

No. 25-7146

IN THE SUPREME COURT OF THE UNITED STATES

JAMES PERRIN,
PETITIONER,

VS.

UNITED STATES OF AMERICA,
RESPONDENT.

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

PETITIONER'S REPLY IN SUPPORT OF CERTIORARI

KEITH M. DONOGHUE
Assistant Federal Defender
Counsel of Record

ABIGAIL E. HORN
Chief of Appeals

LISA EVANS LEWIS
Chief Federal Defender

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Suite 540 West – The Curtis
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

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The government does not deny the circuits and state high courts are split on whether the “principal prosecuting attorney” described by 18 U.S.C. § 2516(2) may delegate responsibility for reviewing wiretap applications to ensure they abide the Constitution, federal and state law, and sound discretion. *See* Br. Opp. 15-16 (discussing, inter alia, *Villa v. Maricopa County*, 865 F.3d 1224 (9th Cir. 2017), *cert. denied*, 584 U.S. 961 (2018)). But it argues that this case fails to present that question, postulating that former Pennsylvania Attorney General Kathleen G. Kane’s first deputy, Adrian King, signed the subject application while he was serving as the acting Attorney General in Ms. Kane’s absence, such that Mr. King was the state’s “principal prosecuting attorney” at the relevant time. The record squarely defeats that suggestion. As the first deputy and the Attorney General’s executive assistant alike testified, and as the district court found, the Attorney General deliberately *refrained* from vesting her first deputy with general authority to act in her stead on all official business while she was traveling. Pet. App. B3-B4.

The government otherwise pleads that the case’s plain error posture disfavors review, submitting that petitioners cannot show error satisfying the standard’s second prong. Br. 16. But to the extent there was any confusion in the law before this case, it would only heighten the need for resolution of the split. This case cleanly presents the question, making it an eminently sound vehicle. Moreover, the government does not suggest that, to the extent error appears, its impact was anything less than outcome-determinative as to petitioner. Should this Court grant certiorari

and reverse, the matter may be remanded for a determination of whether plain error appears and warrants correction. *See Tapia v. United States*, 564 U.S. 319, 355 (2010).

A. The record defeats the government’s submission that the first deputy signed the wiretap application while serving as acting Attorney General for the Commonwealth of Pennsylvania.

As set out in the petition (at 6-10), until this case, no court had approved the making of a wiretap application without some active involvement on the part of the jurisdiction’s chief prosecuting officer. *State v. Harris*, 509 P.3d 83, 92 (Ore.), *cert. denied*, 143 S. Ct. 485 (2022) (surveying authorities). The decision below is in direct conflict with the unanimous decision in *Harris*, which suppressed the fruits of a wiretap conducted in conformance with Oregon state law, as well as the Ninth Circuit’s decision in *Villa*, *supra*, which held § 2516(2) to require a jurisdiction’s chief prosecutor to personally review the facts and circumstances represented in an application to warrant the surreptitious interception of private phone calls. *Villa*, 865 F.3d at 1234.

The Third Circuit split with these authorities by holding that delegation of wiretap authority in accordance with state law satisfies § 2516’s “purpose of centralizing authorization ‘in a publicly responsible official[.]’” Pet. App. A15-A16 (quoting *United States v. Giordano*, 416 U.S. 505, 520 (1974); additional citation omitted). In adopting this rule, the court of appeals echoed cert petitions filed by the State of Oregon and one of the nation’s most populous counties in *Harris* and *Villa*, respectively, arguing that “established delegation principles,” 22-85 Pet. 18-21, or “background legal principles,” 17-862 Pet. 14-18, along with legislative history, state sovereignty, and law enforcement considerations call for reading § 2516(2) to permit delegation of wiretap authority in accordance with state law.

The government does not take issue with the petition’s review of the *Harris* and *Villa* decisions, but points out (as did the petition) that two federal courts of appeals have approved applications made by an acting chief during the officeholder’s absence or incapacity. *See* Br. Opp. 15-16 (citing *United States v. Perez-Valencia*, 727 F.3d 852, 855 (9th Cir. 2013), *cert.*

denied, 574 U.S. 853 (2014), and *United States v. Fury*, 554 F.2d 522, 527 n.4 (2d Cir. 1977)); Pet. 10 (same). Contrary to the government’s account of the record, however, that is precisely what did *not* happen in this case.

As the district court set out in its findings, Pet. App. B3-B4, the Attorney General declined to sign a letter designating the first deputy as acting Attorney General while she was away, choosing instead to charge her executive assistant with contacting her should any matter require attention. On April 14, the executive assistant called the Attorney General, but after reaching voicemail repeatedly over “about one hour,” Pet. App. B2, the executive assistant complied with the first deputy’s instruction to sign the designation letter. The first deputy, for his part, did not suggest he signed the wiretap application while acting as *the* Attorney General for the Commonwealth of Pennsylvania. *See* C.A. App. 719 (agreeing that Attorney General “did not sign the letter, the broad grant of authority”). Rather, his testimony was that the Attorney General approved his signing the application specifically in a phone call the night before. Consistent with this record, the government did not argue in the court of appeals that the first deputy “was temporarily serving as the acting Attorney General.” Br. Opp. 15. Instead, it took the position that the Attorney General’s approval of the underlying investigation and oversight of wiretap applications after her return to the office on April 22, 2014, substantially complied with 18 U.S.C. § 2516(2). *See* Gov’t C.A. Br. 37-42; Pet. App. B6.

Furthermore, the first deputy did not meaningfully review the particulars of the investigation to confirm satisfaction of Title III’s prerequisites, either. *See* Appellant’s CA3 Opening Br. 33-34 (setting out pertinent facts of record); C. A. App. 698 (first deputy’s testimony that he relied on chief of criminal division’s oversight of application to conclude “everything was in order”). Consequently, even had the first deputy been designated the acting Attorney General before signing the wiretap application, it would need be found that the Kane administration failed to honor § 2516(2)’s statutory limitation.

The government does not deny the question is one of surpassing importance, *see* Pet. 10-11, though it repeats (at 10) the Third Circuit’s view that limiting delegation in accordance with

§ 2516(2) would require “state wiretap applications to remain on hold” during an Attorney General’s temporary absence or disability. But that is a feature, not a bug, of Title III. The framers and the 90th Congress endeavored to place obstacles in the way of a “too permeating police surveillance,” *United States v. Di Re*, 332 U.S. 581, 595 (1948), and that protection stands today in the form of § 2516(2)’s “principal prosecuting attorney” limitation and the other safeguards erected by Title III against abuse of the power to intercept private phone communications. As the petition noted (at 11) and the government does not doubt, Congress knew that requiring top-level review “would inevitably foreclose resort to wiretapping where investigative personnel would otherwise seek intercept authority from the court and the court would very likely authorize its use.” *United States v. Donovan*, 429 U.S. 413, 435-36 (1977) (quoting *Giordano*, 416 U.S. at 528). As the draftsman of the legislation testified, “[i]t may very well be that in some number of cases there will not be time to get the Attorney General to approve it.... If we cannot make certain cases, that is going to have to be the price we will have to pay.” *Giordano*, 416 U.S. at 518-19 (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)).

Congress nonetheless elected to require top-level approval from the executive branch in order “to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications.” *Giordano*, 416 U.S. at 515. Because a court generally lacks discretion to decline to issue a warrant for which the government has made an adequate showing, *see Ex Parte United States*, 287 U.S. 241, 249 (1932), it was only by interposing the “mature judgment” of a high-level executive branch official “as a critical precondition to any judicial order” that Congress could be assured of due restraint in the exercise of discretion to employ an unrivaled surveillance power. *Giordano*, 416 U.S. at 515-16.

It may also be noted that the circumstances of the present case suggest the district court and court of appeals overstated the practical consequences of requiring personal review by a

jurisdiction's chief prosecutor for probable cause, necessity, and sound policy. Attorney General Kane had not disappeared or lost her faculties. The "scenario," Br. Opp. 15, was that her executive assistant could not reach her by phone for an "hour or so," Pet. App. B2 n.1, because, as her top aides were aware, she was aboard a flight that would soon land. That is not an absence or incapacity requiring a workaround lest, as the district court put it, "all wiretap applications grind to a halt." Pet. App. B14. In fact, though the First Deputy signed the application on April 14, it was not submitted until two days later, *see* Pet. App. B6 & n.4, so the Attorney General could have made the personal review required by § 2516(2) had she chosen to do so. In all, there is no warrant for the Third Circuit's concern that requiring the Attorney General or District Attorney to personally review applications for conformity with the law is so onerous a burden on law enforcement that it "invites non-compliance." Pet. App. A14.

To the extent the government otherwise engages the merits, it recites the Third Circuit's proposition that because the "plain language of subsection 2516(2) defers to state statutes three times," it demonstrates "Congress's intention to keep procedures for authorizing wiretaps under a state's purview when implementing Title III's statutory mandates[.]" Br. Opp. 13 (quoting Pet. App. A11). That rationale is unsound because the very purpose of the cited language is to preempt any more permissive state enactment, as the court of appeals purported to recognize. *See* Pet. App. A13-A14. Congress commanded in Title III that, to the extent a State wishes to have its law enforcement conduct wiretaps and its courts admit the fruits of this surveillance, the State's legislature must enact a statute that, at a minimum, affords as much protection against unwarranted intrusion as Title III. *See* Pet. 3-4, 12 (citing, *inter alia*, *United States v. Tortorello*, 480 F.2d 764, 772 (2d Cir. 1973)). The language cited by the court of appeals thus does not supply a tenable ground for construing § 2516(2)'s lodging of application-making authority in a jurisdiction's "principal prosecuting attorney" to permit delegation of this power to an assistant.

B. The record's clean presentation of the split question of law makes this case a fully suitable vehicle.

The matter's plain error posture is no impediment to this Court's authoritative resolution of the purely legal question presented. The government does not dispute that the record is fully developed thanks to the overlapping challenge put forward by trial counsel. Pet. 13. Nor does it claim it would be prejudiced by resolution of the question presented. Moreover, there can be little doubt that the rule advocated by petitioner, were review granted and this rule adopted, would prove outcome-determinative in his own case. It was only by means of the wiretap that petitioner's existence became known to investigators, and at trial his intercepted calls and texts lent prominent support to the government's theory that he was Price Montgomery's "right-hand man." C.A. App. 1072. It bears noting as well that though the question presented has recurred time and again since Title III's enactment in 1968 (including twice in just the last nine years, throughout which time James Perrin has been confined on the instant charges), most cases presenting Title III questions in fact never reach an appellate court because wiretap surveillance often yields evidence overcoming any possible defense, prompting targets to plead guilty. In view of the question's surpassing importance and the division among lower courts, the Court should intervene now to resolve it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Keith M. Donoghue

KEITH M. DONOGHUE
Assistant Federal Defender
Counsel of Record

ABIGAIL E. HORN
Chief of Appeals

LISA EVANS LEWIS
Chief Federal Defender

Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 540 West, Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

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