CA NO. 12-50063

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>MAYEL PEREZ-VALENCIA,<br>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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# TABLE OF CONTENTS

**Page**

# TABLE OF AUTHORITIES

**Page**

**FEDERAL CASES**

## TABLE OF AUTHORITIES (Cont'd)

**Page**

## TABLE OF AUTHORITIES (Cont'd)

**Page**

## TABLE OF AUTHORITIES (Cont'd)

**Page**

## TABLE OF AUTHORITIES (Cont'd)

**Page**



**STATE CASES**



**FEDERAL STATUTES AND COURT RULES**

## TABLE OF AUTHORITIES (Cont'd)

**Page**



**STATE STATUTES**



**OTHER AUTHORITIES**

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| UNITED STATES OF AMERICA,<br>Plaintiff-Appellee,<br>v.<br>MAYEL PEREZ-VALENCIA,<br>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

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[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.

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> 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

# STATUTORY APPENDIX

# TABLE OF CONTENTS

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.

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