No. _____

IN THE

Supreme Court of the United States

STATE OF OREGON,

Petitioner,

v.

LANGSTON AMANI HARRIS

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 authorizes the "principal prosecuting attorney" of a locality to apply for a wiretap order when allowed by state law to do so. 18 U.S.C. § 2516(2).

1. Does 18 U.S.C. § 2516(2) prohibit the principal prosecuting attorney from delegating that authority to a deputy when state law allows the delegation?

2. If a wiretap is later held invalid, does Title III require suppression of the evidence obtained even if law enforcement officers had an objectively reasonable, good-faith belief that their conduct was lawful?

RELATED PROCEEDINGS

State v. Harris, No. 20CR28186, Oregon Circuit Court, Washington County. Order entered April 2, 2021.

State v. Harris, No. S068481, Oregon Supreme Court. Opinion issued April 28, 2022.

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INTRODUCTION

This case implicates two longstanding lower-court splits about Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Title III regulates applications for wiretap orders to intercept phone calls. Federal courts of appeal and state supreme courts have disagreed about how to answer two basic questions related to Title III's requirements, questions that implicate the validity of at least 20 states' statutes and the wiretaps obtained under those statutes.

First, to what extent (if at all) does federal law regulate the delegation of authority to apply for wiretaps? Title III authorizes the "principal prosecuting attorney" of a political subdivision—typically a district attorney or the equivalent—to apply to a state court for a wiretap order if permitted to do so by state law. 18 U.S.C. § 2516(2). At least 20 states have statutes expressly empowering their principal prosecuting attorneys to delegate that authority to a subordinate, such as a deputy district attorney, in various circumstances. Some courts, like the Second Circuit, treat the delegation question as one left to state law, and so they uphold delegations under those state statutes. Others, like the Oregon Supreme Court here, treat Title III as implicitly prohibiting at least some delegation. The courts on that side of the split further disagree about exactly what sorts of delegation Title III allows or prohibits.

Second, does the good-faith doctrine, which allows prosecutors to use evidence obtained in violation of the Fourth Amendment when law enforcement officials reasonably believed that their conduct was law-

ful, also apply to Title III? Even if Title III prohibited the delegation of authority here, prosecutors relied in good faith on a state statute expressly allowing the delegation at a time when no controlling authority invalidated the statute. But the Oregon Supreme Court joined a minority of federal circuits in holding that Title III's suppression remedy does not have a good-faith exception. Four circuits have reached the opposite conclusion.

Both circuit splits are entrenched, significant, and have been noted by practitioners. *See* Kevin Sali, *Challenging State Wiretaps: Who Asked for the Order? The Answer May Support Suppression*, 39-MAR Champion 42, 43, 46 (2015) (noting that "courts have varied in their answers" to the delegation question presented here and that "[t]here is at present a circuit split" on the good-faith-exception question).[1] This Court should grant review to settle the law on both of these important questions.

OPINIONS BELOW

The opinion of the Oregon Supreme Court (App. 1a–38a) is reported at 369 Or. 628, 509 P.3d 83 (2022). The order of the Oregon Circuit Court (App. 30a–54a) is not published.

JURISDICTION

The Oregon Supreme Court issued its opinion affirming the trial court's suppression order on April

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[1] This article from the magazine of the National Association of Criminal Defense Lawyers, which is available on Westlaw, can be found at www.salilaw.com/images/March2015Champion.pdf.

28, 2022. This Court has jurisdiction under 28 U.S.C. § 1257(a); *see also Arkansas v. Sullivan*, 532 U.S. 769, 771 n.* (2001) (*per curiam*) (noting that § 1257 confers jurisdiction over a state-court order suppressing evidence "notwithstanding the absence of final judgment in the underlying prosecution").

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 2516(2) 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, rob-

> bery, 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.

18 U.S.C. § 2518(10)(a) provides in relevant part:

> 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. * * *

Oregon Revised Statutes § 133.724(1) provides in pertinent part:

> An ex parte order for the interception of wire, electronic or oral communications may be issued by any circuit court judge upon written application made upon oath or affirmation of the individual who is the district attorney or a deputy district attorney authorized by the district attorney for the county in which the order is sought. * * *

The full text of those and other relevant provisions are reprinted in the appendix. App. 55a–82a.

STATEMENT OF THE CASE

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 regulates the interception of wire, oral, and electronic communications. The provision at issue here—18 U.S.C. § 2516(2)—provides that "the principal prosecuting attorney of any political subdivision" of a state may apply for a judicial order authorizing the interception of such communications to investigate certain serious crimes, if authorized by state law to do so. The state law here authorizes those applications to be made by the district attorney or "a deputy district attorney authorized by the district attorney." Or. Rev. Stat. § 133.724(1). At issue is whether evidence obtained through a court-ordered wiretap must be suppressed if the application was made by a deputy district attorney rather than by the district attorney personally.

This case involves a pretrial motion to suppress evidence in a murder prosecution. The murder victim—identified by his initials "RBH" in the Oregon Supreme Court's decision—was found shot in the head outside his apartment building in Washington County, Oregon, which is part of the Portland metropolitan area. App. 3a. Records from the victim's cell phone and other evidence suggested that respondent was involved. App 5a.

The state sought wiretaps of phones used by respondent. App. 5a. The four wiretap orders at issue here were granted by a Washington County circuit judge on application of a Washington County deputy district attorney. Each application included the deputy district attorney's statement, made under oath, that he or she had been authorized by the district attorney to make the application:

> I am a senior deputy district attorney for Washington County, Oregon, and am authorized by District Attorney Robert Hermann for Washington County, Oregon to make this application pursuant to [Or. Rev. Stat. §] 133.724(1)(a)[.]

State's Exh. 9, at 13; Exh. 11, at 11–12; Exh. 12, at 12; Exh. 13, at 15; Tr. 369–77 (receiving those exhibits into evidence).[2]

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[2] Citations to the lower court record are to the trial exhibits, the 693-page trial court transcript, or the PDF page numbers of the 1,396-page trial court file received by the Oregon Supreme Court.

After obtaining evidence from the wiretaps, the state indicted respondent for crimes including the murder of RBH. App 2a.

Respondent moved to suppress the evidence obtained from the wiretaps on several grounds, only one of which—the grounds asserted in defense motion 101—is relevant here. App. 7a. In that motion, respondent argued that the wiretaps were unlawful under 18 U.S.C. § 2516(2) because "the applications in this case were made by deputy district attorneys" rather than the district attorney. Trial Court File 230. Respondent also argued that the remedy for that statutory violation was suppression, and in particular that there was no "good faith" exception to suppression under Title III. *Id.* 235.

The state opposed the motion, arguing that 18 U.S.C. § 2516(2) leaves the delegation question to state law and that the Oregon statute expressly allows a district attorney to delegate the power to apply for a wiretap to a deputy. *Id.* 161–72; Tr. 518–35; *see also* (allowing wiretap applications by "a deputy district attorney authorized by the district attorney for the county in which the order is sought"). The state also argued, in the alternative, that even if the deputy district attorney lacked authority to apply for the wiretap, suppression was improper because law enforcement had relied in good faith on the state statute and the circuit court's facially valid wiretap order. Tr. 541–43.

The trial court granted the motion, siding with respondent's interpretations of Title III:

> States are prohibited from creating less restrictive laws than 18 USC § 2516(2). ORS 133.[724](1) is a less restrictive statute allowing an elected district attorney or the principal prosecuting attorney to delegate authority to deputy district attorneys or assistant attorney generals to apply for wiretap applications. *U.S. v. Giordano*, 416 US 505 (1974); *Villa v. Maricopa* 865 F3rd 1224 (2017). In this case, because the office responsive to the political process did not indicate that he or she was aware of the wiretap application, the evidence gained in response to the wiretaps are suppressed.
>
> The good faith exception does not apply to this situation.

App. 40a.[3]

The state appealed the trial court's order to the Oregon Supreme Court. App. 2a. The state reprised the arguments it made in the trial court. In particular, the state argued that 18 U.S.C. § 2516(2) leaves the question of delegation to state law and, alterna-

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[3] The trial court separately rejected all of respondent's other arguments for suppression of the wiretap evidence, including the argument that the wiretap applications were insufficient after excising information that the trial court suppressed for unrelated reasons. App. 40a–41a.

tively, that its good-faith reliance on the state statute authorizing delegation should prevent suppression of the evidence it obtained. App. 10a, 14a–15a, 21a.

The Oregon Supreme Court affirmed the trial court's ruling on the wiretap issues. App. 2a. The court concluded that § 2516(2) prohibits the district attorney—the principal prosecuting attorney here—from delegating the power to apply for a wiretap to a deputy district attorney. App. 11a-21a. It held that even if § 2516(2) requires only "some active involvement on the part of the 'principal prosecuting attorney'—by authorizing the particular application, reviewing the merits of the particular application, or both," there was no evidence in the record that the district attorney personally had done either of those things for the wiretaps at issue here. App. 18a–19a. The court also rejected the state's good-faith argument, concluding that Title III did not allow any good-faith exception to suppression. App. 21a–4a.[4]

REASONS FOR GRANTING THE PETITION

The Oregon Supreme Court decided two significant questions of federal statutory interpretation that have divided the federal courts of appeal and that merit this Court's review: the extent (if at all) to which 18 U.S.C. § 2516(2) prohibits principal prosecuting attorneys from delegating their authority to apply for wiretap orders even when state law allows

[4] In addition to its ruling on the federal questions related to wiretaps, the Oregon Supreme Court also affirmed the trial court's separate rulings under state law related to suppression of evidence from certain search warrants. App. 24a–37a. Those rulings are not at issue here.

them to do so, and the existence of a good-faith exception to suppression under Title III. The square rulings of the lower court and clean factual record make this case an ideal vehicle for resolving both questions.

A. The delegation question merits this Court's review.

1. This case is an ideal vehicle to resolve a split about whether, and to what extent, delegation is a matter of state law.

Under 18 U.S.C. § 2516(2), the "principal prosecuting attorney" may apply to a state court for a wiretap order when "authorized by a statute of that State" to make the application. Although the statute does not expressly address whether the principal prosecuting attorney may delegate that authority to a deputy, the Senate Report on the bill that enacted § 2516(2) stated that the "issue of delegation" was "a question of State law":

> Paragraph (2) provides that the principal prosecuting attorney of any State or the principal prosecuting attorney of any political subdivision of a State may authorize an application to a State judge of competent jurisdiction, as defined in section 2510(9), for an order authorizing the interception of wire or oral communications. *The issue of delegation by that officer would be a question of State law.*

S. Rep. No. 90–1097, at 98, 1968 U.S.C.C.A.N. 2112, 2187 (emphasis added).

Despite that clear legislative history, federal courts of appeals and state courts of last resort are divided on the issue of delegation. Some courts, consistent with the Senate Report, treat the delegation question as purely one of state law and uphold delegations that are permitted by state law. Other courts, including the Oregon Supreme Court here, read § 2516(2) as implicitly prohibiting delegation allowed by state law in at least some circumstances.

The Second Circuit held that the delegation question is a matter of state law in *Alexander v. Harris*, 595 F.2d 87 (2d Cir. 1979) (*per curiam*). *Alexander* was a habeas corpus proceeding challenging a New York criminal conviction where some of the evidence had been obtained through a wiretap authorized in New Jersey. *Id.* at 88. The New Jersey county prosecutor delegated authority to a police detective to apply for renewal of the wiretap order, and the petitioner argued that that delegation violated 18 U.S.C. § 2516(2). *Id.* at 88–89. The Second Circuit affirmed denial of habeas relief on the ground that the delegation of authority—which was permitted by New Jersey law—did not violate § 2516(2). *Id.* at 89. In so ruling, the court cited the Senate Report's statement quoted above that the "issue of delegation by that officer would be a question of State law." *Id.* (citing 1968 U.S.C.C.A.N. at 2187).

Several state supreme courts have reached conclusions consistent with the Second Circuit's approach, treating the delegation question as purely a matter of state law. *See, e.g.*, *People v. Gonzalez*, 287 Cal. Rptr. 3d 2, 24–25 & n.10 (2021) (upholding the district at-

torney's delegation of authority to a deputy to act in his absence), *cert. denied*, 142 S. Ct. 2719 (2022); *O'Hara v. People*, 271 P.3d 503, 509, 514–15 (Colo. 2012) (remanding for a determination whether the district attorney specifically authorized the wiretap at issue as required by state law); *State v. Marine*, 464 A.2d 872, 877 (Del. 1983) (upholding a delegation by the Attorney General to a deputy when the Attorney General approved the application by telephone). To the extent those decisions discuss federal law at all, they conclude that § 2516(2) "leaves the matter of delegation up to state law." *Marine*, 464 A.2d at 877.

By contrast, the Ninth Circuit interprets § 2516(2) as forbidding delegation by the principal prosecuting attorney—even when expressly allowed by state law—unless that attorney is "personally familiar with all the facts and circumstances justifying his or her belief that an order should be issued." *Villa v. Maricopa County*, 865 F.3d 1224, 1234 (9th Cir. 2017) (quotation marks omitted), *cert. denied*, 138 S. Ct. 1696 (2018). The Supreme Courts of Kansas and Minnesota have gone further, concluding that § 2516(2) forbids delegation entirely. *State v. Bruce*, 287 P.3d 919, 924 (Kan. 2012) (holding that § 2516(2) "allows no such delegation of wiretap order applications"); *State v. Frink*, 206 N.W.2d 664, 669–70 (Minn. 1973) (concluding that "the responsibilities vested in the persons designated in the Federal statute could not be delegated to anyone").

The Massachusetts Supreme Judicial Court has staked out an intermediate position, expressly rejecting the requirement adopted by the Ninth Circuit in

Villa that the principal prosecuting attorney be "personally familiar with all the facts and circumstances" but suggesting that § 2516(2) may require some personal involvement in the decision to seek a particular wiretap order. *Commonwealth v. Vitello*, 327 N.E.2d 819, 839 (Mass. 1975) (rejecting the argument that the principal prosecuting attorney must "personally apply or affirmatively demonstrate total familiarity with all aspects of a case" as long as that official specifically authorizes a particular application); *see also United States v. Smith*, 726 F.2d 852, 858 (1st Cir. 1984) (*en banc*) (upholding delegations allowed under Massachusetts law).

Further exacerbating the conflict, some courts take an entirely different view about delegation when the principal prosecuting attorney is absent. In some tension with its decision in *Villa*, for example, the Ninth Circuit had upheld delegation if the principal prosecuting attorney is absent, noting the legislative history stating that delegation is "a question of state law." *United States v. Perez-Valencia*, 727 F.3d 852, 855 (9th Cir. 2013); *see also State v. Daniels*, 389 So. 2d 631, 636 (Fla. 1980) (interpretating § 2516(2) as preventing it from construing state law to allow general delegation of authority to assistant state attorneys, but leaving open whether the legislature could enact a "narrowly confined" delegation for when "the state attorney is absent for an extended period of time").[5]

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[5] The Oregon Supreme Court suggested that the results, if not necessarily the reasoning, of most of the cases can be reconciled by interpreting § 2516(2) to require "some active involvement on

At a minimum there is a split between the Second Circuit and the Oregon Supreme Court, and there is significant tension in the decisions of the federal courts of appeals and state supreme courts on the delegation issue more generally. This case is an ideal vehicle for resolving the conflict. The Oregon Supreme Court squarely ruled on the question of federal statutory interpretation, and the relevant facts here are simple and straightforward. The district attorney authorized a senior deputy district attorney to apply for each of the wiretap orders at issue. Those delegations are explicitly authorized by Or. Rev. Stat. § 133.724(1). If § 2516(2) leaves the issue of delegation to state law, the delegations were lawful. If

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the part of the 'principal prosecuting attorney'—by authorizing the particular application, reviewing the merits of the particular application, or both." App. 18a. But the Second Circuit's opinion in *Alexander* mentions no facts suggesting that the county prosecutor had any active involvement in the decision to apply for renewal of the wiretap order. 595 F.2d at 89; *see also Commonwealth v. D'Amour*, 704 N.E.2d 1166, 1174 & n.10 (Mass. 1999) (approving delegation to an assistant district attorney of the authority to apply for any wiretaps relevant to a particular criminal investigation, including multiple potential targets who were involved in the crimes under investigation as well as renewed or amended applications for wiretaps, without suggesting that the district attorney had to have personal involvement in each specific wiretap application). Nor would the Oregon Supreme Court's test explain the holdings of cases permitting delegation while the principal prosecuting attorney is absent or unavailable. *See, e.g.*, *United States v. Fury*, 554 F.2d 522, 527 n.4 (2nd Cir. 1977); *Perez-Valencia*, 727 F.3d at 855; *cf. Gonzalez*, 287 Cal. Rptr. 3d at 26 n.11 (reserving decision on whether district attorneys are "absent" under the California law allowing delegation merely because they are engaged in other work).

§ 2516(2) prohibits delegation, or at least requires a record showing that the district attorney was actively involved in the application or was absent, the delegations were unlawful. The delegation issue was the sole basis on which the trial court suppressed the wiretap evidence; the court rejected all of respondent's other challenges to the wiretap orders. App. 40a–41a (denying defense motion 102). The case thus offers this Court a clean opportunity to rule on the delegation question.

2. The question is important because it implicates the validity of at least 20 states' statutes.

Wiretaps are a key tool for investigating certain kinds of criminal activities. In particular, "[o]rganized crime cases depend heavily on wiretaps." *United States v. Albertelli*, 687 F.3d 439, 442 (1st Cir. 2012) (Boudin, J.). Wiretap evidence is "one of the most persuasive pieces of evidence that can be presented to a jury." Kyle G. Grimm, *The Expanded Use of Wiretap Evidence in White-Collar Criminal Prosecutions*, 33 Pace L. Rev. 1146, 1147 (2013). From 2010 through 2020, the last year for which data are available, courts authorized more than 55,000 wiretaps, the majority of them based on applications by state prosecutors. U.S. Courts, *Wiretap Reports 2020*, tbl. 7, *available at* https://www.uscourts.gov/statistics-reports/wiretap-report-2020 (last visited May 11, 2022).

Because of the importance of wiretap evidence and the need to move swiftly to obtain it, at least a dozen states have enacted legislation expressly allowing principal prosecuting attorneys to delegate their au-

thority to apply for wiretap orders.[6] Another state authorizes any assistant attorney general or assistant state's attorney to apply for wiretap orders without specifically requiring delegation by the principal prosecuting attorney.[7] At least six more states expressly allow delegation of authority to apply for wiretap orders when the principal prosecuting attor-

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[6] Alaska Stat. § 12.37.010 ("a person designated in writing or by law to act for the attorney general"); Ariz. Rev. Stat. § 13-3010(A) ("a prosecuting attorney whom a county attorney or the attorney general designates in writing"); La. Rev. Stat. Ann. § 15:1308(A) ("any assistant attorney general acting pursuant to the authorization of the attorney general" and "any assistant district attorney acting pursuant to the written authorization of the district attorney"); Mass. Gen. Laws ch. 272, § 99(F)(1) ("any assistant attorney general specially designated by the attorney general" and "any assistant district attorney specially designated by the district attorney"); N.Y. CPL § 700.05(5) ("if authorized by the attorney general, the deputy attorney general in charge of the organized crime task force"); N.C. Gen. Stat. § 15A-291(a) ("the Attorney General's designee"); Ohio Rev. Code § 2933.53(A) ("an assistant to the prosecuting attorney of that county who is specifically designated by the prosecuting attorney to exercise authority under this section"); Or. Rev. Stat. § 133.724(1) ("a deputy district attorney authorized by the district attorney"); R.I. Gen. Laws § 12-5.1-2(a) ("an assistant attorney general specially designated by the attorney general"); S.C. Code § 17-30-70(A) ("his designated Assistant Attorney General"); Utah Code § 77-23a-8(1) ("any assistant attorney general specially designated by the attorney general" and any "deputy county attorney[] or deputy district attorney specially designated by the county attorney or by the district attorney"); Va. Code § 19.2-66(A) (the "Chief Deputy Attorney General, if the Attorney General so designates in writing").

[7] N.D. Cent. Code § 29-29.2-02(1).

ney is absent or unavailable.[8] And Congress itself, in enacting legislation implementing Title III for the District of Columbia, allowed the principal prosecuting attorney—the United States Attorney for the District of Columbia—to delegate the authority to apply for wiretap orders to Assistant United States Attorneys and other law enforcement officers.[9] Although Congress of course has the power to exempt the District of Columbia from the requirements of § 2516(2)

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[8] Cal. Penal Code § 629.50(a) ("the person designated to act as district attorney in the district attorney's absence"); Colo. Rev. Stat. § 16-15-102(1)(a) ("his or her designee if the attorney general or district attorney is absent from his or her jurisdiction"); Haw. Rev. Stat § 803-44 ("a designated deputy attorney general in the attorney general's absence or incapacity" and "a designated deputy prosecuting attorney in the prosecuting attorney's absence or incapacity"); Ind. Code § 35-33.5-2-1(a) ("if the prosecuting attorney is unavailable, a chief deputy prosecuting attorney specifically authorized by the prosecuting attorney"); N.J. Stat. § 2A:156A-8 ("a person designated to act for such an official and to perform his duties in and during his actual absence or disability"); 18 Pa. Cons. Stat. Ann. § 5708 ("during the absence or incapacity of the Attorney General, a deputy attorney general designated in writing by the Attorney General" and "during the absence or incapacity of the district attorney, an assistant district attorney designated in writing by the district attorney of the county").

[9] Pub. L. No. 91-358, tit. II, § 210(a), 84 Stat. 473, 617 (1970) (codified as D.C. Code § 23–541(11)) (defining "[t]he United States attorney" for these purposes as "the United States attorney for the District of Columbia or any of his assistants designated by him or otherwise designated by law to act in his place for the particular purpose in question"); *id.* at 620 (codified as D.C. Code § 23–546(a)) ("The United States attorney may authorize, in writing, any investigative or law enforcement officer to make application to a court for an order authorizing the interception of wire or oral communications.").

that apply to the states, its policy choice for the District suggests that Congress intended for the states to enjoy similar flexibility, and it reflects the practical importance of allowing delegation to law enforcement.

All told, the question presented here implicates the validity of at least 20 states' laws. If delegations were impermissible, a "significant number of wiretap orders" issued by state courts would be "vulnerable to attack." Sali, *supra*, at 42. The question presented thus has sufficiently widespread consequences to justify this Court's review. *Cf. Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996) (*per curiam*) (noting that summary reversal is appropriate "when what is at issue is the total invalidation of a state-wide law").

3. The Oregon Supreme Court's ruling is inconsistent with established delegation principles and clear legislative history.

Review is also justified because the Oregon Supreme Court's interpretation of § 2516(2) is simply incorrect. A well-settled principle of statutory construction—the presumption of delegability—resolves the question presented here. That presumption is reinforced here by unusually definitive legislative history.

When a federal statute grants authority to an executive official, the official presumptively may delegate that function to a subordinate. *See, e.g.*, *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947) (concluding that the Temporary Controls Administrator could delegate statutory authority to issue subpoenas). The presumption of

delegability reflects the understanding that an executive principal "speaks and acts through" subordinate agents, and that the acts of the subordinates are "in legal contemplation" the acts of their superior. *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839) (upholding an action by the Secretary of War under a statute that authorized the President to act). The federal courts of appeals are "unanimous in permitting subdelegations to subordinates, even where the enabling statute is silent, so long as the enabling statute and its legislative history do not indicate a prohibition on subdelegation." *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014), *cert. denied*, 576 US 1055 (2015). The presumption of delegability is all the more appropriate when the federal statute confers authority on a state official, because federal statutes presumptively do not interfere with a state's power to determine "the character of those who exercise government authority." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

That presumption is confirmed here by remarkably clear legislative history, which is rarely so on point and so unequivocal. As noted above, the Senate Report on Title III states that "[t]he issue of delegation" by the principal prosecuting attorney "would be a question of State law." 1968 U.S.C.C.A.N. at 2187. Although Congress's general purpose in enacting the 1968 legislation may have been to "centralize authority," App. 15a, its specific intent on the issue of delegation was to leave the question to state law.

This Court recognized the significance of that legislative history in *United States v. Giordano*, 416 U.S. 505, 522 n.11 (1974). *Giordano* held that the parallel provision governing wiretap applications by federal prosecutors—18 U.S.C. § 2516(1), which at the time stated that a wiretap application could be authorized by "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General"—implicitly forbade delegation to lower-ranking Department of Justice personnel like the Attorney General's Executive Assistant. *Id.* at 508. The federal government had argued that the absence of any restrictions on delegation at the state level in § 2516(2) suggested that delegation should also be unrestricted for federal prosecutors. 416 U.S. at 522–23. But this Court explained that the textual difference between subsections (1) and (2) reflected a conscious policy choice by Congress to treat the federal and state governments differently, based on the infeasibility of imposing one-size-fits-all structural mandates on varied state governments: "[I]t is apparent that Congress desired to centralize and limit this authority where it was feasible to do so, a desire easily implemented in the federal establishment by confining the authority to approve wiretap applications to the Attorney General or a designated Assistant Attorney General." *Id.* at 523. As a commentator writing shortly after the *Giordano* decision explained, "Congress apparently avoided the issue of delegation in section 2516(2), not because it wished to prohibit all delegation, but because the specification of delegation guidelines would have been inefficient and impractical." Richard R. Rohde, *Electronic Surveillance—State Authorization*

of Wiretaps Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 56 B.U. L. Rev. 600, 606 (1976).

The text (read through the lens of the presumption of delegability) and the legislative history of § 2516(2) both strongly suggest that Congress intended to leave the issue of delegation to state law. This Court should grant review to determine whether the Oregon Supreme Court's contrary conclusion is correct.

B. The good-faith question independently merits this Court's review.

1. There is an entrenched circuit split on whether there is a good-faith exception to suppression under Title III.

The Fourth Amendment's exclusionary rule has a well-established "good faith" exception: When law enforcement officials act with an objectively reasonable, good-faith belief that their conduct is lawful, the evidence they obtain will not be suppressed even if a court later determines that the conduct violated the Fourth Amendment. *Davis v. United States*, 564 U.S. 229, 238 (2011). The good-faith exception applies, among other circumstances, when officials rely on a statute or a search warrant that is later held invalid. *Illinois v. Krull*, 480 U.S. 340, 349 (1987); *United State v. Leon*, 468 U.S. 897, 924 (1984).

The lower courts are split on whether the same good-faith exception applies to Title III, which allows a party to move to suppress evidence derived from a wiretap if "the communication was unlawfully

intercepted." 18 U.S.C. § 2518(10)(a)(i). Like the Oregon Supreme Court here, the Sixth and D.C. Circuits have held that there is no good-faith exception to suppression under Title III. *See United States v. Rice*, 478 F.3d 704, 711 (6th Cir. 2007) ("We hold that the government's good-faith argument is without merit, because the good-faith exception to the warrant requirement is not applicable to warrants obtained pursuant to Title III."); *United States v. Glover*, 736 F.3d 509, 515–16 (D.C. Cir 2013) (rejecting the government's argument that the court should "recognize the government's 'good faith' and, therefore, import a good faith exception to Title III's remedy of suppression"), *abrogated on other grounds by Dahda v. United States*, 138 S. Ct. 1491 (2018); *see also United States v. Scurry*, 821 F.3d 1, 13 (D.C. Cir. 2016) ("[O]nce a reviewing court determines that a wiretap order is facially insufficient, the only appropriate remedy is suppression.").

The Fourth, Eighth, Ninth, and Eleventh Circuits, by contrast, recognize a good-faith exception to suppression under Title III. *See United States v. Brunson*, 968 F.3d 325, 334 (4th Cir. 2020) ("[W]e conclude that where law enforcement officials have acted reasonably and in good faith to comply with the central substantive requirements of the Wiretap Act, as is the case here, suppression is not justified."), *cert. denied*, 141 S. Ct. 1398 (2021); *United States v. Friend*, 992 F.3d 728, 731 (8th Cir. 2021) (explaining that "this court has ruled that the statute incorporates the good-faith exception to the exclusionary rule"), *cert. denied*, 142 S. Ct. 819 (2022); *United States v. Reed*, 575 F.3d 900, 917 (9th Cir. 2009)

("suppression in this case would not be warranted, because the Government acted in good faith"), *cert. denied*, 559 U.S. 987 (2010); *United States v. Malekzadeh*, 855 F.2d 1492, 1497 (11th Cir. 1988) (applying good-faith exception to motion to suppress wiretap evidence), *cert. denied*, 489 U.S. 1029 (1989). Although some of those cases also had alternative bases for denying suppression, others—including *Friend* and *Malekzadeh*—turned entirely on the good-faith holding.

This case is an appropriate vehicle to resolve that longstanding circuit split. The prosecutors here acted in objectively reasonable reliance on Or. Rev. Stat. § 133.724(1)(a), which expressly allows a district attorney to delegate the authority to apply for wiretap orders to a deputy district attorney. "Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law." *Krull*, 480 U.S. at 349–50. At the time of the wiretap applications, no controlling precedent made the statute clearly unconstitutional. The prosecutors also acted in objectively reasonable reliance on the state-court orders authorizing the particular wiretaps at issue here. "[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Leon*, 468 U.S. at 922. If good-faith reliance on a state statute or court order is a basis to deny suppression, suppression is inappropriate here regardless how this Court resolves the delegation issue.

2. Title III does not require suppression when law enforcement relied in good faith on statutory authorization.

As most federal courts have recognized, the text and legislative history of Title III support recognizing a good-faith exception. Not all violations of Title III require suppression of evidence received from an otherwise permissible wiretap. *See, e.g.*, *Dahda*, 138 S. Ct. at 1499 (suppression not required when the wiretap order improperly allows interception outside the court's territorial jurisdiction); *United States v. Donovan*, 429 U.S. 413, 435 (1977) (suppression not required when the wiretap application fails to identify all those likely to be overheard); *United States v. Chavez*, 416 U.S. 562, 569 (1974) (suppression not required when the wiretap application and order misidentify the official who authorized the application). Suppression is appropriate only when it would further Congress's intent to limit the use of wiretaps. *See, e.g.*, *Chavez*, 416 U.S. at 575 (misidentification of the approving official is not grounds for suppression because it "did not affect the fulfillment of any of the reviewing or approval functions required by Congress"); *cf. United States v. Ojeda Rios*, 495 U.S. 257, 266–67 (1990) (construing a different suppression provision in Title III, 18 U.S.C. § 2518(8)(a), as not requiring suppression when the government acted in good faith on an "objectively reasonable" misinterpretation of the law).

Here, suppression would not further Congress's purpose in enacting Title III's restrictions on wiretaps. Congress made that clear when it provided

elsewhere in Title III that "good faith reliance" on "statutory authorization" is a "complete defense against any civil or criminal action brought under this chapter or any other law." 18 U.S.C. § 2520(d). Legislative history confirms that understanding. *See* S. Rep. No. 90–1097, at 96, 1968 U.S.C.C.A.N. at 2185 (the bill was not intended "generally to press the scope of the suppression role beyond present search and seizure law"); *United State v. Moore*, 41 F.3d 370, 376 (8th Cir. 1994) (that passage "expresses a clear intent to adopt suppression principles developed in Fourth Amendment cases"), *cert. denied*, 514 U.S. 1121 (1995).[10]

The circuit split on the good-faith question has percolated for a decade and a half and shows no sign of resolving itself. In view of its practical importance to law enforcement and the entrenched conflict about it, the question independently merits this Court's attention.

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[10] The Oregon Supreme Court reasoned that because suppression was required by the delegation violation in *Giordano*, suppression is required here. App. 23a. *Giordano*, however, did not involve reliance on a facially valid statute that expressly authorized the delegation and did not consider the availability of a good-faith exception to suppression. *Giordano*—as most federal courts of appeals that have addressed the question recognize—does not dictate the outcome here.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

Filed: April 28, 2022

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,

Appellant,

v.

LANGSTON AMANI HARRIS,

Respondent.

(CC 20CR28186) (SC S068481)

On appeal from an order of the Washington County Circuit Court under ORS 138.045(1)(d), ORS 138.045(2), and ORAP 12.07.*

Argued and submitted November 2, 2021; resubmitted January 25, 2022.

Benjamin Gutman, Solicitor General, Salem, argued the cause and filed the briefs for appellant. Also on the briefs were Ellen F. Rosenblum, Attorney General, and Jennifer S. Lloyd, Assistant Attorney General.

Kevin Sali, Kevin Sali LLC, Portland, argued the cause and filed the brief for respondent. Also on the brief was John Robb.

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* Janelle F. Wipper, Judge.

Before Walters, Chief Justice, and Balmer, Flynn, Duncan, Nelson, Garrett, and DeHoog, Justices.**

FLYNN, J.

This case involves the state's direct and interlocutory appeal of an omnibus pretrial order granting numerous defense motions to suppress evidence that the state obtained through wiretaps and search warrants. *See* ORS 138.045(1)(d) (authorizing state to appeal from "[a]n order made prior to trial suppressing evidence"); ORS 138.045(2) (specifying that "the state shall take the appeal to the Supreme Court if the defendant is charged with murder or aggravated murder"). The trial court ruled: (1) that the wiretaps violated federal law because the applications did not indicate that the elected district attorney personally was even aware of the applications, and (2) that roughly two dozen search warrants for cell phone data and social media accounts were invalid for multiple reasons, including that the warrants were overbroad and that, after excising from later warrant applications all information derived from the invalid earlier warrant(s), the state lacked probable cause to support the later warrants. We affirm those rulings of the trial court.

I. FACTS

Defendant has been charged with first-degree and second-degree murder, first-degree robbery, promoting prostitution, and other crimes. In this pretrial

** Nakamoto, J., retired December 31, 2021, and did not participate in the decision of this case.

posture, the following facts are undisputed for purposes of this direct appeal.

The murder charges arise from the death of RBH, who was shot outside of his apartment building in the early morning hours of September 20, 2017. RBH had had an argument with his wife the evening before and had left their home to spend the night in his pickup truck. RBH's wife spoke to him about 3:00 a.m., while he was sitting in his truck in the parking lot outside of their building. Officers were called to the scene the next morning and found RBH on the ground near his truck, with a gunshot wound to the head. It appears that the shooting occurred at about 3:30 a.m., based on the report of a neighbor who heard sounds that might have been gunfire and saw a car driving away from where the body was found.

When officers arrived at the scene, they found two cell phones on RBH's body. Although his wife could identify only one cell phone as belonging to RBH, officers eventually determined that the second phone belonged to him as well. With consent from RBH's wife, police obtained a search warrant for the call and text records for the second phone. Through those records, officers identified a phone number, -2494, that had called RBH nine times between 3:13 a.m. and 3:21 a.m. on the morning of the murder. Four of the calls were not completed, another four had gone to voicemail, and the final call had been answered and had lasted over four minutes.

Based on that information, the state applied for a search warrant for records of phone number -2494 from the service provider, T-Mobile. The affidavit

supporting the application explained that the "aforementioned" facts gave rise to probable cause "to believe that evidence of the crimes of Murder (ORS 163.115) and Manslaughter in the First Degree (ORS 163.118)" could be found in the records associated with that phone number because of the repeated calls to [RBH's] phone "minutes before witnesses reported hearing two popping sounds in the area of where [RBH's] body was eventually found." The affidavit explained that

> "[t]he records are going to provide evidence of the crime of murder because the records will help identify people who may be able to provide witness information or details about what was happening or have information about the murder because the calls were so close in time to reports of 'pops' by neighbors."

The affidavit requested a warrant to obtain detailed records for the period from 8:00 a.m. on September 19, 2017, through 8:00 p.m. on September 21, including "location data" for the phone, "details of all voice, message, and data usages (incoming and outgoing)," and "all incoming and/or outgoing SMS and/or MMS messages and related records." The warrant issued on September 22, 2017.

Around the time that officers received records in response to the September 22 warrant for phone number -2494, which the state later linked to defendant, officers learned from an analysis of RBH's phone records that he had exchanged numerous text messages and phone calls in the hour before his death with multiple phone numbers that police linked to

online advertisements for prostitution services. One of these calls to RBH's phone was made at 3:27 a.m., from a phone number linked to prostitution advertisements for a woman named Sterling-Clark.

Relying in part on the additional information from RBH's phone and in part on records obtained in response to the September 22 warrant, officers then sought and obtained orders for the records of multiple additional phone numbers. And those records, in turn, led to still other search warrants. As relevant here, the state would eventually obtain more than twenty additional search warrants directed against defendant based on the information developed from the September 22 warrant. Those additional warrants were primarily for phone numbers, but also included warrants for online accounts, that were owned or used by defendant.

In addition, the state applied for and obtained orders to intercept oral, electronic, and wire communications (wiretaps) for multiple phone numbers allegedly used by defendant, a process that is restricted under federal law. *See* 18 USC §§ 2510-2520 (setting out when state and federal courts may authorize the interception of wire, electronic, and oral communications).

The state's theory of the case, which it expects the evidence will support, is that defendant and Sterling-Clark were part of a prostitution ring operating in Washington County. On the night that RBH was murdered, he had responded to an online ad for prostitution services and had arranged to meet Sterling-Clark. Defendant, who helped arrange the encounter,

drove Sterling-Clark to meet RBH. At some point, defendant and Sterling-Clark decided to rob RBH, who had texted them a picture of a large amount of cash. In the course of the robbery, defendant shot and killed RBH. Later, defendant tried to intimidate Sterling-Clark into concealing his role in the murder.

After being indicted, defendant filed numerous pretrial motions, including motions to suppress evidence intercepted through the wiretaps and obtained through search warrants for cell phone records, beginning with the September 22 warrant. The trial court granted some of defendant's motions to suppress, and the state filed this pretrial appeal pursuant to ORS 138.045(1)(d), (2).

II. DISCUSSION

As described at the outset, the state divides its challenges to the pretrial rulings into two assignments of error. The first assignment of error challenges the grant of defendant's motion to suppress evidence obtained through the wiretap orders on the basis that the applications failed to satisfy the requirements of federal law. The second assignment of error challenges the court's combined ruling granting two dozen motions to suppress evidence derived from search warrants for cell phone records on the basis that each warrant was invalid for multiple alternative reasons. As the facts are undisputed, we review the trial court's rulings on the motions to suppress for legal error. *See State v. Turnidge*, 359 Or 364, 399, 374 P3d 853 (2016). And we conclude that the trial court did not err.

A. *Wiretap Evidence*

1. *Motion to suppress and trial court order*

Defendant sought to suppress the evidence obtained as a result of the four wiretap orders. Federal law—enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), Pub L 90-351, 82 Stat 197 (1968)—restricts in several ways the ability of both state and federal government officials to obtain judicial wiretap orders. Most pertinent to this appeal, the act prohibits all courts, federal and state, from admitting any wiretap evidence obtained in violation of the act in any trial, hearing, or other similar proceeding. 18 USC § 2515; *see also id.* § 2518(10)(a) (setting out procedures for suppression).[1]

The relevant restriction on wiretaps is set out in 18 USC section 2516(2), which provides that wiretap applications at the state level must be made by "[t]he 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[.]"

In this case, all of the challenged applications for wiretaps were made by a deputy district attorney. The applications stated that the deputy district attorney was

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[1] The act also specifies that the permissible use of a wiretap is limited to developing evidence of certain serious offenses, *see* 18 USC § 2516 (listing offenses); that the application for a wiretap must contain prescribed information, *id.* § 2518(1); and the court must make certain findings before granting the order, *id.* § 2518(3). None of those requirements is in dispute here.

> "authorized by District Attorney Robert Hermann for Washington County, Oregon to make this application pursuant to ORS 133.724(1)(a)[.]"

The affidavits provided no further information about the authorization.

In his motion to suppress, defendant argued that the "principal prosecuting attorney" under section 2516(2) is limited to the Attorney General or an elected district attorney and that the district attorney cannot delegate the authority to make wiretap applications. Defendant recognized that Oregon law purports to authorize district attorneys to delegate to a deputy their authority to apply for wiretaps. *See* ORS 133.724(1) (permitting wiretap applications by "the individual who is the district attorney or a deputy district attorney authorized by the district attorney"). But he contended that federal law precludes that delegation of the authority to seek wiretaps. Because the wiretap applications in this case were submitted by a deputy district attorney, without any indication that the elected district attorney even had participated in the process, defendant contended that the wiretap orders were issued in violation of federal law and that the trial court should suppress the wiretap evidence as "unlawfully intercepted." *See* 18 USC § 2518(10)(a)(i) (so providing).

The state did not dispute that the phrase "principal prosecuting attorney" in the federal act refers to the district attorney. It contended, however, that the federal law does not preclude Oregon from permitting district attorneys to delegate their authority to apply

for wiretaps. It also argued in the alternative that, regardless of the validity of the wiretap applications, the evidence should not be suppressed because the state had acted in good faith.

The trial court rejected the state's argument and suppressed the wiretap evidence. It concluded that states are prohibited from creating less restrictive wiretapping requirements than those in section 2516(2). And it concluded that the Oregon statute authorizing delegation, ORS 133.724(1), is less restrictive because it allows delegation to deputy district attorneys to apply for wiretaps. Because in this case "the official responsive to the political process did not indicate that he or she was aware of the wiretap application[s]," the court held that the wiretaps violated federal law. The court concluded that no "good faith exception" applies and that the evidence obtained in response to the wiretaps must be suppressed.

2. *Delegation by "principal prosecuting attorney"*

The issue regarding the wiretap evidence is entirely one of federal law.[2] To determine whether section 2516(2) permits a "principal prosecuting attorney" to delegate authority to a subordinate, we follow the

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[2] The parties do not appear to dispute that ORS 133.724(1) permits Oregon district attorneys to delegate their authority to submit wiretap applications. The state recognizes, however, that the dispositive question is whether federal law prohibits that delegation of authority. *See, e.g.*, *Villa v. Maricopa Cty.*, 865 F3d 1224, 1230 (9th Cir. 2017), *cert. den.*, —— US ——, 138 S Ct 1696 (2018) (citing numerous cases recognizing proposition that federal wiretapping law "sets forth minimum procedural requirements for state and federal orders authorizing wiretapping" and preempts less restrictive state requirements).

methodology prescribed by the federal courts. "Federal courts generally determine the meaning of a statute by examining its text and structure and, if necessary, its legislative history." *Corp. of Presiding Bishop v. City of West Linn*, 338 Or 453, 463, 111 P3d 1123 (2005); *see also City of Eugene v. Comcast of Oregon II, Inc.*, 359 Or 528, 545, 375 P3d 446 (2016) (same).

The text of section 2516(2) authorizes only certain officials to seek court-authorized wiretaps. Specifically, that statute provides that "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof," may apply "to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications," if also authorized to do so "by a statute of that State."

The state does not dispute that, in Oregon, the "principal prosecuting attorney" of a county is the district attorney and not deputy district attorneys. The state nevertheless asserts that, despite textual use of the term "principal prosecuting attorney," the statute is "silent" on whether that officer may delegate authority to apply for a wiretap warrant. The state urges us to understand that "silence" as implicit authorization for the delegation.

We are not convinced. Section 2516(2) sets specific limitations on the officials who are authorized to apply for wiretaps. It does not allow *any* prosecuting attorney to apply, but only a "principal prosecuting attorney." *Id.* Even then, applications by that person must also be expressly authorized by state statute.

See id. (application must be made by an "attorney *** authorized by a statute of that State to make [that] application"). Although the statute may not prohibit delegation in express terms, its specificity implies that prohibition.

Moreover, important context for the meaning of section 2516(2) can be found in the related provision that specifies the *federal* officials who are authorized to make application for wiretaps, section 2516(1), which the Supreme Court has construed as precluding the kind of delegation that the state proposes here. *See United States v. Giordano*, 416 US 505, 94 S Ct 1820, 40 L Ed 2d 341 (1974). Like section 2516(2), section 2516(1) identifies specific officers who are authorized to apply for a wiretap:

> "The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General ***."

(Footnote omitted.) Both provisions were adopted as part of the Omnibus Crime Control and Safe Streets Act of 1968. *See Giordano*, 416 US at 507 (so noting). The Court in *Giordano* concluded that Congress intended section 2516(1) to be a limitation on the power to authorize federal wiretap applications. *Giordano*, 416 US at 514.

The United States in *Giordano* had argued that the Attorney General could permissibly delegate au-

thority to an executive assistant to approve wiretap applications. *Id.* at 512-13. It noted that there were federal statutes expressly vesting all functions of the Department with the Attorney General, who was then authorized to delegate that authority to others. *Id.* at 513.[3]

But the Court rejected that argument. *Id.* at 523. Although acknowledging that section 2516(1) did not expressly prohibit delegation, the Court held that the provision, "fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." *Giordano*, 416 US at 514.

The Court explained that the overall structure of the act showed a congressional intent to limit when wiretaps would be permitted at all. *Id.* at 514-15. Conceding that the statute "is not as clear in some respects as it might be," the Court concluded that it was "at once apparent" that Congress intended to "impose[ ] important preconditions to obtaining any intercept authority at all." *Id.* at 515. "[T]he clear intent [was] to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of

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[3] The Court cited 28 USC sections 509 ("All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General [subject to identified exceptions].") and 510 ("The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General."). *Giordano*, 416 US at 513.

wire and oral communications." *Id.* As regards the officers authorized to apply, the Court explained that "[t]he mature judgment of a *particular, responsible* Department of Justice official is interposed as a *critical precondition* to any judicial order." *Id.* at 515-16 (emphases added).

The Court also examined the extensive legislative history behind the act, which dated back to an original proposal in 1961 that would have allowed the United States Attorney General, as well as the Executive Assistant and any United States Attorney, to apply for a wiretap. *Id.* at 516-22. At that time, the Department of Justice had itself requested "that the authority to approve applications be substantially narrowed so that the Attorney General could delegate his authority only to an Assistant Attorney General." *Id.* at 516. The drafter of the operative text later testified that "'I would not want this equipment used without high level responsible officials passing on it.'" *Id.* at 518 (quoting Hearings on Anti-Crime Program before Subcommittee No. 5 of the House Committee on the Judiciary, 90th Cong, 1st Sess, 1379 (1967) (testimony of Professor G. Robert Blakey)).

The Court also reviewed the relevant sections of the Senate report regarding the act that created section 2516(1). *Giordano*, 416 US at 520 (discussing S Rep 90-1097, 90th Cong, 2d Sess, 96-97, to which we will turn shortly). The Court concluded that that report was "particularly significant in that it not only recognizes that the authority to apply for court orders is to be narrowly confined but also declares that it is to be limited to those responsive to the political process." *Id.*

The Court's conclusion—that Congress intended section 2516(1) to circumscribe the particular federal officials who have the authority to apply for wiretaps—provides significant context for what the same Congress intended to convey by specifying particular state officials in section 2516(2). It supports our conclusion, based on the text of section 2516(2), that Congress intended paragraph (2) to circumscribe the particular state officials who have the authority to apply for wiretaps.

The state contends, however, that a later congressional enactment provides context pointing to a different interpretation of section 2516(2). The provision that the state identifies was added by the 1970 Congress to the Code for the District of Columbia, the codification of general and permanent laws relating to the District. The state under-stands that 1970 law to expressly permit the United States Attorney for the District of Columbia to delegate authority to apply for a wiretap to assistants and to "investigative or law enforcement officer[s]." *See* Pub L 91-358, § 210(a), 84 Stat 473, 616-17, 620 (1970) (codified at DC Code §§ 23-541(11), 23-546(a)). Notably, the District of Columbia is defined as a "state" for purposes of 18 USC section 2516(2). 18 USC § 2510(3). Thus, according to the state, the 1970 Congress' decision to allow delegation of the United States Attorney's wiretapping authority in the District of Columbia suggests that the 1968 Congress intended to permit similar delegation of the wiretapping authority by principal prosecuting attorneys in the 50 states.

The state's proposal, however, extends beyond the inferences that reasonably may be drawn from the

District of Columbia statute. At least with respect to the wiretapping provisions, there is no basis for inferring that the intent of the 1970 Congress can be imputed to the 1968 Congress. As defendant emphasizes, the composition of the two Congresses was different. Moreover, the drafters of the 1970 law identified the delegation provision as one that would "supersede" provisions of the 1968 wiretapping law "in cases of irreconcilable conflict." Pub L 91-358, § 210(a), 84 Stat 627 (DC Code § 23-556(b)). At least one member of Congress described the 1970 legislation as containing "broad and general wiretap authority going far beyond the limited authority of Title III of the 1968 Omnibus Crime Bill[.]" *Crime in the National Capital: Hearings on S. 2601 Before the S. Comm. on the District of Columbia*, 91st Cong 2077 (Mar 23 and Apr 2, 1970) (statement of Senator Ervin).

The state also points to one sentence in the senate report for the 1968 Act, which refers to "[t]he issue of delegation" being "a question of State law." S Rep 90-1097, 90th Cong, 2d Sess, *reprinted in* 1968 USCCAN 2112, 2187. The broader context of the report's discussion of section 2516(2), however, significantly undermines the weight that the state ascribes to the isolated sentence. The report's discussion of section 2516(2) repeatedly emphasizes that the intent of the proposed provision was to centralize authority and restrict who among state officials may apply for wiretaps. The relevant paragraph of the report explains that "[t]he intent of the proposed provision is to provide for the centralization of policy relating to statewide law enforcement in the area of the use of electronic surveillance in the chief prosecuting officer

of the State." *Id*. In those states where the absence of an attorney general (or equivalent) makes it necessary for "policymaking" to "move down to the next level of government," "[t]he intent of the proposed provision is to centralize areawide law enforcement policy in [that officer]." *Id*. And the paragraph concludes that, "[w]here there are both an attorney general and a district attorney, either could authorize applications," but that "[t]he proposed provision does not envision a further breakdown." *Id.*

Those statements of intent to centralize and limit the authority of state officials to pursue wiretaps are similar to the statements of intent to centralize and limit the authority of federal officials that the Court in *Giordano* considered to be so persuasive. *See Giordano*, 416 US at 520 (discussing S Rep 90-1097, 90th Cong, 2d Sess, 96-97). The statements of intent persuaded the Court in *Giordano* that section 2516(1) prohibits the delegation of wiretapping authority beyond the specific officials identified in that section, despite a federal statute that authorized the Attorney General to delegate various other duties. *Id.* at 514, 520. The Court's reasoning persuades us that—just as Congress did not intend that section 2516(1) would permit delegation beyond the specified federal officers—Congress did not intend that section 2516(2) would permit delegation beyond the specified state officials. Consistent with that restriction, Oregon law can authorize "the principal prosecuting attorney" of a political subdivision of the state "to make application," but that is the only delegation of authority that Congress has permitted.

That conclusion should mean that the applications by a deputy district attorney here were not authorized applications for wiretaps. But the state urges us to follow the holdings of some courts from other states and federal districts that have upheld wiretaps despite something less than literal compliance with the application limits of section 2516(2). *See, e.g.*, *State v. Verdugo*, 180 Ariz 180, 183, 883 P2d 417, 420 (Ariz Ct App 1993) (upholding state authorization statute that court concluded "substantially complies" with federal wiretapping statute). The state acknowledges that those decisions are not binding on this court and that the issue is one on which jurisdictions "have not reached a uniform interpretation of section 2516(2)."[4] Nevertheless, the state similarly urges us to allow

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[4] Some courts have interpreted section 2516(2) as strictly limiting authority to apply for wiretaps to the "principal prosecuting attorney." *See, e.g.*, *State v. Bruce*, 295 Kan 1036, 1044, 287 P3d 919, 924-25 (2012) (holding that section 2516(2) "allows no such delegation of wiretap order applications by 'the principal prosecuting attorney of any State' "); *State v. Frink*, 296 Minn 57, 75, 206 NW2d 664, 674 (1973) (rejecting conclusion that assistant county attorney could apply for wiretap, despite state statute generally authorizing assistant county attorney to exercise authority of county attorney; neither state or federal statute "intends that at the county level anyone other than the 'principal prosecuting attorney' *** shall have the power to initiate an electronic surveillance"). Others employ a "substantial compliance" standard that permits only slight deviation from the federal requirements. *See Villa*, 865 F3d at 1233-34 (wiretap application failed to satisfy Arizona's "substantial compliance" standard, although application had been expressly authorized by the Maricopa County Attorney, because the application was made by a deputy and did not state that the County Attorney "was personally familiar with any evidence providing probable cause that would justify a wiretap on any of those numbers or persons").

wiretap applications that comply with the purpose of section 2516(2).

What the state misses in proposing a focus on congressional intent is that, as we have already explained, Congress' purpose in narrowly circumscribing the state and federal officials who may apply for wiretaps was to centralize and limit the exercise of that authority. Even the purpose-driven decisions most favorable to the state do not stray as far from the requirements of section 2516(2) as the state would have us stray; those courts still have required some active involvement on the part of the "principal prosecuting attorney"—by authorizing the particular application, reviewing the merits of the particular application, or both. *See Verdugo*, 180 Ariz at 182-84, 883 P2d at 419-21 (upholding statute that permitted applications by "'such prosecuting attorneys as [the attorney general or the county attorney] may designate in writing,'" and noting that applications had been supported by affidavit of the county attorney); *State v. Marine*, 464 A2d 872, 877-78 (Del 1983) (wiretapping application that was personally authorized by state Attorney General by phone—but signed by a deputy—satisfied the legislative purpose, "the centralization of authorization authority in the Attorney General"); *Commonwealth v. Vitello*, 367 Mass 224, 231-32, 257-58, 327 NE2d 819, 825-26, 839 (1975) (concluding that special designation under state statute comported with section 2516(2) as long as "the district attorney *** [gave] full and fair review of the grounds asserted for seeking a wiretap warrant," did so "on a case by case basis only," and the authority was "specifically granted in writing"); *State*

v. Peterson, 841 P2d 21, 22, 24 n 1 (Utah Ct App 1992) ("Here, the Utah County Attorney prepared a document specifically authorizing Deputy County Attorney Taylor to apply for the wiretap order [of a particular phone], thus fulfilling the requirements of both the federal and state acts").[5]

In this case, we need not decide whether to reject the reasoning that has motivated other courts to conclude that "substantial compliance" with the application requirements of the federal wiretap act is enough, because the wiretap applications in this case fall below even the standards set in the decisions that the state views as persuasive. The most that is shown here regarding involvement of the "principal prosecuting attorney" in the wiretap applications at issue is a generic claim that the Washington County District Attorney had delegated his authority to file wiretap applications. As far as the applications show, the district attorney could have given a blanket oral authorization to all assistant district attorneys to file wiretap applications in any case where they see fit.

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[5] The state also cites *People v. Vespucci*, 75 NY2d 434, 554 NYS2d 417, 553 NE2d 965 (1990), in which the court took a slightly different approach. There, the state statute had authorized wiretap applications by " 'the deputy attorney general in charge of the organized crime task force,' " and the court reasoned that the nature of the state's Organized Crime Task Force made the director a "principal prosecuting attorney" for purposes of section 2516(2). *Vespucci*, 75 NY2d at 438-40, 554 NYS2d at 419-20, 553 NE2d at 967-68 (citation and emphasis omitted). Here, the state has not contended that a deputy district attorney can be considered a "principal prosecuting attorney," and the state identifies no court that has interpreted the term that broadly.

Indeed, the state affirmatively argues that "it is irrelevant whether the district attorney was specifically aware of any particular wiretap application." That is far too similar to the blanket delegation that the Court in *Giordano* refused to authorize. *See United States v. Giordano*, 469 F.2d 522, 524 (4th Cir 1972), *aff'd*, 416 US 505, 94 S Ct 1820, 40 L Ed 2d 341 (1974) (referring to "the 'Alice in Wonderland' world of [United States] Justice Department wiretap applications," in which "neither [Attorney General] Mitchell nor [Assistant Attorney General] Wilson had heard of the *Giordano* application or signed the letters bearing their respective initials and signature").[6] None of the cases identified by the state appears to have approved such open-ended delegation, and it is beyond what even a "substantial compliance" standard would support. The trial court correctly held that the wiretaps in this case were unlawful.

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[6] As the First Circuit stated in *United States v. Smith*, 726 F2d 852, 858 (1st Cir 1984), *cert den*, 469 US 841 (1984), such a blanket delegation would "frustrat[e] the twin congressional objectives of policy uniformity and political accountability, and would constitute an abdication of responsibility." *See also Bruce*, 295 Kan at 1036-37, 1043, 287 P3d at 920, 924 (state attorney general had given assistant attorney general blanket delegation of all authority to make wiretap applications in all cases; court could not "perceive Congress intended that at any given time the number of persons in Kansas who may obtain a wiretap order is limited only by the number of assistant attorneys general and county attorneys in existence at the particular time" (internal quotation marks and citation omitted)).

3. *Whether there is a "good faith" exception to suppression*

The state argues that, regardless of whether the wiretaps were lawful, the trial court erred in suppressing the evidence that the state obtained through those wiretaps. It asks us to conclude that law enforcement had obtained the evidence in good faith reliance on the wiretap warrants and, on that basis, that the evidence should not be suppressed. We reject that argument.

The "good faith" principle on which the state relies is a court-created exception to the court-created rule that evidence obtained in violation of the Fourth Amendment should be excluded. The "good faith" doctrine was first recognized in *United States v. Leon*, 468 US 897, 104 S Ct 3405, 82 L Ed 2d 677 (1984), regarding an invalid search warrant. The Court there held "that the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id*. at 922. The Court premised its creation of a good faith exception on the fact that "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Id*. at 906. It reasoned that "[t]he wrong condemned by the [Fourth] Amendment is fully accomplished by the unlawful search or seizure itself, and the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered." *Id.* (internal quotation marks and citations omitted).

There is no basis for applying the doctrine in the context of a statute that specifically provides for the suppression and exclusion of evidence intercepted through an unlawful wiretap. As noted above, suppression is required by two different provisions of the federal wiretap act. The first is section 2515, which provides, in part:

> "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 *** of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."

The second is section 2518(10)(a), which provides, in part:

> "Any aggrieved person in any trial, hearing, or proceeding in or before any court *** 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[.]"

In addition to those suppression provisions, the law prohibits the intentional disclosure or use of the content of intercepted communications, if the person

knows or has reason to know that they were unlawfully intercepted. 18 USC § 2511(1)(c), (d).

The Court in *Giordano* emphasized that "'unlawfully intercepted'" is "not limited to constitutional violations," and it concluded that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." 416 US at 527 (quoting 18 USC § 2518(10)(a)(i)). The Court also held that, where there is a failure to satisfy the requirement that only the named officials have authority to apply for a wiretap, that failure requires suppression:

> "We are confident that the provision for preapplication approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored."

Id. at 528.

Although *Giordano* predates the Court's adoption of a "good faith" exception to the Fourth Amendment exclusionary rule, *Giordano* remains controlling precedent on the question of whether evidence intercepted through an unlawful wiretap must be suppressed. Moreover, the Court has since reiterated *Giordano*'s holding, albeit in a different context. *Dahda v. United States*, —— US ——, 138 S Ct 1491, 1499, 200 L Ed 2d 842 (2018). Whereas *Giordano* had involved suppression due to a defective wiretap *application* under section 2518(10)(a)(i), in *Dahda*, the Court addressed

suppression under section 2518(10)(a)(ii), which provides for suppression of evidence intercepted through a wiretap *order* that is "insufficient on its face." *Dahda*, —— US ——, 138 S Ct at 1499-1500. Despite recognizing that the suppression requirement under subparagraph (ii) was less rigid than that required for an unlawful application under subparagraph (i), the Court reiterated *Giordano*'s holding that suppression under section 2518(10)(a)(i) was required when "the Government's use of a wiretap *** violates a statutory provision that reflects Congress' core concerns." *Dahda*, —— US ——, 138 S. Ct. at 1498-99.

In summary: We agree with the trial court that the wiretap applications here were not made by an authorized applicant under section 2516(2), and the wiretap orders were, thus, invalid. Given that proper authorization was a core concern of Congress in enacting the federal act and that Congress expressly provided for exclusion of evidence intercepted through an unauthorized application, the trial court correctly granted defendant's motion to suppress the evidence as "unlawfully intercepted" under section 2518(10)(a)(i).

B. *Search Warrants*

1. *Motions to suppress and trial court order*

The state's second assignment of error challenges the court's consolidated ruling that granted "Defense Motions 104, 107-129," all of which sought suppression of evidence obtained from the search warrants for cell phone records. Defendant's motions separately challenged the validity of 24 different search warrants but raised arguments that were common to all.

The earliest warrant that defendant challenged was the September 22 warrant for records related to the -2494 phone number (Defense Motion 104).[7] He argued that the affidavit in support of that warrant failed to establish probable cause and, alternatively, that the warrant lacked specificity and was overbroad. Because of those defects, defendant contended, evidence obtained through the warrant must be excluded from trial and must be stricken from all subsequent warrant applications before the court analyzed defendant's challenges to those later warrants. In his separate motions challenging the later warrants, defendant argued that the affidavits in support failed to establish probable cause, especially once the court struck the evidence that had been unlawfully obtained through the prior warrants. He also argued that the later warrants themselves lacked specificity and were overbroad.

The state filed a consolidated response to defendant's motions to suppress the evidence obtained through the cell phone search warrants ("Omnibus Consolidated Responses to Defense Motions #104-129"). The response did not specifically address defendant's motion 104 regarding the September 22 warrant; it instead asserted generically that all of the search warrants were based on probable cause and were sufficiently specific and not overbroad.

The trial court agreed with defendant and granted the motions to suppress cell phone records. In its

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[7] The earliest warrant that the state obtained was for the records related to RBH's cell phone. Defendant has not challenged that warrant.

written order, the court addressed defendant's "Motions 104, 107-129" under a single heading in which it both described one warrant specifically and ruled on the challenges that were common to all warrants.[8] The court specifically quoted text from the September 22 warrant but noted that the information requested in the other warrants was "substantively the same throughout." The court concluded that each of the warrants amounted to a "general warrant," was "overbroad," and was not supported by "particular facts to support anything more than a suspicion that evidence of the suspected crime(s) would result." The court also specified that its probable cause rulings with respect to later warrants had been based on an evaluation of the affidavits after striking evidence obtained from earlier invalid warrants:

> "Finally, to the extent that affidavits rely on evidence obtained from earlier search warrants that have been suppressed, the court struck that evidence from subsequent affidavits and concludes there is no probable cause to support the warrant."

On appeal, the state argues that all of the warrants were supported by probable cause and were sufficiently specific and that none of the warrants was overbroad.

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[8] The trial court also granted defendant's motions to suppress number 105 and 106, but on a different basis, and that ruling is not before us on appeal.

2. *September 22 warrant*

We begin with the trial court's ruling that the September 22 warrant for records related to the -2494 phone number was invalid and that the evidence obtained must be suppressed and stricken from all later affidavits. Because the trial court struck that information from later search warrant applications and then concluded that the resulting warrants lacked probable cause, and because the later warrants all relied to some extent on evidence obtained from the September 22 warrant, the fall of that warrant was effectively the domino that caused the rest of the chain to fall.[9]

As described above, the affidavit in support of that warrant described the two cell phones on the victim's

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[9] The state asserts in its reply brief that it "does not understand the trial court to have suppressed any evidence obtained from" the September 22 warrant. The state points to a comment in a different trial court ruling that, "after striking the information suppressed from prior search warrants what remains is the evidence from the 1st search warrant," but the "1st search warrant" in this case was the unchallenged warrant for records of RBH's cell phone. Although the "1st search warrant" reference might have been ambiguous in the abstract, the court's written order expressly grants defendant's motion 104, and defendant's motion 104 was directed solely at suppressing the evidence obtained through the September 22 warrant. Indeed, the court's explanation in that ruling for why the warrants were defective quotes the text of the September 22 warrant and simply describes the later warrants as comparable. Thus, it is clear to us that the court suppressed the evidence obtained from the September 22 warrant.

body and recited that one of those phones had been called repeatedly by phone number -2494 over a period of eight minutes close to the time of the murder: four calls that did not connect, four calls that went to voicemail, and a final call that connected and lasted for four minutes. The final call from phone number -2494 had connected to the victim's phone at approximately the same time that a witness had reported hearing "popping sounds" near where the victim's body was found. The affidavit asserted that those facts showed probable cause to believe that records for phone number -2494 "will help identify people who may be able to provide witness information or details about what was happening or have information about the murder." And the affiant asked the court to issue a search warrant to obtain the records for that phone number.

The first part of the resulting search warrant was consistent with the stated probable cause: that is, it directed T-Mobile to provide information relevant to who owned the phone (*e.g.*, subscriber's name, address, date of birth). The warrant went on, however, to request the production of an extensive amount of additional information regarding the -2494 number. For a 60-hour period surrounding the estimated time of the murder—"from 8:00 a.m. (Pacific Coast Time) September 19th, 2017 through 8:00 p.m. (Pacific Coast Time) September 21[st], 2017"—the warrant directed T-Mobile to produce "complete call detail records" of every phone call and text message sent or received by -2494, "including, but not limited to, dates and times of use, duration of use, and the destination and origination numbers"; details of all "data usages"

by -2494 (including the addresses for every website visited); and all "location data including any and all cell site data and GPS location information." As particularly relevant here, the warrant required T-Mobile to produce the content of defendant's communications:

> "Any and all incoming and/or outgoing SMS and/or MMS messages and related records from 8:00 a.m. (Pacific Coast Time) September 19th, 2017 through 8:00 p.m. (Pacific Coast Time) September 21[st], 2017; including all metadata such as date, time, destination phone (or IP) number and origination phone (or IP) number, and geotags (or geographical coordinates)[.]"

The trial court granted suppression of the material obtained through the September 22 warrant under Article I, section 9, of the Oregon Constitution. That section provides:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

This court recently explained that Article I, section 9, imposes an "objective test of whether the government's conduct would significantly impair an individual's interest in freedom from scrutiny, *i.e.*, his privacy." *State v. Mansor*, 363 Or 185, 206-07, 421 P3d 323 (2018) (internal quotation marks omitted). The obli-

gations imposed by Article I, section 9, "must be read in light of the ever-expanding capacity of individuals and the government to gather information by technological means," and accordingly it "applies to every possible form of invasion—physical, electronic, technological, and the like." *Id.* at 207 (internal quotation marks omitted).

The standard for whether a warrant is issued "upon probable cause," Or Const, Art I, § 9, is whether the state has established "an objectively reasonable belief that seizable things will probably be found in the location to be searched," *State v. Foster*, 350 Or 161, 172, 252 P3d 292 (2011). "The test is one of probability, which requires more than mere suspicion or a mere possibility." *Id.* In evaluating probable cause on appeal, we ask whether a neutral magistrate could conclude, based on the facts in the supporting affidavit and the reasonable inferences from those facts, whether there was probable cause. *State v. Castilleja*, 345 Or 255, 265, 192 P3d 1283 (2008).

Although the trial court granted defendant's motion with respect to the September 22 warrant on multiple, alternative bases, the state has never contended that suppression remedy would be different if only one of those bases invalidated the warrant. Thus, it is enough for purposes of this appeal to address only one: the ruling that the warrant was "overbroad." Overbreadth is an aspect of the requirement in Article I, section 9, that warrants issue only "upon probable cause, *** and particularly describing the place to be searched, and the person or thing to be seized." *See Mansor*, 363 Or at 212 (emphasizing that the particularity requirement is informed by the "re-

lated, but distinct, concepts" of specificity and overbreadth). The constitutional requirement means that, "even if the warrant is sufficiently specific, it must not authorize a search that is broader than the supporting affidavit supplies probable cause to justify." *Id*. (internal quotation marks omitted); *see* Wayne R. LaFave, 2 *Search and Seizure* § 4.6(a), 752 (6th ed 2020) ("[A]n otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based."). The probable cause shown by the supporting affidavits, thus, constrains the scope of the lawful search. *See State v. Blackburn/Barber*, 266 Or 28, 34, 511 P2d 381 (1973) (explaining that, if the warrant "makes possible the invasion of [an] interest in privacy without the foundation of probable cause for the search, the warrant is too broad and therefore constitutionally defective").

In this case, the affidavit in support of the September 22 warrant set out precisely the state's asserted probable cause: that the caller was a witness whom the state needed to identify:

> "The records are going to provide evidence of the crime of murder because the records will help identify people who may be able to provide witness information or details about what was happening or have information about the murder because the calls were so close in time to reports of 'pops' by neighbors."

The asserted probable cause—that the person (or people) who called from phone number -2494, at approximately the time that shots might have been

fired, "may be able to provide" information or details relevant to the murder—might support a search of records that would identify the person who made those calls. But the state offers no explanation for how the asserted probable cause justifies a search of the account holder's entire record of cell phone calls, text messages, internet usage, and locations for a period of 60 hours. Nor can we identify a basis to conclude that the invasion of the account-holder's privacy interest in that information is supported by "the foundation of probable cause for the search." *See Blackburn/Barber*, 266 Or at 34. Thus, we agree with the trial court that the search authorized by the September 22 warrant was "broader than the supporting affidavit supplies probable cause to justify." *See Mansor*, 363 Or at 212 (internal quotation marks omitted).

The state also asserts on appeal that the affidavit in support of the September 22 warrant showed probable cause for a reasonable magistrate to conclude that the user of phone -2494 was "involved in the homicide." Among the multiple impediments to that argument is that the premise is not sound. The fact that someone repeatedly tried to reach the victim, and ultimately connected for a short phone conversation, shortly before the victim was shot does not make it probable that the caller was involved in the shooting. And the state does not explain how that evidence establishes an objectively reasonable probability that the caller was *involved in* the murder. At best, that might be a possible explanation for the calls; but possibility is not enough. *See Foster*, 350 Or at 173 (observing that "probable cause is harder to establish

based on observations" that would be "equally or more consistent with innocent circumstances"); *State v. Carter/ Grant*, 316 Or 6, 13, 848 P2d 599 (1993) ("Probable cause is necessary to support a warrant, not merely one possibility, among many.").

We therefore agree with the trial court: The September 22 warrant was overbroad.

3. *Partial suppression as remedy for September 22 warrant*

As a form of alternative argument, the state contends that some of the evidence obtained through the unlawful search warrant should not have been suppressed because defendant lacked a protected privacy interest in at least some of the "third-party" records that the state obtained. According to the state, defendant had a protected privacy interest only in some location data and in the contents of messages on his account. Under that theory, the remaining records could have been lawfully obtained from the cell phone service without a warrant and, thus, should not have been suppressed. As pertinent to our analysis of the September 22 warrant, the state's theory of partial suppression—limited to the evidence in which defendant had a protected privacy interest—would require the trial court to reevaluate which facts must be excised from the later warrant affidavits and reevaluate whether the affidavits, as modified, establish probable cause to support the warrants.

Defendant disagrees with the state's "third-party" reasoning. According to defendant, the principles that govern a person's privacy interest in information con-

tained on a cell phone apply equally when that information is maintained by a cell phone service.

We need not resolve in this case the parties' dispute over the extent of defendant's protected privacy interest, because the state's alternative argument for partial suppression is unpreserved. And we decline to undertake in the first instance the kind of parsing of information obtained through the warrant that the state now seeks with its alternative argument. As indicated above, the state filed a consolidated response to all defendant's motions to suppress the warrants at issue here. In it, the state asserted that the supporting affidavits for the warrants established probable cause; that the warrants themselves described with sufficient particularity the items to be seized; and that the warrants were narrowly tailored so as not to exceed the probable cause shown. The state did not separately address defendant's motion to suppress evidence obtained through the September 22 warrant—either to explain why the breadth of the warrant was supported by probable cause or to identify the records that the state believed it could have obtained without a warrant.

To the extent that the state addressed the scope of protected privacy interests with respect to any of the search warrants, it made a generic statement that the *enhanced* privacy interests that apply to the data stored on personal electronic devices do not extend to "records and data stored with third-parties," but it acknowledged that this court has "suggested" that "a customer has a constitutionally protected privacy right in the contents of his or her past communications," even if "stored and kept with a service provid-

er." Those arguments did not address which of the individual categories of evidence sought by the September 22 warrant—or by any of the other search warrants—was information in which defendant lacked a protected privacy interest. Nor did the state identify which pieces of information it believed it could have obtained without the September 22 warrant. And it did not explain how the analysis of probable cause for the later warrants would be different if some of the information obtained through the September 22 warrant could have been lawfully obtained without a warrant.

In other words, the state litigated the motions to suppress on an all-or-nothing basis. It did not argue that the court should deny the motion to suppress only in part even if the court agreed with defendant's challenge to the warrant. Under the circumstances, the state did not preserve its argument that the trial court should have suppressed only some—but not all—of the evidence obtained unlawfully. *See State v. Jones*, 339 Or 438, 441, 121 P3d 657 (2005) (when "the state did not argue to the trial court that differing circumstances surrounding each interview provided separate grounds for admitting the evidence pertaining to each interview," state had failed "to preserve for appeal any alternative argument supporting the admissibility of any part of the evidence"); *see also State v. Sarich*, 352 Or 601, 618, 291 P3d 647 (2012) (explaining that, "when a party offers evidence as a whole and the evidence is rejected by the trial court, the appellate court will affirm the trial court's ruling if any part of the evidence is inadmissible"). Before us, the state does not dispute that it obtained

at least some information in which defendant had a protected privacy interest through the overbroad September 22 warrant. *See State v. Johnson*, 340 Or 319, 336, 131 P3d 173 (2006) ("Defendant clearly had a cognizable privacy interest in the *content* of his telephone calls." (Emphasis in original.)). Thus, the trial court correctly granted defendant's motion to suppress evidence obtained through the overbroad September 22 warrant, and we decline to consider whether the state might have been entitled to have the motion denied in part. Accordingly, we conclude that the trial court did not err in suppressing the entirety of the evidence obtained from the September 22 warrant.

4. *Later warrants*

Our conclusion that we must affirm the trial court's suppression of all evidence obtained through the overbroad September 22 warrant cascades into our analysis of the rest of the search warrants at issue here. The state relied on evidence obtained through the September 22 warrant to obtain the next round of warrants a few days later, and then continued to rely on the evidence derived from the September 22 warrant to obtain each subsequent warrant that defendant challenged. In its ruling, the trial court expressly found that,

> "to the extent that affidavits [for later search warrants] rely on evidence obtained from earlier search warrants that have been suppressed, the court struck that evidence from subsequent affidavits and concludes there is no probable cause to support the warrant."

The state has not challenged that conclusion, except in challenging the court's underlying conclusion that the evidence obtained with the earlier warrants must be suppressed. The state, for example, did not (and does not) argue that the affidavits for any of the later suppressed search warrant established probable cause *even after* excising the evidence that the state unlawfully obtained from the overbroad September 22 warrant and those warrants that relied on that evidence to establish probable cause. And the state did not (and does not) make an argument of that type with respect to any of the subsequent affidavits that the state relied on to obtain the subsequent search warrants. Thus, the court did not err in concluding that the 23 subsequent search warrants were not supported by probable cause, after excising from the supporting affidavits evidence that the state derived from the unlawful September 22 search.

In summary: We conclude that the trial court did not err in determining the September 22 T-Mobile warrant to be overly broad. Because the state now concedes that at least some of the information it obtained required a valid warrant, and because the state did not preserve its alternative argument that that evidence should have been suppressed only in part, we conclude that the trial court did not err in suppressing all of the evidence obtained with the warrant. We also conclude that the trial court did not err in granting defendant's motions to suppress evidence obtained through the remaining 23 search warrants, which lacked probable cause once the information derived from the September 22 warrant had been excised.

III. CONCLUSION

For the foregoing reasons, we affirm the challenged rulings by the trial court.

The order of the circuit court is affirmed.

APPENDIX B

IN THE CIRCUIT COURT FOR THE STATE OF OREGON FOR THE COUNTY OF WASHINGTON

STATE OF OREGON,

Plaintiff,

vs.

LANGSTON AMANI HARRIS,

Defendant.

Case No: 20CR28186

ORDER FROM OMNIBUS HEARING

THIS MATTER came before the Court for an Omnibus hearing on March 9-11, 2021. Appearing for the State was Senior Deputy District Attorney John Gerhard and Deputy District Attorney Rayney Meisel. Defendant Langston Amani Harris appeared in person, in custody, with Counsel John Robb and Kevin Sali. The court hear evidence, reviewed the parties motions and replies and heard argument from the parties, and now being fully apprised of the matter rules as follows: Arguments concerning the Defendant's Constitutional Rights under the Oregon State Constitution and the United States Constitution were duly considered in the court's ruling, and unless specifically addressed below, the court does not find that any of the defendant's constitutional rights are unduly infringed upon in making the court's rulings.

THE COURT FINDS:

DEFENSE MOTION 101- FIRST MOTION TO SUPPRESS WIRETAP EVIDENCE

GRANTED. States are prohibited from creating less restrictive laws than 18 USC § 2516(2). ORS 133.174(1) is a less restrictive statute allowing an elected district attorney or the principal prosecuting attorney to delegate authority to deputy district attorneys or assistant attorney generals to apply for wiretap applications. *U.S. v. Giordano*, 416 US 505 (1974); *Villa v. Maricopa* 865 F3rd 1224 (2017). In this case, because the office responsive to the political process did not indicate that he or she was aware of the wiretap application, the evidence gained in response to the wiretaps are suppressed.

The good faith exception does not apply to this situation.

DEFENSE 102 – SECOND MOTION TO SUPPRESS WIRETAP EVIDENCE

DENIED. ORS 133.724(3) allows for a judge to approve interception within the State of Oregon therefore the court finds there is no jurisdiction violation. All necessary language is contained within the order specifying the time of 2pm on the day the wiretap order was signed. ORS 133.724(1)(c)(A) includes "other crime dangerous to life and punishable as a felony" therefore all crimes in the wiretap applications are covered if the court finds probable cause. As defined by caselaw[1], a good faith effort to minimize was made by the officers who monitored the calls.

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[1] *Scott v. U.S.*, 436 U.S. 128 (1978).

Once information is stricken from warrants that are suppressed, the remaining information still established probable cause for wiretap for TTA or target telephone A, belonging to Langston Harris only. Necessity was also established in the application.

DEFENSE MOTION 103- MOTION TO SUPPRESS EVIDENCE ARISING OUT OF NOVEMBER 17, 2016 SEIZURES

DENIED. The defendant was stopped on November 17, 2016 by Portland Police. The officers had specific and articulable facts that the defendant may have committed a crime that were objectively and subjectively reasonable under the totality of the circumstances. Sgt Kim Hubbard testified that she stopped the car where defendant was a passenger based on these articulable facts: black male, late twenties, hair style (braids or dreadlocks), area of stop and approximately 11 mins after the shooting at the food cart area on MILK Blvd. The court further finds that the stop was approximately two blocks from the-shooting and that witnesses reported that the shooter had gone into the Mallory Apts. Defendant was first spotted at the intersection of Mallory and Fremont.

DEFENSE MOTION 105 & 106- MOTION TO SUPPRESS 18 USC 2703(d) SEARCH OF TELEPHONE x5882, x7431

GRANTED. The information related to location data is suppressed as it was not obtained pursuant to a search warrant. *Carpenter v. U. S.*, 585 US 138 S. Ct 2206 (2018). As to the remaining information obtained the court does not find that the remaining in-

formation would have been inevitably discovered via subsequent search warrants.

DEFENSE MOTIONS 104, 107- 129

GRANTED. Case law has drastically changed since these warrants were issued. Just this week, in *State v. Bock*, 310 Or App 329 (2021) the court of appeals specifically addressed the issue of warranted cell phone searches. The warrant in that case sought to search a cell phone that was found in car related to the crime for which they were investigating. That search warrant asked for these things:

- (1) Any evidence identifying the owner/user of the device.
- (2) Any records of communication sent or received by [defendant] between 05/26/17 and 05/27/17.
- Any location information for the device between 05/26/17 and 05/27/17.
- Any other evidence related to the investigation of Attempted Murder... Attempted Assault I...Assault II...[2]

In *Bock*, the court said the particularity requirement prohibits general warrants. *Id.* at 333. Particularity is made up of two distinct components: specificity and particularity. *Id. citing State v. Friddle*, 281 Or App 130, 137 (2016). An electronic search warrant must describe with as much specificity as reasonably possible under the circumstances, the information related to the alleged criminal conduct which there is

[2] *Id* at 332.

probable cause to believe will be found on the computer. *State v. Bock*, at 333, 334 *citing State v. Mansor*, 363 Or 185 (2018). The court goes on to say that "any interpretation of the search command broad enough to permit the use of any material discovered on the cell phone relevant to establish the device owner or user's identity is impermissibly nonspecific. A warrant without clear limitations on the material subject to search and seizure requires the executing officer to employ discretion in deciding what to search or seize". *Id*. The court also says "a warrant that authorizes-seizure of any item on a cell phone that might later serve as circumstantial evidence of the device owner or user is tantamount to a general warrant. *Id* at 335. The court also found that a warrant authorizing a search for all evidence relating to various crimes or offense is invalid. *Id* at 335-336. Finally, the court finds that evidence from these broad searches on electronic devices are not saved by the plain view doctrine. *Id*. At 337.

The warrant(s) in this case ask to seize, review and examine the following:

- A description of the nature of any associated accounts as well as any account - identification or reference numbers;
- The subscriber's (or subscribers') full names(s);
- The subscriber's (or subscribers') date of birth(s);
- The subscriber's (or subscriber's) address(es);

• The subscriber's (or subscribers') telephone number(s);

• The subscriber (or subscribers') billing or payment information (including, but not limited to, the type and number of credit or bank cards, financial account information, identification numbers, date service was initiated, and current status of account);

• The subscriber's (or subscribers') complete call detail records (voice, message, & data) from 8:00 am (Pacific Coast Time) September 19th ,2017 through 8:00 pm (Pacific Coast Time) September 21st, 2017[3] - listing details of all voice, message, -and data usages (incoming and outgoing) including, but not limited to, dates and times of use, duration of use, and the destination and origination numbers (or IP Addresses) for all incoming and outgoing voice, messages, and data uses.

• Any and all incoming and/or outgoing SMS and/or MMS messages and related records from 8:00 am (Pacific Coast Time) September 19th, 2017 through 8:00 pm (Pacific Coast Time) September 21st,2017; including all metadata such as date, time, destination phone (or IP) number and origination phone (or IP) number, and geotags (or geographical coordinates);

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[3] The dates change depending on the warrant, but the rest of the requested information requested is substantively the same throughout the warrants.

• Any location data including any and all cell site data and GPS location information maintained by the cellular service provider for any records, data, or files associated with the aforementioned accounts and/or subscribers including the related date and time such information was collected from 8:00 am (Pacific Coast Time) September 19th, 2017 through 8:00 pm (Pacific Coast Time) September 21st, 2017;

• Cell site & sector (physical address) information and GPS (geographical) Coordinates for any in information or communications with T-Mobile network by the subscriber(s)'s of the aforementioned accounts along with date and time of such communication's from 8:00 am (Pacific Coast Time) September Lgth,2017 through 8:00 pm (Pacific Coast Time) September 21st, 2017;

• The live location or GPS positioning of the cellular phone associated with TMobile phone number 503-442-2494 starting at the time of receipt of this search warrant by T-Mobile and lasting through12:00 am on (Thursday) September 28th, 2017.

• An engineering map showing all cell site tower locations, sectors, and orientations as it pertains to the requested and produced records; AND

• Any other evidence of the crimes of Murder (O.R.S. 163.115) and Manslaughter in the First degree (O.R.S. 163.118).

> One or more of the objects of the search and seizure requested for this search warrant relate to an offense triable within this judicial district (or Washington County, Oregon)

In addition, search warrant affidavits must assert more than a suspicion, but a probability that the evidence sought will be contained in the item to be searched. See *State v. Friddle*, 281 Or App 130, 139 (2016) *citing State v. Williams*, 270 Or App 721 (2015) (not merely a suspicion but a probability (more likely than not) that examination of the contents of those devices would disclose evidence of the alleged (crime)). An affidavit that suggests that evidence is there, is not enough. *State v. Marmom*, 303 Or App 469 (2020) In addition, officers need to show that their experience relates to the evidence sought. *State v. Daniels*, 234 Or App 533 (2010) (officers' training and experience must be relevant to proving particular circumstances, it is not presumed based solely upon a police officer's employment status). The affidavit must be more than general assertions that evidence will be on the phones. *State v. Hernandez* ,308 Or App 783 *citing Williams*, 270 Or App 721, 727 (2021).

In this case, the court concludes that the warrants) for cell phone records amounted to a general warrant. The court further finds that the affidavits rely on general statements of the officers "training and experience" to support the warrants for such crimes as prostitution enterprises, and the racketeering statute to support that idea that the evidence sought will in the phone records, email addresses, Facebook records, bank records etc. The court did not find any particular facts to support anything more

than a suspicion that evidence of the suspected crime(s) would result. In addition, the court grants the motion based on the warrants being overbroad. Finally, to the extent that affidavits rely on evidence obtained from earlier search warrants that have been suppressed, the court stuck that evidence from subsequent affidavits and concludes there is no probable cause to support the warrant.

DEFENSE MOTION 130 - — MOTION TO SUPPRESS ORS 165.663 PR/TT ORDER; 18 USC 2703(d) ORDER FOR TRANSACTIONAL RECORDS; AND SEARCH OF LOCATION INFORMATION OF TELEPHONE X1164

DENIED. The court finds, that after striking the information suppressed from prior search warrants what remains is the evidence from the 1st search warrant, the evidence from the November 17, 2016 stop, and the phone number received from defendant's probation officer to support probable cause to allow the PR/TT Order and Search Warrant for this phone number.

DEFENSE MOTION 131- MOTION TO EXCLUDE WIRETAP EVIDENCE

Ruling on this motion deferred to the second Omnibus hearing.

DEFENSE MOTION 132- MOTION TO COMPEL

The court relies upon the parties to comply with the law, including all rules of discovery. The court expects that the parties will raise timely and specific objections if the need arises.

DEFENSE MOTION 133- MOTION TO DISCLOSE AMENDMENTS TO STATEMENTS

The court relies upon the parties to comply with the law, including all rules of discovery. The court expects that the parties will raise timely and specific objections if the need arises.

DEFENSE MOTION 134- MOTION TO EXCLUDE INADMISSIBLE HEARSAY

The court relies upon the parties to comply with the law. The court expects that the parties will raise timely and specific objections if the need arises.

DEFENSE MOTION 135- MOTION IN MINE TO REQUIRE PROSECUTOR TO IDENTIFY "NON-HEARSAY" STATEMENTS BEFORE ELICITING THEM

DENIED. The State should, however, notify the court and the defendant during the trial when it will seek to admit a declarant's out of court testimonial statements fora non-hearsay purpose when that statement also implicates the defendant. The State should provide enough notice for the defendant to make an objection and request a ruling or hearing outside the presence of the jury.

DEFENSE MOTION 136 - MOTION TO SUPPRESS. STATEMENTS

DENIED. Interview at the Probation Office: The defendant was read his Miranda rights He acknowledged his rights. Statements made before invoking

Miranda Rights admissible. Anything after Miranda rights invoked are suppressed.

Interview at Washington County Jail: Defendant called Detective Gilbert from the jail and asked him to come to the jail to talk to him about his case and without his lawyer present. This was at defendant's invitation. Miranda rights were again read to defendant at the jail and subsequent to the defendant acknowledging his Miranda rights, defendant did not invoke his rights. Court finds that statements made to defendant's dad regarding wanting to set a future date to talk does not invalidate his future request to have Detective Gilbert come to jail and talk to him.

DEFENSE MOTION 137 - MOTION. TO EXCLUDE EVIDENCE REGARDING ALLEGED PRIOR ACTS

The court deferrers, ruling on this motion till the second hearing on this matter.

DEFENSE MOTION 138 - MOTION CHALLENGING JURY POOL AND SEEKING JURY RECORDS

Ruling on this motion is deferred.

DEFENSE MOTION 139 - MOTION FOR DISCOVERY OF PROSECUTORIAL INFORMATION OF PROSPECTIVE JURORS

DENIED. The court finds that the Defendant has considerable resources available in this case. Both parties shall receive information on prospective jurors as provided by the jury questionnaires.

DEFENSE MOTION 140- MOTION FOR SEPARATE AND INDIVIDUAL VOIR DIRE

DENIED. Juror selection will proceed in small groups to be determined by the court at a later date.

DEFENSE MOTION 141- MOTION TO MODIFY UCJ11320 TO STRIKE REFERENCE TO "PRESIDING JUROR"

DENIED. The court will follow UCJI 1320.

DEFENSE MOTION 142- MOTION TO HAVE WRITTEN JURY INSTRUCTIONS

GRANTED.

DEFENSE MOTION 143- MOTION IN LIMINE TO PREVENT ALL PARTIES FROM REFERRING TO DECEASED AS "VICTIM" AND DEATH AS "MURDER."

DENIED. The court finds that the use of these words is appropriate and supported by the United States and Oregon Constitutions and Oregon Statues. Use of these words in their legal context will not cause any undue prejudice to the Defendant.

DEFENSE MOTION 144- MOTION IN HAHNE TO EXCLUDE OR LIMIT GRAPHIC EVIDENCE OF INJURIES

DENIED at this time. Under OEC 402, relevant evidence is admissible, and the court would need to make further determinations based upon OEC 403.

DEFENSE MOTION 145 - MOTION IN LIM1NE TO PRECLUDE THE STATE FROM DESIGNATING A REPRESENTATIVE TO BE PRESENT IN THE COURTROOM DURING TRIAL

Pursuant to OEC 615(2) the court denies Defendant's Motion and grants States motion to designate Detective Pat Brady as the state's representative for the duration of the trial. The court will further allow the defense investigator to also be present for the trial.

DEFENSE MOTION 146- MOTION TO EXCLUDE WITNESSES

GRANTED, subject to the exception for victims, and the states representative under ORE 615(2) and the defense investigator. This motion applies equally to both the State and Defendant.

DEFENSE MOTION 147- MOTION TO DISALLOW IMPROPER OPINION TESTIMONY FROM STATE WITNESSES

The court relies upon the parties to comply with the law, including the rules of evidence. The court expects that the parties will raise timely and specific objections if the need arises.

DEFENSE MOTION 148- MOTION TO EXCLUDE VICTIM IMPACT EVIDENCE FROM CULPABILITY PHASE OF TRIAL

DENIED. The court relies upon the parties to comply with the law, including all rules of evidence. The court expects that the parties will raise timely and specific objections if the need arises.

DEFENSE MOTION 149- MOTION TO COMPEL GRAND JURY RECORDS

DENIED. Defendant may renew this motion if necessary, at trial.

DEFENSE MOTION 150- MOTION TO LIMIT STATE TO ONE CLOSING ARGUMENT OR TO ALLOW DEFENSE TWO CLOSING ARGUMENTS

DENIED.

DEFENSE MOTION 151- MOTION TO REQUIRE PROSECUTION TO DECLARE AND ELECT AGGRAVATING EVIDENCE IN ADVANCE OF TRIAL

DENIED. Defendant requests that the State declare and elect aggravating evidence for purposes of a potential sentencing hearing in advance of trial. Defendant is allowed to request reconsideration of the issue requested pretrial at the time of any sentencing proceeding.

DEFENSE MOTION 152- MOTION TO FIND ACQUITAL FIRST JURY INSTRUCTION UNCONSTITUTIONAL AND TO PROHIBIT ITS APPLICATION

DENIED. ORS 136.460 and the UCrJI are not unconstitutional as applied to this Defendant and his criminal case. The court finds that the statute does not alter any legal rule of evidence or alter the type or amount of evidence to be received at trial. The pur-

pose of the statute is to direct the order of jury deliberation.

DEFENSE MOTION 153- MOTION FOR FULL AND ADEQUATE CROSS EXAMINATION OF WITNESSES; MOTION TO COMPEL WITNESS INFORMATION

The court will defer ruling on this motion.

DEFENSE MOTION 154- MOTION TO DISALLOW ALL REFERENCES TO GUILT PHASE

The court directs the parties to use the terms "Trial Phase" and "Sentencing Phase."

DEFENSE MOTION 155- MOTION TO PRECLUDE A SENTENCE IN THIS CASE OF MORE THAN LIFE WITH A 30 YEAR MINIMUM

Provisionally denied. The court intends to allow the State to submit the enhancement factors to the jury, unless Defendant waives his right to a jury finding. The court finds that notice was proper to the Defendant.

DEFENSE MOTION 156 & 157- MOTION TO DETERMINE CROSS- ADMISSIBILITY OF EVIDENCE, MOTION TO SEVER

DENIED. Defendant has not met its burden that substantial prejudice will result if cross admissibility of evidence would come into this case. Defendant may ask for limited instructions.

STATE'S MOTION 1- MOTION IN LIMINE FOR COURT FINDING. GRAND JURY TESTIMONY ADMISSIBLE AS SUBSTANTIVE EVIDENCE.

The court deferrers ruling on this motion till the trial.

4/2/21 /s/ Janelle Factora Wipper
Janelle Factor Wipper
Circuit Court Judge

APPENDIX C

18 U.S.C. § 2515 provides:

> **§ 2515. Prohibition of use as evidence of intercepted wire or oral communications**
>
> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2516 provides:

> **§ 2516. Authorization for interception of wire, oral, or electronic communications**
>
> (1) The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division or National Security Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception

of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—

(a) any offense punishable by death or by imprisonment for more than one year under sections 2122 and 2274 through 2277 of title 42 of the United States Code (relating to the enforcement of the Atomic Energy Act of 1954), section 2284 of title 42 of the United States Code (relating to sabotage of nuclear facilities or fuel), or under the following chapters of this title: chapter 10 (relating to biological weapons), chapter 37 (relating to espionage), chapter 55 (relating to kidnapping), chapter 90 (relating to protection of trade secrets), chapter 105 (relating to sabotage), chapter 115 (relating to treason), chapter 102 (relating to riots), chapter 65 (relating to malicious mischief), chapter 111 (relating to destruction of vessels), or chapter 81 (relating to piracy);

(b) a violation of section 186 or section 501(c) of title 29, United States Code (dealing with restrictions on payments and loans to labor organizations), or any offense which involves murder, kidnapping, robbery, or extortion, and which is punishable under this title;

(c) any offense which is punishable under the following sections of this title: section 37 (relating to violence at international airports), section 43 (relating to animal enterprise terrorism), section 81 (arson within special maritime and territorial jurisdiction), section 201 (bribery of public officials and witnesses), section 215 (relating to bribery of bank officials), section 224 (bribery in sporting contests), subsection (d), (e), (f), (g), (h), or (i) of section 844 (unlawful use of explosives), section 1032 (relating to concealment of assets), section 1084 (transmission of wagering information), section 751 (relating to escape), section 832 (relating to nuclear and weapons of mass destruction threats), section 842 (relating to explosive materials), section 930 (relating to possession of weapons in Federal facilities), section 1014 (relating to loans and credit applications generally; renewals and discounts), section 1114 (relating to officers and employees of the United States), section 1116 (relating to protection of foreign officials), sections 1503, 1512, and 1513 (influencing or injuring an officer, juror, or witness generally), section 1510 (obstruction of criminal investigations), section 1511 (obstruction of State or local law enforcement), section 1581 (peonage), section 1582 (vessels for slave trade), section 1583 (enticement into slavery), section 1584 (involuntary servitude), section 1585 (seizure, detention,

transportation or sale of slaves), section 1586 (service on vessels in slave trade), section 1587 (possession of slaves aboard vessel), section 1588 (transportation of slaves from United States), section 1589 (forced labor), section 1590 (trafficking with respect to peonage, slavery, involuntary servitude, or forced labor), section 1591 (sex trafficking of children by force, fraud, or coercion), section 1592 (unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labor), section 1751 (Presidential and Presidential staff assassination, kidnapping, and assault), section 1951 (interference with commerce by threats or violence), section 1952 (interstate and foreign travel or transportation in aid of racketeering enterprises), section 1958 (relating to use of interstate commerce facilities in the commission of murder for hire), section 1959 (relating to violent crimes in aid of racketeering activity), section 1954 (offer, acceptance, or solicitation to influence operations of employee benefit plan), section 1955 (prohibition of business enterprises of gambling), section 1956 (laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 659 (theft from interstate shipment), section 664 (embezzlement from pension and welfare funds), section 1343 (fraud by

wire, radio, or television), section 1344 (relating to bank fraud), section 1992 (relating to terrorist attacks against mass transportation), sections 2251 and 2252 (sexual exploitation of children), section 2251A (selling or buying of children), section 2252A (relating to material constituting or containing child pornography), section 1466A (relating to child obscenity), section 2260 (production of sexually explicit depictions of a minor for importation into the United States), sections 2421, 2422, 2423, and 2425 (relating to transportation for illegal sexual activity and related crimes), sections 2312, 2313, 2314, and 2315 (interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), section 2340A (relating to torture), section 1203 (relating to hostage taking), section 1029 (relating to fraud and related activity in connection with access devices), section 3146 (relating to penalty for failure to appear), section 3521(b)(3) (relating to witness relocation and assistance), section 32 (relating to destruction of aircraft or aircraft facilities), section 38 (relating to aircraft parts fraud), section 1963 (violations with respect to racketeer influenced and corrupt organizations), section 115 (relating to threatening or retaliating against a Federal official), section 1341 (relating to mail fraud), a felony violation of section 1030 (relating to

computer fraud and abuse), section 351 (violations with respect to congressional, Cabinet, or Supreme Court assassinations, kidnapping, and assault), section 831 (relating to prohibited transactions involving nuclear materials), section 33 (relating to destruction of motor vehicles or motor vehicle facilities), section 175 (relating to biological weapons), section 175c (relating to variola virus), section 956 (conspiracy to harm persons or property overseas), a felony violation of section 1028 (relating to production of false identification documentation), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), section 1541 (relating to passport issuance without authority), section 1542 (relating to false statements in passport applications), section 1543 (relating to forgery or false use of passports), section 1544 (relating to misuse of passports), section 1546 (relating to fraud and misuse of visas, permits, and other documents), or section 555 (relating to construction or use of international border tunnels);

(d) any offense involving counterfeiting punishable under section 471, 472, or 473 of this title;

(e) any offense involving fraud connected with a case under title 11 or the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs, punishable under any law of the United States;

(f) any offense including extortionate credit transactions under sections 892, 893, or 894 of this title;

(g) a violation of section 5322 of title 31, United States Code (dealing with the reporting of currency transactions), or section 5324 of title 31, United States Code (relating to structuring transactions to evade reporting requirement prohibited);

(h) any felony violation of sections 2511 and 2512 (relating to interception and disclosure of certain communications and to certain intercepting devices) of this title;

(i) any felony violation of chapter 71 (relating to obscenity) of this title;

(j) any violation of section 60123(b) (relating to destruction of a natural gas pipeline), section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with dangerous weapon), or section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life, by means of weapons on aircraft) of title 49;

(k) any criminal violation of section 2778 of title 22 (relating to the Arms Export Control Act);

(l) the location of any fugitive from justice from an offense described in this section;

(m) a violation of section 274, 277, or 278 of the Immigration and Nationality Act (8 U.S.C. 1324, 1327, or 1328) (relating to the smuggling of aliens);

(n) any felony violation of sections 922 and 924 of title 18, United States Code (relating to firearms);

(o) any violation of section 5861 of the Internal Revenue Code of 1986 (relating to firearms);

(p) a felony violation of section 1028 (relating to production of false identification documents), section 1542 (relating to false statements in passport applications), section 1546 (relating to fraud and misuse of visas, permits, and other documents), section 1028A (relating to aggravated identity theft) of this title or a violation of section 274, 277, or 278 of the Immigration and Nationality Act (relating to the smuggling of aliens); or

(q) any criminal violation of section 229 (relating to chemical weapons) or section 2332, 2332a, 2332b, 2332d, 2332f, 2332g, 2332h [3] 2339, 2339A, 2339B, 2339C, or 2339D of this title (relating to terrorism);

(r) any criminal violation of section 1 (relating to illegal restraints of trade or commerce), 2 (relating to illegal monopolizing of trade or commerce), or 3 (relating to illegal restraints of trade or commerce in territories or the District of Columbia) of the Sherman Act (15 U.S.C. 1, 2, 3);

(s) any violation of section 670 (relating to theft of medical products);

(t) any violation of the Export Control Reform Act of 2018; or

(u) any conspiracy to commit any offense described in any subparagraph of this paragraph.

(2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable State statute an order authorizing, or approving the interception of wire, oral, or electronic communications by investigative or law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of the offense of mur-

der, 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.

(3) Any attorney for the Government (as such term is defined for the purposes of the Federal Rules of Criminal Procedure) may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant, in conformity with section 2518 of this title, an order authorizing or approving the interception of electronic communications by an investigative or law enforcement officer 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 any Federal felony.

18 U.S.C. § 2518 provides:

§ 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 de-

scription 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 lan-

guage 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 or-

ders 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.

18 U.S.C. § 2520 provides:

§ 2520. Recovery of civil damages authorized

(a) IN GENERAL.—Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

(b) RELIEF.—In an action under this section, appropriate relief includes—

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) COMPUTATION OF DAMAGES.—

(1) In an action under this section, if the conduct in violation of this chapter is the private viewing of a private satellite video communication that is not scrambled or encrypted or if the communication is a radio communication that is transmitted on frequencies allocated under subpart D of part 74 of the rules of the Federal Communications Commission that is not scrambled or encrypted and the conduct is not for a tortious or illegal purpose or for purposes of direct or indirect commercial advantage or private commercial gain, then the court shall assess damages as follows:

(A) If the person who engaged in that conduct has not previously been enjoined under section 2511(5) and has not been found liable in a prior civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory

damages of not less than $50 and not more than $500.

(B) If, on one prior occasion, the person who engaged in that conduct has been enjoined under section 2511(5) or has been found liable in a civil action under this section, the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than $100 and not more than $1000.

(2) In any other action under this section, the court may assess as damages whichever is the greater of—

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

(d) DEFENSE.—A good faith reliance on—

(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization;

(2) a request of an investigative or law enforcement officer under section 2518(7) of this title; or

(3) a good faith determination that section 2511(3), 2511(2)(i), or 2511(2)(j) of this title

permitted the conduct complained of; is a complete defense against any civil or criminal action brought under this chapter or any other law.

(e) LIMITATION.—A civil action under this section may not be commenced later than two years after the date upon which the claimant first has a reasonable opportunity to discover the violation.

(f) ADMINISTRATIVE DISCIPLINE.—If a court or appropriate department or agency determines that the United States or any of its departments or agencies has violated any provision of this chapter, and the court or appropriate department or agency finds that the circumstances surrounding the violation raise serious questions about whether or not an officer or employee of the United States acted willfully or intentionally with respect to the violation, the department or agency shall, upon receipt of a true and correct copy of the decision and findings of the court or appropriate department or agency promptly initiate a proceeding to determine whether disciplinary action against the officer or employee is warranted. If the head of the department or agency involved determines that disciplinary action is not warranted, he or she shall notify the Inspector General with jurisdiction over the department or agency concerned and shall provide the Inspector General with the reasons for such determination.

(g) IMPROPER DISCLOSURE IS VIOLATION.—Any willful disclosure or use by an investigative or law enforcement officer or governmental entity of information beyond the extent permitted by section 2517 is a violation of this chapter for purposes of section 2520(a).