No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KENNETH R. FRIEND, Petitioner

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari
to the U.S. Court of Appeals, Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

It is uncontested that the wiretap orders in Mr. Friend's case do not contain the proper name of the Deputy Assistant Attorney General who authorized the applications for those orders. Despite that fact, the Eighth Circuit held that the executing officers were entitled to rely on them under the good faith exception to the warrant requirement, and alternatively that they were sufficient. The case thus presents the following questions:

1. Does the good faith exception to the warrant requirement established in *United States v. Leon*, 468 U.S. 897 (1984), apply to warrants issued in violation of the wiretap statute, 18 U.S.C. § 2518?

2. Is a warrant which does not contain the proper name of the Deputy Assistant Attorney General who authorized the applications for those orders, and does not describe the authorizing officer in a way which could apply to only one person, sufficient on its face as required by 18 U.S.C. § 2518 and *Dahda v. United States*, 138 S.Ct. 1491, 1498 (2018)?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Kevin R. Friend is the Petitioner in this case and was represented in the court below by Elizabeth Unger Carlyle. He was represented in the district court by Stuart P. Huffman.

The United States of America was represented in the courts below by Assistant United States Attorney Randall D. Eggert.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Petitioner Kenneth Friend prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered on March 31, 2021.

OPINIONS BELOW

The order of the Eighth Circuit reversing the district court's grant of relief is reprinted at Appendix (hereinafter "App.") p. 1a. The opinion is reported at 992 F.3d 728. The Report and Recommendations of the United States Magistrate Judge and the Order of the district court approving those recommendations are printed beginning at App. p. 5a.

JURISDICTION

The judgment of the Eighth Circuit Court of Appeals was entered on March 31, 2021, affirming the district court's denial of Mr. Friend's motion to suppress wiretap evidence. *See* App. p. 1a. That court denied a timely petition to that court for rehearing or, in the alternative, for rehearing en banc, on May 26, 2021. App. p. 15a. Pursuant to this Court's order of March 19, 2020, Mr. Deck's petition for writ of certiorari is due October 25, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

18 U.S.C. § 2515

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

18 U.S.C. § 2518. Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the

investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application 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), if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify-

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire, oral, or electronic communication under this chapter shall, upon request of the applicant, direct that a provider of wire or electronic communication service, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such service provider, landlord, custodian, or person is according the person whose communications are to be intercepted. Any provider of wire or electronic communication service, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant for reasonable expenses incurred in providing such facilities or assistance. Pursuant to section 2522 of this chapter, an order may also be issued to enforce the assistance capability and capacity requirements under the Communications Assistance for Law Enforcement Act.

(5) No order entered under this section may authorize or approve the interception of any wire, oral, or electronic communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Such thirty-day period begins on the earlier of the day on which the investigative or law enforcement officer first begins to conduct an interception under the order or ten days after the order is entered. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days. In the event the

intercepted communication is in a code or foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. An interception under this chapter may be conducted in whole or in part by Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney

General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that--

(a) an emergency situation exists that involves—

(i) immediate danger of death or serious physical injury to any person,

(ii) conspiratorial activities threatening the national security interest, or

(iii) conspiratorial activities characteristic of organized crime,

that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception,

may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order,

such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8)(a) The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.

They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section

2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of—

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire, oral, or electronic communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any wire, oral, or electronic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or

denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

(c) The remedies and sanctions described in this chapter with respect to the interception of electronic communications are the only judicial remedies and sanctions for nonconstitutional violations of this chapter involving such communications.

(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if--

(a) in the case of an application with respect to the interception of an oral communication—

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

(iii) the judge finds that such specification is not practical; and

(b) in the case of an application with respect to a wire or electronic communication—

(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;

(iii) the judge finds that such showing has been adequately made; and

(iv) the order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably proximate to the instrument through which such communication will be or was transmitted.

(12) An interception of a communication under an order with respect to which the requirements of subsections (1)(b)(ii) and (3)(d) of this section do not apply by reason of subsection (11)(a) shall not begin until the place where the communication is to be intercepted is ascertained by the person implementing the interception order. A provider of wire or electronic communications service that has received an order as provided for in subsection (11)(b) may move the court to modify or quash the order on the ground that its assistance with respect to the interception cannot be performed in a timely or reasonable

fashion. The court, upon notice to the government, shall decide such a motion expeditiously.

STATEMENT OF THE CASE

Prior to trial, Mr. Friend filed a motion to suppress wiretap evidence in his case. DCD 918. After a hearing before the U.S. Magistrate Judge, the motion was denied. App. pp. 5a, 11a. Mr. Friend was convicted on his plea of guilty of conspiracy to distribute 500 grams or more of methamphetamine (Count 1) and engaging in monetary transactions to promote unlawful activity (Count 66). He was sentenced to concurrent terms of 324 months on Count 1 and 240 months on Count 66. Mr. Friend's plea agreement provides that he may appeal the denial of his motion to suppress wiretap evidence, and in the event that appeal is successful, he may withdraw his plea of guilty. DCD 1253, p. 14.

The facts, as relevant to the wiretap issue, are as follows.

Applications for wiretaps in this case were submitted to the U.S. District Court on August 26, 2014; September 10, 2014; October 6, 2014; October 28, 2014 and November 4, 2014, and corresponding wiretap orders were issued. *See* Sealed Supp. App. pp. 1sa-119sa. Each of these

applications was made by a duly designated Deputy Assistant Attorney General who was identified in the application and provided a supporting affidavit. But none of the orders include the name of the authorizing Deputy Assistant Attorney General. In fact, the texts of the orders are identical, but two different Deputy Assistant Attorneys General authorized different orders. See Sealed App. pp. 1sa-2sa.

Mr. Friend moved to suppress evidence derived from these wiretaps because of the order failed to include the name of the authorizing Deputy Assistant Attorney General. He asserted that his identity as a target was discovered by the government as a result of the September 10, 2014 wiretap. DCD 918, p. 2. Thus, all evidence against him was derived from the wiretap evidence.

The U.S. Magistrate Judge recommended that despite the failure of the orders to specify the name of the authorizing officer, the motion to suppress be denied. App. p. 5a. The district judge approved the report and recommendations, and denied the motion. App. p. 11a.

On appeal, the Eighth Circuit affirmed. The court first held that the good faith exception to the exclusionary rule announced by this Court in *United States v. Leon*, 468 U.S. 897 (1984), applied to the

defect in the wiretap order. For that reason, Mr. Friend was not entitled to exclusion of the evidence. In the alternative, the court held, "But even accepting that an order is insufficient on its face if it fails to 'specify . . . the identity . . . of the person authorizing the application,' it does not necessarily follow that an order must include the name of an authorizing official." App. p. 2a. The appeals court went on to discuss authorities supporting the finding that the orders here were sufficient.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI AND HOLD THAT THE *LEON* GOOD FAITH EXCEPTION DOES NOT APPLY TO WIRETAP ORDERS ISSUED IN VIOLATION OF THE WIRETAP STATUTE. (CONFLICT WITH AUTHORITY OF THIS COURT, CIRCUIT SPLIT, RELATES TO QUESTION 1.)

This Court should make clear that the good faith exception that excuses certain defects in search warrant applications and orders is not available in wiretap cases. *See United States v. Leon*, 468 U.S. 897 (1984). This is because unlike the exclusionary rule of the Fourth Amendment, which is judicially created, "the law governing electronic surveillance via wiretap is codified in a comprehensive statutory scheme providing explicit requirements, procedures, and protections."

United States v. Rice, 478 F.3d 704, 712 (6th Cir. 2007). The court went on, "The statute is clear on its face and does not provide for any exception. Courts must suppress illegally obtained wire communications." *Id.*

In addition to *Rice*, the Eighth Circuit itself has declined to apply the good faith exception to a case where the warrant application was defective. In *United States v. Lomeli*, 676 F.3d 734, 743 (8th Cir. 2012), holding, "To hold otherwise on these facts would prompt bad practices and reward those who routinely include mere boilerplate language in wiretap applications, which runs upstream from the carefully laid out statutory scheme."

As the dissenting judge in *United States v. Brunson*, 968 F.3d 325, 342 (4th Cir. 2020), explained,

> The [*Leon*] exception is relevant in cases of constitutional suppression; it is a judicially created exception to a judicially created remedy to protect a constitutional right. *See* [*Leon*] at 906. . . . This, however, is not a constitutional case; the statute controls, and the statute does not provide a good faith exception. *Cf. [United States v. Giordano,* 416 U.S. 505], 524. . . . [(1974)]("The issue [of suppression] does not turn on the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, but upon the provisions of Title III . . . ."). Rather, the statute directs a court to suppress orders that are "insufficient on [their] face." 18 U.S.C. § 2518(10)(a)(ii). Accordingly, as the

Government itself acknowledged at oral argument, the Supreme Court has never imported the good faith exception into Title III.

Contrary to the holding of the Eighth Circuit in Mr. Friend's case, there is no case law prior to the execution of the warrants in this case that authorized reliance on an order that does not comply with the statute. In fact, this Court's decision in *United States v. Chavez*, 416 U.S. 562, 573 (1974), made clear that facially invalid orders require suppression of the seized evidence.

The Eighth Circuit also relied on the legislative history of the wiretap statute to support the application of the good faith exception. App. p. 3a. But the wiretap statute was drafted before this Court's decision in *Leon*, so Congress clearly did not have *Leon* in mind when it provided for mandatory suppression. The Senate Judiciary Committee Report concerning the wiretap statute states simply, "There is. . . no intention to . . . press the scope of the suppression role beyond ***present*** search and seizure law." 1968 U.S.C.C.A.N. 2112, 2185, emphasis added. The reference to "present" search and seizure law is significant. The committee could have said that it intended the suppression provision to be interpreted using whatever search and seizure principles

might be in effect in the future. It did not say so, and therefore application of *Leon* is not supported by the legislative history.

Nor does the rational of *Leon* support its application here. One basis for the *Leon* exception is that officers executing search warrants are not responsible for the content of those warrants, and therefore the exclusionary rule is not needed to deter their conduct. But the wiretap order presents a different situation. It is clear that the orders themselves are drafted by the Justice Department. In *United States v. Brunson*, 968 F.3d 325 (4th Circuit 2020), the United States Attorney, following argument, provided a template purportedly then suggested by the Justice Department which corrected the error here.[1] Thus, the very same agency which implements the wiretap is providing the text for the judge to sign. The only way to ensure compliance with the statute, then, is to apply the law to the Justice Department.

This Court should grant certiorari and hold, consistent with the court in *Rice*, that the good faith exception does not apply to cases where suppression is required by 18 U.S.C. § 2515.

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[1] For the convenience of the Court, that letter and template are included in the appendix beginning at App. p. 14a.

II. THIS COURT SHOULD GRANT CERTIORARI AND CLARIFY ITS HOLDING IN *DAHDA V. UNITED STATES*, 138 S.CT. 1491, 1498 (2018) (CIRCUIT SPLIT, RELATES TO QUESTION 2.)

While the primary holding of the Eighth Circuit was that the good faith exception excused any defect in the order, the court also discussed whether the order was in fact defective. ("But even accepting that an order is insufficient on its face if it fails to 'specify . . . the identity . . . of the person authorizing the application,' it does not necessarily follow that an order must include the name of an authorizing official.") App. p. 2a. This, too, requires clarification by this Court.

At issue is the Eighth Circuit's interpretation of *Dahda,* which states that a wiretap order is insufficient on its face if it does not contain all information required by the wiretap statute, 18 U.S.C. 2518. The statute does not provide for any exceptions from this rule and, in the words of the U.S. Supreme Court, "The statute means what it says." *Dahda v. United States*, 138 S.Ct. 1491, 1498 (2018).

The Eighth Circuit relied on *United States v. Brunson*, 968 F.3d 325 (4th Circuit 2020), to find the order sufficient. This Court should reject the reasoning of *Brunson.* This is especially true because the opinion of the court in *Brunson* mischaracterizes the language of the

order in that case. The opinion says, "Each order identifies, as the authorizing official, the Deputy Assistant Attorney General of the Criminal Division of the Department of Justice *who signed off on the application* leading to the issuance of the order." (emphasis in original.). *Brunson* at 333. The court found that this language meant that a particular person was identified in the order. In fact, the order was far less clear. It said that the warrant was issued "pursuant to an application authorized by an appropriate official of the Criminal Division, United States Department of Justice, Deputy Assistant Attorney General, pursuant to the power delegated to that official by special designation of the Attorney General. . . ." Supp. App. p. 124sa.[2] The order thus did not mention that any particular person had "signed off on" the application, much less identify that person.

Mr. Friend's orders are quite similar to those in Mr. Brunson's case. They did not refer to the specific authorizing Deputy Assistant Attorney General. And they were not all authorized by the same Deputy Assistant Attorney General. *See* Sealed App. pp. 1sa-2sa. As stated by

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[2] This document was filed in the Fourth Circuit in Sealed Vol. III of the Supplemental Joint Appendix at pp. 737-753.

the dissenting judge in *Brunson*, "the majority's analysis will sow unnecessary confusion among district courts and litigants alike." *Brunson* at 342-343.

Subsequent to oral argument in *Brunson*, the government presented to the court a letter referencing the Justice Department's current template for wiretap orders. App. p. 14a. The template does include a space for the name of the authorizing official. But that is simply the Justice Department's current guidance. It could be changed at the whim of the Justice Department at any time. This Court needs to make clear that whether an order includes all of the information required by statute is not subject to the discretion of the Justice Department or the issuing judge.

There is a clear circuit split on this issue. The court in *United States v. Scurry*, 821 F.3d 1 (D.C. Cir. 2016), faced with exactly the same deficiency at issue here, found the orders facially insufficient and therefore held that the evidence derived from the wiretaps must be suppressed. Responding to the government's argument that because the district judge knew the identity of the person authorizing the application, the omission of the name from the order could be excused,

the *Scurry* court observed, "There is something incongruous about an interpretation that would let extrinsic documents transform an order that is 'insufficient on its face' into one that is sufficient 'on its face.'" *Id.* at 9.

The court addressed specifically the dual identification requirements of the statute, and held,

> Each identification requirement, then, has a distinct audience in the Title III process. "Requiring identification of the authorizing official in the application facilitates the court's ability to conclude that the application has been properly approved under § 2516. . . ." *Chavez*, 416 U.S. at 575. . . . Including that identification in the wiretap order facilitates additional oversight, this time by the parties executing the order. Congress did not want field agents or telecommunications service providers to conduct or assist in conducting wiretaps unless they—like the judge who authorized the wiretap—could satisfy themselves of proper compliance with section 2516(1)'s application pre-approval requirement. Section 2518(4)(d)'s order identification requirement is how Congress chose to furnish them evidence of compliance, thereby ensuring that the evidence would be at once fairly reliable, because a federal judge has vouched for its accuracy, and easily accessible, because it is included in the operative field document. And by tying immunity to good-faith reliance on a court order, see 18 U.S.C. § 2520 (d), Congress created an incentive for field agents and service providers to examine a wiretap order for completeness, including the identity of the authorizing Justice Department official.
>
> *Id.* at 11.

It is quite clear in Mr. Friend's case that the application and order did not travel together. The orders in Mr. Friend's case state,

> IT IS FURTHER ORDERED that the orders. this application and accompanying affidavit, all progress reports, and other ancillary paperwork be placed [sic] SEALED and retained in a safe and secure location in the custody of the Drug Enforcement Administration, until further order of this Court, except that copies of the orders, in full or redacted form, may be served by the Drug Enforcement Administration to effectuate the Court's order.

Sealed App. pp. 25sa, 48sa, 71sa, 94sa, 117sa.

Thus, the application and authorization would not have been available to the officers executing the wiretap order, and they would have no way of evaluating whether it was properly authorized. The concerns emphasized in *Scurry* exist in Mr. Friend's case.

Similarly, the U.S. District Court for the Eastern District of Texas, suppressing wiretap evidence after *Dahda*, held that the cases allowing use of evidence when the application but not the order contained the identity of the approving official were now "outdated." *United States v. Romero*, 2018 WL 6981231*8 (E.D. Tex. 2018) (Report and recommendation adopted by district court, *United States v. Romero*, Case No. 1:17-cr-00153-TH, Doc. 220, filed 1/18/19).

This Court should grant certiorari and make clear that under *Dahda*, a valid wiretap order must contain all of the information required in 18 U.S.C. § 2515.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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