No. 17-862

IN THE

Supreme Court of the United States

MARICOPA COUNTY, ARIZONA, *et al.*,

Petitioners,

v.

MANUELA VILLA,

Respondent.

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

BRIEF IN OPPOSITION

CAMERON A. MORGAN, ESQ.
Counsel of Record
4356 N. Civic Center Plaza
Scottsdale, Arizona 85251
(480) 990-9507
camerona.morgan@hotmail.com

Counsel for Respondent

279839

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 says that "the principal prosecuting attorney" of a state or locality may apply for an order authorizing the interception of wire, oral or electronic communications. 18 U.S.C. § 2516(2). Does Title III allow a principal prosecuting attorney to delegate the task of applying for such an order to a subordinate?

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Page

News Articles

Statutes

Cited Authorities

INTRODUCTION

18 U.S.C. § 2516(2) allows a "principal prosecuting attorney" of a state to make an application for an order to intercept oral or electronic communications if the state has a wiretap statute that complies with the minimum requirements of Title III. Arizona has a wiretap statue, A.R.S. § 13-3010, and the Maricopa County Attorney's Office initiates wiretap investigations by having the Maricopa County Attorney designate several attorneys to authorize and apply for wiretap orders and extensions thereof in his name.

Numerous wiretap applications and orders for any number of phones and extensions thereof may be involved in a given investigation, as occurred here. The County Attorney does not write, read, or review the applications, determine their sufficiency in terms of probable cause or necessity, sign or file them with the court. He merely designates others to do all of these tasks. In *Villa v. Maricopa County*, the Ninth Circuit found that this delegation of authority violated 18 U.S.C. § 2516(2), and found the state statute that appears to allow this delegation, A.R.S. § 13-3010(A), and the practice itself, unconstitutional under the preemption doctrine.

Maricopa County has requested this court grant a writ of certiorari for its question, "Does Title III allow a principal prosecution attorney to delegate the task of applying for such an order to a subordinate." The Petitioner asserts that there is a split between federal and state courts of last resort over this issue when, in fact, no serious dispute exists. To the extent that the various jurisdictions use different language in requiring the direct

and full participation of principal prosecuting attorneys in the wiretap application process, the underlying principles shared by all are the same and stem from the Congressional Record for Title III. Congress intended to limit the persons who could apply for and/or authorize wiretaps applications in order to centralize policy and accountability in specific individuals to protect the public's right to privacy from governmental abuse. See *U.S. v. Giordano,* 416 U.S. 505 (1974) (Attorney General could not delegate authorization power under 18 U.S.C. § 2516(1) to his executive assistant). Thus, any asserted or imagined conflict is neither clear nor deep and unworthy of a writ of certiorari from this court.

The Ninth Circuit went to great lengths to avoid such a conflict and adopted and followed the reasoning of the 1st circuit in *U.S. v. Smith*, 726 F.2d 852 (1st Cir. 1984) which in turn had approved of the strict limitations on the delegation of authority put on a similar statute by the Massachusetts Supreme Court decision in *State v. Vitello,* 327 N.E.2d 819 (Mass. 1975). In order to avoid finding that its state wiretap statute was unconstitutional under the preemption doctrine, the *Vitello* court held that a principal prosecuting attorney is required to carefully review the application, consider whether it meets the standards for the use of a wiretap in his jurisdiction and he may then authorize the filing of the application. The delegation of the actual writing and filing of the application is allowed under the Massachusetts wiretap statute subject to the direct review and authorization of the principal attorney.

The Petitioner then asserts that the real dispute is between the Ninth Circuit and the Arizona Court of Appeals. Petition p. 1. Since the Arizona Court of Appeals

is not a state court of last resort and the Arizona Supreme Court has not weighed in on the issue, this argument is usually considered to be insufficient to grant a writ for certiorari. See Rule 10, Rules of the Supreme Court. However, even the Arizona Court of Appeals requires that the County Attorney authorize the application; thus, to the extent that "to authorize" and "to apply" are considered to be interchangeable concepts under 18 U.S.C. § 2516 as some courts have suggested, the Arizona Court of Appeals does not support an affirmative answer to the question posed by Maricopa County.

The other asserted reason Petitioner is requesting certiorari is the claim that the Ninth Circuit simply committed error. This error is explained as failing to find that Title III allows "state prosecutors to delegate wiretapping matters as they see fit." Petition at p. 15. Further, Maricopa County argues that following the anti-delegation policy in Title III, as recognized by this court in *United States v. Giordano*, supra, would put "serious and unwarranted burdens on state and local prosecutors." Petition at p. 1.

As to the "error" argument, the decision on the merits in this case fits none of the recommended reasons for a writ of certiorari in Rule 10, Rules of the Supreme Court. The rule states that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no assertion that there were any erroneous factual findings and the Ninth Circuit ruled in substantial conformity with every other jurisdiction that has considered the issue of delegation. While this court of course has the discretion to grant a writ on the basis that

the lower court ruled in error, Respondent asserts that this argument does not support issuance of a writ herein and furthermore, the Ninth Circuit did not commit error.

The second argument asserting a burden on the county attorney is simply specious. This court should not grant certiorari because the Maricopa County Attorney "is a busy man with myriad responsibilities" and the law is too hard for him to follow. Petition at p. 20. The Petitioner offers no objective evidence that the authorization and application requirements of 18 U.S.C. § 2516 hampers wiretap investigations whatsoever, and, if it does, that is the intent and will of Congress. In reality though, the opposite is true. The 2015 wiretap report of the Administrative Office of U.S. Courts shows that a total of 4,148 interception orders were issued, 2,745 by state courts. Maricopa County reported seven wiretap investigations that intercepted over 500,000 calls but resulted in only 49 arrests and three convictions. Asking this Court for special dispensation from the requirements of Title III and his role to "guarantee that no abuses will happen" is not a valid argument for a writ of certiorari. See *U.S. v. Giordano*, supra (citing the Congressional record).

STATEMENT OF THE CASE

18 U.S.C. § 2510 et. seq., commonly referred to as Title III, is the comprehensive federal statutory scheme governing authorizations, applications, orders, use, and penalties related to the interception of wire, oral and electronic communications. It was designed as the minimum standard for wiretap procedures, precludes the use of any communications intercepted in violation of its requirements and provides for criminal and civil

penalties if violations do occur. State authorities may not utilize state wiretaps unless there is a corresponding state wiretap statute that meets the minimum requirements of Title III. The preemption doctrine applies to this statutory scheme.

18 U.S.C. § 2518(1) requires that each application for an order of interception must be made in writing under oath. The application will include an affidavit from the law enforcement officials involved in the investigation. The applicant must state his authority to request the wiretap and give a full and complete statement of the facts and circumstances that he relies on to show probable cause and necessity. Law enforcement officials cannot apply for wiretaps without the authorization of a person named in 18 U.S.C. § 2516.

On the issue of authorization of a wiretap by an attorney for the government, 18 U.S.C. § 2516 provides both federal and state procedures. The federal provision, § 2516(1), provides that only the Attorney General and specifically named deputies and assistants can *authorize* a wiretap application. After authorization, the application is usually filed in the district in which it is requested by an assistant U.S. attorney general.

The state provision, § 2516(2), provides that only a principal prosecuting attorney, in Arizona that is the state attorney general or a county attorney, can *make application to a state judge* for a wiretap order. A principal prosecuting attorney, as a general principal, can only file for a wiretap order in his jurisdiction.

The purpose of the authorization limitations in 18 U.S.C. § 2516 is to centralize policy making, responsibility and accountability in only high ranking authorities generally responsive to the political process. The Congress specifically eschewed the general delegation of authority arguments offered by Maricopa County by specifically naming the persons in § 2516(1) and the class of persons in § 2516(2) who could authorize and/or apply for a wiretap.

However, Arizona has enacted a provision that allows its principal prosecuting attorneys to delegate their plenary powers to authorize and apply for wiretap orders to subordinates. A.R.S. § 13-3010(A) states that "On application of a county attorney, the attorney general or *a prosecuting attorney whom a county attorney or the attorney general designates in writing,* [a judge] may issue an ex parte order for the interception of wire, electronic or oral communications…." It is, or was, standard procedure for the Maricopa County Attorney to authorize four or more attorneys in a given case to apply for wiretaps and extensions thereof as the subordinates saw fit without any involvement by the Maricopa County Attorney other than to sign a form appointment document that is attached to the first application in the investigation. A deputy county attorney authorized, authored and filed the applications for the wiretap orders and extensions in this case. All of the applications were signed by a deputy and state that the deputy read the affidavits of the involved law enforcement officers attached to the application and found probable cause and necessity.

Ms. Villa was not a target of the drug trafficking investigation known as CWT-412 but her daughter's boyfriend was. Ms. Villa conversations with her daughter

were intercepted pursuant to an interception order for the boyfriend's cell phone obtained by a deputy county attorney. Ms. Villa sued for damages under 18 U.S.C. § 2520 alleging that her calls were illegally intercepted because the wiretaps were not properly authorized and the recorded calls were not sealed by the court in a timely manner because they were not submitted in a timely manner as is required by 18 U.S.C. § 2518(8).

The District Court granted Maricopa County's motion to dismiss pursuant to Rule 12(b)(6) Federal Rules of Civil Procedure. Ms. Villa appealed the two issues, the authorization/delegation procedures and the sealing procedures for the recordings. The Ninth Circuit ruled in her favor on the merits of both issues but found that, due to the order for interception and the statute allowing designation, Maricopa County demonstrated good faith under 18 U.S.C. § 2520. The court also found that she did not have standing to represent the class of persons whose calls were likewise intercepted pursuant to unauthorized applications for interception orders.

The issue below that is the subject of this appeal is whether the authorization provision of the Arizona wiretap statute, A.R.S. § 13-3010(A), is unconstitutional under the preemption doctrine, facially or as applied. Ms. Villa maintained that the delegation of authority violates the plain language of § 2516(2) and defeats the intent of Congress to centralize policy making, responsibility and accountability in only high ranking authorities generally responsive to the political process.

REASONS FOR DENYING CERTIORARI

1. THE VILLA DECISION DOES NOT CONFLICT WITH THE DECISION OF OTHER FEDERAL COURTS OR STATE COURTS OF LAST RESORT

In *Villa v. Maricopa County* the Ninth Circuit held that the principal prosecuting attorney provision of 18 U.S.C. § 2516(2) conflicts with Arizona law which allows the delegation of the power to apply for wiretap orders to an assistant attorney. It held that the purpose of § 2516(2) is to ensure that a "publically responsible official subject to the political process" personally approves a wiretap application. It discussed the holding of *U.S. v. Smith*, 726 F.2d 852 (1st Cir. 1984), which upheld the constitutionality of the Massachusetts wiretap statute that is substantially similar to the Arizona statute. *U.S. v. Smith*, supra allowed the delegation of authority to assistant prosecutors to compile and file an application only if it was reviewed and authorized in writing by the principal prosecutor. It agreed that the "judicial gloss" put on the Massachusetts statute by the Massachusetts Supreme Court in *State v. Vitello*, 327 N.E.2d 819 (Mass. 1975) saved the plain wording of the statute allowing general delegation to assistants from being found unconstitutional. *Vitello,* supra required that an assistant district attorney submit the application to his district attorney for review, that the district attorney determine whether the proposed interception was consistent with his wiretap policies and that he authorize each such application in writing.

The Ninth Circuit agreed with the First Circuit that substantial compliance with the centralization of authority and responsibility policies of § 2516(2) was sufficient

under Title III. Both circuits also appear to agree that statutes and procedures that undermine Congress's policies to prevent abuses in the use of wiretaps would be unconstitutional under the preemption doctrine.

The Petitioner has attempted to create conflict where none really exists. There is a difference in language between § 2516(1), which allows federal authorities named in the statute to authorize an application, and § 2516(2) which allows state principal prosecuting attorneys to apply for a wiretap order. However, for purposes of this issue it is a distinction without a difference. One statue allows certain specific individuals to authorize a wiretap application while the other allows a specific class of individuals to make application. The Massachusetts cases, *Smith* and *Vitello,* follow the federal authorization model and allow the delegation of the tasks of writing and filing. Other cases simply equate authorization with application finding the terms interchangeable. See *O'Hara v. People,* 271 P.3d 503 (Colo. 2012). No case requires that a principal prosecutor actually to write and file the application, they simply deny assistants the ability to authorize or apply for wiretap orders on their own.

There are two other federal cases of note on a separate delegation issue regarding the continuity of authority in office when the principal is absent. In *U.S. v. Fury,* 554 F.2d 522 (2nd Cir. 1977) the court found that a New York district attorney could delegate his authority to apply for wiretaps to a subordinate when the district attorney was out of the jurisdiction. The Ninth Circuit agreed with this reasoning and held in *U.S. v. Perez-Valencia*, 727 F.3d 852 (9th Cir. 2013) that a California district attorney could also name an assistant to apply for wiretaps when the district

attorney was indisposed so long as he delegated all of his plenary powers to the assistant and the assistant became the functional district attorney.

The Kansas Supreme Court, in two cases, *State v. Farha,* 544 P.2d 341 (Kan. 1975) and *State v. Bruce*, 287 P.3d 919 (Kan. 2012), held that the Kansas wiretap statute did not allow the delegation of authority to apply for a wiretap to assistant attorneys. It found that delegation would violate the Congressional intent to centralize responsibility and accountability.

In *O'Hara v. People,* supra, the Colorado Supreme Court found that under its statute, the district attorney was required to personally authorize each application for a wiretap or an extension thereof. The court held that authorization and application were interchangeable concepts under § 2516. The court remanded the case to the trial court to determine whether the district attorney authorized all of the applications.

In *State v. Marine*, 464 A.2d 872 (Del. 1983) the Delaware Supreme Court held that the Delaware statute required the Attorney General to authorize the wiretap application but he could do so over the phone to a assistant in circumstances where he was out of state. The assistant could then file the application on behalf of the Attorney General.

In *Price v. Goldman,* 525 P.2d 598 (Nev. 1974) the Nevada Supreme Court held that the Nevada wiretap statute "requires that the term "district attorney" not be construed to include his deputies."

Another case that this court should consider is the *State v. Frink*, 206 N.W.2d 664 (Minn. 1973). The Minnesota Supreme Court held that an assistant county attorney did not have the authority to apply for a wiretap. It stated as follows:

> "As we noted at the outset, it [Title III] is a criminal statute which punishes unauthorized use of electronic surveillance. It is designed to give effect to the Fourth Amendment and not to erode it. If Congress had intended to permit an assistant county attorney to apply for an order authorizing an electronic surveillance, it had only to follow 18 USCA, § 2516(1), which expressly designates assistant attorneys general as qualified to exercise such authority.
>
> We are satisfied from a reading of the state and Federal statutes and the numerous cases construing them that neither statute intends that at the county level anyone other than the "principal prosecuting attorney" (18 USCA, § 2516[2]) shall have the power to initiate an electronic surveillance."

With respect to the cases cited by the Petitioner, *Alexander v. Harris* 595 F.2d 87 (2nd Cir. 1979) is simply another authorization case concerning whether the prosecutor had to appear at court. The court stated that "In accordance with 18 U.S.C. § 2516(2) the prosecutor did just this, i.e., authorized the detective to seek an extension order. The prosecutor's personal appearance was not required." Id.

The Petitioner also cites *State v. Daniels*, 389 S0.2d 631 (Fla. 1980) but erroneously claims that its central holding is dicta. The Florida Supreme Court held that Florida's delegation provisions for assistant prosecutors did not allow them to authorize wiretaps.

> "Based on section 2516, its legislative history, and the *Giordano* decision, we conclude that section 27.181(3), Florida Statutes (1975), cannot be held to empower assistant state attorneys to authorize applications for electronic eavesdropping orders. This is so for two reasons. First, Congress intended such authority to be limited to a narrow class of officials to ensure that such decisions come from a centralized, politically responsive source. Second, the officials who may exercise this power must be specifically enumerated in the authorizing statute. Our statute granting assistant state attorneys all the powers of state attorneys generally is not a specific grant of authority to authorize electronic surveillance applications."

Respondent submits that a canvas of the relevant federal and state case law shows there is no conflict of any substance. The guiding principal of centralization of responsibility and accountability is universally recognized and followed by all courts that have addressed the issue of delegation. The argument that there is a conflict is meritless.

2. THE VILLA DECISION DOES NOT CONFLICT WITH THE LAW CITED IN *STATE V. VERDUGO*; THE *VERDUGO* COURT SIMPLY WRONGLY APPLIED THE LAW

Petitioner asserts that there is a conflict between the Ninth Circuit and *State v. Verdugo*, 883 P.2d 417 (Ariz. App. 1993). In *Verdugo*, which is best described as an outlier case, the court held that it agreed with *State v. Vitello*, supra but did not specifically adopt its holding. It agreed that authorization of the application by the county attorney was a prerequisite to issuing the wiretap order. It then found that the Maricopa County Attorney provided after-the-fact affidavit evidence of pre-application authorization to the trial court at the hearing on a motion to suppress. However, as the Ninth Circuit stated, the county attorney in that case did not read the affidavits, determine probable cause or necessity, authorize the application in writing and he was only minimally aware of the investigation. That is a far cry from the careful reading of the application and authorization in writing required under *Vitello.* The Ninth Circuit was correct in pointing out the obvious deficiencies in the application of the law by the Arizona Court of Appeals.

State v. Verdugo does not stand for the proposition that the county attorney can delegate his authorization and application powers to an assistant. It says that the county attorney must authorize the application and therefore there is no conflict between the Ninth Circuit and the Arizona Court of Appeals on that point. A careful and informed reading of the case shows that the *Verdugo* court attempted to implement the *Vitello* authorization requirements, but it simply did a very bad job in doing

so. Respondent asserts that *Verdugo* fails to support the proposition for which the Petitioner would like it to stand, i.e. that assistants can authorize wiretap applications in violation of the policies of centralization of authority and responsibility that Title III and this Court have always required.

3. THE NINTH CIRCUIT WAS CORRECT OF THE MERITS

The claim that the Ninth Circuit was just "plain wrong" is not a sufficient ground to grant certiorari where the Ninth has applied the law as it has been interpreted throughout both the federal and state court systems. But the claim by Petitioner that he should not have to do the job that Congress specifically assigned to him is itself "just plain wrong." Worse, it is an affront to the will of Congress and the Fourth Amendment. The ruling of the Ninth Circuit is correct; it is the Maricopa County Attorney who has abused his authority and discretion.

Wiretapping is one of the most intrusive investigative techniques and is prone to abuse by law enforcement. The potential for abuse was discussed at length in the sixties as Title III was being written and was set forth in the Congressional Record. In the seventies the abuse of the authorization procedures by the Attorney General came to light during the Nixon administration and led this Court to strictly construe the authorization procedures for federal officials. See *Giordano*, supra. As is set forth above in the canvas of the case law on delegation, every court in the country that has addressed this issue has recognized the potential for abuse and the safeguards that Congress had built into the application process to lessen that abuse.

Context and current events can help to understand a specific application of the law. This case was filed in the U.S. District Court for Arizona in July 2014. The appeal to the Ninth Circuit was filed in 2015. As the *Villa* case wound through the court system and put the spotlight on the Arizona procedures, California had its own scandal regarding the authorization of illegal wiretaps that was investigated and exposed by journalists from the Desert Sun and USA Today. See *Justice officials fear nation's biggest wiretap operation may not be legal,* Brad Heath and Brett Kelman, USA TODAY, Published Nov. 11, 2015 and *Judge: So many Riverside wiretaps, they can't be legal,* Brett Kelman, The Desert Sun, Published July 6, 2016.

DEA task force personnel started utilizing the Riverside County District Attorney's Office and Riverside County Superior Court to obtain hundreds of wiretap orders from a single state court. In 2014, according to the U.S. Administrative Office for the Courts Wiretap Report, Arizona state officials reported a total of 26 wiretap investigations statewide. Riverside County, California reported ***624***. This massive wiretap mill, the largest in the country by far, required the use of assistant prosecutors to authorize and apply for all of the applications, the same abuse found in Arizona in this case. The Riverside county attorney admitted that he did not read any of the applications and was quoted by the journalists as saying "I didn't have time to review all of those," Zellerbach said last year. "No way." He was defeated in his 2014 election, i.e. the political process responded to his abuse of power with his removal. His refrain should sound familiar; it is the same claim made herein by the Maricopa County Attorney.

A single judge, the Honorable Helio Hernandez, approved all of the applications. Observers believe that he could not have possibly read the voluminous applications, affidavits and orders that were required for these wiretaps. One report stated that he issued 17 wiretaps in one day.

This wiretap mill avoided Ninth Circuit review because federal prosecutors in California would not utilize wiretap evidence from the Riverside wiretaps. They warned the DEA not to utilize the state system for their wiretaps. Federal officials knew, or suspected, that the operation was illegal under Title III and did not want to jeopardize federal investigations. In cases where the Riverside evidence was used by investigators, they utilized parallel construction of evidence to avoid having to disclose the wiretap evidence. However, the scope of the abuse of the system became common knowledge in the legal community, was reported in the press and was certainly known at the Ninth Circuit.

There is no question that wiretapping is subject to abuse by overzealous investigators, prosecutors and judges who, like Petitioner, believe that the restraints of Title III and the Fourth Amendment that are designed to protect the public and privacy are unnecessary and a burden on law enforcement. The abuse of the wiretap authorization procedures in Arizona and California is ample evidence that *Villa* was correctly decided.

There is also no question that requiring a county attorney to read and authorize in writing each wiretap application is a safeguard that promotes centralization of responsibility and accountability, just as Congress

intended. A wiretap can result in hundreds of thousands of calls being intercepted, many, if not most, from innocent persons like Ms. Villa. It is not too much to ask that the Maricopa County Attorney uphold the Constitution, protect the privacy rights of the persons in his jurisdiction and follow the law as set forth in Title III.

Finally, there is no question that 18 U.S.C. § 2516(2) says that a principal prosecuting attorney, and no other, may apply for a wiretap order in conformity with the requirements of 18 U.S.C. § 2518 and the applicable state statute for wiretaps. 18 U.S.C. § 2518(1)(b) states that the application shall be made in writing upon oath or affirmation to a judge and shall state the "applicant's authority to make such application…" § 2518(1)(a) requires a "full and complete statement of the facts and circumstances relied on by the applicant…" There is no question that the Maricopa County Attorney did not do any of these things.

The decision of the Ninth Circuit was not wrong; using an assistant to skirt the requirements of Title III is what is wrong.

CONCLUSION

The Petitioner has not put forth a good or adequate reason for granting Certiorari. For the reasons set forth herein the petition should be denied.

Respectfully submitted,

CAMERON A. MORGAN, ESQ.
Counsel of Record
4356 N. Civic Center Plaza
Scottsdale, Arizona 85251
(480) 990-9507
camerona.morgan@hotmail.com

Counsel for Respondent