and another comparable provision within the same statute[5] – make the assistant district attorney "acting district attorney *to all intents and purposes*." 1962 N.Y. Op. Att'y Gen. 95 (quoting 1928 N.Y. Att'y Gen. 229) (emphasis added), *available at* 1962 WL 114784. *See also People v. Lester*, 48 N.Y.S.2d 409, 410 (App. Div. 1944) (quoting predecessor statute enabling assistant district attorney to "discharge any duties imposed by law upon, or required of the district attorney . . ."). Thus, even the case most favorable to the government does not support its argument that exercising a selected set of duties the district attorney

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[4] The *Fury* opinion noted that the assistant district attorney who applied for the wiretap in that case had stated in his application "that he was proceeding under the authority of § 702 of the New York County Law." *Fury*, 554 F.2d at 526. The same statute was relied upon in the New York state case cited in *Fury – People v. Fusco*, 348 N.Y.S.2d 858 (Nassau Cty. Ct. 1973). *See id.* at 863, *cited in Fury*, 554 F.2d at 527 n.4.

[5] Subsection (5) of section 702 provides that "[i]n the event of a vacancy in the office of district attorney, the assistant, or if more than one has been appointed, the assistant so designated, shall perform the powers and duties of the office of district attorney until a successor is appointed and has qualified." N.Y. County Law § 702(5).

has decided to make delegable is sufficient.[6]

B. THE EXIGENCY RATIONALE.

The exigency rationale and/or distinction suggested by the district court, the government, and the district attorney is similarly an unpersuasive interpretation and application of this Court's opinion. Initially, that rationale, like the "delegable powers" rationale, is not a fair reading of what the Court said in its opinion. The Court's opinion requires that the assistant district attorney be "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Supra* p. 1 (emphasis in original). The opinion does not say that the assistant district attorney must "act for *all* purposes as the district attorney of the political subdivision in question" (emphasis in original), with an exception for those decisions that "can await the return of the DA" and "are not of an exigent nature." *Supra* p. 4. The opinion does not say that the assistant district attorney must "act for *all* purposes as the district attorney of the political subdivision in question" (emphasis in original), with an exception for selected policy and procedural decisions that "are both important and not of an exigent nature." *Supra* p. 5. Rather, the opinion states without qualification that the assistant district attorney must be "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Supra* p. 1 (emphasis in original).

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[6] As noted in Appellant's Opening Brief, the defense position is that the suggestion in *Fury* that an assistant district attorney may in some circumstances be "the principal prosecutor attorney" who can apply for a wiretap is both dictum and wrong. *See* Appellant's Opening Brief, at 11-24. The defense recognizes that this Court's opinion finds *Fury* at least in part persuasive, however.

This exigency rationale – and the district attorney's testimony which first suggested it – is also unpersuasive because it reflects a view of wiretaps which is inconsistent with the wiretap statute's structure, purpose, and history. As discussed in some detail in Appellant's Opening Brief, Congress deliberately wrote a statute including "a host of procedural safeguards," *United States v. Callum*, 410 F.3d 571, 574 (9th Cir. 2005), to ensure careful deliberation at the highest levels of government. *See* Appellant's Opening Brief, at 11-14. Wiretaps are not to be used on a regular basis as part of expedited, emergency criminal investigations but are to be "used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *United States v. Giordano*, 416 U.S. 505, 515 (1974).[7] That means that wiretaps (1) are not meant to be a tool for urgent investigations and (2) will simply take too long to get in some cases. As suggested by one witness who authored model wiretap legislation and later gave Congressional testimony that has been quoted by the Supreme Court:

> It may very well be that in some number of cases there will not be time to get the Attorney General to approve [the wiretap]. I think we are going to have just to let those cases go, ... If we cannot make certain cases, that is going to have to be the price we will have to pay.

Hearings on Anti-Crime Program Before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong., 1st Sess. 1379 (1967) (testimony of

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[7] Indeed, federal wiretap applications often take weeks to prepare and process, as recognized by Judge Trott of this panel during oral argument. *See* Oral Argument, February 4, 2013, *United States v. Perez-Valencia*, No. 12-50063, *available at* http://www.ca9.uscourts.gov/media/view.php?pk_id=0000010275, time counter 27:37 (last visited January 16, 2014) (noting that applications at time of his service as Assistant Attorney General were first reviewed by director of FBI and then could spend two weeks pending review at Department of Justice).

Professor G. Robert Blakey), *quoted in Giordano*, 416 U.S. at 518-19.[8]

For better or for worse – and many would say for better – Congress chose to treat the decision to invade a citizen's privacy by monitoring his or her personal phone calls as a decision that should deserve greater consideration than probably any other investigative decision. Just as the death penalty which this district attorney felt he must personally decide on is an extraordinary punishment that should be decided at only the highest level of authority, a wiretap is an "extraordinary investigative device," *United States v. Giordano*, 416 U.S. at 527, that should be decided at only the highest level of authority. It is in the class of prosecutorial decisions that deserve to be made – and in the case of a wiretap, is statutorily required to be made[9] – at the very highest level of authority.

And an assistant district attorney who can make most, but not all, decisions is not the very highest level of authority. If other decisions are important enough that they have to wait for the district attorney's availability, wiretap decisions are important enough that they have to wait for the district attorney. That is the only fair reading of the statute, and it is the only reading consistent with the requirement established in this Court's opinion that the assistant district attorney

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[8] The present case is actually a good illustration of a case where there was not any exigency and the wiretap would have been just as efficacious if the application had been filed a few days later after the district attorney returned to the office. *See* Appellant's Opening Brief, at 24-27.

[9] There is apparently not this sort of statutory requirement for the decision to seek the death penalty. The district attorney who testified was unaware of any such statutory requirement, *see* SER 29-30 (testimony by district attorney that requirement that he personally approve decision to seek death penalty is "policy that we have in our office" and he was not certain whether it was codified somewhere), and appellate counsel for Mr. Perez-Valencia has found none.

be "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Supra* p. 1 (emphasis in original).

III.

CONCLUSION

The testimony at the hearing and the district court's findings make clear that the assistant district attorney who was acting for the district attorney here was not "designated to act for *all* purposes as the district attorney of the political subdivision in question." *Supra* p. 1 (emphasis in original). That means he was not "the principal prosecuting attorney" under 18 U.S.C. § 2516(2). That in turn makes the wiretap invalid.

Respectfully submitted,

DATED: January 21, 2014

By s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 3,079 words.

DATED: January 21 , 2014

s/ Carlton F. Gunn
CARLTON F. GUNN

Certificate of Service

I hereby certify that on January 21, 2014, I electronically filed the foregoing Appellant's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: s/ Carlton F. Gunn
CARLTON F. GUNN

A P P E N D I X 8

No. 12-50063

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAYEL PEREZ-VALENCIA,

Defendant-Appellant.

GOVERNMENT'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

APPEAL FROM
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No. 12-50063

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAYEL PEREZ-VALENCIA,

Defendant-Appellant.

GOVERNMENT'S RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF

I.

INTRODUCTION

This Court remanded this matter to the district court for the limited purpose of ascertaining whether the district attorney of San Bernardino County properly designated, in his absence, one person to be the acting district attorney with all the powers and responsibilities of an acting district attorney, including but not limited to applying for the state wiretap subject to a motion to suppress in this case. On remand, the district court found that the district attorney did, in fact, designate only one person who had all the powers of the acting district attorney on the date the acting district attorney applied for the state wiretap at issue. As such, the wiretap

was authorized in compliance with both federal and California wiretap law, and suppression is not warranted.

II.

STATEMENT OF FACTS

A. DEFENDANT'S MOTION TO SUPPRESS

On September 12, 2011, defendant-appellant Mayel Perez-Valencia ("defendant"), in the district court (the Honorable Percy Anderson, United States District Judge), filed a motion to suppress a state wiretap sought by the San Bernardino District Attorney's Office ("SBCDA"), which was authorized on March 30, 2010 (the "motion to suppress"), alleging that it was obtained in violation of 18 U.S.C. § 2516(2). Defendant argued that the wiretap was unlawfully obtained because the application was signed by SBCDA Assistant District Attorney ("ADA") Dennis Christy instead of SBCDA District Attorney ("DA") Michael Ramos. The district court denied defendant's motion to suppress on October 17, 2011, and defendant timely appealed his conviction and sentence.

B. THE COURT'S LIMITED REMAND

On August 20, 2013, after briefing and oral argument, this Court held that compliance with 18 U.S.C. § 2516(2) necessarily requires an analysis of California Penal Code § 629.50; that § 629.50 "plainly authorizes '<u>the</u> person designated to act as district attorney in the district attorney's absence' to apply

for [a wiretap] order"; and that "'the' attorney designated to act in the district attorney's absence . . . must be acting 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. . . ." United States v. Perez-Valencia, 727 F.3d 852, 855 (9th Cir. 2013) (emphases in original). The Court remanded to the district court for the limited purpose of developing a factual record regarding three questions: (1) did ADA Christy have "all the powers of an acting district attorney" on March 30, 2010, or were his powers limited to applying for state wiretaps; (2) what was DA Ramos' purpose in designating three people in the July 1, 2009 memorandum executed pursuant to California Penal Code § 629.50(a) (the "Designation Memo"); and (3) did the Designation Memo give the three named person simultaneous or successive power to apply for state wiretaps? Id.

C. THE DISTRICT COURT'S FINDINGS OF FACT

1. DA Ramos' Supplemental Declaration

On September 12, 2013, the government submitted a supplemental declaration from DA Ramos, dated September 6, 2013, addressing the issues identified by the Court (the "Supplemental

Ramos Declaration"). (SER 1-13.)[1] In it, DA Ramos explained that it was the policy of the SBCDA that, should DA Ramos be unavailable or unable to carry out the duties of the district attorney, the ADA for Criminal Operations would "be the first to assume the powers of the District Attorney in [DA Ramos'] absence," and if both DA Ramos and the ADA for Criminal Operations were absent, "then the [ADA] for Administration would assume the powers of the District Attorney." (SER 6.) During 2009 and 2010, the ADA for Criminal Operations was Dennis Christy and the ADA for Administration was James Hackleman. (SER 5.) The next in command after the two ADAs was the Chief Deputy District Attorney for the Central Division, Clark Hansen III, who would assume the powers of the district attorney in the event that DA Ramos and both ADAs were absent. (Id.) DA Ramos stated that the purpose in designating these three people to act in successive order was to "provide a clear and concise procession in the event that the District Attorney and/or one or both Assistant District Attorneys are absent or unavailable to act as District Attorney." (SER 6.)

[1] "ASB" refers to Appellant's Supplemental Brief, "GAB" refers to the Government's Answering Brief, "SER" refers to the Supplemental Excerpt of Record filed by defendant, "GSER" refers to the Government's Supplemental Excerpt of Record filed by the government, and "RT" refers to the Reporter's Transcript filed by defendant; each reference is followed by the applicable page number. "CR" refers to the Clerk's Record in the district court and is followed by the docket number.

DA Ramos' purpose in executing the Designation Memo in 2009 was to codify this office policy in order to "delineate someone to act on [his] behalf in the event [he] was absent or unavailable . . . which included, but was not limited to applying for wiretap orders." (SER 7.) DA Ramos specifically invoked California Penal Code § 629.50(a) in the Designation Memo to ensure a written record of compliance with California's wiretap statute, not to limit the authority of the individuals named within to only applying for wiretap orders. (SER 7-8.)

Finally, DA Ramos clarified that during his three-day absence from the office from March 29 through 31, 2010, ADA Christy was the sole person who "was the acting District Attorney." (SER 8.)

Defendant did not submit any evidence.

2. DA Ramos' Testimony

On October 25, 2013, DA Ramos testified at a hearing before the district court during which he stated that, for the period of March 29 through 31, 2010, he did not make any decisions regarding policy, personnel, or criminal cases, nor did he sign any wiretap applications. (SER 27-28; RT 10/25/2013 29:12-30:12.) Indeed, DA Ramos was not in communication with the office for all of March 29 and 30, 2010, or during business hours on March 31, 2010, because he was in a hospital room with his wife, who did not transition back to their home from the

hospital until the third day. (SER 26; RT 10/25/2013 28:5-21.) Thus, during these three days, if any issues regarding policy, personnel, or criminal cases had arisen, ADA Christy, the acting district attorney, would have made those decisions. (SER 27-28; RT 10/25/2013 29:12-30:8.)

DA Ramos also explained that there are certain powers of his office that are not delegated in the event of his absence or unavailability because they are not of an exigent nature and can await his return. (SER 32-33; RT 10/25/2013 34:22-7.) These include the power to make the final determination as to whether to seek the death penalty in a case (SER 29; RT 10/25/2013 31:10-22); whether to fire an employee (SER 24; RT 10/25/2013 26:4-9); and budgeting decisions (SER 25; RT 10/25/2013 27:2-7). Such decisions would be "calendar[ed to] a time when [DA Ramos] was available to make that decision." (SER 24; RT 10/25/2013 26:6-7; see also SER 24; RT 10/25/2013 26:17-18 (the "team" responsible for making death penalty decisions "would calendar [the final] decision to make sure that [DA Ramos] was available"); SER 25; RT 10/25/2013 27:6-7 (budget decisions would be "continued to a point where [DA Ramos] was available").) All of DA Ramos' other powers and responsibilities were assumed by ADA Christy, the acting district attorney, during DA Ramos' absence from March 29

through 31, 2010. (SER 31-32; RT 10/25/2013 34:1-15; see also SER 33; RT 10/25/2013 35:8-11.)

DA Ramos distinguished applying for wiretaps, which involve "exigent circumstances," from those other decisions which could be calendared for a time when he returned to the office:

> When you have a wiretap, . . . you have exigent circumstances. You have peace officers' lives possibly on the line. You have got sometimes informants' lives' on the line. You have got criminal activity that is ongoing 24 hours a day. It is not something that you can calendar and put off until I am available such as making a decision like seeking death.

(SER 30; RT 10/25/2013 32:89-16.)

3. Government's Proposed Findings of Fact

On November 4, 2013, the parties lodged their respective proposed findings of fact. (See GSER 1-7; CR 648.) On November 12, 2013, the parties lodged their respective objections and reasons for their objections to the opposing party's proposed findings of fact. (See GSER 8-39; CR 653, 654.)

4. The District Court's Findings of Fact and Conclusions of Law

On December 6, 2013, the district court issued its findings of fact and conclusions of law, denying defendant's motion to suppress the March 30, 2010 state wiretap because:

> on March 30, 2010, no one other than ADA Christy was authorized to apply for wiretaps pursuant to Section 629.50(a). Nor was any other person authorized to exercise any of the responsibilities and duties of the District Attorney during DA Ramos' absence.

(SER 40.) Accordingly, ADA Christy "had all the powers of an acting district attorney" and was "duly acting as 'the' 'principal prosecuting attorney' of San Bernardino County for all purposes within the meaning of 18 U.S.C. § 2516(2) and California Penal Code Section 629.50 when he authorized the wiretap application at issue in this case." (Id.)

III.

ARGUMENT

ADA CHRISTY WAS THE SOLE ACTING DISTRICT ATTORNEY DURING DA RAMOS' ABSENCE AND WAS THEREFORE THE "PRINCIPAL PROSECUTING ATTORNEY" FOR PURPOSES OF THE MARCH 30, 2010 STATE WIRETAP

The principal question raised on remand was whether "'the' attorney designated to act in the district attorney's absence" –- here, ADA Christy –- "ha[d] all the powers of an acting district attorney or did he merely possess the limited authority to apply for state wiretaps?" Perez-Valencia, 727 F.3d at 855 (emphasis in original). If other assistant district attorneys had been given concurrent authority to act as the district attorney, or if ADA Christy had been delegated only the authority to apply for wiretaps, then there necessarily would have been other subordinates who had been delegated the responsibilities of the district attorney, resulting in several "acting" district attorneys running the office during DA Ramos' three-day absence. Avoiding such a scenario is key to satisfying Title III because one of the purposes of 18 U.S.C.

§ 2516(2) was to "centralize areawide law enforcement policy" in "the principal prosecuting attorney" such as the "district attorney." S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, at 2187 ("The most important question, however, is not the name but function . . . ."). Congress was concerned with "the lines of responsibility lead[ing] to an identifiable person" should abuses of the federal wiretap law occur. Id. at 2185; see also United States v. Fury, 554 F.2d 522, 527 (2d Cir. 1977) ("[T]he delegation in New York is to an 'acting' district attorney." Accordingly, there could only be one person who was designated to be the "acting district attorney" in order for the March 30, 2010 state wiretap application to have been in compliance with both federal and California wiretap law, and that one person had to have more than just the limited power to authorize wiretap applications. That was the case here with ADA Christy. Indeed, as DA Ramos testified, no other assistant district attorney was designated to act for any purpose as district attorney. (See SER 26; RT28:24-25; see also SER 27-28; RT 10/25/2013 29:12-30:8.)

DA Ramos' Designation Memo named three persons to assume the duties of the acting district attorney in DA Ramos' unavailability or absence from the office in "successive order":

> [ADA] Christy was first authorized to act in [DA Ramos'] absence. If [ADA] Christy was unavailable to act, then [ADA] Hackleman was authorized to act in [DA

> Ramos'] absence. And if both [ADA] Christy and [ADA] Hackleman were unavailable to act for [DA Ramos] in [his] absence, then Mr. Hansen was authorized to act.

(SER 7.) Further, although the Designation Memo expressly invoked California Penal Code § 629.50(a), "it was not intended to limit the authority of the named individuals to 'act in [DA Ramos'] absence' only to applying for wiretap orders." (Id.) Rather, the Designation Memo "codified the policy of succession in the office" that in DA Ramos' absence, the ADA for Criminal Operations "would be the first to assume the powers of the District Attorney in [DA Ramos'] absence," the ADA for Administration would be second to do so, and the Chief Deputy District Attorney for the Central Division would be the third to do so. (SER 6-7.) Accordingly, these three persons were named in the Designation Memo in the order that they were to "exercise the powers of District Attorney" in the event of DA Ramos' absence or unavailability. (SER 7.)

Here, during the entire period of DA Ramos' absence from March 29 through 31, 2010, and specifically on March 30, 2010, when the state wiretap application at issue was signed by ADA Christy, he "was the acting District Attorney such that he assumed all the powers and responsibilities of the District Attorney, which included, but was not limited to, the making of the application for the wiretap order in this case." (SER 8; see also SER 40 (district court found that "on March 30, 2010,

no one other than ADA Christy was authorized to apply for wiretaps . . . . Nor was any other person authorized to exercise any of the responsibilities and duties of the District Attorney during DA Ramos' absence. The Court therefore finds that at that time, ADA Christy had all the powers of an acting district attorney.").)

Defendant argues that because there were certain duties that were not delegated by DA Ramos to the acting district attorney (such as "final decisions about whether to seek the death penalty and personnel decisions in which an employee is to be terminated"), the acting district attorney was not "designated to act for all purposes as the district attorney." (ASB 3 (citing Perez-Valencia, 727 F.3d at 855 (emphasis in original)).) Reading the Court's opinion in light of its three questions on remand, however, it is clear this Court's overriding concerns were that (1) DA Ramos delegate more than the sole authority to authorize wiretap applications, and that (2) DA Ramos delegate his authority to only one assistant district attorney so that attorney has all the powers of "an acting district attorney." Id. DA Ramos did just that. It cannot be the case that DA Ramos' decision to not delegate the death penalty, budgetary decisions, and the decision to fire an employee means that "local wiretap activity would be completely suspended." Id.

Rather, the "acting" district attorney is the one person who is authorized to run the office during the absence of the district attorney until he returns. That person is acting as the "assistant district attorney duly designated to act for all purposes as the district attorney" and, "'should abuses occur [while the acting district attorney is acting], the lines of authority lead to an identifiable person,' the acting district attorney." Fury, 554 F.2d at 527. Thus, the question of whether the acting district attorney was designated to "act for all purposes," Perez-Valencia, 727 F.3d at 855 (emphasis omitted), is more about whether DA Ramos left more than one person in charge in his absence (such that the lines of authority did not lead to one identifiable person), and less about whether the sole person left in charge in DA Ramos' absence enjoyed powers that are never delegated to anyone. So long as "[t]here is still only one person who has the authority and he is at the top," Title III is satisfied. See Fury, 554 F.2d at 527.[2]

Relatedly, defendant also attacks a so-called "exigency rationale" in criticizing the practice of the SBCDA to carve out

[2] This is particularly true here, where DA Ramos was only absent from the office for three days so that ADA Christy's assumption of the "acting district attorney" role was temporary and short-lived. Moreover, it was wholly plenary during those three days as no decisions regarding the death penalty, the budget, or terminations were at issue. (See SER 26; RT28:24-25; see also SER 27-28; RT 10/25/2013 29:12-30:8.)

the three limited decisions that are never delegated to a subordinate during DA Ramos' unavailability or absence from the office because those decisions can await his return. (ASB 8.) For defendant's rationale to be relevant to the question of whether Title III was violated here, however, there would have to have been another person in the SBCDA who was separately authorized to make the decisions that were "calendared" for DA Ramos' return. There was no such person, as DA Ramos retained those powers while he was absent from the office and, as a result, those decisions simply did not get made while he was absent -- both in theory and in practice. (See SER 26; RT28:24-25; see also SER 27-28; RT 10/25/2013 29:12-30:8.)

Defendant further asserts, without authority, that wiretaps "are not meant to be a tool for urgent investigations," and are "important enough that they have to wait for the district attorney." (ASB 9-10.) However, this is not the law. As discussed in the Government' Answering Brief, there is no exigency requirement for an acting district attorney to apply for a state wiretap either in the federal or California state wiretap laws. (GAB 39-42.) More importantly, this Court has already recognized that California's wiretap statute "plainly authorizes 'the person designated to act as district attorney in the district attorney's absence' to apply for [wiretaps]." Perez-Valencia, 727 F.3d at 855 (emphasis in original) (citing

California Penal Code § 629.50(a)). Accordingly, DA Ramos was in compliance with both federal and California wiretap law when he availed himself of the provisions of California's wiretap statute authorizing him to designate an acting district attorney to, among all of the other powers and responsibilities he assumed as the acting district attorney, apply for wiretaps. The fact that there were a limited number of decisions that DA Ramos deemed non-exigent and, as such, were never delegated to the acting district attorney –- or anybody else -- does not change this.

IV.

CONCLUSION

For the reasons set forth above, the district court's denial of defendant's motion to suppress the state wiretap and, consequently, defendant's conviction and sentence, should be affirmed. Should this Court determine, however, that DA Ramos' designation of ADA Christy as the acting district attorney in DA Ramos' absence was done in contravention of Title III and/or California's wiretap statute, the government respectfully

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requests that the Court remand the case to the district court for further proceedings on the issue of attenuation.

Dated: February 4, 2014

Respectfully submitted,

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