No. 21-

IN THE

Supreme Court of the United States

JOSEPH SCHNEIDER,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits wiretapping except as provided in the enabling statute, 18 U.S.C. §2516. Section 2516(1) authorizes federal judges to issue eavesdropping warrants, and section 2516(2) is the enabling statute that authorizes state judges to issue wiretap orders. Under Title III states are free to adopt wiretapping procedures either more restrictive than federal law or prohibit wiretapping completely.

Joseph Schneider, a California resident, has never set foot in New York, never made calls to or received calls from New York, and never committed any crimes in New York. A New York Judge issued wiretap orders on his mobile phone in California, and the signal was re-directed to a listening post in Brooklyn where police overheard the communications regarding his gambling operations – none of which took place in New York.

The question presented is:

Do State Judges have authority under Title III's enabling statute to issue wiretap orders beyond their state borders as here where a New York Judge

ordered wiretaps on Joseph Schneider's mobile phone in California when all phone calls originated and terminated outside of New York State and Joseph Schneider committed no crimes in New York State?

PARTIES TO PROCEEDING

The People of the State of New York are represented by the Kings County District Attorney, Mr. Eric Gonzalez.

Joseph Schneider, the petitioner, is represented by Stephen N. Preziosi, Esq.

RELATED CASES

- *People v. Joseph Schneider*, 4097/2016, Supreme Court of the State of New York, County of Kings, Criminal Term Part 19. Judgment dated September 15, 2017.

- *People v. Joseph Schneider*, 2018-09853, Supreme Court of the State of New York, Appellate Division, Second Department. Judgment dated Oct. 16, 2019.

- *People v. Joseph Schneider*, No. 41, New York Court of Appeals. Judgment dated June 3, 2021.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO PROCEEDING iii
RELATED CASES iv
TABLE OF APPENDICES viii
TABLE OF AUTHORITIES ix
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 2
INTRODUCTION 3
STATEMENT OF THE CASE 8

- Procedural History 10
- Motions And Decisions In The Lower Court 11
- The Brooklyn Judge Adopts The Listening Post Rule And Denies The Motion To Suppress 13
- The Plea and Sentence: Issues Preserved For Appellate Review By Agreement Of The District Attorney And The Lower Court 15
- Appeal To the Intermediate Appellate Court 16
- Appeal To The New York Court of Appeals 17

REASONS FOR GRANTING THE WRIT 21

EXTRATERRITORIAL WIRETAP ORDERS BY STATE JUDGES ARE BEYOND THE SCOPE OF AUTHORITY PERMITTED UNDER TITLE III AND CONSTITUTE AN INVASION OF STATE SOVEREIGNTY AS THEY ALLOW STATE JUDGES TO PROJECT CRIMINAL STATUTES INTO SISTER STATES' JURISDICTIONS 21

The Pressing Question Of A State Judge's Territorial Reach To Issue Wiretap Orders Under Title III's Enabling Statute Is Squarely Presented In This Case 22

The Enabling Statute's Silence On The Territorial Reach Of State Judges' Wiretap Orders Has Fomented A Patchwork Of State Wiretap Laws 23

The Issue Of Territorial Reach Of Wiretap Orders Has Created A Split Of Authority In The Federal Circuit Courts 26

Extraterritorial Wiretap Orders Are An Invasion Of State Sovereignty 31

The Extraterritorial Application Of Criminal Statutes Violates The Due Process Rights Of Sister State Citizens..... 35

The Variation In State Laws Creates Conflict Among The States: Different Criminal Offenses Are Subject To Wiretap Orders 37

States That Permit Wiretap Orders On Cellphones Beyond Their Borders Run Afoul Of Common Law Territorial Principles 39

The Enabling Statutes For Federal And State Judges Are Written Differently And Must Be Interpreted Differently 41

The Listening Post Rule: Allowing States To Project Their Laws Into Other Jurisdictions And Redirect The Phone Signal Back To The Jurisdiction Of The Issuing Judge Encourages Forum Shopping 45

CONCLUSION 48

TABLE OF APPENDICES

Appendix A Opinion of the Court of Appeals of New York, dated June 3, 2021 .....1a

Appendix B Opinion of the Supreme Court of the State of New York, Appellate Division: Second Judicial Department, dated October 16, 2019.....55a

Appendix C Opinion of the Supreme Court of the State of New York County of Kings: Criminal Term Part 19, dated September 15, 2017.....59a

TABLE OF AUTHORITIES

CASES

Allgeyer v. State of La.,
165 U.S. 578 (1897) 36

Berger v. New York,
388 U.S. 41 (1967) 3, 4, 6

Dahda v. United States,
138 S.Ct. 1491 (2018) 23, 29

Davis v. State,
43 A.3d 1044 (Md. 2012) 25

Katz v. United States,
389 U.S. 347 (1967) 3, 6

Kiobel v. Royal Dutch Petroleum Co.,
569 U.S. 108 (2013) 35

Morrison v. National Australia Bank Ltd.,
561 U.S. 247 (2010) 35

Mutual Pharmaceutical Co., Inc. v Bartlett,
570 U.S. 472 (2013) 7

New York Life Ins. Co. v. Head,
234 U.S. 149 (1914) 36

Nielsen v. Oregon,
212 U.S. 315 (1909) 36

People v. Schneider,
176 A.D.3d 979 (2d Dept. 2019) 1

People v. Schneider,
No. 41, 2021 WL 2228796 (N.Y. June 3, 2021) .....
.....1, 33-34

State v. Ates,
86 A.3d 710 (N.J. 2014).....23, 24

State v. Brye,
935 N.W.2d 438 (Neb. 2019).....25

State v. Cain,
757 A.2d 142 (Md. 2000).....39

State v. Darroch,
287 S.E.2d 856 (N.C. 1982).....39

State v. Smith,
421 N.W.2d 315 (Minn. 1988).....39

United States v. Glover,
736 F.3d 509 (D.C. Cir. 2013) 28-29

United States v. North,
728 F.3d 429 (5th Cir. 2013) (Case No. 11-60763),
withdrawn 27, 28

United States v. North,
735 F.3d 212 (5th Cir. 2013).....27

United States v. Ramirez,
112 F.3d 849 (7th Cir. 1997) 26-27

United States v. Rodriguez,
968 F.2d 130 (2d Cir. 1992) 14, 17, 24

STATUTES:

18 Pa.C.S.A. §5708(1) 38

18 U.S.C. §§ 2510-22 (Wiretap Act) ..... *passim*

18 U.S.C. § 2516..... *passim*

18 U.S.C. §2516(1) ..... *passim*

18 U.S.C. § 2516(1)(c) 42

18 U.S.C. 2516(1)(l)..... 42

18 U.S.C. § 2516(1)(m)..... 43

18 U.S.C. §2516(2) ..... *passim*

18 U.S.C. § 2518..... 2, 43

18 U.S.C. §2518(3) 7, 26-28, 30, 43

18 U.S.C. §2518(10)(ii)..... 28

28 U.S.C. §1257(a) 1

725 Ill. Comp. Stat. Ann. § 5/108B-3(a) 38

Alaska Stat. Ann. § 12.37.010 38

Cal. Penal Code §629.50 et seq. 5, 12

Cal. Penal Code §629.52 ..... 12, 38

Cal. Penal Code §630 12

Del. Code Ann. Title 11, §2407(c)(3) 5, 25

Haw. Rev. Stat. Ann. § 803-46 38

Md. Code Ann., Cts. And Jud. Proc.
§10-408(c)(3) 5, 24-25

M.G.L.A. 272 §99 5

Neb. Rev. St. §86-291 38

Neb. Rev. Stat. Ann. §86-293(3) 25

N.J. Stat. Ann. §2A:156A-2(v) 5, 24

N.Y. CPL §700 19

N.Y. CPL §700.05 5

N.Y. CPL §700.05(4) 24

N.Y. C.P.L. §700.05(8) 38

N.Y. CPL §700.05(8)(c) 38

N.Y. Penal Law § 105.05(1) 10

N.Y. Penal Law § 225.10(1) 10

N.Y. Penal Law § 225.20(1) 10

N.Y. Penal Law § 460.20 10

CONSTITUTION:

Cal. Const. art. I §13..... 36

U.S. Const. art IV 36

U.S. Const. art VI, cl. 2..... 7

LEGISLATIVE HISTORY:

S. Rep. No. 1097, 90th Cong. (1968)..... 4, 7, 31

OTHER AUTHORITIES:

Larry Kramer, *Jurisdiction over Interstate Felony Murder*, 50 U. Chi. L. Rev. 1431 (1983) 38-40

PETITION FOR A WRIT OF CERTIORARI

Joseph Schneider respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The New York Court of Appeals' opinion is reported at 2021 WL 2228796 (App. 1a). The Appellate Division can be found at 176 A.D.3d 979 (2d Dept. 2019) (App. 55). The lower court decision is contained in the appendix at App. 59a.

JURISDICTION

On June 3, 2021, the New York Court of Appeals issued a decision authorizing New York State judges to issue eavesdropping warrants on mobile phones beyond the borders of New York State and beyond the scope of their authority in the enabling statute in Title III of the Omnibus Crime Control and Safe Streets Act of 1968. This Court has jurisdiction under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. §2516(2), the enabling statute under Title III of The Omnibus Crime Control and Safe Streets Act of 1968, provides:

> 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,

human trafficking, child sexual exploitation, child pornography production, prostitution, 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.

INTRODUCTION

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act. That legislation was passed in response to the United States Supreme Court's decisions in *Berger v. New York*, 388 U.S. 41 (1967) and *Katz v. United States*, 389 U.S. 347 (1967). In the *Berger* case, the Supreme Court struck down New York State's eavesdropping statute as unconstitutional. The New York statutory scheme was held to be too broad in its sweep; it contained no requirement for particularity as to what crime had been or was being committed; it did not specify the

place to be searched or conversations to be seized as required by the Fourth Amendment.

A significant part of the 1968 legislation is the provision outlawing wiretapping in general, and Title III's enabling statute, carving out exceptions for federal and state judges to issue eavesdropping orders. When Congress enacted Title III, it relied on the broadest reach of its commerce clause powers, imposing on the States the minimum constitutional criteria for electronic surveillance legislation mandated by the *Berger* case.

Title III has two purposes: to protect privacy of wire and oral communications, and to create a uniform basis for the circumstances and conditions in the law for the authorization and interception of wire and oral communications. S. Rep. No. 1097, 90th Cong. at 37 (1968). Because of the very general structure of 2516(2), the states have enacted eavesdropping legislation with great variation and contrary to the goal of achieving uniform circumstances and conditions for the authorization of intercept orders.

Section 2516(2) lists the *de minimus* constitutional requirements imposed on state judges for intercept orders of wire, oral, or electronic communications. Although the enabling statute requires that the state judge be of competent jurisdiction and lists a series of other requirements such as who may make wiretap applications and for what offenses, the statute is silent on the territorial reach of state-issued wiretap orders. State legislation concerning territorial reach varies from those state statutes that are completely silent on the issue (see New York: N.Y. CPL §700.05; Massachusetts: M.G.L.A. 272 §99; California: Cal. Penal Code §629.50 et seq.) to those states that expressly permit a wiretap order to go beyond the borders of the state into other jurisdictions to wiretap mobile phones. (See New Jersey: N.J. Stat. Ann. §2A:156A-2(v); Maryland: Md. Code Ann., Cts. And Jud. Proc. §10-408(c)(3); Delaware: Del. Code Ann. Title 11, §2407(c)(3)) Some states require that there be some criminal nexus to the issuing jurisdiction, some do not.

The disharmony in state legislation gnaws at the stated goal of the Omnibus Crime Control and

Safe Streets Act for uniformity and consistency in the circumstances and conditions for wiretap orders. Some states confine themselves to wiretapping cell phones within state limits while others reach across borders and across the nation into sister state jurisdictions, even where the states' laws conflict on matters of offenses appropriate for wiretapping. As the use of cell phones and other mobile devices become more ubiquitous, the enabling statute's silence on territorial limitations promises to drag the several states further from the goal of uniformity and further from consistency in the application of wiretap law.

The legislative intent was to harmonize, to bring constitutional consistency to the process of obtaining wiretaps orders and, in doing so, to protect the privacy of wire and oral communications of citizens. The objective was not to supersede state regulation on eavesdropping, but to limit it. In the new light of *Berger* and *Katz*, the enabling language of 18 U.S.C. § 2516(2) allows states to adopt procedures and standards more restrictive than those imposed by the federal law, i.e. imposing greater restrictions on the process of issuing of wiretapping

orders, or, if they desire, to prohibit wiretapping altogether, but states may not be less restrictive than federal law. S. Rep. No. 1097, 90th Cong. at 69 (1968); in other words, the federal law provides the minimum constitutional protections for citizens, and states, although free to devise their eavesdropping statutes as they see fit, may not provide less constitutional protection for citizens. While §2516(2) is silent on territorial boundaries for wiretap orders, it is plainspoken in its objectives – to limit states' authority to issue wiretap orders.

Under pre-emption principles, any State law drawn more broadly than the federal statute runs afoul of the Supremacy Clause (U.S. Const. art VI, cl. 2) *Mutual Pharmaceutical Co., Inc. v Bartlett*, 570 U.S. 472, 479-480 (2013). The legislative history of Title III clarifies the boundaries of authority for both federal and state judges. The Senate Report Number 1097, cited above, says that the states can adopt legislation that is more restrictive than the federal law, but not less restrictive. Federal judges have limited authority to issue wiretap orders outside of their jurisdiction under §2518(3) in the case of a mobile interception device and that authority is

further limited to the listed offenses under §2516(1). The enabling statute for state judges must, therefore, be more restrictive on the powers of state judges to issue wiretap orders.

When the state statute is written or interpreted more broadly than the federal statute, then it runs afoul of the Supremacy Clause. Because several states have written their statutes providing broader authority, and several states interpret their statutes to provide broader authority than federal law permits, they have run afoul of the Supremacy Clause as their statutes provide greater authority than Congress intended.

STATEMENT OF THE CASE

On December 3, 2015, a New York State judge sitting in Brooklyn, New York issued an order to wiretap the mobile phone and intercept electronic communications of Joseph Schneider in California. All the communications intercepted originated and terminated outside of New York State.

Joseph Schneider is a California resident. He has lived and worked in California his entire life. Prior to his arrest in this case, he had never set foot in New York, did not know anyone in New York, and had no contacts with anyone in New York. The December 3, 2015 wiretap and interception order, and all the subsequent orders allowed the Brooklyn District Attorney's office and their detectives to eavesdrop on phone conversations and electronic communications between Joseph Schneider and people located principally in California but also in Arkansas, Colorado, Florida, Michigan, Nevada, New Jersey, Hawaii, and Costa Rica – none of his communications began in, ended in, or had any relation to New York State.

In fact, after Joseph Schneider was arrested in California and transported to Brooklyn, the District Attorney stated at his arraignment "*As far as connections to New York, the People are not aware of any Schneider connections with New York, with the exception of the deceased Patrick Deluise…*" Mr. Deluise was, in fact, a resident of New Jersey, not New York, and none of the calls between Deluise and Schneider originated or terminated in New York.

Procedural History

In June 2016 Joseph Schneider was arrested in California, transported to New York, indicted in Kings County (Brooklyn), and charged with one count of enterprise corruption under Penal Law § 460.20 (Count 1 of Indictment); seventeen counts of promoting gambling in the first degree under Penal Law § 225.10(1) (Counts 2-18); one count of possession of gambling records in the first degree under Penal Law § 225.20(1) (Count 54); and one count of conspiracy in the fifth degree under Penal Law § 105.05(1) (Count 57).

The indictment came after more than a yearlong investigation conducted by the King's County District Attorney's Office and their detectives. The investigation included numerous eavesdropping warrant applications made to a Kings County, New York Supreme Court Judge. Extensive eavesdropping evidence was collected, making up the majority of the evidence in this case.

Motions And Decisions In The Lower Court

After Joseph Schneider's arrest and arraignment, Defense counsel moved to suppress the evidence obtained through the eavesdropping warrants as illegally obtained. The argument for suppression was grounded on the fact that none of the criminal activity attributed to Mr. Schneider took place in New York. Mr. Schneider had no communications with anyone in New York and his gambling websites took no bets from anyone in New York, either directly or indirectly.

Additionally, the defendant argued that the principles of state sovereignty and due process prohibit the Kings County District Attorney's Office from eavesdropping on the private communications of the defendant, a resident of California, in violation of California's privacy statute.

Because each state is free to create its own eavesdropping statutes as the state legislatures see fit under the federal enabling statute, California eavesdropping laws and New York eavesdropping laws differ. Unlike New York, California does not

authorize eavesdropping for gambling related offenses and prohibits eavesdropping by out-of-state law enforcement officials unless they work in conjunction with California law enforcement. (See California Penal Code §§ 629.50, 629.52, and 630) The Kings County District Attorney never made an application for an eavesdropping warrant to a California judge and never worked with California authorities before wiretapping Mr. Schneider's cell phone.

Most importantly, the overwhelming majority of the phone calls monitored by the Kings County District Attorney took place between California residents (i.e. phone calls were from California to California) and all the other phone calls and electronic communications were between Mr. Schneider in California and residents of states other than New York. Mr. Schneider did not make or receive any phone calls or electronic communications to or from New York. In fact, the probable cause contained in the application for the warrant on Mr. Schneider's cellphone was stated by the detective as follows: "*I am aware that SCT 19 (626-701-7266) was in contact at least fifteen times or more during the*

same time period with telephone numbers whose area codes originate from States other than California, such as, Arkansas, Colorado, Florida, Michigan, Hawaii, and Nevada. Lastly, I am aware that SCT 19 received three incoming calls from telephone number 01150687307941 during that same period. I am aware that this telephone number originates from Costa Rica."

It was never alleged that Mr. Schneider had any contact, directly or indirectly, with the State of New York or that he committed any crimes in New York. Although the lower court lacked any evidence of probable cause to believe that a crime was committed in New York by Mr. Schneider, the court denied the motion to suppress.

The Brooklyn Judge Adopts The Listening Post Rule And Denies The Motion To Suppress

The lower court denied defense counsel's suppression motion and held that the eavesdropping warrant was "executed" in Kings County where the Kings County District Attorney, with the assistance of the phone company, electronically diverted the

signal from the out-of-state phone calls to a listening post in Brooklyn, New York. The lower court veiled its reasoning with the listening post rule. It held that because the out of State phone conversations were electronically diverted from California to where they were first listened to in Brooklyn, the eavesdropping warrants were, therefore, "executed" in Brooklyn, New York.

In support of its decision, the Brooklyn court cited the seminal case establishing the listening post rule, *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992). The *Rodriguez* case held that where phone lines (land lines) were making calls between New York and New Jersey, the New Jersey phones were subject to wiretap orders from the U.S. District Court in the Southern District of New York because the signal was diverted back to a listening post in Manhattan, New York, and, thus, the interception took place within the issuing judge's jurisdiction.

The lower court never addressed the concern that, through the use of the phone company's advancements in switching technology, phone calls to or from anywhere in the nation can be redirected and

listened to at a location of the NYPD's choosing. Most importantly, the lower court never addressed how these technological advancements affect the jurisdictional and geographic boundaries of a New York State Judge's authority to act outside the borders of New York State.

The Plea and Sentence: Issues Preserved For Appellate Review By Agreement Of The District Attorney And The Lower Court

On March 6, 2018, Joseph Schneider pleaded to count one, enterprise corruption, a class B felony; counts two through eighteen, promoting gambling in the first degree, a class E felony; count fifty-four, possession of gambling records, a class E felony; and count fifty-seven, conspiracy in the fifth degree, a class A misdemeanor.

The District Attorney consented to allow Mr. Schneider to remain out on bail while his appeal is pending. All appellate courts, including the New York Court of Appeals, have extended the stay of his sentence and Mr. Schneider remains out of custody

on bail with the consent of the Kings County District Attorney's Office.

At sentence, defense counsel, the court, and the District Attorney agreed that the arguments raised in the pre-trial motions would be preserved for appellate review. The lower court then sentenced Mr. Schneider on count one to an indeterminate sentence of one to three years to run concurrent to all other counts; on counts 2 through 18 to an indeterminate sentence of 1 to 3 years to run concurrent to all other counts; on count 54 possession of gambling records to an indeterminate term of 1 to 3 years to run concurrent with all other counts; and on count 57 conspiracy in the fifth degree to a definite term of one year in jail to run concurrent to all other counts.

Appeal To the Intermediate Appellate Court

Mr. Schneider filed an appeal to the Appellate Division, Second Department, arguing that the lower court acted beyond the scope of its statutory authority when it issued eavesdropping orders to intercept communications that took place entirely outside the State of New York. He argued that the Omnibus

Crime Control and Safe Street Act of 1968 did not confer authority on New York State judges to issue eavesdropping orders on cell phones where the phone calls originated and terminated outside New York and where Mr. Schneider committed no crimes in New York. Mr. Schneider also argued that the eavesdropping orders violated several Constitutional provisions such as the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the separate sovereign's doctrine.

The Appellate Division, Second Department relied on the listening post rule established in *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992) and held that the eavesdropping warrant was "executed" in Brooklyn when the phone calls were overheard by law enforcement officers in Brooklyn. Additionally, the Appellate Division rejected the notion that the eavesdropping warrants constituted an unconstitutional extraterritorial application of New York State law.

Appeal To The New York Court of Appeals

The New York Court of Appeals granted Mr. Schneider's motion for leave to appeal, and on June

3, 2021, issued a split decision. The majority opinion held that a New York judge may issue a wiretap order on phone calls entirely outside the state of New York where the phone company redirects the signal back to the judge's jurisdiction. The place where the phone conversation is overheard, the majority asserted, was the place of interception.

The dissenting opinion found that there was no factual basis for a New York Judge to wiretap Mr. Schneider's phone when neither his phone calls nor activities ever touched New York. Additionally, the dissenting judges found that when New York's wiretap statutes were passed (shortly after the Omnibus Crime Control and Safe Streets Act of 1968) wiretaps were carried out by physically tapping lines and the police had to be in the same physical jurisdiction as the phone they were tapping. Thus, the legislature could never have fathomed that a phone could be wiretapped by instructing a cellular service carrier to redirect out-of-state phone signals to New York, and there is nothing in the legislative history that suggests that state judges can divert purely out-of-state voice calls back to New York.

It is undeniable that New York's eavesdropping statutes, Article 700 of New York's Criminal Procedure Law, were written under the framework of Title III's enabling statute. Because the Court of Appeals majority opinion found that execution of the warrant depends only on the action of law enforcement, it held that it does not matter the location of the target, the target's communication devices or the participants engaged in the call.

The New York Court of Appeals' majority opinion gives a New York State judge authority to issue wiretap orders on any two phones anywhere in the nation, regardless of the point of origin or point of reception of the call. This holding allowed a Brooklyn judge to extend the eavesdropping laws of New York into another state's jurisdiction where that state's eavesdropping laws conflict with New York's. California does not permit eavesdropping for the offense of gambling while New York does, and California law does not allow the wiretapping of California citizens' cell phones without a joint investigation with California authorities. The Brooklyn District Attorney never made an application to a California court for an eavesdropping

warrant and never contacted California law enforcement before wiretapping Mr. Schneider's phone.

The New York Court of Appeals held that the issues raised regarding Mr. Schneider's constitutional rights as a California resident, the separate sovereign's doctrine, and other rights based on Mr. Schneider's California citizenship were without merit.

REASONS FOR GRANTING THE WRIT

EXTRATERRITORIAL WIRETAP ORDERS BY STATE JUDGES ARE BEYOND THE SCOPE OF AUTHORITY PERMITTED UNDER TITLE III AND CONSTITUTE AN INVASION OF STATE SOVEREIGNTY AS THEY ALLOW STATE JUDGES TO PROJECT CRIMINAL STATUTES INTO SISTER STATES' JURISDICTIONS

The scope of authority for state judges to issue wiretap orders under Title III is limited. In fact, §2516(2) is silent on the territorial reach with no express or implied authority for state judges to issue such orders beyond the borders of their state. Had Congress intended for states to have such authority, it would have plainly said so in the statute. Additionally, it may be presumed from the limited express and inferred authority given to federal judges under §2516(1), which is blatantly absent from the enabling statute for state judges, that Congress never intended for state judges to authorize wiretaps beyond their borders.

Extending the territorial reach of state judges and permitting them to impose one state's criminal statutes in another state's jurisdiction is antithetical to the words of Title III, to the interpretation of criminal statutes in general, to the common law principles of territoriality, and, most importantly, to the sovereignty of each state as they must be permitted to establish criminal laws within their jurisdictions as their separate and independent legislatures see fit, without interference or imposition from other states.

The Pressing Question Of A State Judge's Territorial Reach To Issue Wiretap Orders Under Title III's Enabling Statute Is Squarely Presented In This Case

The question of the territorial reach of a state court judge's eavesdropping orders and whether they may stretch beyond the borders of the issuing judge's state and into the jurisdiction of other states is squarely presented to this Court for the first time. The issue was raised at each level of litigation in this case as outlined above in all of New York's appellate courts, including the New York Court of Appeals. Although this Court has dealt with factually similar

cases, the legal questions presented in those cases were ancillary to the question of the extraterritorial reach of a judge's eavesdropping orders presented here. See *State v. Ates*, 86 A.3d 710 (N.J. 2014); *Dahda v. United States*, 138 S.Ct. 1491 (2018).

The Enabling Statute's Silence On The Territorial Reach Of State Judges' Wiretap Orders Has Fomented A Patchwork Of State Wiretap Laws.

Because the enabling statue under Title III is silent on the question of the territorial reach of a state judge's wiretap orders, state legislatures have enacted statutes that vary on the question of how far a state judge's wiretap orders may travel. While some state statutes are silent on the territorial reach of wiretap orders, others have express provisions allowing them to issue such orders on cell phones beyond the states' borders. Although the states' laws vary on territorial reach, many states look to federal case law to interpret their statutes, even though the enabling statutes for federal and state judges are quite different.

For example, in this case, New York's eavesdropping statutes are silent on the territorial reach of a judge's eavesdropping orders; however, the New York Court of Appeals, citing to *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992), has interpreted New York's wiretap statute (N.Y. CPL §700.05(4)) by finding that, although the phones tapped were all located outside the state, the warrant was "executed" within the judge's jurisdiction because the signal was redirected to Brooklyn at a listening post within the court's jurisdiction.

In New Jersey, the eavesdropping law defines the point of interception as the site where law enforcement is located. See N.J. Stat. Ann. § 2A:156A-2(v). New Jersey's Supreme Court has interpreted this statute as giving New Jersey courts jurisdiction to wiretap cell phones when the calls originate and terminate outside the state. *State v. Ates*, 86 A.3d 710 (N.J. 2014).

Maryland's wiretap statute states that the communication device (a cell phone) does not have to be within the jurisdiction of the court at the time of interception. (See Md. Code Ann., Cts. & Jud. Proc. §

10-408(c)(3)) Maryland courts have interpreted this as giving authority to its judges to wiretap phone calls that originate and terminate outside the state. *Davis v. State*, 43 A.3d 1044 (Md. 2012).

Delaware's wiretap statute expressly permits the interception of mobile telephone communications whether the phone is within the jurisdiction of the court or not, but requires that the application for the order allege that the offense investigated may transpire in the jurisdiction of the court. See Del. Code Ann. tit. 11, § 2407(c)(3).

In Nebraska, a judge may enter an order authorizing interception of mobile telephone communications within the territorial jurisdiction of the court. See Neb. Rev. Stat. Ann. § 86-293(3). Nebraska's Supreme Court, relying on federal case law, has interpreted this statute to authorize the interception of out of state mobile phone calls as long as the signal is redirected to a listening post within the judge's jurisdiction. *State v. Brye*, 935 N.W.2d 438 (Neb. 2019).

The Issue Of Territorial Reach Of Wiretap Orders Has Created A Split Of Authority In The Federal Circuit Courts.

The issue of territorial reach of wiretap orders has created a split of authority in federal courts and across the Circuits. Although the enabling statute for federal judges, 18 U.S.C. §2516(1), is different than that for state judges, the ambiguity regarding federal judges' territorial reach under §2518(3) has created various interpretations that warrant this Court's attention. Section 2518(3) states that a district court judge may approve a tap "*within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction).*" The ambiguity of the phrases "mobile interception device" and "Federal court within such jurisdiction" have created numerous interpretations regarding the territorial reach of a wiretap order issued by federal judges.

In *United States v. Ramirez*, the Seventh Circuit addressed the issue of territorial jurisdiction

and the definition of "mobile interception device" found in 18 U.S.C. §2518(3). 112 F.3d 849 (7th Cir. 1997). In that case, the government had applied for a wiretap order from a district court judge in the Western District of Wisconsin while the phone and the listening post were both in Minnesota. The Seventh Circuit held that neither the location of the phone nor the location of the listening post affected the legality of the tap.

Conversely, in the Fifth Circuit it was held that the district court located in the Southern District of Mississippi did not have territorial jurisdiction to issue a wiretap order on phones located in Texas where the calls were being monitored in Louisiana. *United States v. North*, 728 F.3d 429 (5th Cir. 2013) (Case No. 11-60763), *withdrawn*. Although the Fifth Circuit later withdrew its opinion and issued a second opinion (*U.S. v. North*, 735 F.3d 212 (5th Cir. 2013)) that decided the case on different grounds, the rationale of the first decision puts the Fifth Circuit at odds with other Circuits on the issue of territorial reach of wiretap orders.

The Fifth Circuit disagreed with the Seventh Circuit's holding regarding the definition of the phrase "mobile interception device." While the Seventh Circuit held that a mobile interception device, mentioned in 18 U.S.C. §2518(3), refers to the mobility of the device being intercepted, i.e. the phone, the Fifth Circuit conversely, in its initial opinion, found that the phrase mobile interception device referred to the mobility of the thing intercepting, not the phone. This finding has implications on the territorial reach of a wiretap order because under this interpretation either the phones or the device intercepting must be within the issuing judge's jurisdiction. Additionally, the Fifth Circuit, in the first opinion, found that the lack of territorial jurisdiction required suppression because, under 2518(10)(ii), when an authorization is insufficient on its face where the district court lacked territorial jurisdiction, a core concern is implicated. *North*, 728 F.3d 429 (5th Cir. 2013) (Case No. 11-60763), *withdrawn*.

In *United States v. Glover*, 736 F.3d 509 (D.C. Cir. 2013), the D.C. Circuit held that where the FBI obtained a warrant from the district court for the

District of Columbia for an audio recording device to be placed on a truck located in Baltimore, the warrant was insufficient on its face because the place where the device was to be installed was outside the district court's jurisdiction. The warrant stated that the agents could enter the truck whether it was located in the District of Columbia, District of Maryland, or the Eastern District of Virginia. The D.C. Circuit held that "a judge cannot authorize the interception of communications if the mobile interception device was not validly authorized, and a device cannot be validly authorized if, at the time of the warrant is issued, the property on which the device is to be installed is not located in the authorizing judge's jurisdiction. A contrary reading would render the phrase 'authorized by a Federal court within such jurisdiction' completely superfluous." *Glover*, 736 F.3d at 514.

In *United States v. Dahda*, 138 S.Ct. 1491 (2018), the issue was whether wiretap orders issued by the district court from the District of Kansas were facially insufficient where the orders authorized the interception of phones in Kansas from a listening post in Kansas and authorized interception using a

listening post in Missouri as well. Ultimately, the evidence obtained from the Missouri listening post was not introduced at trial. This Court held that not every defect in a wiretap order renders the order facially insufficient, and, absent the challenged language, the wiretaps that produced evidence introduced at trial were properly authorized. In a line of dicta, this Court found that a listening post within the court's territorial jurisdiction could lawfully intercept communications made to or from telephones located within Kansas or outside Kansas.

The language of 2518(3) has still not been settled regarding the territorial reach of federal judges' wiretap orders. Whether or not the same language in 2518(3), applicable to Federal judges, is also applicable to state judges remains an unanswered question. The split of authority amongst Federal Circuits only renders the question of territorial reach of state judges more nebulous, requiring this Court's attention.

Extraterritorial Wiretap Orders Are An Invasion Of State Sovereignty

When states impose their version of wiretap laws in a sister state jurisdiction, they undermine Congress's main goals when it enacted Title III: uniformity and consistency in the authorization of wiretap orders. But more than disassociating from Title III's stated policies, the extraterritorial application of a states' criminal laws is an invasion of state sovereignty and an invitation to conflict.

In 1968, the animating force in enacting Title III was Congress's concern with "the tremendous scientific and technological developments that have taken place in the last century that have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance." S. Rep. No. 1097, 90th Cong. at 2154 (1968).

Congress's concerns in 1968, when the number of wiretap orders was a mere fraction of what it is

today, are more relevant now than ever. In fact, the listening post rule that has become almost standard amongst federal circuits has become so due to new developments in technology. Wiretaps cross the borders of cities, counties, and states with the flick of a switch at the phone company, and law enforcement never even leaves its office. This is a technology and a level of invasiveness never imagined by the authors of Title III.

The phone company, through use of "switching station" technology, can now re-direct phone conversations between any two phones in any two cities from anywhere in the nation to anywhere in the nation the police choose to listen in. The erosion of privacy and uniformity, along with state borders and state sovereignty is the result.

To foster use of the listening post rule, state courts have devised their own fictionalized definition of interception. The theory is that the interception occurs in two places simultaneously: at the situs of the phone and at the listening post where the phone conversation is redirected and first overheard.

However, the technology of signal re-direction tells a different story.

The switching station that the phone company used to re-direct the signal in this case was in California. The phone signal was captured in California – where state law permits neither wiretapping of gambling offenses nor wiretapping without a joint investigation with California law enforcement – then by order of a New York judge, re-directed to the listening post in Brooklyn.

Despite the capture of the signal at the regional switching station nearest Joseph Schneider's phone in California at the direction of a New York judge, the New York Court of Appeals held that "the rerouting of cell phone communications by third-party service providers to the point of execution … is not itself the court-ordered interception." The Court devised a fictional work-around when the phone company acts as agent of law enforcement in redirecting phone conversations, holding that the phone company's switching technology was "a preparatory step to effectuate the execution of

eavesdropping warrants by government agents." 2021 NY Slip Op 03486 at 6.

By re-imagining the point of interception of a phone call, the Court of Appeals dragged the invasive extraterritorial application of New York's criminal statutes in California back into Brooklyn. The chimerical repositioning of the point of interception allows one state to impose its criminal laws within a sister state's jurisdiction by redefining the word "intercept." The wiretap order required someone to capture Joseph Schneider's phone signal at a regional switching station near his phone in California. When the service provider redirected the phone signal in California it acted as agent of New York law enforcement and carried out the wiretap order of a New York judge within the borders of California and in violation of California law.

The conflict in this case is representative of the collision between the wiretap laws of many states. The enabling statute's silence on the territorial reach of state wiretap orders is a failure to recognize that sister states have exclusive sovereignty over their own territories absent federal preemption. "When a

statute gives no clear indication of an extraterritorial application, it has none." *Morrison v. National Australia Bank Ltd.,* 561 U.S. 247, 255 (2010); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013). One state may not supplant the laws of a sister state within that sister state's borders.

In addition to the invasion of sovereignty, the extraterritorial application of criminal laws violates the due process rights of the individual citizens. When California, or any other state, enacts a statute, its citizens are protected by and entitled to legitimate expectations and reliance on those laws.

The Extraterritorial Application Of Criminal Statutes Violates The Due Process Rights Of Sister State Citizens

Territorial reach and the discrepancies in the listed offenses of states' eavesdropping laws are critical. Every citizen of every state is entitled to know the extent of the law of the state in which they reside and is entitled to the protection of the laws of their home state. When one state projects its criminal statutes into another, the citizen is denied both

procedural and substantive due process. Joseph Schneider had the right to have a California judge review the wiretap application before his phone was wiretapped. He had that right under both the Fourth Amendment of the U.S. Constitution and Article I Section 13 of California's Constitution. He was denied that right and denied due process.

This Court has consistently held that the extraterritorial application of a state's laws violates the due process right of the citizen. In *Nielsen v. Oregon*, 212 U.S. 315, 321 (1909), this Court held that Oregon cannot apply its criminal statutes within the state of Washington where the opinion of the legislatures of the two states is different, one state cannot enforce its opinion against that of the other as to an act done within the limits of that other state. In *Allgeyer v. State of La.*, 165 U.S. 578 (1897), this Court found that a statute violates due process and is unconstitutional where it prohibits making of contracts outside the state. Again, in *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914), this Court held that it would be impossible to permit the statutes of Missouri to operate beyond its jurisdiction because it would destroy freedom of contract, throw

down constitutional barriers of the States, and interfere with their lawful authority. The preservation of the lawfully distinct status of the states is a fundamental element of our Constitution.

In this case, when the Omnibus Crime Control and Safe Streets Act was passed, it was envisioned that the enabling statute, §2516(2), would allow each state to pass wiretap laws within that framework as they saw fit. When wiretap offenses vary from state to state and one state imposes its laws in another jurisdiction, as was done here, it violates the due process right of that sister state's citizens. The Kings County District Attorney imposed New York's wiretapping laws in the State of California in violation of California law where gambling is not a listed offense and where interstate eavesdropping is not permitted without a joint investigation with California law enforcement.

The Variation In State Laws Creates Conflict Among The States: Different Criminal Offenses Are Subject To Wiretap Orders.

The geographic range of wiretap orders has far reaching consequences regarding the independent

sovereignty of the states, especially where states enact conflicting eavesdropping statutes that subject different criminal offenses to eavesdropping orders. For example, in this case, California law excludes gambling as an offense for which eavesdropping orders may be issued (Cal. Penal Code § 629.52), while New York law includes gambling in its list of offenses (N.Y. Criminal Procedure Law §700.05(8)(c). When a New York judge imposes a wiretap order on a cell phone located in California for the offense of gambling, the judge projects a New York criminal statute beyond the borders of New York into a sister state, and in conflict with California law.

This statutory distinction is not exclusive to California and New York. Many states like New York, Illinois, and Pennsylvania include long lists of offenses that are subject to wiretap orders (See N.Y. CPL §700.05(8); 725 Illinois Compiled Statutes Annotated 5/108B-3(a); Pennsylvania: 18 Pa.C.S.A. §5708(1)), while other states like Alaska, Hawaii, and Nebraska have extremely shorts lists of offenses. (See Alaska Stat. Ann. § 12.37.010; Haw. Rev. Stat. Ann. § 803-46; Neb. Rev. St. §86-291). The ubiquitous nature of cell phones and mobile electronic devices

coupled with the extraterritorial application of state wiretap laws for various criminal offenses presages repeated conflict among the states.

States That Permit Wiretap Orders On Cellphones Beyond Their Borders Run Afoul Of Common Law Territorial Principles.

Under common law, state jurisdiction is grounded upon territorial principles. A state only has power to make conduct or the result of conduct a crime if the conduct takes place or the result happens within its territorial limits. *State v. Cain*, 757 A.2d 142, 145 (Md. 2000); *State v. Smith*, 421 N.W.2d 315, 318 (Minn. 1988); *State v. Darroch*, 287 S.E.2d 856, 863 (N.C. 1982). Thus, for the majority of crimes, either the criminal act or its effect had to occur within the territory of the state in order for someone to be charged within the state.

However, even under the common law in crimes which encompass acts and consequences in more than one state, it is required that the court localize the whole crime for jurisdictional purposes on one side of a political boundary line. See Larry

Kramer, Jurisdiction over Interstate Felony Murder, 50 U. Chi. L. Rev. 1431, 1434 (1983). The method chosen by common law judges to localize a crime is to select a single point in space and time where it is said that the crime was committed. *Id.* This point, the "locus of the offense," determines jurisdiction over the offense and the offender. Courts identify the "locus of the offense" as the place where the "gist of the offense"' occurred. *Id.* The "gist of the offense" is that element or those elements essential to demonstration of the existence of the crime—the gravamen of the offense or its most important aspect.

In this case, the Kings County District Attorney and its wiretap applications show that the acts of Joseph Schneider never occurred in New York. In fact, the "Probable Cause" section of the affidavit in support of the wiretap order stated that Joseph Schneider was in contact with many other states, including Arkansas, Colorado, Florida, Michigan, Hawaii, Nevada, and Costa Rica. However, there was no allegation that Mr. Schneider had committed any act or crime in the State of New York or that he was in contact with anyone in New York.

Thus, in this case, the extraterritorial application of the wiretap orders, issued by a judge sitting in Brooklyn, on Joseph Schneider's phone in California violated the common law principle of territoriality because Joseph Schneider had no territorial connection to New York. The listening post rule asserted by the New York Court of Appeals, which other states are bound to follow, projects the criminal laws of one state into the sovereign jurisdiction of another, engineering the collapse of common law territorial principles.

The Enabling Statutes For Federal And State Judges Are Written Differently And Must Be Interpreted Differently.

Title 18 United States Code § 2516 has two subsections. Subsection one is the enabling statute for federal judges, which permits them to issue wiretap orders. It contains an extensive list of national and international crimes for which wiretap orders may be issued. Conversely, §2516(2), the enabling statute for state judges, enumerates a much more limited number of crimes for which state judges may issue wiretap orders, namely 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. Commonly, each of the crimes listed in 2516(2) takes place in one jurisdiction.

It is significant that subsection one is much more extensive in the number and types of crimes listed and in the inferred ability of federal judges to issue eavesdropping and interception orders outside of their jurisdictions. For example, 2516(1) authorizes federal judges to issue eavesdropping orders when Federal authorities are investigating crimes such as arson within special maritime and territorial jurisdiction, transportation of slaves from United States, interstate and foreign travel or transportation in aid of racketeering enterprises, theft from interstate shipment, interstate transportation of stolen property, conspiracy to harm persons or property overseas, and relating to construction or use of international border tunnels (see 18 U.S.C. § 2516(1)(c)), the location of any fugitive from justices (see 18 U.S.C. 2516(1)(l)), and

any crime relating to the smuggling of any aliens (see 18 U.S.C. § 2516(1)(m)).

The enabling statute for Federal judges infers authority to issue eavesdropping orders on a host of crimes that would naturally occur in more than one geographic jurisdiction and outside the jurisdiction of any single Federal judge. Not so in §2516(2). Comparing the types of offenses listed in the two subsections gives some insight into what the legislature intended to be the geographic limits of both federal and state judges in issuing wiretap orders.

Additionally, section 2516(1) incorporates 18 U.S.C. § 2518, which gives the limited express authority to a federal judge to issue an eavesdropping order outside of a Federal judge's geographic jurisdiction. Section 2518(3) states: "…the judge may enter an *ex parte* order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device

authorized by a federal court within such jurisdiction) …" Thus, under the enabling statute for federal judges, any wiretap outside the jurisdiction of the judge by use of a mobile interception device must be authorized by a Federal court within the jurisdiction of the mobile interception device. There is no express permission for state judges to act outside of their jurisdiction.

Because New York State's eavesdropping statute is modelled after, and derives its limited authority from, the enabling statute under Title III of the Omnibus Crime Control and Safe Streets Act (as do all other states), a New York State judge does not have the express or implied authority to issue eavesdropping orders beyond the borders of New York State. This is especially true where none of the communications touched New York and there was no nexus between Joseph Schneider's wiretapped phone calls with any crime committed within the borders of New York State.

The Listening Post Rule: Allowing States To Project Their Laws Into Other Jurisdictions And Redirect The Phone Signal Back To The Jurisdiction Of The Issuing Judge Encourages Forum Shopping.

When a state judge can order the signal between two phones anywhere in the nation to be re-directed into his jurisdiction, it encourages forum shopping by the prosecution. The location of the cell phones no longer matters because the phone company can redirect the signal to any location. Law enforcement will, therefore, gravitate to the place of least resistance, i.e. where a judge is most likely to sign a wiretap order.

The statistical data from wiretap reports strongly suggests that wiretap applications and orders are concentrated in specific areas. The data in New York and California both show a very high number of wiretap authorizations that do not correlate to the population of either state. The data shows that the number of wiretap authorizations in those two jurisdictions, in fact, far exceeds what one would expect given the population density.

For example, New York State makes up about 6% of the population in the United States[1] and New York State judges (not including federal judges in New York) consistently make up one of the largest percentages of wiretap authorizations nationally. In 2020 New York State judges accounted for 23% of all state court wiretap authorizations nationwide[2]; in 2019 New York State judges accounted for 28% of state court wiretap authorizations nationwide[3]; in 2018 they accounted for 22% of all state wiretaps[4]; in

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[1] https://www.census.gov/quickfacts/fact/dashboard/NY,US/PST045219

[2] https://www.uscourts.gov/statistics-reports/wiretap-report-2020

[3] https://www.uscourts.gov/statistics-reports/wiretap-report-2019

[4] https://www.uscourts.gov/statistics-reports/wiretap-report-2018

2017 they accounted for 23% of all such wiretaps[5]; in 2016, 19%[6]; and in 2015, 19%[7].

Equally alarming statistics come from the State of California (not including federal judges' authorizations for wiretaps). In 2019, California State judges accounted for 22% of all wiretap authorizations nationwide; in 2018, California accounted for 24% of such authorizations; in 2017, California accounted for 34% of all such authorizations; in 2016, California accounted for 35% of all such authorizations; in 2015, California accounted for 41% of all authorizations nationwide.[8]

State judges of New York and California, two states containing roughly 18% of the U.S. population,

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[5] https://www.uscourts.gov/statistics-reports/wiretap-report-2017

[6] https://www.uscourts.gov/statistics-reports/wiretap-report-2016

[7] https://www.uscourts.gov/statistics-reports/wiretap-report-2015

[8] See footnotes 2 – 7 for statistics on California State judge wiretap percentages.

authorized between 50 and 60% of all wiretap orders by state judges nationwide from 2015-2020. This means that New York and California authorized more wiretaps than all other states combined. When more than half the wiretap orders are concentrated in two places over an extended period of time, it is clear that prosecutors gravitate to those jurisdictions to obtain such orders – they forum shop to obtain the results they are looking for, to get wiretap orders signed by a judge.

CONCLUSION

Since before the United States was a country, the states were sovereign, separate, and distinct. Independent of one another, they enacted laws enforceable within their borders and as their respective legislatures saw fit. Under our Constitution, they were entitled to do so then, and are entitled to do so now.

The enabling statute in Title III for state judges permits each state to enact the wiretap statutes as their respective legislatures see fit and has created a national patchwork of wiretap laws.

The states' laws are inconsistent with one another and inconsistent with the stated goals of the Omnibus Crime Control and Safe Streets Act of uniformity and protection of privacy. When states project their criminal statutes into another state it creates conflict between sister states and is violative of the due process rights of citizens.

The territorial principles of criminal statutes and sovereign borders that have governed state interaction under our constitution are abandoned with the flick of a switch by the phone company. Where and when a private conversation will be subject to eavesdropping is now completely at the whim of local police. Brooklyn can listen to Boise, Phoenix to Philadelphia, San Diego to San Antonio, and Dallas to Detroit; boundaries and borders are no longer relevant when every state judge can claim that the warrant was executed in his jurisdiction because the phone company has a new technology that permits the police to redirect the signal to their desks wherever they may be.

This Court must grant this petition to determine how far a state judge's wiretap order may travel.

Dated: August , 2021

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEALS OF NEW YORK, DATED JUNE 3, 2021

COURT OF APPEALS OF NEW YORK

No. 41

June 3, 2021, Decided

THE PEOPLE & c.,

Respondent,

v.

JOSEPH SCHNEIDER,

Appellant.

OPINION

DiFIORE, Chief Judge:

The issue raised on defendant's appeal is whether a Kings County Supreme Court Justice had jurisdiction to issue eavesdropping warrants for defendant's cell phones, which were not physically present in New York, for the purpose of gathering evidence in an investigation of enterprise corruption and gambling offenses committed in Kings County. To resolve defendant's jurisdictional challenge, we must decide whether the eavesdropping warrants were "executed" in Kings County within the

meaning of Criminal Procedure Law § 700.05(4). We hold that eavesdropping warrants are executed in the geographical jurisdiction where the communications are intentionally intercepted by authorized law enforcement officers within the meaning of CPL article 700. Accordingly, the order of the Appellate Division should be affirmed.

I

Law enforcement officers in Kings County conducted a two-year investigation into an illegal gambling enterprise. In the early stages of the investigation, an undercover agent met with defendant's accomplice, PD, and placed bets at a location in Kings County. A variety of investigative tools were used to identify coconspirators and gather evidence, including physical surveillance and the installation of a bugging device and video surveillance at the Kings County location. Investigators obtained eavesdropping warrants on the cell phones of multiple targets, including targets physically present in New York. Defendant's participation in the illegal gambling enterprise was uncovered when his telephonic communications were intercepted pursuant to a warrant authorizing eavesdropping on the cell phone of PD, who regularly came to Kings County in furtherance of the gambling enterprise. In the intercepted calls, defendant and PD were overheard discussing password-protected internet accounts on sports gambling websites, through which defendant controlled the usernames, passwords, betting limits, gambling lines and spreads for all his gambling clients.

The Kings County District Attorney applied for eleven successive eavesdropping warrants to intercept

communications on three cell phones linked to defendant, at least two of which did not have subscriber information but were connected to defendant by voice identification. A Kings County Supreme Court Justice issued the warrants after finding probable cause to believe that defendant was engaging in designated gambling offenses in Kings County, mainly through his website "thewagerspot.com," and that "normal investigative procedures . . . reasonably appear[ed] to be unlikely to succeed," justifying the use of eavesdropping. The warrants, as provided by statute, directed the particular communications service providers that controlled and operated the telephone wires and other digital and computer systems that transferred the telephonic and electronic communications to "provide all information, facilities, and technical assistance" to law enforcement to execute the warrants in Kings County.

Defendant was subsequently indicted in Kings County, along with seven others, for enterprise corruption, promoting gambling and related crimes. Among other acts attributed to defendant, the indictment alleged that on seventeen specific dates between September 13, 2015 and January 3, 2016, in Kings County, defendant and his accomplices received or accepted five or more illegal sports wagers on each date through defendant's gambling website, totaling more than five thousand dollars on each occasion. Defendant moved to suppress the evidence obtained pursuant to the warrants[1]. He did not assert that the government interception of his communications

1. Defendant's suppression motion addressed only one of the three intercepted phone numbers attributed to him.

violated his constitutional privacy interests. Nor did he dispute that the charges were properly brought in Kings County based on the commission of designated crimes in that location. Instead, as relevant here, defendant claimed that the Kings County Supreme Court Justice lacked the authority to issue the eavesdropping warrants because defendant and his cell phones were not located in New York and his intercepted communications involved call participants who were not physically present in New York and therefore execution of the warrants did not occur in Kings County. He also claimed that the People violated his due process rights, the separate sovereign doctrine and other constitutional limitations because California law does not include gambling offenses as designated crimes for eavesdropping.

The suppression court denied the motion, concluding that there was probable cause to believe that defendant committed the designated gambling crimes (CPL 700.05[8]) in Kings County, that the warrant was executed at a facility in Kings County where the communications were overheard and accessed by authorized law enforcement, and the warrants were properly issued by a Justice in Kings County. The court further rejected defendant's claim that, under this approach, a judicial warrant allows law enforcement to "re-route phone calls being made anywhere in the country to Kings County and thereby have nation-wide jurisdiction." The court concluded that since the crimes were allegedly committed in Kings County, there was jurisdiction to prosecute the crimes and a sufficient nexus for the issuance of the eavesdropping warrants in that county.

Defendant entered a guilty plea to all counts of the indictment against him. The Appellate Division affirmed the judgment, holding that the suppression court properly denied defendant's motion to suppress the eavesdropping evidence because CPL article 700 authorized the Supreme Court Justice in Kings County to issue warrants that would be "executed" in that court's judicial district, meaning where the communications would be "intentionally overheard and recorded" (176 A.D.3d 979, 980, 112 N.Y.S.3d 248 [2d Dept. 2019], quoting CPL 700.05[3][a]). The Court also rejected defendant's claim that the warrants represented an unconstitutional extraterritorial application of New York state law. A Judge of this Court granted defendant leave to appeal (34 N.Y.3d 1132, 118 N.Y.S.3d 511, 141 N.E.3d 467 [2019]).

II

There is no dispute here that law enforcement agents must obtain a judicial warrant to intercept real time cell phone communications. Historically, the Fourth Amendment guarantee against unreasonable searches and seizures (U.S. Const Amend IV) focused on whether the government obtained information by physical intrusions on constitutionally protected areas (*see Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206, 2213, 201 L. Ed. 2d 507 [2018]; *Olmstead v. United States*, 277 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 944 [1928]). However, over fifty years ago, it was established that "'the Fourth Amendment protects people, not places,' [which] expanded [the] conception of the Amendment to protect certain expectations of privacy'" (*Carpenter*, 138

S. Ct. at 2213, quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 [1967]). Given the more modern appreciation "that property rights are not the sole measure of Fourth Amendment violations," a person's right to privacy has become the paramount concern in assessing the reasonableness of government intrusions, especially as "innovations in surveillance tools . . . ha[ve] enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," and courts must continue to "secure the privacies of life against arbitrary power" (*id.* at 2213–2214 [internal quotations omitted]; *see also Katz*, 389 U.S. at 351–352; *Riley v. California*, 573 U.S. 373, 381–382, 134 S. Ct. 2473, 189 L. Ed. 2d 430 [2014]).

In New York, article I, § 12 of the New York State Constitution authorizes the issuance of eavesdropping warrants as a law enforcement investigative tool to overhear and intercept telephonic communications, provided that certain safeguards against unreasonable privacy invasions are met. "[I]n addition to tracking the language of the Fourth Amendment" (*People v. Weaver*, 12 N.Y.3d 433, 438-439, 909 N.E.2d 1195, 882 N.Y.S.2d 357 [2009]), article I, § 12, adopted in 1938, provides in relevant part that:

> "[t]he right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of

> crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

New York State's express constitutional privacy protections for telephonic communications predated the United States Supreme Court's recognition of the Fourth Amendment protection against eavesdropping (*see Katz*, 389 U.S. at 351–353; *see also People v. Capolongo*, 85 N.Y.2d 151, 158, 647 N.E.2d 1286, 623 N.Y.S.2d 778 [1995]). Yet, our early statutory procedure for obtaining evidence by **wiretap** order was struck down as unconstitutional under the Fourth Amendment due to the absence of additional protections, given the gravity of the privacy invasion in overhearing the content of the communications (*see Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 [1967]).[2]

In response to United States Supreme Court decisions in *Katz* and *Berger*, which invalidated government eavesdropping operations based on their failure to employ

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2. The federal exclusionary rule recognized in *Weeks v. United States* (232 U.S. 383, 34 S. Ct. 341, 58 L. Ed. 652, T.D. 1964 [1914]), prohibiting the use in federal court of any evidence seized in violation of the Fourth Amendment was extended to illegally seized **wiretap** evidence (*see Nardone v. United States*, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314 [1937]). New York followed suit in 1962, enacting CPLR 4506, which barred admission of any eavesdropping evidence that was unlawfully obtained (*see Capolongo*, 85 N.Y.2d at 158, citing L 1962, ch 308).

adequate privacy protections (*see Capolongo*, 85 N.Y.2d at 159), Congress enacted **Title III** of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USC § 2510 *et seq.*) (**Title III**), "imposing upon the States minimum standards for electronic surveillance" (*Capolongo*, 85 N.Y.2d at 159; *see also* L 1969, ch 1147). States were permitted to adopt procedures and standards that were more restrictive than those imposed by federal law or to prohibit **wiretapping** completely (*see id.; see also* 18 USC § 2516).

Soon after **Title III** was enacted, our state legislature enacted CPL article 700, which sets forth the procedural mechanism for securing a court-ordered eavesdropping warrant (*see Capolongo*, 85 N.Y.2d at 159). In enacting article 700, the state legislature sought to "afford law enforcement 'greater flexibility in the employment of eavesdropping as an effective weapon against crime' and, in particular, organized crime, 'where the obtaining of evidence for successful prosecutions is often extremely difficult'" (*People v. Rabb*, 16 N.Y.3d 145, 151, 945 N.E.2d 447, 920 N.Y.S.2d 254 [2011], quoting Governor's Approval Mem, Bill Jacket, L 1969, ch 1147, 1969 NY Legis Ann, at 586). Complying with federal law, New York also gave effect to our "strong public policy of protecting citizens against the insidiousness of electronic surveillance" by requiring strict compliance with CPL article 700 (*see Capolongo*, 85 N.Y.2d at 159–160). Issuance of the eavesdropping warrants based on demonstrated probable cause, which is not challenged here, satisfied the overarching constitutional privacy protections.

Before discussing the relevant statutory language as to what constitutes the point of execution of the warrant

for the purpose of jurisdiction under CPL 700.05, some context with regard to the geographical predicates to conduct eavesdropping investigations and issue eavesdropping warrants is instructive. As a first principle, the court's jurisdiction to issue eavesdropping warrants is not boundless, but is limited by the rules of geographical jurisdiction set forth in our state constitution and CPL article 20. Under our State Constitution, a defendant generally has a right to be tried in the county where the crime was committed (*see People v. Greenberg*, 89 N.Y.2d 553, 555, 678 N.E.2d 878, 656 N.Y.S.2d 192 [1997]; NY Const, art I, § 2). A person may be prosecuted in a particular county where conduct occurred establishing an element of an offense or an attempt or a conspiracy to commit such offense (s*ee* CPL 20.40 [1]). Even where no conduct was committed within the county, a person may be prosecuted there under certain circumstances, such as where the result of an offense "occurred within such county" (CPL 20.40 [2]; *see also* CPL 20.60 [3] [causing the use of a computer service in one jurisdiction from another jurisdiction is deemed a use in both jurisdictions]).

Once the jurisdictional predicate to prosecute the crime in a particular county is established, as it was here, then, under CPL 700.10 (1), "a justice may issue an eavesdropping warrant . . . upon ex parte application of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application." Because this was a county-based prosecution (*see* CPL 20.40), the prosecutor authorized to prosecute the designated crimes in that jurisdiction—the Kings

County District Attorney—was the proper warrant applicant (*see* CPL 700.05[5]).

Turning next to the operative statutory language governing the "manner and time of execution," CPL 700.35(1) provides that "[a]n eavesdropping . . . warrant . . . must be executed according to its terms by a law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications . . . ." The law enforcement officers here were competent to execute the warrants because they were authorized to investigate and arrest defendant in the jurisdiction where the interception occurred (*see* CPL 700.05[6]). Notwithstanding the dissent's suggestion that defendant had no connection to New York (dissenting op at 8), the investigation and prosecution of defendant and his accomplices based on their participation in the gambling enterprise that operated in Kings County are not challenged and were jurisdictionally sound (*see People v. Di Pasquale*, 47 N.Y.2d 764, 765, 391 N.E.2d 710, 417 N.Y.S.2d 678 [1979]; CPL 20.40; *see also People v. Carvajal*, 6 N.Y.3d 305, 312, 845 N.E.2d 1225, 812 N.Y.S.2d 395 [2005]).

Despite the satisfaction of the jurisdictional and probable cause predicates in this case as mandated by our constitution and CPL articles 20 and 700, defendant challenges the jurisdiction of a Supreme Court Justice presiding in Kings County to issue the eavesdropping warrants on the theory that the court acted extraterritorially. Specifically, defendant claims that the warrants were not "executed" in Kings County

as required by CPL 700.05(4) because his cell phones were not physically located in New York and his communications occurred outside of New York[3]. Resolution of this discrete challenge depends on the statutory interpretation of the word "executed" as used in CPL 700.05(4), a term that is not defined in CPL article 700. CPL article 700, which sets forth the procedural mechanism of securing a court ordered eavesdropping warrant, and Penal Law § 250.00, which contains definitions used in article 700, provide the framework to determine where the warrants targeting defendant's communications were executed.

When resolving a question of statutory interpretation, the primary consideration is to ascertain and give effect to the legislature's intent (*see Matter of Marian T.*, 36 N.Y.3d 44, 49, 137 N.Y.S.3d 272, 161 N.E.3d 460 [2020]). The starting point in determining legislative intent is to give effect to the plain language of the statute itself—"'the clearest indicator of legislative intent'" (*id.*, quoting *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 696 N.E.2d 978, 673 N.Y.S.2d 966 [1998]). Additionally, when the language at issue is a component part of a larger statutory scheme, the language must be analyzed in context and the related provisions must be harmonized and rendered compatible (*see id.* at 49). We are also "governed by the principle that we must interpret a statute so as to avoid an unreasonable or absurd

3. Although defendant claims that his calls were not made to parties in New York, the suppression court specifically found in denying defendant's suppression motion that "defendants were calling people in New York state from California and as such, a clear connection is established with New York state and Kings County."

application of the law" (*People v. Garson*, 6 N.Y.3d 604, 614, 848 N.E.2d 1264, 815 N.Y.S.2d 887 [2006] [internal quotation marks and citations omitted]).

To begin, under CPL 700.05(4), "any justice of the supreme court of the judicial district *in which the eavesdropping warrant is to be executed*" is authorized to issue an eavesdropping warrant (emphasis added). When section 700.05(4) is read as an integrated whole and in a commonsense manner along with other sections of the CPL and correlative Penal Law definitions, the statute makes plain that a warrant is "executed" at the time when and at the location where a law enforcement officer intentionally records or overhears telephonic communications and accesses electronic communications targeted by the warrant. Contrary to defendant's theory, a plain reading of CPL article 700 demonstrates that "execution" of a warrant depends on the action of authorized law enforcement officers vis-à-vis the communications and does not depend on the location of a target, the target's communication devices or the participants engaged in the call. Indeed, **wiretapping** occurs upon "the intentional overhearing or recording of telephonic . . . communication[s]" and that statutory definition expressly excludes the actions of telecommunications providers in their normal operations (Penal Law § 250.00[1]).

"Eavesdropping" contemplates the performance of specific acts by government actors in three ways—**wiretapping**, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication (*see* CPL 700.05[1]). The judicial warrants here

authorized interception of both telephonic and electronic communications. Telephonic communications, when "intentionally overheard or recorded . . . by means of any instrument, device or equipment," are "[i]ntercepted communication[s]"—as are electronic communications that are "intentionally intercepted and accessed" (CPL 700.05[3]; Penal Law § 250.00[6]). Given the inclusion of telephonic communications in the definition of "intercepted communication," the dissent's view that the legislature inexplicably failed to authorize interception and "**wiretapping**" of telephonic communications occurring on cellular phones is meritless (*see* dissenting op at 10–11). Notably, under the dissent's rather absurd hypothesis, the government apparently could not eavesdrop on cellular communications even where a cell phone or call participant is located within New York's borders.

Mirroring the federal definition of a wire communication, this state defines telephonic communication as "*any aural transfer* made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable *or other like connection between the point of origin and the point of reception* (*including the use of such connection in a switching station*) . . . ." (Penal Law § 250.00[3] [emphasis added]; *see also* 18 USC § 2510 [1]). An "aural transfer" means "a transfer containing the human voice at any point between and including the point of origin and the point of reception" (Penal Law § 250.00[4]; *see also* 18 USC § 2510[18]). In contrast, "electronic communication" includes the transfer of various signals and data transmitted by wire (Penal Law § 250.00[5]). Based on these definitions, execution

of the warrants occurs at the point where authorized law enforcement intentionally overhears or records the human voice contained in telephonic communications and intentionally accesses the transferred signals or data in the electronic communications.

The legislative history accompanying substantive amendments made to CPL article 700 and Penal Law § 250.00 in 1988 demonstrates that the revisions were designed to keep pace with emerging technologies "as well as to bring New York law into conformity with the then-existing federal law [18 USCA § 2510 *et seq.*]" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, Penal Law § 250.05; *see also* Senate Introducer's Mem in Support, Bill Jacket, L 1988, ch 744 at 8–9). Through the 1988 amendments, the legislature clearly intended to continue the availability of **wiretapping** to be accomplished by the overhearing of "cellular and cordless telephonic communications" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, Penal Law § 250.05), and to add the ability to capture communications involving "various new forms of electronic communications" (Governor's Approval Mem, Bill Jacket, L 1988, ch 744 at 6). The statutory definitions of "eavesdropping and **wiretapping**" were revised at that time "to distinguish . . . the tapping of telephone and telegraph communications, the mechanical overhearing of conversations or discussion, and the interception of data transmission" based on emerging electronic technologies (Mem in Support, Bill Jacket, L 1988, ch 744 at 8). These amendments were enacted well after the Federal Communications Commission approved the use

of cellular telephone services in 1981 (*see* Rep of Senate Judiciary Commn at 9, S Rep 99–541, 99th Cong, 2d Sess, 1986). Acknowledging that law enforcement would require technical assistance in executing warrants involving modern modalities for both telephonic and electronic communication, the legislature's 1988 amendments "authorize[d] courts to direct that providers *of wire or electronic communication* services furnish the applicant with necessary assistance to accomplish unobtrusi[ve] interception," which was codified in CPL 700.30 (9) (Letter from Div. of Criminal Justice Servs., Dec. 23, 1988, Bill Jacket, L 1988, ch 744 at 12 [emphasis added])[4].

To be sure, the rerouting of cell phone communications by third-party service providers to the point of execution by

4. As previously stated, the notion raised by the dissent that the statute, as written, does not authorize eavesdropping on cellular communications is meritless. Defendant never identified any distinctions in the types of technology used in **wiretapping** or in rerouting or redirecting communications as a basis for his jurisdictional challenges. Nor did defendant make any claim that he had a reasonable expectation of privacy in the telecommunications providers' use of their own technology in transferring the communications point to point. The dissent's extended discussion of these unpreserved issues comparing early landline phones and digital and wireless methods of transfers of telephonic communications and the resulting analysis based on those distinctions (*see* dissenting op at 10–13) is flawed. The definition of telephonic communications under both state and federal law has remained the same because the transfer of the human voice still remains the communication to be intercepted. While both federal and state statutes account for the evolving technology used by the providers to transfer the communications, that evolving technology does not alter the essence of an aural communication, which is clearly subject to interception by eavesdropping.

authorized law enforcement officers enables "interception" as authorized by the warrant to occur, but is not itself the court-ordered interception. Federal and state statutes expressly recognize that telephonic communications are aural transfers, in part, and are controlled by service providers between two points (*see e.g.* Penal Law § 250.00[3]). Anticipating the use of emerging technologies in the commission of crime, both federal and state statutes have recognized for decades the necessity of third-party communications carriers to facilitate court-ordered interception through switching technology that enables the rerouting of calls. To that end, in 1994, Congress enacted the Communications Assistance for Law Enforcement Act (CALEA) to preserve the government's ability, pursuant to court order, to intercept communications involving technologies such as digital and wireless transmission modes (*see U.S. Telecom Assn. v. FCC*, 227 F.3d 450, 454, 343 U.S. App. D.C. 278 [2000]). Most significantly, the Act "[did] not alter the existing legal framework for obtaining **wiretap** . . . authorization," as CALEA was intended to "preserve the status quo" (*id.* at 455 [citation omitted]). Similarly, in New York, pursuant to CPL 700.30 (9), an eavesdropping order may direct communications service providers to "furnish the applicant information, facilities, or technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference" to the service customer. Contrary to the dissent's conclusion, private communication carriers do not "execute" the warrant (dissenting op at 16). Indeed, our state statute mandates that the court "*shall not direct the service providers to perform the intercept* or use the premises of the service

provider for such activity" (CPL 700.30 [9] [emphasis added]). Plainly, under CALEA and CPL 700.30 (9), an order directing the telecommunications carrier, which alone controls the transfer of communications, to provide technical assistance to investigators is not the equivalent of an interception; rather, these statutes anticipate the rerouting of digital communications by third parties employing their up-to-date technology as a preparatory step to effectuate the execution of eavesdropping warrants by government agents.

When read in the context of this legislative history, the statutory scheme supports our holding: the Kings County Supreme Court Justice presiding in the jurisdiction where defendant's communications were overheard and accessed and therefore intercepted by authorized law enforcement agents had the authority to issue the warrants. No language in the statutory scheme equates the place of interception with the variable points where cell phones or call participants are located.

Defendant nonetheless claims that a Kings County Supreme Court Justice's authority to grant eavesdropping warrants is, at best, limited to "anywhere in the state," citing CPL 700.05(4)'s definition of a "justice" who may issue a warrant "to authorize the interception of oral communications occurring in a vehicle or wire communications occurring over a telephone located in a vehicle." However, that part of CPL 700.05(4) has no application to this case. CPL 700.05(4) mandates that when interception of communications in a vehicle or over a telephone located in a vehicle is to be made through a

listening device that is "installed or connected" in the vehicle, the eavesdropping "warrant may be executed and such . . . communications may be intercepted anywhere in the state." Under this section, it is only when communications occurring in a vehicle are intercepted by an eavesdropping "device" that physically moves out of New York along with the vehicle that the justice is without authority to order extraterritorial interception (*see* Peter Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 700.05). That portion of section 700.05(4) does not relate to the place of execution of a warrant involving the rerouting of communications of a cell phone to a fixed wire room, nor does it conflict with our conclusion that jurisdiction in this case is tied to the place of authorized call interception. No devices were physically connected or implanted in a phone or vehicle in this case and no physical listening device employed by the law enforcement officers traveled outside Kings County. Thus, the vehicle-related language of CPL 700.05(4) is inapposite to the resolution of this appeal.

III

Because "the New York eavesdropping statute was intended to conform 'State standards for court authorized eavesdropping warrants with federal standards'" (*People v. McGrath*, 46 N.Y.2d 12, 26, 385 N.E.2d 541, 412 N.Y.S.2d 801 [1978], quoting Governor's Mem, L 1969, ch 1147, 1969 NY Legis Ann at 586), federal court decisions interpreting the federal eavesdropping statute are useful as an aide in interpreting provisions of the New York statute that are patterned after the federal counterpart. However, as

we explained in *People v. Gallina* (66 N.Y.2d 52, 56, 485 N.E.2d 216, 495 N.Y.S.2d 9 [1985]), when the language of our state statute differs from the federal statute, the distinction is considered "purposeful" and the plain language of CPL article 700 controls.

The jurisdiction of federal courts to issue eavesdropping warrants is defined in 18 USC § 2518. The federal statute—like our state statue—authorizes federal judges of "competent jurisdiction" to issue such an order "authorizing or approving *interception* of wire, oral, or electronic communications *within the territorial jurisdiction of the court in which the judge is sitting. . . .*" (18 USC § 2518 [1] [emphasis added]). Beginning with *United States v. Rodriguez* (968 F.2d 130 [2d Cir.1992]), every federal Circuit Court interpreting the language of section 2518 (1) has endorsed a "listening post" rule, which focuses on the point of "interception" in analyzing a court's jurisdiction to issue such warrants (*see United States v.* Jackson, 849 F.3d 540, 551-552 [3d Cir.2017] [collecting federal Circuit Court cases]). In *Rodriguez*, the Second Circuit concluded that "interception" occurred at both the site of the target phone in New Jersey *and* at the "place where the redirected contents [were] first heard" in the Southern District of New York (968 F.2d at 136). The *Rodriguez* court thus employed "the listening post rule" in holding that a warrant for such interception was properly issued by a judge of the Southern District of New York because the communications were overheard at a location "within the territorial jurisdiction" of that court. The Second Circuit concluded that the listening post rule served the key goal of the eavesdropping statute, which was to protect constitutional privacy interests from law

enforcement abuse while providing technological tools to advance designated criminal investigations when normal investigative procedures are insufficient (*id.* at 136)[5]. Other high courts have also followed the federal "listening post rule," concluding that, under their respective state statutes modeled upon **Title III**, the location of cell phones or call recipients does not drive the analysis, and execution of a warrant occurs at the place of interception—even where both parties to the calls or communications are not within the state (*see e.g. State v. Ates*, 217 NJ 253, 273, 86 A.3d 710 [2014]; *see also Davis v. State*, 426 Md. 211, 226–227, 43 A.3d 1044 [2012] [collecting cases])[6].

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5. 18 USC § 2518 (3) permits a federal judge to issue an eavesdropping warrant for interception "outside" the territorial jurisdiction of the court "but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction." Defendant claims here that this section provides federal judges, not state judges, with "express authority to issue eavesdropping orders outside of their geographical jurisdiction," and concludes that this means that a state judge can administer eavesdropping orders only "within its borders." Determinatively, defendant failed to preserve any issue of law for our review as to whether the eavesdropping orders issued here involved installation of a "mobile interception device" as defined in section 2518 (3). Thus, while there is an apparent split in the federal Circuit Courts as to the meaning of a "mobile interception device" (compare *United States v. Ramirez*, 112 F.3d 849, 853 [7th Cir.1997] ["mobile interception device" means "a device for intercepting mobile communications"] with *United States v. Dahda* (853 F.3d 1101, 1112-1113 [10th Cir.2017] ["mobile interception device" means "a listening device that is mobile"], *affd* on other grounds ___ U.S. ___, 138 S. Ct. 1491, 200 L. Ed. 2d 842 [2018]), we do not consider whether the cellphone fits the definition of a mobile interception device.

6. In *Ates*, the New Jersey Supreme Court rejected the defendant's arguments that New Jersey law enforcement officers

Because both the federal and state statutes link a court's jurisdiction to issue warrants to the point of interception, the decisions of federal and state courts interpreting their similar statutory provisions support our conclusion here.

Given the ubiquity of cell phones and widespread use of the Internet, this interpretation of our statutory scheme, one in line with the federal "listening post rule," reaffirms that eavesdropping warrants are a critical tool in investigating large-scale crime syndicates operating in our state. Defendant's "multiple plant" theory, pursuant to which a court's authority to issue a warrant is dependent upon the location of targeted cell phones or call participants, is not workable. Nor does defendant's proposal for inter-agency "cooperation" provide a solution. Linking jurisdiction to the undetectable locations of cell phones and creating dependence on outside law enforcement agencies to investigate and prosecute very serious crimes committed in this state is unreasonable. It would result in a logistical scheme that leaves jurisdiction in flux, creates multi-state wire rooms with diffuse oversight responsibility and in many cases would eliminate

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exceeded their jurisdiction in intercepting communications in cell phone calls among participants that were out of state, "creat[ing] an 'artificial connection' to New Jersey" and that only a judge from the defendant's state of residence could authorize a **wiretap**. The court explained that those arguments disregarded the fact that the New Jersey **Wiretap** Act requires an actual nexus to the state before an eavesdropping order can be issued, which is met by a predicate finding of probable cause to believe that a designated offense under New Jersey law is being committed and that communications about criminal offenses occurring in that state may be obtained through eavesdropping (*id.* at 268).

eavesdropping as an investigative tool. More importantly, centralized oversight by a single issuing court of competent jurisdiction over the eavesdropping investigation of designated New York crimes is critical to protect against abuses in the invasion of an individual's privacy in the communications—the paramount constitutional concern—and to ensure that any interception is necessary, properly minimized, and promptly terminated in accordance with constitutional safeguards (*see People v. Rodriguez y Paz*, 58 N.Y.2d 327, 335-336, 448 N.E.2d 102, 461 N.Y.S.2d 248 [1983]). That crucial oversight is impossible under defendant's proposed construct, which was certainly not the legislature's intent in carefully designing this State's eavesdropping statutes.

Defendant's remaining claims that the warrants at issue violated his constitutional rights as a California resident, the separate sovereignty doctrine and other constitutional rights of the state of California are without merit.

Accordingly, the order of the Appellate Division should be affirmed.

WILSON, J. (dissenting):

I agree with the majority that the issue is "discrete": does Criminal Procedure Law § 700.05 authorize a New York court to issue a warrant commanding the diversion into New York of a cellular telephone call between a California resident who has never been to New York and persons not resident or present in New York, so that New

York officers may listen to it in New York? I conclude that the statute does not[1].

I

Joseph Schneider is a lifelong resident of California who—prior to his arrest and extradition in June 2016—had never set foot in New York. At one time, Mr. **Schneider** operated his own gambling website. But beginning in April 2015 he began using facilities provided by a competitor (and fellow Southern California resident) Gordon Mitchnick, for which Mr. **Schneider** paid Mr. Mitchnick $30,000 per month. Mr. Mitchnick managed a network of "Master Agents" and "Agents" across the country and supported the websites those agents used to place bets on professional and collegiate sporting events. A team in San Jose, Costa Rica provided technical support. The operation required that Mr. Mitchnick and his associates employ a range of strategies to conceal payments made by customers and launder their profits.

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1. As the majority notes, Mr. **Schneider** advanced no claim under the Fourth Amendment of the U.S. Constitution or article I, § 12 of the New York Constitution. Further, I agree with the majority that Mr. **Schneider** failed to challenge the jurisdiction of the Kings County court to prosecute him, though we must be careful not to confuse the question of the court's jurisdiction to prosecute Mr. **Schneider** based on evidence turned up through the **wiretaps** with the court's statutory authority to issue the **wiretapping** warrants in the first place. Finally, I would also reject Mr. **Schneider**'s claims framed under the Full Faith and Credit Clause and his explication of California's public policy, at least in the manner in which he has presented those arguments.

The principal evidence against Mr. **Schneider** consisted of conversations recorded over the course of a six-month **wiretap** investigation beginning in December 2015. But in the initial warrant application, the People did not allege that Mr. **Schneider** had any contact with the state of New York or that he had any customers located in New York. Instead, they summarized four conversations between Mr. **Schneider** and a New Jersey-based bookmaker, Patrick Deluise, as evidence that Mr. **Schneider** operated a gambling website used by Mr. Deluise. During one of the calls, Mr. Deluise informed Mr. **Schneider** that he was in Florida: he did not mention his location in the remaining three, and the warrant application did not assert that Mr. Deluise was in New York when any of those calls took place. The application went on to describe Mr. **Schneider**'s business as "national in scope," noting that he had placed calls to numbers in California, Arkansas, Colorado, Florida, Michigan, Hawaii and Nevada and pointing to three incoming calls from Costa Rica, where online gambling is legal. New York was not among the states listed, and the warrant application contained no suggestion that Mr. **Schneider** had communicated by phone with anyone located in New York. Nevertheless, Supreme Court issued the warrant and the **wiretap** commenced.

Over the course of six-months, investigators extensively documented Mr. **Schneider**'s conversations with agents and customers in California, Nevada, Michigan and Costa Rica. But they failed to turn up any evidence that Mr. **Schneider** made or received calls to or from anyone located in Kings County. Indeed, during that period Mr.

Schneider made no calls to anyone in New York, and received just one, from a number registered to an address in Kingston[2]. The People do not assert that any other evidence uncovered during their lengthy investigation demonstrated that Mr. **Schneider** had contacts with persons located in New York.

II

Although Mr. **Schneider** advances no argument under article I, § 12 of the New York Constitution, its explicit protections against unreasonable interception of telephone communication—absent from the Fourth Amendment—are important in interpreting Article 700 of the Criminal Procedure Law. The majority apparently agrees, by acknowledging that New York's constitutional protections for the privacy of electronic communications exceed what the Fourth Amendment provides, but draws from that acknowledgement the odd conclusion that New York's constitution was amended in 1938 to "authorize" eavesdropping as an investigative tool (majority op at 6). That claim mischaracterizes the explicit language of article I, § 12 and misinterprets the intention of the delegates who authored it.

In 1928, the constitutionality of **wiretapping** was presented to the U.S. Supreme Court, which held that

2. Although the majority highlights the suppression court's finding that *other* defendants made calls to New York from California (majority op at 10 n. 3), the prosecution's warrant applications failed to demonstrate that Mr. **Schneider** was communicating with individuals in New York.

the Fourth Amendment did not prohibit or constrain **wiretapping** so long as the **wiretapping** was performed outside of the target's home (*Olmstead v. United States*, 277 U.S. 438, 465, 48 S. Ct. 564, 72 L. Ed. 944 [1928]). Thus, with no reason to suspect anyone of a crime, the police could climb a telephone pole, install a **wiretap**, listen, and use the evidence in criminal prosecutions. Or, if allowed by the telephone company, they could sit in a chair at the company's offices and do the same. *Olmstead* was met with swift public condemnation (*see, e.g.*, Forrest Revere Black, *An Ill-Starred Prohibition Case*, 18 Geo LJ 120 [1930]; Osmond K. Fraenkel, *Recent Developments in the Law of Search and Seizure*, 13 Minn L Rev 1 [1928]; Editorial, *Government Lawbreaking*, NY Times, June 6, 1928 at 24 ["Prohibition, having bred crimes innumerable, has succeeded in making the Government the instigator, abettor and accomplice of crime. It has now made universal snooping possible"]).[3]

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3. In an about-face, the U.S. Supreme Court thereafter held that the Communication Act of 1934, which provided that "no person" may divulge an intercepted telephone communication to "any person," prohibited the use of **wiretapped** information in both federal (*Nardone v. United States*, 302 U.S. 379, 58 S. Ct. 275, 82 L. Ed. 314 [1937]) and state (*Weiss v. United States*, 308 U.S. 321, 60 S. Ct. 269, 84 L. Ed. 298 [1939]) prosecutions. The managers of the bill that became the 1934 Communications Act "repeatedly declared that it was designed solely to transfer jurisdiction over radio, telegraph, and telephone to a new agency, the Federal Communications Commission, and that 'the bill as a whole does not change existing law'" (Alan F. Westin, *The Wire-Tapping Problem: An Analysis and a Legislative Proposal*, 52 Colum L Rev 165, 174 [1952]). Thus, "the *Nardone* decision was generally regarded as a bit of judicial legislation, a policy decision by the Court that the increased need to

Appendix A

At the New York Constitutional Convention of 1938, the delegates added article I, § 12 to the Constitution. Its first paragraph copies the U.S. Constitution's Fourth Amendment verbatim, but the amendment added a second paragraph not found in the Federal Constitution:

> "The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained, and identifying the particular means of communication, and particularly describing the person or persons whose communications are to be intercepted and the purpose thereof."

This second paragraph was a direct response to *Olmstead*. In a message to the convention, Governor Lehman emphasized the need to protect scrupulously against **wiretapping**, citing to Justice Brandeis' dissent in *Olmstead* for the proposition that "writs of assistance and general warrants are but puny instruments of tyranny oppression when compared with wire tapping" (Message of Gov. Lehman, 1 Revised Record of the Constitutional Convention of the State of New York at 339, quoting 277 U.S. at 476 [Brandeis J., dissenting]; *see also* Speech of Delegate Thomas B. Dyett, 1 Rev Rec at 505, quoting 277

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curb a dangerously prevalent practice justified a somewhat liberal remolding of a statutory section" (*id.* at 175).

U.S. at 474–475; Speech of Delegate Philip Halpern, 1 Rev Rec at 550). Article I, § 12 of the New York Constitution does not "authorize" **wiretapping**: rather, it expresses our State's fundamental distrust of the use of **wiretapping** and intention strictly to limit its availability.

The scope of Article 700 must be understood with that background in mind. In 1967, the Supreme Court overruled *Olmstead* (*see Katz v. United States*, 389 U.S. 347, 353, 88 S. Ct. 507, 19 L. Ed. 2d 576 [1967]), and held that New York's eavesdropping statute failed to require that warrants "particularly [describe] the place to be searched, and the persons or things to be seized" as required by the Fourth Amendment (*Berger v. New York*, 388 U.S. 41, 55, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 [1967]). In response, Congress passed **Title III** of the Omnibus Crime Control and Safe Streets Act of 1968 ("OCCSSA"), which established minimum federal statutory requirements for applications for eavesdropping warrants and the orders themselves (*see* 18 USC § 2518). **Title III** requires states to provide at least the protections it specifies but does permit states to adopt more restrictive measures. As Chief Judge Kaye explained: "Beyond the question of authority, however, stands our strong public policy of protecting citizens against the insidiousness of electronic surveillance by both governmental agents and private individuals. New York State has, therefore, responded to the problems raised by electronic surveillance with greater protection than is conferred under Federal law, and continues to assert this strong public policy, through evolving legislation, as technology advances" (*People v. Capolongo*, 85 N.Y.2d 151, 160, 647 N.E.2d 1286, 623 N.Y.S.2d 778 [1995]).

Given the protections enshrined in the Constitution and enacted by statute, our "strong public policy" requires that we interpret our eavesdropping statutes narrowly especially where—as here—the statute is silent on the question before us (*id.* at 162–163 [applying notice provisions of Article 700 to introduction of foreign **wiretap** evidence where statutory scheme is silent on the rules governing the admission of such evidence]). Likewise, nothing in Article 700's legislative history suggests any contemplation of the narrow issue presented here: whether a New York court can issue a warrant requiring a telephone company to divert a signal into New York when neither party to the call is located in New York or resides in New York. Contrary to the majority's assertion (majority op at 14 n. 4), I completely agree that CPL article 700 authorizes a New York court to issue an eavesdropping warrant when the warrant application shows that a cellular telephone line is being used to communicate to or from New York; I am puzzled by what portion of my "rather absurd hypothesis" would have caused the majority to think otherwise.

III

The easiest way to expose the majority's error is to remove the verbiage and line up the opinion's substantive points: (1) New York has longstanding constitutional protections specifically for telephone communications absent in the federal constitution (majority op at 6); (2) because of "New York's strong public policy" in protecting privacy, "strict compliance with CPL article 700" is required (*id.* at 7–8); (3) resolution of Mr. **Schneider**'s claim turns on the word "executed", "a term that is not

defined" (*id.* at 10); and (4) "the court's jurisdiction to issue eavesdropping warrants is not boundless, but is limited by the rules of geographical jurisdiction set forth in our State Constitution and CPL article 20" (*id.* at 8). Stripped bare, the majority claims that because New York has a long history of protecting privacy rights in telephone communications and the legislature did not say what it meant by "executed," the legislature meant to grant New York courts the ability to issue warrants to listen in on any cell phone calls between anyone in the United States, or perhaps in the world, so long as a U.S. telephone carrier can divert the call to New York. To the contrary, the obvious conclusion from those points is that we should not interpret an undefined term to permit New York courts to authorize the issuance of warrants requiring the diversion into New York of telephone calls between people with no connection to New York and which calls neither originated nor terminated in New York.

The history of New York's protections of privacy, both constitutional and statutory, establishes the desire to afford electronic communication at least as much protection as is provided for searches and seizures of tangible objects. Instead, the majority grants law enforcement an unlimited geographic reach not available for searches and seizures of physical property. For example, police officers must execute warrants in "the county of issuance or an adjoining county" or in another county within the state "if (a) his geographical area of employment embraces the entire county of issuance or (b) he is a member of the police department or force of a city located in such county of issuance" (CPL 690.25 [2]).

Similarly, police officers may not make arrests outside their geographic jurisdiction unless assisted by officers in the jurisdiction where the arrest is made (CPL 120.60; *see also People v. Johnson*, 303 AD2d 903, 905-906, 757 N.Y.S.2d 349 [3d Dept. 2003]). Nor does our law permit law enforcement agents from another state to conduct a search under either a federal or out-of-state warrant (*see People v. La Fontaine*, 92 N.Y.2d 470, 705 N.E.2d 663, 682 N.Y.S.2d 671 [1998]). Those rules reflect the fundamental importance of territoriality in the authorization of searches and seizures. If New York officers have probable cause to believe that the home of a Californian contains evidence relevant to the prosecution of New York crimes, they must—and do—obtain a warrant from a California court. How can we infer such a dramatic change from a word the legislature did not define?

IV

Even were we to ignore New York's longstanding commitment to the privacy of electronic communications and look at the statute in a vacuum (which is not what the majority advocates [*see* majority op at 6]), I could not arrive at the majority's conclusion. I start, as does the majority, with the fact that the statute is silent on the meaning of "executed" (*id.* at 10). CPL 700.05(4) authorizes the issuance of an "eavesdropping warrant" by Supreme Court Justices "of the judicial district in which the eavesdropping warrant is to be executed." An "'[e]avesdropping warrant' means an order of a justice authorizing or approving eavesdropping" (CPL 700.05[2]), and "'[e]avesdropping' means '**wiretapping**,' 'mechanical

overhearing of conversation,' or the 'intercepting or accessing of an electronic communication', as those terms are defined in section 250.00 of the penal law" (CPL 700.05[1]). Thus, CPL 700.05 permits the issuance of an eavesdropping warrant for three different types of surveillance.

Penal Law § 250.00 carefully differentiates between "**wiretapping**" and "intercepting or accessing of an electronic communication" in a way that is crucial to understanding what "execution" of a warrant means[4]. Telephonic communications are "**wiretapped**," defined as the "intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment" (PL § 250.00[1]). In contrast, electronic communications are "intercepted" or

4. "**Wiretapping**" is "the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof . . . by means of any instrument, device or equipment." A "telephonic communication" means "any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station)" (PL § 250.00[3]). "Aural transfer" is in turn defined as "a transfer containing the human voice at any point between and including the point of origin and the point of reception" (PL § 250.00[4]). "Electronic communication" is defined as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photo-optical system" (PL § 250.00[5]).

"accessed" through the "intentional acquiring, receiving, collecting, overhearing, or recording by means of any instrument, device or equipment" (PL § 250.00[6]). Thus, the legislature authorized eavesdropping warrants that "intercepted or accessed" electronic communications but did not use those words when authorizing eavesdropping warrants of telephonic communications[5]. Telephonic

5. The majority contends that this argument is "meritless," pointing to CPL 700.05(3)'s definition of "intercepted communication," which includes a) telephonic or telegraphic communications, b) conversations or discussions intentionally overheard and recorded, and c) "an electronic communication which was intentionally intercepted or accessed." However, "intercepted communication" does not bear on the meaning of "executed" in CPL 700.05[4]. Rather, it is an omnibus term used throughout Article 700 to refer to all three types of communications that may be the targets of eavesdropping warrants (*see* CPL 700.35[3] ["In the event an *intercepted communication* is in code or foreign language, and the services of an expert in that foreign language or code cannot reasonably be obtained during the interception period, where the warrant so authorizes and in manner specified therein, the minimization required by subdivision seven of section 700.30 of this article may be accomplished as soon as practicable after such interception"] [emphasis added]; CPL 700.50 [3] ["Within a reasonable time written notice of the fact and date of the issuance of the eavesdropping or video surveillance warrant must be served upon the person named in the warrant and other such other parties to the *intercepted communications* or subjects of the video surveillance as the justice may determine in his discretion is in the interest of justice. The justice may in his discretion make available to such person or his counsel for inspection such portions of the *intercepted communications* or video surveillance"] [emphasis added]; CPL 700.65 [1] ["Any law enforcement officer who, by any means authorized by this article, has obtained knowledge of the contents of any *intercepted communication* or video surveillance, or evidence derived therefrom, may disclose such contents to

communications are explicitly excluded from the definition of electronic communication (PL § 250.00[5][a]), further evidencing the legislature's determination to treat those two forms of communication differently. The Bill Jacket for the 1988 amendments to CPL Article 700 confirms the legislature's explicit differentiation between **wiretaps** of telephonic communication and the surveillance of other types of communications (Senate Introducer's Mem in Support, Bill Jacket, L 1988, ch 744 at 8).

Those distinctions reflect the manner in which **wiretaps** were carried out prior to the advent of cell phones. Historically, telephonic communication — and hence **wiretapping** — traveled point-to-point through vast networks of wires or cables. Law enforcement could simply splice the wire servicing the phone to be monitored with a wire terminating at the law enforcement agency (Micah Sherr et al., *Signaling Vulnerabilities in* ***Wiretapping*** *Systems*, 3 IEEE Security & Privacy 13, 14 [2005]). The wires could be joined either between the telephone and the first junction box or at a local telephone exchange (James G. Carr et al, Law of Electronic Surveillance § 1.2 [Oct. 2020 Update]). Thus, **wiretaps** were carried out in close geographic proximity to the intended target. The definition of telephonic communication provided in Penal

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another law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure"] [emphasis added]; CPL 700.70 ["The contents of any *intercepted communication*, or evidence derived therefrom, may not be received in evidence or otherwise disclosed upon a trial unless the people, within fifteen days after arraignment and before the commencement of the trial, furnish the defendant with a copy of the eavesdropping warrant"] [emphasis added]).

Law § 250.00 (3), which emphasizes the transmission of communication over wires, cables or other similar connections, indicates that the Legislature expected that overhearing or recording telephone calls would require accessing wires, regardless of the device used. It follows that the Legislature would have assumed that **wiretaps**—the physical accessing of the signal—would be carried out within the jurisdiction of the law enforcement agency executing the warrant, because a New York officer could not obtain a warrant from a New York court to travel to California and splice a wire there.

However, intercepting a call placed from a cell phone requires very different technology. Cell phones do not operate solely through the use of wires. Although wires and cables carry the cellular signal through some points of its travel, substantial portions of the transmission—including the initial transmission by the caller and the final receipt by the recipient—are wireless. A cell phone converts the voice of the caller into an encoded electrical signal and transmits it to a local cell phone tower via the electromagnetic spectrum (Rich Mazzola, *How Do Cell Phones Work? A Story of Physics, Towers, and the Government*, Medium [Oct. 7, 2015], https://medium.com/swlh/richmazzola-how-do-cellphones-work-a-story-of-physics-towers-and-the-government-8369aa7226b1). The tower then directs the signal to its intended destination, where the receiving cell phone decodes the signal, allowing the receiver to hear the sender's voice (*id*). **Wiretaps** of cellular phone calls are now carried out by telephone companies rather than law enforcement: the company decodes the signaling information and separates out the call audio to a new channel, which is then transmitted

to the law enforcement agency (Sherr et al. at 15). That process does not require a physical connection to the tapped line (*id*). Therefore, as a technological matter, a **wiretap** of a call made to or from a cell phone need not occur in territorial proximity to the intended target.

The majority claims that the Legislature's 1988 amendments to Article 700 anticipated the rise of new technology (majority op at 12–13). That is correct. The legislature made an explicit definitional choice, by which all "telephonic communications"—both conventional and cellular—were expressly excluded from the definition of "electronic communication." Because even calls placed to and from a cellular telephone contain aural transfers "made in whole or part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection" and "electronic communication" "does not include[] any telephonic or telegraphic communication" (PL § 250.00[5][a]), the majority's reliance on citations to the legislative history and commentators relating to the 1988 amendments is not illuminating. Indisputably, the legislature added a definition of "electronic communication" distinct from telephonic communication—for example, to capture "various new forms of electronic communication" (e.g., emails, FTP transfers, SMS messages) that are not "aural"—but its intention to permit eavesdropping of those "electronic communications" does not bear on the territorial limitations for the execution of **wiretapping** warrants.[6]

6. The majority cites McKinney's Practice Commentaries for Penal Law § 250.05 to support its view that "the legislature clearly intended to continue the availability of **wiretapping** to

The only new *telephone* technology expressly addressed by the 1988 amendments was car phones, not the handheld mobile phones ubiquitous today[7]. The legislature's treatment of car phones in the 1988 amendments cannot be reconciled with the majority's position. According to the majority, the 1988 amendments permit any court in New York state to authorize the

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be accomplished by the overhearing of 'cellular and cordless communications'" (majority op at 13). However, the quoted language refers to the fact that under New York law "people are entitled to privacy in their telephonic communications, even if a portion of the conversation is transmitted by radio" (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, Penal Law § 250.05). McKinney's, in turn, cites to *People v. Fata*, a 1990 case in which the Second Department concluded that the warrantless surveillance of cordless telephone conversations was illegal (159 AD2d 180, 185, 559 N.Y.S.2d 348 [2d Dept. 1990]). *Fata* references the 1988 amendments to distinguish between federal law (which explicitly excludes cordless telephones from its definition of wire communications that may not be intentionally intercepted without a warrant) and state law (which does not) (*id*). From that fact—and the broader protections afforded New York state citizens under our constitution—*Fata* concluded that "the Legislature intended to provide greater protection for the privacy of telephone communications than that available under the Federal eavesdropping statute" (*id*).

7. The legislature's focus on car phones is understandable. In the late 1980s, hand-held mobile phones were a high-end luxury good used by less than one percent of Americans (*see* Michael Decourcy Hinds, *Consumer's World; Mobile Phones, as Prices Drop, Aren't Just for Work Anymore*, NY Times [June 10, 1989], https://www.nytimes.com/1989/06/10/style/consumer-s-world-mobile-phones-as-prices-drop-aren-t-just-for-work-anymore.html). In contrast, car phones were an increasingly common consumer good (*id*).

wiretap of a telephone call, diverted from anywhere in the country, so long as the police listen to the call somewhere within the court's judicial district. If that were so, the legislature would have had no need to provide that, for "wire communications occurring over a telephone located in a vehicle . . . such warrant may be executed and such oral or wire communications may be intercepted anywhere in the state." The legislature's specific statewide expansion of the interception of telephone calls made over car phones only is nonsensical under the majority's interpretation, because under the majority's reading of the statute, calls from car phones could be diverted to anywhere in the state even without the car phone provision. Thus, the majority's interpretation of the statute should be rejected under our settled rules of construction (*see Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 587, 696 N.E.2d 978, 673 N.Y.S.2d 966 [1998]; *Matter of OnBank & Trust Co.*, 90 N.Y.2d 725, 731, 688 N.E.2d 245, 665 N.Y.S.2d 389 [1997; *Roosevelt Raceway, Inc. v. Monaghan*, 9 N.Y.2d 293, 305-306, 174 N.E.2d 71, 213 N.Y.S.2d 729 [1961]).[8]

Furthermore, simply as a matter of commonsense, when a signal is diverted to bring it into New York, it is done so by command of a warrant. If the warrant is

8. Although I place little or no weight on failed legislative attempts, I note that in the 2001-2002 legislative term, S.B. 5793 was introduced; it would have authorized "roving interceptions" of telephone communications by eliminating the "specification of the facilities from which, or the place where, the communication is to be intercepted" in cases where the People could show that those limitations were "not practical." Had that bill's sponsor shared the majority's view, the bill would never have been introduced.

never executed, the signal will not be diverted; if the signal is diverted, it is diverted solely by execution of the warrant. The fact that the telephone company, rather than the police, conduct the physical diversion is of no legal importance. Private actors working at the behest of law enforcement are treated as law enforcement (*see People v. Esposito*, 37 N.Y.2d 156, 160, 332 N.E.2d 863, 371 N.Y.S.2d 681 [1975]). Where a telephone company acting pursuant to a warrant diverts an out-of-jurisdiction telephone call, it has executed the warrant at a point outside the judicial district in which the issuing court sits, which Article 700 does not allow. The fact that it is later listened to within the judicial district of the issuing court does not erase the warrant's initial out-of-jurisdiction execution (*cf. United States v. Rodriguez*, 968 F.2d 130, 144 [2d Cir.1992] [Meskill J., concurring] ["The contents of the Imperio Café communications were *acquired* by law enforcement officials when they were diverted in New Jersey. In Manhattan the *previously acquired* contents were transformed into sound, but, because they were already within the control of law enforcement agents, they were not newly 'acquired.' I do not believe the contents of a communication become acquired anew each time they are transformed into a different medium"]).

In sum, the meaning of the term "execute" in CPL 700.05(4) must be understood in the relevant historical context. At the time of the statute's enactment, **wiretaps** on telephonic communications would have been carried out by law enforcement physically tapping lines in close geographical proximity to the targeted subject. The legislature could not have imagined that a warrant could

be "executed" simply by instructing a nationwide cellular phone company to redirect into New York an out-of-state electronic signal that never would have entered New York, containing conversation between two people not located in New York. The majority can point to nothing in the legislative history that suggests the legislature intended to grant New York courts the ability to divert purely out-of-state voice calls into New York state by issuance of a warrant.

The scattershot of arguments offered by the majority for its expansive interpretation of "execute" do not bear on the proper interpretation of the term. The various citations to the legislative history of the 1988 amendments and commentators' views thereof stand for the unremarkable proposition that, by defining "electronic communication" and subjecting such communications to eavesdropping, the legislature took steps "designed to keep pace with emerging technologies" (majority op at 12–13). That is precisely the point: the legislature understood that new technologies, such as email or FTP transfers, could be subjected to warranted surveillance. It permitted those defined "electronic communications" to be "intercepted or accessed," but purposefully excluded "telephonic communications" from that provision. The statute does not authorize courts to issue warrants that "intercept" or "access" telephone calls. Instead, it used a word with a settled territorial component—"execution:" of a warrant—to limit a court's authority to seize telephone calls.

V

Neither the federal nor foreign state caselaw relied on by the majority supports its position. I discuss each in turn.

A

The majority's reliance on the federal "listening post" rule says nothing about how to interpret the CPL. There is no suggestion that the CPL's definition of **wiretapping** or rules relating to **wiretapping** are derived from federal law, or that the choice of the word "execute"—which the majority contends is the key to New York's statute—was derived in any way from a federal statute or caselaw. Indeed, the federal statutory scheme is quite different. The federal statute, 18 USC § 2518 (3), does not use the word "execute" at all. Instead, it provides that a "judge may enter an ex parte order authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting." Interception is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical or other device" (18 USC § 2510 [4]). Thus, the federal statute lumps together, without distinction, voice and all other electronic communication regardless of the type of means used to transmit the signal, and authorizes the "interception" of all such information through the use of any type of device, whereas New York differentiates between voice communications that use wire or cable for any part of the transmission (which includes cellular phone

calls) from the transmission of other types of electronic communication, with different rules applying to each, as explained *supra* at 10–11.

Moreover, when it comes to the ability of a court to issue a warrant to divert an out-of-jurisdiction call into a jurisdiction, federal and state courts are quite different. Because use of wires (or radio frequencies allocated by the federal government) necessarily implicates interstate commerce, federal courts have nationwide jurisdiction. It is perfectly understandable that federal statutes, and federal courts' interpretation of those statutes, may have fewer concerns about the ability of a federal court to issue an order diverting a call using facilities of interstate commerce to a listening post anywhere in the United States. Not so with state courts: query whether New Yorkers would be content if a Mississippi court authorized the **wiretapping** of calls purely between New York residents who have never set foot in Mississippi.[9]

Furthermore, there is no view of the OCCSSA under which states courts may authorize more expansive eavesdropping than federal courts. Whether a federal district court could authorize the **wiretapping** of a cellular phone conversation that neither originated nor terminated

9. The majority's reliance on the Communications Assistance for Law Enforcement Act (CALEA) and CPL 700.30 (9) is misplaced (majority op at 14–15). Both CALEA and CPL 700.30 (9) require telecommunications carriers to assist in the seizure of telephonic and electronic communications authorized by a proper warrant, but neither statute expands or contracts the territorial jurisdiction of courts, whether state or federal, to issue warrants.

within the judicial district in which the issuing federal court sits is unsettled, as I explain below. For that reason alone, we should be hesitant to grant New York courts the authority to grant **wiretapping** warrants for telephone conversations that neither originate nor terminate in New York.

The majority's reliance on *United States v. Rodriguez* (968 F.2d 130 [2d Cir.1992]), is misplaced, because it did not involve the **wiretapping** of purely extraterritorial phone calls nor the **wiretapping** of cellular phone calls. In *Rodriguez*, law enforcement in the Southern District of New York obtained the **wiretap** warrant in question in connection with an investigation of a crack organization based in the Hunts Point section of the Bronx (*id.* at 133). The organization's operations extended to a restaurant in New Jersey (*id.* at 133–134). In connection with the investigation, **wiretaps** were placed on four telephones at the New Jersey restaurant and the apartment of one of the conspirators in the Bronx (*id.* at 134). The calls were monitored at the Drug Enforcement Administration headquarters in the Southern District (*id.* at 135). The warrant application thus facially established that calls made from the New Jersey phone numbers were being made to a telephone in New York, and a telephone in New York was being used in furtherance of the crack operation. Those calls were between conventional land lines, carried by wire or cable, which necessarily physically traversed New York. Here, in contrast, the warrant application did not establish probable cause (or, indeed, any reason to believe) that Mr. **Schneider**'s phone was making or receiving calls to or from New York, and the calls would not have entered New York but for their seizure pursuant to the

warrant[10]. It is also important to note that in *Rodriguez*, Judge Meskill separately concurred. He emphasized his disagreement "with the majority's treatment of the **wiretap** issue, which effectively repeals 18 USC § 2518 (3)'s requirement that a judge may only enter an order authorizing the interception of communications 'within the territorial jurisdiction of the court in which the judge is sitting'" (*id.* at 143–44). As he explained:

> "I cannot join the majority in holding that the unilateral decision of law enforcement agents as to where to set up their listening post can grant authority to a judge in any jurisdiction to authorize a phone tap in any other jurisdiction. . . .The heart of the definition of 'intercept' in 18 U.S.C. § 2510(4) is the 'acquisition of the contents' of a communication. The contents of the Imperio Cafe communications were *acquired* by law enforcement officials when they were diverted in New Jersey" (*id.* at 144).

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10. The Second Circuit interpreted the federal definition of "interception" to mean both the location where "the contents of a wire communication are captured or redirected" and "where the redirected contents are first heard" (968 F.2d at 135–136). Thus, it read the federal statute to authorize the diversion of the signal "through the use of any electronic, mechanical or other device" as explicit statutory authority to order the out-of-state **wiretaps** on the New Jersey phones. New York law contains no analogous provision for telephone **wiretapping** and, indeed, uses "interception" when authorizing eavesdropping of electronic communications only, not telephonic communications.

In *United States v. Ramirez* (112 F.3d 849 [7th Cir.1997]), the Seventh Circuit considered whether a federal district court could issue an eavesdropping warrant for a cellular phone call where the communication neither originated nor terminated within the judicial district of the issuing court. It concluded that the 1986 Electronics Communications Privacy Act, which authorized federal—but not state—courts to intercept "wire, oral, or electronic communications . . . outside [the district court's] jurisdiction but within the United States in the case of a mobile interception device" allowed a federal district court to intercept cellular telephone signals anywhere in the United States (*id.* at 853). It interpreted the phrase "mobile communication device" to mean "a device for intercepting mobile communications," not "the irrelevant mobility or stationarity of the device" (*id*). By relying on the "mobile communication device" provision, which applies only to federal courts, the Seventh Circuit implicitly decided that without that provision, a federal court could not issue eavesdropping warrants for communications occurring solely outside its judicial district. Indeed, the "mobile communication device" amendment expanding jurisdiction beyond the federal court's judicial district would be meaningless if courts could issue extra-jurisdictional warrants without it. Because that "mobile communication device" expansion was provided for federal courts only, both *Ramirez* and the ECPA suggest that state courts do not have the ability to issue eavesdropping warrants for wholly out-of-state communications.

More recently, the Fifth Circuit, in *United States v. North* (728 F.3d 429 [5th Cir.2013]) issued a decision holding that federal district courts may not divert cellular

telephone calls into their jurisdictions and establish listening posts there, but then withdrew the decision and substituted it with a decision suppressing the **wiretap** on the ground of lack of minimization (735 F.3d 212, 216 [5th Cir.2013]). However, the concurring opinion of Judge DeMoss sets out the rationale of the withdrawn opinion, which rejects the Seventh Circuit's construction of "mobile communication device," concluding that it refers to interception devices that themselves are mobile—not the interception of mobile phone communications (*id.* at 217–18).

Subsequently, in *United States v. Glover* (736 F.3d 509, 407 U.S. App. D.C. 189 [DC Cir.2013]), the court rejected the Seventh Circuit's interpretation of "mobile communication device," noting that "[a]ccording to a Senate Judiciary Committee report, the objective of the language was to ensure that warrants remain effective in the event a target vehicle is moved out of the issuing judge's jurisdiction *after* a warrant is issued, but before a surveillance device can be placed in the vehicle" (*id.* at 514). Most recently, in *United States v. Dahda* (853 F.3d 1101 [10th Cir.2017], *affd on other grounds*, 138 S. Ct. 1491, 200 L. Ed. 2d 842 [2018]), the Tenth Circuit likewise concluded that "mobile communication device" meant a device that itself was mobile (*id.* at 1114 ["For example, some scholars point to small mobile devices such as 'IMSI catchers,' which are capable of intercepting the content from cell phone calls" (*id.* at 1113 n. 4)]).

My point is not that the law is settled as to whether a federal court could issue an eavesdropping warrant to divert a purely out-of-state conversation into the judicial

district in which the court sits, where the warrant fails to establish that the warrant's target had ever made calls to that district or set foot in that district. To the contrary, my point is that the federal law is unsettled and, however great the federal jurisdiction might be, the jurisdiction of a state to authorize eavesdropping of purely out-of-state phone conversations can be no greater, and is likely lesser.

B

Additionally, the majority points to the adoption of the listening post rule by two other states' high courts. Those states, however, have markedly different statutory provisions from New York's and different state constitutional backdrops against which both legislative and judicial decisions should be framed. The majority cites to the New Jersey high court's decision in *State v. Ates* (217 NJ 253, 271, 86 A.3d 710 [2014]) and that of Maryland in *Davis v. State* (426 Md. 211, 218, 43 A.3d 1044 [2012]). The New Jersey **wiretapping** statute provides "[a]n order authorizing the interception of a wire, electronic or oral communication may be executed at any point of interception within the jurisdiction of an investigative or law enforcement officer executing the order," and defines the "point of interception" as "the site at which the investigative or law enforcement officer is located at the time the interception is made" (NJ Stat Ann 2A:156A-12; NJ Stat Ann 2A:156A-2(v)). New York uses "execution" of the warrant instead of "interception" of the signal and lacks New Jersey's statutory direction that the point of interception is where the listening officer is located.

Appendix A

Maryland's **wiretapping** law supports my position, not the majority's. Until Maryland's legislature amended its **wiretapping** law in 1991, eavesdropping warrants were limited to calls occurring "within the jurisdiction of a particular circuit court"; the 1991 amendment "obviated the need for law enforcement agents to obtain multiple ex parte orders for each jurisdiction where a mobile phone might be located and allowed them to apply for one ex parte order in the jurisdiction where the 'base station' was located" (*Davis*, 426 Md. at 222). Even so, in *Perry v. State* (357 Md. 37, 741 A.2d 1162 [1999)]) and *Mustafa v. State* (323 Md. 65, 591 A.2d 481 [1991]), Maryland's Court of Appeals held that communications intercepted in another state are inadmissible at trial if they would violate the Maryland **wiretap** statute had they been intercepted in Maryland. In response, the legislature amended its law once again to authorize "certain out-of-state interceptions" (426 Md. at 222, citing 2001 Md. Laws 370). Then, in 2002, the legislature again amended Maryland's **wiretapping** statute to broaden its reach. Only in view of the repeated legislative efforts to expand the reach of its courts, and Maryland's use of the word "interception" which copied the federal statutory authorization, did the Maryland Supreme Court conclude that its statute should be read to reach extraterritorially. In contrast, New York's statutory scheme is different and evidences neither the words nor the legislative history that would render comparison to New Jersey or Maryland apposite.

VI

Last, in a pronouncement having nothing to do with the statutory language or legislative intent, the majority proposes a fusillade of policy justifications in support of its position. It is worth quoting them just to have them in mind:

- It is "not workable" if "a court's authority to issue a warrant is dependent upon the location of the targeted cell phones or call participants" (majority op at 19);

- "Linking jurisdiction to the undetectable locations of cell phones or callers and creating dependence on outside law enforcement agencies to investigate and prosecute very serious crimes is unreasonable" and "would result in a logistical scheme that leaves jurisdiction in flux; creates multi-state wire rooms with diffuse oversight responsibility and in many cases would eliminate eavesdropping as an investigative tool" (*id*);

- "More importantly, centralized oversight by a single issuing court of competent jurisdiction over the

> eavesdropping investigation of designated New York crimes is critical to protect against abuses in the invasion of an individual's privacy in the communications—the paramount constitutional concern—and to ensure that any interception is necessary, properly minimized and promptly terminated in accordance with constitutional safeguards" (*id.* at 19–20);
>
> • "That crucial oversight is impossible under defendant's proposed construct, which was certainly not the legislature's intent in carefully designing this State's eavesdropping statutes" (*id.* at 20).

The astonishing feature of the majority's policy arguments is that they are pure conjecture. These policy arguments are based on nothing—not facts found below, not facts in the record, not even facts found by the majority from extra-record sources.

Here, instead, are some facts that render the majority's policy arguments untenable. First, both state and federal courts are required to report to the Administrative Office of the United States Courts all **wiretaps** sought, granted and denied (*see* 18 USC § 2519). For the eleven years from

2009-2019, state and federal courts together received 36,127 **wiretap** applications (*Table Wire 7 — **Wiretap***, U.S. Courts [Dec. 31, 2019], available at https://www.uscourts.gov/statistics/table/wire-7/**wiretap**/2019/12/31). Thirty-six thousand, one-hundred eighteen applications were granted: only nine were denied (*id*). Not a single state or federal **wiretap** request was denied in 2017, 2018 or 2019 (*id*). So the idea that crucial, strict oversight of **wiretaps** would be eroded if, for example, an officer from New York had to go to a California court to seek authorization for this very **wiretap**, is wholly fictional: there is no oversight to erode, because 99.975% of **wiretap** applications are granted.

Likewise, the idea law enforcement would be drastically impaired if officers from one jurisdiction had to cooperate with those in another—for example, if the officers here had to seek a warrant from the federal district court or a California state court instead of a New York state court—has no support in fact. Federal law enforcement agents frequently seek warrants in state courts. As an example, by 2014, the DEA was sending more than 60% of its **wiretap** applications to state courts, including a DEA operation with California state prosecutors that "built a **wiretapping** program that secretly intercepted millions of calls and text messages based on the approval of a single state-court judge" (Brad Heath, *DEA Changes **Wiretap** Procedure After Questionable Eavesdropping Cases*, USA Today [Jul. 7, 2016, 2:09 PM], https://www.usatoday.com/story/news/2016/07/07/dea-changes-**wiretap**-procedure-after-questionable-eavesdropping-cases/86802508/).

As Mr. **Schneider** points out, the People readily sought and obtained warrants in California state court for his arrest and a search of his home. Perhaps doing so was not quite as rapid as it would have been if a New York court could have issued the warrant for his arrest, but no facts support the majority's doomsday pronouncements, which should be viewed with great skepticism, as the U.S. Supreme Court has admonished:

> "[W]e have found no empirical statistics on the use of electronic devices (bugging) in the fight against organized crime. Indeed, there are even figures available in the **wiretap** category which indicate to the contrary. . . . Some may claim that without the use of such devices crime detection in certain areas may suffer some delays since eavesdropping is quicker, easier, and more certain. However, techniques and practices may well be developed that will operate just as speedily and certainly and—what is more important—without attending illegality" (*Berger*, 388 U.S. at 60).

The proposition that the majority's holding will better ensure that "the invasion of an individual's privacy—the paramount constitutional concern" is "properly minimized" runs headlong into a different set of facts (majority op at 20). New York accounts for a little less than 6% of the total United States population, yet in 2019, New York state courts accounted for 28% of all **wiretap** applications granted by all state courts (***Wiretap*** *Report 2019*, U.S. Courts [Dec. 31, 2019], https://www.uscourts.gov/statistics-reports/**wiretap**-report-2019). In contrast,

the United States District Court for the Southern District of New York, which granted the greatest number of federal **wiretap** applications of any federal district court, accounted for just 4% of the federal total (*id*). Adding in the other New York federal district courts brings the New York federal court total to just 5.9% of all federally-issued warrants nationwide (*see Table Wire A1-Appendix Tables* ***Wiretap***, U.S. Courts [Dec. 31, 2019], available at https://www.uscourts.gov/statistics/table/wire-a1/**wiretap**/2019/12/31). Thus, compared either to the rest of the nation or the federal courts in New York, New York's prosecutors, aided by the New York state courts, are **wiretap**-happy—hardly fulfilling the Constitution's paramount concern to protect the privacy of New Yorkers touted by the majority. One should not expect the majority's grant of nationwide **wiretapping** authority to New York courts to provide enhanced protection of the right to privacy given the above data.

Yet one bit of truth in the majority's policy pronouncements is borne out by the facts: requiring New York law enforcement officials who desire to **wiretap** conversations not originating or terminating in New York, and not from or to a New York resident, to obtain authorization from either a federal court or the court of some other appropriate state may occasionally "eliminate eavesdropping as an investigative tool" (majority op at 19). In dissent in *Olmstead*, Justice Brandeis rejected the worth of that complaint in words of unequalled elegance:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole

> people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means — to declare that the Government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face (277 U.S. at 468)."

Wiretapping is a crime under our Penal Law. Neither the text nor the legislative history of CPL Article 700 suggests that the legislature authorized our courts to issue warrants commanding the diversion of purely out-of-state telephone calls between nonresidents so that they could be listened to by New York law enforcement agents. Firmly convinced thereof, I respectfully dissent.

Order affirmed.

Opinion by Chief Judge DiFiore. Judges Stein, Fahey and Garcia concur. Judge Wilson dissents in an opinion, in which Judge Rivera concurs.

APPENDIX B — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT, DATED OCTOBER 16, 2019

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

October 16, 2019, Decided

2018-09853

THE PEOPLE, ETC.,

Respondent,

v

JOSEPH SCHNEIDER,

Appellant.

Ind. No. 4087/16

DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Danny K. Chun, J.), rendered May 30, 2018, convicting him of enterprise corruption, promoting gambling in the first degree, possession of gambling records in the first degree, and conspiracy in the fifth degree, upon his plea of guilty, and

imposing sentence. The appeal brings up for review the denial, without a hearing, of that branch of the defendant's omnibus motion which was to suppress evidence obtained pursuant to eavesdropping warrants.

ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50(5).

The defendant pleaded guilty to numerous charges in connection with his involvement in an Internet gambling enterprise, which involved operations in Kings County, New York, and other locations throughout the nation. Much of the evidence against the defendant was derived from his cellular telephone calls and electronic messages that law enforcement officers intercepted pursuant to eavesdropping warrants. The Supreme Court denied, without a hearing, that branch of the defendant's omnibus motion which was to suppress the evidence obtained pursuant to those warrants. The Supreme Court issued a stay of execution of the defendant's judgment pending this Court's hearing and determination of this appeal.

We reject the defendant's contention that the Supreme Court, Kings County, lacked jurisdiction to issue eavesdropping warrants against him to intercept cellular telephone calls and electronic messages which were made and received outside of New York State. "[A]ny justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed" (CPL 700.05[4]) "may issue an eavesdropping warrant . . . upon ex parte application of an applicant who is authorized

by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application" (CPL 700.10[1]). Although the word "execute" is not defined in CPL article 700, the plain meaning of the word "execute" and the use of that word in relevant sections of the Criminal Procedure Law reveal that an eavesdropping warrant is "executed" when a communication is intercepted by law enforcement officers, that is, when the communication is "intentionally overheard or recorded" by law enforcement officers (CPL 700.05[3][a]; *see* CPL 700.35[1]). Here, the eavesdropping warrants were executed in Kings County, New York, where the communications were intercepted by the New York City Police Department (*see* CPL 700.05[4]; *Stegemann v Rensselaer County Sheriff's Off.*, 155 AD3d 1455, 1459, 67 N.Y.S.3d 304; *People v Perez*, 18 Misc 3d 582, 588, 848 N.Y.S.2d 525 [Sup Ct, Bronx County]; *People v Delacruz*, 156 Misc 2d 284, 287-288, 593 N.Y.S.2d 167 [Sup Ct, Bronx County]; *United States v Rodriguez*, 968 F2d 130, 136 [2d Cir]). Therefore, under the applicable provisions of the Criminal Procedure Law, a Justice of the Supreme Court, Kings County, had jurisdiction to issue the eavesdropping warrants.

Moreover, we reject the defendant's argument that the eavesdropping warrants, which were authorized for the purpose of investigating crimes that were occurring in New York, constituted an unconstitutional extraterritorial application of New York State law (*see generally People v McLaughlin*, 80 NY2d 466, 470-471, 606 N.E.2d 1357, 591 N.Y.S.2d 966). Furthermore, contrary to the defendant's contention, the affidavit of a detective submitted in support

of the warrants demonstrated that normal investigative procedures either had been tried and failed, or reasonably appeared unlikely to succeed if tried, to obtain the evidence sought (*see* CPL 700.20[2][d]; 700.15[4]; *People v Rabb*, 16 NY3d 145, 153, 945 N.E.2d 447, 920 N.Y.S.2d 254; *People v Giddens*, 161 AD3d 1191, 1194, 78 N.Y.S.3d 355; *People v Ndaula*, 158 AD3d 650, 67 N.Y.S.3d 854).

The defendant's contentions with respect to the sufficiency of the evidence before the grand jury were forfeited by his plea of guilty, and are not reviewable on appeal (*see People v Guerrero*, 28 NY3d 110, 116, 42 N.Y.S.3d 80, 65 N.E.3d 51; *People v Higgs*, 146 AD3d 981, 44 N.Y.S.3d 914; *People v McCrory*, 114 AD3d 810, 980 N.Y.S.2d 164).

MASTRO, J.P., HINDS-RADIX, MALTESE and BRATHWAITE NELSON, JJ., concur.

ENTER:

/s/_____
Aprilanne Agostino
Clerk of the Court

APPENDIX C — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: CRIMINAL TERM PART 19, DATED SEPTEMBER 15, 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 19

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

JOSEPH SCHNEIDER,

Defendant.

DANNY K. CHUN, J.

MOTION TO CONTROVERT/
OMNIBUS DECISION AND ORDER

IND. NO. 4087/2016

Upon considering the defendant's Motion to Controvert the Eavesdropping Warrant and Omnibus Motion, dated March 8, 2017, the People's response, dated June 28, 2017, and the defendant's reply, dated July 19, 2017, the following constitutes this court's decision:

1. The defendant's motion to controvert and suppress the eavesdropping warrant:

Appendix C

Jurisdiction

The defendant argues that all evidence derived from the eavesdropping warrant should be suppressed because (1) principles of state sovereignty and due process prohibit the Kings County District Attorney's Office from eavesdropping on the private e1ectronic communications of the defendant, a resident of California, in violation of California's privacy statute; (2) California Law does not authorize eavesdropping for gambling-related offenses and prohibits eavesdropping by out-of-state law enforcement officials; and (3) New York Law does not allow its prosecutors to eavesdrop on out-of-state residents in violation of that person's state privacy rights.

In response, the People argue that the defendant's motion should be summarily denied because the cellular telephone conversations and electronic communications by the defendant were first overheard and recorded in Kings County and the warrants were executed in Kings County within the jurisdiction of a Kings County Supreme Court pursuant to CPL § 700.

This court denies the defendant's motion for the following reasons. First, the eavesdropping warrant was to be executed in Kings County, and as such, Kings County District Attorney's Office was allowed to apply for the warrant against the defendant and this court had jurisdiction to issue the warrant.

Under CPL § 700.10(1), "a justice may issue an eavesdropping warrant . . . upon ex parte application

of an applicant who is authorized by law to investigate, prosecute or participate in the prosecution of the particular designated offense which is the subject of the application." CPL § 700.75(4) defines 'justice," in part, as "any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed." In addition, Promoting Gambling in the Second Degree (PL § 225.05) and Promoting Gambling in the First Degree (PL § 225.10) are both "designated offenses" pursuant to CPL § 700.05(8)(c).

Here, according to the affidavits submitted for the eavesdropping warrants, there was evidence derived during the investigation that the defendant with his accomplices, co-conspirators and agents was involved in crimes related to promoting gambling in Kings County and elsewhere. In addition, the affidavit states that all the calls were to be monitored and secured in a plant located in Kings County. Furthermore, this court is a Justice of the Supreme Court of Kings County and therefore, authorized to issue eavesdropping warrants that are to be executed in Kings County.

The issue here is whether "execution of the warrant" occurred in Kings County, where the calls were monitored, or in California, where the defendant made the phone calls. CPL § 700 does not define the term "executed" and no higher court in this state has decided this issue. According to the *Oxford English Dictionary,* the definition of the term "execute" in this context is to carry out a judicial order, as in executing a search warrant. In addition, CPL § 700.35(1) states that "[a]n eavesdropping or video surveillance

warrant must be *executed* according to its terms by a law enforcement officer . . . [emphasis added]" Therefore, based on the plain meaning of the term and its use in CPL § 700.35, an eavesdropping warrant is "executed" by law enforcement officers, and not the participants to the communication. Furthermore, CPL § 700.30(7) provides that an eavesdropping warrant must contain "[a] provision that the authorization to intercept . . . shall be executed as soon as practicable . . ." Therefore, an eavesdropping warrant is executed when communication is intercepted. CPL § 700.05(3)(a) defines "intercepted communication" as "a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by means of any instrument, device or equipment."

Therefore, an eavesdropping warrant is executed when a law enforcement officer intentionally overhears a telephonic or telegraphic communication. In this case, the eavesdropping warrants were to be executed in Kings County. The plant was located in Kings County, the communications were listed to and intercepted by law enforcement located only in Kings County. As such, this court was authorized to issue the warrant applied for by the Kings County District Attorney's Office.

This conclusion is consistent with other New York State Supreme Court cases. In *People v. DeLaCruz*, the court concluded that "to execute an eavesdropping warrant intercepting a telephone conversation is to order the intentional overhearing or recording of the

human voice as it is transferred through the use of wire, cable, or other like communication." *People v. DeLaCruz*, 156 Misc.2d 284, 287-288 (1992). Therefore, that court concluded that "[t]he jurisdiction where the conversation is overheard or recorded constitutes the jurisdiction of the issuing justice." *Id.* at 288. Similarly, in *People v. Perez,* the court held that "an eavesdropping warrant is executed when and where telephonic communication are intercepted or electronic communications are acquired." *People v. Perez,* 18 Misc.3d 582, 530 (2007).

This conclusion is also in line with federal cases. In *United States v. Rodriguez,* the Second Circuit held that "a communication is intercepted not only where the tapped telephone is located, but also where the contents of the redirected communication are first to be heard." *United States v. Rodriguez,* 968 F.2d 130, 136 (1992). In *United States v. Kazarian,* the United States District Court, S.D. New York followed the holding of Rodriguez and concluded that as "the intercepted conversations were to be, and were, first listened to in this District, judges sitting in this District were authorized to issue the wiretap orders at issue." *United States v. Kazarian, 2*012 WL 1810214 (2012).

The defendant argues that this conclusion does not make sense as it would mean law enforcement could re-route phone calls being made anywhere in the country to Kings County and thereby have nation-wide jurisdiction. However, the key is that the crimes and the conspiracy to commit the crimes were being committed in Kings County either directly by the defendant or under an

acting in concert theory by the defendant's accomplices, co-conspirators and agents. As such, there was sufficient nexus between the eavesdropping warrants and Kings County. Therefore, the Kings County District Attorney's Office had jurisdiction to investigate and prosecute the crimes underlying this warrant. This court's holding does not stand for the proposition that this court has jurisdiction to issue eavesdropping warrants under any circumstances as long as the warrant is executed in Kings County. The crimes that are being investigated must also have sufficient nexus with Kings County. In this age of cellular phones and electronic transmissions, it defies logic that law enforcement could only listen to phone calls made and received within the borders of the county where the eavesdropping warrant was issued. Furthermore, the defendants were calling people in New York state from California and as such, a clear connection is established with New York state and Kings County.

Accordingly, this court had jurisdiction to issue the eavesdropping warrants on the defendant's cellular phone located in California.

Second, the fact that eavesdropping is not allowed for gambling related crimes in California cannot be a defense in New York State where such eavesdropping is allowed by law. Pursuant to CPL § 700.05(8)(c), Promoting Gambling in the Second Degree (PL § 225.05), Promoting Gambling in the First Degree (PL § 225.10), Possession of Gambling Records in the Second Degree (§ 225.15) and Possession of Gambling Records in the First Degree (PL § 225.20) are all crimes that can be the subject of an

eavesdropping application in New York State. As stated above, the defendant with his accomplices, co-conspirators and agents was committing gambling related crimes in Kings County. Therefore, Kings County District Attorney's Office was clearly authorized to apply for an eavesdropping warrant on the defendant's phone and this court had jurisdiction to issue the warrant. The defendant would have a defense if the prosecution was in the State of California under California laws. The defendant also may have a defense if the warrant was executed in the State of California. However, that clearly is not the case and the defendant can be prosecuted under New York State laws in New York.

Necessity

The defendant's claim that the application did not satisfy the "necessity" requirement pursuant to CPL § 700.20 is without merit. The People are not required to show that every other method of investigation had been exhausted. *People v. Sica,* 163 A.D.2d 541, 542 (2nd Dep't 1990). Contrary to the defendant's contention, this court does not find that boilerplate allegations of necessity were stated in the affidavit in support of the eavesdropping warrants. In review of Detective John Mullen and Assistant District Attorney Nicholas J. Batsidis' affidavits, this court finds that the People satisfied the necessity requirement

2. The defendant's motion to inspect the Grand Jury minutes pursuant to CPL § 210.30 is granted to the extent of the Court examining *in camera.* The defendant's

further motion to dismiss or reduce the indictment has been decided by this court by a decision dated October 5, 2016.

3. The defendant's motion to suppress all statements made by the defendant is denied. However, a *Huntley* hearing is granted to determine whether any of the defendant's rights were violated when he made the statements.

4. The defendant's motion to suppress evidence of identification, or in the alternative for a *Wade* hearing is denied. The People state that there was no identification procedure as contemplated by CPL § 710.30.

5. The People are directed to turn over all exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States,* 405 U.S. 150 (1972), and the Federal and State Constitutions.

6. The defendant's motion for a Bill of Particulars, pursuant to CPL § 200.95, is granted to the extent of the People's response and the Voluntary Disclosure Form (VDF). The People are directed to continue to provide discovery to the defendant as it becomes available.

7. Pursuant to CPL § 240.20, the People are directed to forthwith disclose to the defendant and make available for inspection, photographing, copying or testing, the following property, if not already done:

(A) Any written, recorded or oral statement of the defendant made, other than in the

course of the criminal transaction herein charged, to a law enforcement public servant or to a person acting under his or her direction or in cooperation with him or her;

(B) Any transcript of the defendant's testimony before the Grand Jury which voted the indictment herein;

(C) Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding herein which was made by, at the request of or pursuant to the direction of a law enforcement public servant;

(D) Any written report or document, or portion thereof, concerning a physical or mental examination, or scientific test or experiment, relating to the criminal action or proceeding herein which was made by a person whom the People intend to call as a witness at trial, or which the People intend to introduce at trial;

(E) Any photograph or drawing relating to the criminal action herein which was made or completed by a law enforcement public servant whom the People intend to call

as a witness at trial, or which the People intend to introduce at trial;

(F) Any photograph or drawing relating to the criminal action herein which was made by a person whom the People intend to call as a witness at trial, or which the People intend to introduce at trial;

(G) Any photograph, photocopy or other reproduction made by or at the direction of a police officer, peace officer or prosecutor of any property prior to its release pursuant to Penal Law § 450.10, irrespective of whether the People intend to introduce the property, photograph, photocopy or other reproduction at trial;

(H) Any other property obtained from the defendant;

(I) Any audio or video tapes or other electronic recordings which the People intend to introduce at trial, irrespective of whether such records in was made during the course of the criminal transaction herein.

8. A *Sandoval/Molineux/Ventimiglia* hearing is granted, but referred to the trial court for its decision prior to trial.

9. Pursuant to CPL § 255.20, unless good cause is shown, the defendant's request to make further motions is denied.

10. The People's motion for reciprocal discovery of defendants' alibi evidence is granted. The defendant is directed provide notice of alibi as specified in CPL § 250.20. In addition, the People's motion for reciprocal discovery is granted as to the material specified in CPL § 240.30. Lastly, pursuant to CPL § 250.10(2), unless good cause is shown, the defendant should be precluded from presenting psychiatric evidence.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
September 15, 2017

/s/
DANNY K. CHUN, J.S.C.