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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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992 F.3d 728
United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Kenneth R. FRIEND, Defendant-Appellant.

No. 19-3225
|
Submitted: November 18, 2020
|
Filed: March 31, 2021
|
Rehearing and Rehearing En Banc Denied May 26, 2021

***729** Appeal from United States District Court for the Western District of Missouri–Springfield

Attorneys and Law Firms

Elizabeth Unger Carlyle, Kansas City, MO, argued, for defendant-appellant.

Randall D. Eggert, Asst. U.S. Atty., Springfield, MO, argued (Timothy A. Garrison, U.S. Atty., Kansas City, MO, on the brief), for plaintiff-appellee.

Before COLLOTON, ARNOLD, and KELLY, Circuit Judges.

Opinion

COLLOTON, Circuit Judge.

Kenneth Friend appeals an order of the district court[1] denying his motion to suppress evidence obtained through the government's interception of his wire and electronic communications. He argues that the court orders authorizing the interceptions were insufficient on their face, because they allegedly failed to specify the identity of the person who authorized the applications for the orders. We conclude that even if the orders were insufficient, suppression of evidence is not warranted, because investigators reasonably relied in good faith on the court orders. We therefore affirm the judgment.

The appeal arises from a prosecution of Friend for money laundering and conspiracy to distribute methamphetamine. *See* 18 U.S.C. § 1956(a)(1)(A)(i); 21 U.S.C. § 846. During an investigation,

federal investigators secured five court orders authorizing the interception of Friend's wire and electronic communications. After a grand jury charged Friend, and the district court denied his motion to suppress all intercepted communications and evidence derived therefrom, Friend entered a conditional guilty plea. He reserved the right to appeal the order denying his motion to suppress. The district court then imposed a sentence of 324 months' imprisonment.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 establishes the procedure for law enforcement to intercept wire, oral, or electronic communications. *See* 18 U.S.C. §§ 2510-2523. The statute provides that an order authorizing the interception of communications "shall specify" several things, including "the ***730** identity ... of the person authorizing the application" for the order. *Id.* § 2518(4)(d). The statute also provides that an aggrieved person "may move to suppress the contents" of an intercepted communication, "or evidence derived therefrom," if "the order of authorization or approval under which it was intercepted is insufficient on its face." *Id.* § 2518(10)(a)(ii).

Friend's complaint is that the court orders authorizing interception of his communications do not include the name of an official who authorized the applications for the orders. The orders state that the applications were "authorized by a Deputy Assistant Attorney General, Criminal Division of the United States Department of Justice, who has been specially designated by the Attorney General of the United States to exercise power conferred upon him" to authorize an application.

Section 2516(1) provides that applications may be authorized by, among others, "any Deputy Assistant Attorney General ... in the Criminal Division" of the Department of Justice, if the official has been "specially designated by the Attorney General." In Friend's case, the record shows that one of two Deputy Assistant Attorneys General in the Criminal Division who were so designated by the Attorney General—David Bitkower and Kenneth A. Blanco—approved each application. But although the name of either Bitkower or Blanco was included in each application, the official's name was not specified in the orders entered by the court.

Friend asserts that because § 2518(4)(d) requires an interception order to specify "the identity ... of the person authorizing the application," the orders must include the name of the authorizing official. As the orders in this case did not do so, he maintains that each order was "insufficient on its face." 18 U.S.C. § 2518(10)(a)(ii). Friend points to the Supreme Court's observation in *Dahda v. United States*, —— U.S. ——, 138 S. Ct. 1491, 200 L.Ed.2d 842 (2018), that § 2518(10)(a)(ii) "covers at least an order's failure to include information that § 2518(4) specifically requires the order to contain." *Id.* at 1498 (citing § 2518(4)(a)-(e)). He also relies on *United States v. Scurry*, 821 F.3d 1 (D.C. Cir. 2016), where the court held that an interception order was insufficient on its face when it identified the authorizing official as "Deputy Assistant Attorney General of the Criminal Division," and there were five such officials in the Criminal Division. *See id.* at 8-12.

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. The D.C. Circuit, for example, concluded that an order is sufficient if it "points unambiguously to a unique qualified officer holding a position that only one individual can occupy at a time." *Id.* at 8-9. On that view, an order may specify the identity of the authorizing person by listing, say, "the Attorney General of the United States" without naming "Merrick Garland," even though a reader must look outside the four corners of the order to discern who was serving in the specified office on the specified date. The Third Circuit likewise concluded that an order was sufficient where it identified the authorizing official as "Assistant Attorney General, Criminal Division, United States Department of Justice." Said the court: "It makes little difference in law that the person authorizing an application for interception was identified by title rather than by name." *United States v. Traitz*, 871 F.2d 368, 379 (3d Cir. 1989).

The Fourth Circuit addressed a related question in *United States v. Brunson*, 968 F.3d 325 (4th Cir. 2020). There, each order identified the authorizing official as "the ***731** 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." *Id.* at 332. The court concluded that the orders were not insufficient on their face because the description led to but one person: a particular Deputy Assistant Attorney General approved the applications, and his name was included in the applications submitted to the district court. Therefore, "both the authorizing judge and Brunson had a description sufficient to readily identify the one official who authorized the application for the order." *Id.* at 333.

The government argues that the orders in this case were sufficient on their face because they, too, included a description that leads to a specific person who authorized the applications. Each order stated that the associated application was "*authorized by a* Deputy Assistant Attorney General, Criminal Division of the United States Department of Justice, who has been specially designated by the Attorney General of the United States to exercise power conferred upon him." *E.g.*, R. Doc. 987-3, at 3 (emphasis added). Each application, in turn, identified by name a specific Deputy Assistant Attorney General as the authorizing official, and attached an order of the Attorney General designating the specified attorney to approve applications. Thus, as in *Brunson*, the authorizing judge and the person subject to interception—by examining the order and the application—could readily identify the official who authorized the application. Friend counters that *Brunson* was wrongly decided, either because an order must include the *name* of an official to "specify" his "identity," or because an order cannot satisfy the statute by identifying the official indirectly through reference to the application. *See Brunson*, 968 F.3d at 339-41 (Motz, J., dissenting).

[1]We need not resolve whether the orders in this case adequately specified the identity of the person authorizing the application. Even assuming for the sake of analysis that the orders were insufficient on their face, suppression of evidence was not warranted. Because the suppression provision, § 2518(10)(a)(ii), is worded to make the suppression decision discretionary, and the "legislative history expresses a clear intent to adopt suppression principles developed in Fourth Amendment cases," this court has ruled that the statute incorporates the good-faith exception to

the exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). *See United States v. Moore*, 41 F.3d 370, 376 (8th Cir. 1994); *see also United States v. Lomeli*, 676 F.3d 734, 742 (8th Cir. 2012). Under the circumstances here, the investigators acted with an objectively reasonable good faith belief that the court orders were sufficient.

[2]The interception orders in this case were signed between August 26 and November 4, 2014, and each order authorized interceptions for a period of thirty days. As of those dates, at least one circuit had ruled that an order that specified "a duly designated official of the Criminal Division" as the official who authorized the application "did not violate any substantive requirement of Title III." *United States v. Fudge*, 325 F.3d 910, 917-18 (7th Cir. 2003). As discussed, the Fourth Circuit concluded last year that orders similar to those in this case were not insufficient on their face, because they described the authorizing official in a way that allowed for ready identification of a specific person when the orders were considered together with the applications. *Brunson*, 968 F.3d at 332-33. Friend cites no authority as of 2014 holding that a comparable order was insufficient on its face. *Cf.* ***732** *United States v. Gray*, 521 F.3d 514, 526-28 (6th Cir. 2008) (where order identified "no official at all," but record showed that a statutorily designated official gave authorization, the violation was "technical rather than substantive in nature," and did not require suppression); *United States v. Radcliff*, 331 F.3d 1153, 1161-63 (10th Cir. 2003) (concluding that order was insufficient on its face where it "listed by title every Department of Justice official with legal authority to authorize an application," but declining to suppress evidence).

Given the state of the law in 2014, and even today in light of *Brunson*, it was objectively reasonable for investigators to rely on the court orders at issue to intercept Friend's communications. Suppression of evidence is therefore not warranted.

The judgment of the district court is affirmed.

All Citations

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Footnotes

1 The Honorable M. Douglas Harpool, United States District Judge for the Western District of Missouri, adopting the report and recommendation of the Honorable David P. Rush, United States Magistrate Judge for the Western District of Missouri.

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
v.	)	Case No. 14-03106-01/29-CR-S-MDH
	)	
KENNETH R. FRIEND *et. al.*,	)	
	)	
Defendants.	)	

REPORT & RECOMMENDATION OF U.S. MAGISTRATE JUDGE

Before the Court is Defendant Kenneth E. Friend's Motion to Suppress, (Doc. 918.), which has been referred to the undersigned for preliminary review pursuant to 28 U.S.C. § 636(b). Defendant Friend moves to suppress all evidence derived from the wire communications intercepted pursuant to five separate wiretap orders issued between August 26, 2014, and November 4, 2014, which Defendant claims were issued in violation of 18 U.S.C. § 2518. The undersigned held a hearing on the suppression issues on August 15, 2017. (Doc. 1037) Friend was present with his attorney, Stuart P. Huffman. (Doc. 1033) The Government was represented by Assistant United States Attorney Tim Garrison. (*Id.*) During a brief hearing, neither party presented any testimony; however, the Court accepted into evidence, without objection, the Government's exhibits, which included certified copies of the five contested wiretap orders along with the supporting applications, the Attorney General's designation orders, and the authorization memorandums approving the applications.[1] (Doc. 1034) For the reasons below, it is **RECOMMENDED** that Defendant's Motion to Suppress, (Doc. 918), be **DENIED**.

[1] The parties also filed supplemental briefing following the hearing. (*See* Docs. 1053 and 1054) The Court notes Defendant Friend filed a pro se supplemental brief (Doc. 1072), raising similar arguments as his counsel as well as several new arguments that were never presented in the parties initial briefing or during the evidentiary hearing. Because Defendant is represented by Counsel, the Court is not obligated to entertain his pro se pleadings. *United States v. Haubrich*, 744 F.3d 554, 557 (8th Cir. 2014)(*citing Abdullah v. United States*, 240 F.3d 683, 686 (8th Cir. 2001). Further, the arguments raised by Defendant Friend in his pro se filing are either addressed by this Court, irrelevant to the suppression issues raised, or unsupported by the record, and therefore not considered by this Court.

I. Findings of Fact

Although neither party presented any testimony at the hearing on this Motion, the parties appear to be in agreement as to the following facts: The Government submitted five separate wiretap applications on August 26th, September 10th, October 6th, October 28th, and November 4th of 2014. Each application requested the court to issue orders authorizing the interception of wire communications related to a United States Drug Enforcement Administration investigation. Each application included two attachments, an Order by the United States Attorney General designating any Deputy Assistant Attorney General to authorize the submission of the applications to a federal judge, and a signed memorandum from the designated Deputy Assistant Attorney General ("authorizing official") who actually reviewed and authorized each application. In addition to attaching the authorization to the application, the Government also specifically identified the authorizing official by name in each application.[2] Defendant admits that each application submitted to the court included "the appropriate facts and testimony needed" for the Court to issue the orders and that the attached memorandums named the authorizing official. The District Judge reviewed and signed each application and issued five separate wiretap orders that identified the title but not the specific name of the authorizing official. This indictment followed approximately two months later. (Doc. 15)

II. Conclusions of Law

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("the Act") provides detailed procedures regulating the government's interception of wire, oral, or electronic communications. Pub.L. No. 90–351, 82 Stat. 197, 211–25, codified at 18 U.S.C. §§ 2510-2520. The law has dual purposes, balancing Fourth Amendment privacy interests against law

[2] Deputy Assistant Attorney General David Bitkower authorized the submission of the August 26 application and Deputy Assistant Attorney General Kenneth Blanco authorized the submissions of the September 10th, October 6th, October 28th, and November 4th applications.

enforcement's need to effectively address organized crime by utilizing wiretapping tools in a limited, uniform and structured way. *United States v. Lomeli*, 676 F.3d 734, 738-739 (8th Cir. 2012) (citing *United States v. Moore*, 41 F.3d 370, 374 (8th Cir. 1994) (quoting S.Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968-2 U.S.C.C.A.N. 2112, 2153)). Pursuant to the Act, the government must follow detailed procedures to apply for a wiretap order. §§ 2516, 2518(1). Specifically, before submitting a wiretap application to the court, law enforcement must first obtain preliminary approval from the United States Attorney General or, as specifically delineated in the Act, an Assistant or Deputy Assistant Attorney General who the Attorney General has designated to authorize submission of the application. §§ 2516(1). Further, both the application and order must "identify" the official who authorized the application. §§ 2518(1)(a),(3),(4)(d). Finally, the Act provides grounds for an aggrieved party to move to suppress any evidence derived from the wiretap "if the disclosure of that information would be in violation of this chapter." §§ 2515, 2518(10)(a)(ii). Defendant Friend argues the evidence derived from these wiretaps must be suppressed because the wiretap orders did not identify the authorizing official by name, which he contends violates § 2518(4)(d) of the Act. In response, the Government argues the omission is a mere technical violation that does not require suppression, and also asserts that Defendant only has standing to challenge the orders that identified his phone or resulted in calls where he was a participant in an intercepted conversation. The Court takes up the parties' arguments below.

As an initial matter, "[a] defendant may challenge evidence gathered pursuant to an interception order only if it is shown 'that it was directed at him, that the Government intercepted his conversations or that the wiretapped communications occurred at least partly on his premises.'" *United States v. Civella*, 648 F.2d 1167, 1171 (8th Cir. 1981)(citation omitted); § 2510(11). The Government does not dispute Defendant's standing to challenge the October 6

Appellate Section *Washington, D.C. 20530*

The Honorable Patricia S. Connor
Clerk of Court
United States Court of Appeals
for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219

February 5, 2020

Re: *United States v. Joey L. Brunson*, No. 18-4696

Dear Ms. Connor:

Pursuant to Fed. R. Crim. P. 28(j), the following supplemental authority is furnished to the Court in light of a request made by Judges Niemeyer and Motz during oral argument on January 29, 2020.

The question in this case is whether judicial wiretap orders were facially insufficient under 18 U.S.C. § 2518(10)(a)(ii) because they provided the title but not the names of the Department of Justice officials who properly authorized the applications. Their names were identified in incorporated applications for those orders.

During oral argument, Judge Niemeyer asked for a copy of the current template for a judicial wiretap order that the Department's Office of Enforcement Operations ("OEO") provides to U.S. Attorney's offices. Additionally, Judge Motz asked the government to provide a copy of the template that existed at the time of the orders at issue in this litigation so the Court could see the "variations" in them.

A copy of the relevant portion of the current template for an interception order is attached to this letter. The template provides a space for the name of the Department official who authorized the government's application for an order under Sections 2518(3)-(4). We have redacted the footnotes in the template because they contain internal guidance and legal advice. At the time of

the signing of the orders at issue in this litigation, OEO did not have an interception order template that was provided to U.S. Attorney's offices.

The attached template is provided to federal prosecutors as a guide and the Department does not require that it be followed precisely. Although the better practice is to include the name of the authorizing official in the order, in this case the names of the authorizing Department officials were readily ascertainable from the orders and accompanying applications, which the orders incorporated. Accordingly, the orders were not facially insufficient under Section 2518(10)(a)(ii).

Please distribute this letter to Judges Wilkinson, Niemeyer, and Motz.

Yours very truly,

Thomas E. Booth
Attorney
Department of Justice
950 Pennsylvania Avenue;
Room 1511
Washington, DC 20044
(202) 514-5201
Thomas.Booth@usdoj.gov

Attachment: Pages 1 to 6 of template for an order under Sections 2518(3)-(4).

ORDER FOR INTERCEPTION OF WIRE [AND ELECTRONIC] COMMUNICATIONS
ORIGINAL, SPINOFF, EXTENSION, OR RENEWAL
MAY 2019

IN THE UNITED STATES DISTRICT COURT
FOR THE **[DISTRICT]**

IN THE MATTER OF THE APPLICATION	)	
OF THE UNITED STATES OF AMERICA	)	
FOR AN ORDER AUTHORIZING THE	)	Case No. _____
INITIAL INTERCEPTION OF WIRE	)	
[AND ELECTRONIC] COMMUNICATIONS	)	UNDER SEAL

ORDER

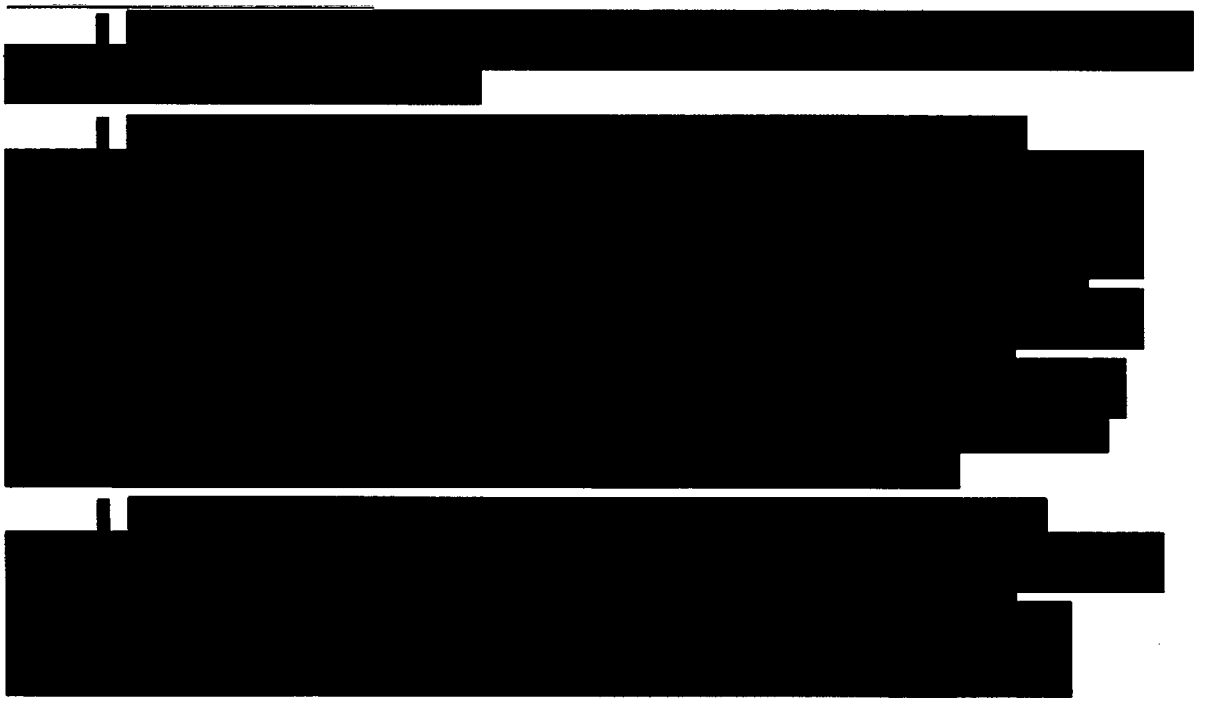
Application under oath having been made before me by **[Name]**, Assistant United States Attorney, **[District]**, an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, and an attorney for the Government as defined in Rule 1(b)(1) of the Federal Rules of Criminal Procedure, for an Order authorizing the interception of wire **[and electronic]** communications pursuant to Section 2518 of Title 18, United

[redacted]

States Code, and full consideration having been given to the matter set forth therein and in supporting documents, the Court finds:

1. There is probable cause to believe that **[list names of target subjects]**, and other persons as yet unknown ("TARGET SUBJECTS") have committed, are committing, and will continue to commit violations of **[list offenses, with code citations]** ("TARGET OFFENSES").

2. There is probable cause to believe that particular wire **[and electronic]** communications of **[list names of target interceptees]**,[5] and other persons as yet unknown ("TARGET INTERCEPTEES") concerning the TARGET OFFENSES will be obtained



through the interception of wire **[and electronic]** communications occurring to and from the cellular telephone bearing the number (XXX) XXX-XXXX and International Mobile Subscriber Identifier **[or Identification or Identity]** (IMSI) number XXXXXXXXXXXXXXX, subscribed to by **[subscriber name and address]** ("TARGET TELEPHONE"), and used by **[name of target]**.

3. In particular, there is probable cause to believe that these communications will concern the specifics of the TARGET OFFENSES, including **[list anticipated subject matters of interceptions/investigative goals; for example: (i) the nature, extent and methods of operation of the TARGET SUBJECTS' unlawful**

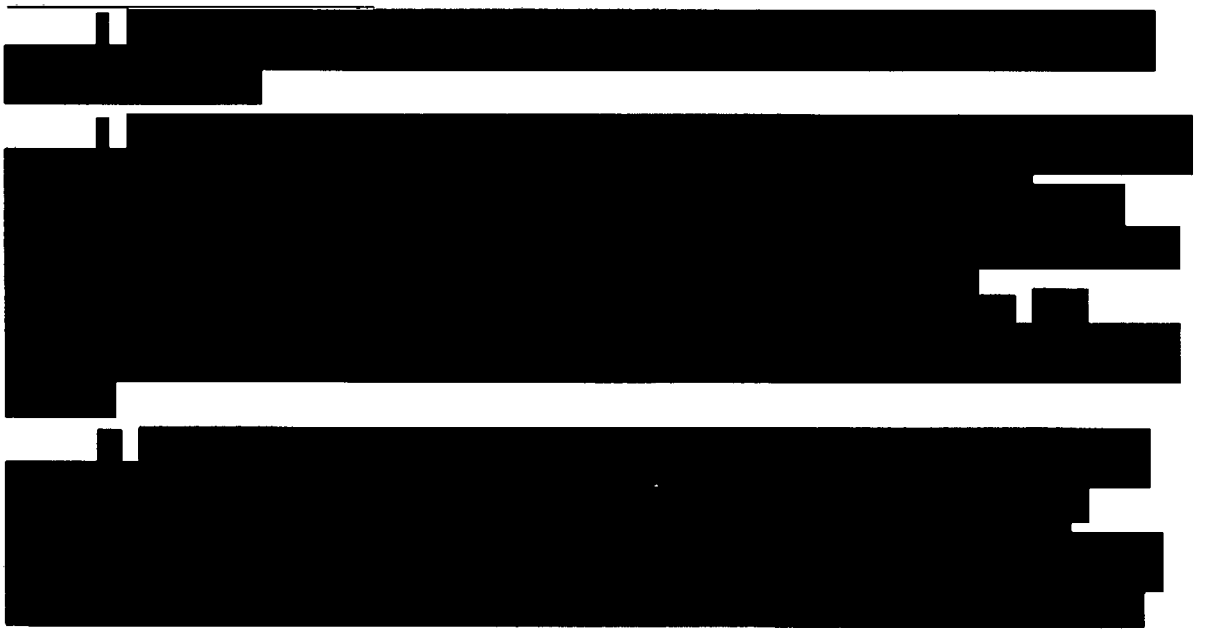
activities; (ii) the identity of the TARGET SUBJECTS, their accomplices, aiders and abettors, co-conspirators and participants in their illegal activities; (iii) the receipt and distribution of narcotics and money involved in those activities; (iv) the locations and items used in furtherance of those activities; (v) the existence and locations of records relating to those activities; (vi) the location and source of resources used to finance their illegal activities; and (vii) the location and disposition of the proceeds from those activities.] In addition, the communications are expected to constitute admissible evidence of the commission of the TARGET OFFENSES.

4. It has been adequately established that normal investigative procedures have been tried and have failed, reasonably appear to be unlikely to succeed if tried, or are too dangerous to employ.

5. There is probable cause to believe that the TARGET TELEPHONE has been, is being, and will continue to be used in connection with the commission of the TARGET OFFENSES.

WHEREFORE, IT IS HEREBY ORDERED pursuant to Section 2518 of Title 18, United States Code, that Special Agents of the [**federal law enforcement agency or agencies**], other duly authorized state and local law enforcement officers working

under the supervision of [**federal law enforcement agency**], government personnel acting under the supervision of the [**federal law enforcement agency**], and personnel acting under contract to and supervision of [**federal law enforcement agency**], pursuant to an application authorized by [**name of authorizing official**], [**title of authorizing official, most likely "Deputy Assistant Attorney General"**], a duly designated official of the Criminal Division, United States Department of Justice, who has been specially designated by the Attorney General of the United States, pursuant to Order Number 4417-2019, dated March 25, 2019, to exercise the power conferred on that official by Section 2516 of Title 18, United States Code, are authorized to intercept wire [**and electronic**] communications to and from the



TARGET TELEPHONE. Attached to the Government's application for this Order, and incorporated into this Order, are copies of the Attorney General's Order of special designation and the Memorandum of Authorization approving this application.

IT IS FURTHER ORDERED that such interceptions shall not terminate automatically after the first interception that reveals the manner in which the alleged co-conspirators and others conduct their illegal activities, but may continue until all communications are intercepted which fully reveal the manner in which the TARGET SUBJECTS and others as yet unknown are committing the TARGET OFFENSES, and which reveal fully the identities of their confederates, their places of operation, and the nature of the conspiracy, but not to exceed a period of thirty (30) days measured from [**for originals or spinoffs**: the earlier of the day on which law enforcement officers first begin to conduct an interception under this Order or ten (10) days after the Order is entered.] [**for extensions**: the date of the Court's Order.]