12-14-2009

State v. Branigh Clerk's Record v. 4 Dckt. 36427

LAW CLERK

Vol IV of

In the
SUPREME COURT
of the
STATE OF IDAHO

STATE OF IDAHO,

Plaintiff-Respondent,

v.

VOLUME IV
SC #36427

LEOTIS B. BRANIGH III,

Defendant-Appellant.

Appealed from the District Court of the Second Judicial District of the State of Idaho, in and for Nez Perce County

CLERK'S RECORD

Honorable JEFF M. BRUDIE, District Judge

LAWRENCE G. WASDEN
Attorney for Plaintiff-Respondent

MOLLY J. HUSKEY
Attorney for Defendant-Appellant

36427

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	SUPREME COURT NO. 36427
	)	
vs.	)	TABLE OF CONTENTS
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	SUPREME COURT NO. 36427
	)	
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State's Requested Instructions filed December 2, 2008 852-867

Request

FILED

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NezPerce

2008 NOV 24 PM 3 13

State of Idaho
Plaintiff(s),

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

v

Ledio Branigh III
Defendant(s).

REQUEST TO OBTAIN APPROVAL TO BROADCAST AND/OR PHOTOGRAPH A COURT PROCEEDING

I hereby request approval to broadcast and/or photograph the following court proceedings:

Case No. CR01-8107
Date: 11/25/08
Time: 9:00
Location: Courtroom #1
Presiding Judge: _____

I have read the attached rule permitting cameras in the courtroom and will comply in all respects with the Rule and Order of the Court.

Signature: Matt Loveless Matt Loveless
Representing: KLEW TV
Address: 2626 17th St, Lewiston
Telephone Number: (208) 746-2636 Fax (208) 746-4819

ORDER

The Court, having considered the request under the rule permitting cameras in the trial courtrooms, hereby orders that permission to broadcast and/or photograph the above hearing is:

[X] Granted under the following restrictions:

_____

_____

[ ] Denied.

Dated this 24 day of Nov, 2008.

District/Magistrate Judge

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Nerpirce

FILED
2008 NOV 25 AM 8:48
PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

State of Idaho,
Plaintiff(s),

v.

Leotis Branigh
Defendant(s).

REQUEST TO OBTAIN APPROVAL TO BROADCAST AND/OR PHOTOGRAPH A COURT PROCEEDING

I hereby request approval to broadcast and/or photograph the following court proceedings:

Case No. CR07-8107
Date: Nov 25 2008
Time: 9am
Location: 2nd District Court
Presiding Judge: Jeff Brudie

I have read the attached rule permitting cameras in the courtroom and will comply in all respects with the Rule and Order of the Court.

Signature: Barry Kough
Representing: Lewiston Tribune
Address: 505 Capital Street
Telephone Number: 208-743-9411

ORDER

The Court, having considered the request under the rule permitting cameras in the trial courtrooms, hereby orders that permission to broadcast and/or photograph the above hearing is:

[X] Granted under the following restrictions:

[ ] Denied.

Dated this 25 day of Nov, 2008.

District/Magistrate Judge

Hearing type:	Hearing on Motions	Minutes date:	11/25/2008
Assigned judge:	Jeff M. Brudie	Start time:	09:09 AM
Court reporter:	Carlton	End time:	10:27 AM
Minutes clerk:	JANET	Audio tape number:	C1
Prosecutor:	Daniel L Spickler		
Defense attorney:	Charles Kovis		

Tape Counter: 90911	Def present and in custody. Crt reviews file and pretrial mtns filed: Mtn to dismiss, renewed mtn to dismiss, mtn for the Crt to det the competency of a State's witness, 2 mtns in limine, 1 re cell phone records, the other prior bad acts, and final mtn to compel info. Crt will take mtns in this order: mtn to dismiss, mtn for change of venue, mtn re competency of St's witness, mtns in limine, and mtn to compel.
Tape Counter: 91119	Crt add mtn to dismiss re double jeopardy.
Tape Counter: 91138	Mr. Kovis presents argument.
Tape Counter: 91535	State presents argument.
Tape Counter: 91734	Mr. Kovis presents rebuttal argument.
Tape Counter: 91838	Crt presents comments. Crt takes mtn under advisement. Crt will enter a written ruling.
Tape Counter: 91931	Crt add mtn for change of venue.
Tape Counter: 91959	Mr. Kovis presents argument.
Tape Counter: 92305	State presents argument.
Tape Counter: 92557	Mr. Kovis has nothing further
Tape Counter: 92064	Crt presents comments. Crt denies mtn for change of venue. Crt presents add comments.
Tape Counter: 92929	Crt add mtn re the competency of a State's witness, Desarie Anderson. Crt presents comments. Mr. Kovis has previously filed an affid in support of this mtn and the Crt has reviewed that.
Tape Counter: 93102	Mr. Kovis presents argument.
Tape Counter: 93158	State presents argument.
Tape Counter: 93316	Mr. Kovis has nothing further.
Tape Counter: 93323	Crt presents comments. Crt grants mtn in part. Crt will make inquiry outside the presence of the jury re the competency of Desarie Anderson. Crt will not order a mental health eval. Crt denies that portion of the mtn.
Tape Counter: 93511	Crt add 1st mtn in limine re cell records. Crt presents comments.

Tape Counter: 93558	Mr. Kovis presents argument. Crt questions Mr. Kovis. Mr. Kovis responds.
Tape Counter: 94338	Court questions Mr. Kovis. Mr. Kovis responds
Tape Counter: 94526	State presents argument. Crt questions State. State responds.
Tape Counter: 95148	Crt presents comments. Crt questions State re evidence from any cell phone account of def. State responds.
Tape Counter: 95329	Mr. Kovis presents rebuttal argument.
Tape Counter: 95453	State presents rebuttal argument.
Tape Counter: 95701	Crt presents comments. Crt takes mtn under advisement. Crt will issue a written ruling.
Tape Counter: 95934	Crt addresses 2nd mtn in limine re 404B re any prior bad acts of def.
Tape Counter: 100212	Mr. Kovis presents argument.
Tape Counter: 100308	State is in agreement.
Tape Counter: 100311	Crt presents comments. Crt will make inquiry outside the presence of the jury and then make ruling.
Tape Counter: 100422	Crt grants 2nd mtn in limine. Crt q State re ruling. State understands ruling.
Tape Counter: 100436	Crt addresses mtn to compel. Crt q Mr. Kovis re disclosure. Mr. Kovis indicates some are still at issue.
Tape Counter: 100534	Crt addresses mental health records of Ms. Anderson.
Tape Counter: 100553	Mr. Kovis has received the police records but did not receive any records from any doctors or hospitals.
Tape Counter: 100612	State indicates he has provided all the records the State has.
Tape Counter: 100641	Mr. Kovis indicates a release was signed for the State to get the records.
Tape Counter: 100656	Crt presents comments. Crt denies Mtn to Compel re mental health records on Ms. Anderson from any doctor or hospital.
Tape Counter: 100800	Crt addresses Def's Mtn to Compel re personnel records of police officers involved in this investigation.
Tape Counter: 100827	Mr. Kovis presents argument.
Tape Counter: 100859	State has previously objected to all of these motions as being overly broad. State presents argument re personnel records of police officers.

Tape Counter: 101146	Crt indicates any police officer being called by the State to testify that has training materials is to be disclosed to Mr. Kovis. There has been no authority given for disciplinary records or personnel records and the Crt denies that request.
Tape Counter: 101243	Crt addresses Mtn to Compel re all reports available on suspected criminal history on Michael Johnston.
Tape Counter: 101302	Mr. Kovis has not received any materials re the Federal gov criminal history.
Tape Counter: 101334	State indicates the Federal gov has not been very cooperative and not made their material available to the State. State has disclosed all other documents in its possession.
Tape Counter: 101434	Crt denies Request #5 re that portion of the mtn to compel dealing the the Federal gov.
Tape Counter: 101515	Crt addresses Def's Mtn to Compel re Request #6 re police reports on Michael Johnson re possession of a fire arm in a vehicle from 1994.
Tape Counter: 101533	Mr. Koivs has not been provided any records on this.
Tape Counter: 101553	State has objected as being irrelevant and beyond the scope of discovery. State presents argument.
Tape Counter: 101641	Mr. Kovis responds.
Tape Counter: 101706	Crt presents comments. Crt grants Def's Mtn to Compel re #6 if any police reports exist on that incident, the State needs to provide them to Mr. Kovis.
Tape Counter: 101745	Crt addresses Def's Mtn to Compel #8 all information in cell phone records in evidence including call histories, contact listsand, voice mail records.
Tape Counter: 101811	Mr. Kovis indicates they do not have any information from Desarie Anderson's cell phone.
Tape Counter: 101832	State has provided everything they have except contact lists as those are overall broad and undue invasion of privacy of people on those lists. State presents argument.
Tape Counter: 102120	Mr. Kovis responds. Crt q Mr. Kovis. Mr. Kovis presents argument.
Tape Counter: 102229	State responds. Voice mail msg are not available, they do not keep those histories. Crt q State re call histories and text msg histories. State responds.
Tape Counter: 102301	Crt presents comments. Crt reviews call histories on 2 cell phones. Crt orders State to provide call histories on 2 cell phones for the months of Sept and Oct 2007, including any text msg history for the same time period. State does not have to provide the contact history.
Tape Counter: 102456	State q Crt re call histories. State never requested those. State did request the text msg history. State will check to see if they can get the call history.
Tape Counter: 102531	Crt indicates that concludes the pretrial motions at this time. Crt will speak with counsel in Chambers re the questionnaire and trial procedures.
Tape Counter: 102612	Mr. Kovis q Crt re hearing the Def's pro se motions.
Tape Counter: 102626	Crt will not address those motions at this time. Crt will address later.

703

Charles E. Kovis
Attorney at Law
312 South Washington Street
Post Office Box 9292
Moscow, Idaho 83843
Telephone: (208) 882-3939
Fax: (208) 882-5379
I.S.B. # 4700
ckovis@turbonet.com

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO, Plaintiff, vs. LEOTIS B. BRANIGH III, Defendant.	CASE NO. CR-07-8107 AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT OF MOTION TO DETERMINE COMPETENCY

STATE OF IDAHO)
:ss.
County of Latah)

Charles E. Kovis, being first duly sworn on oath, deposes and says:

1. I am the Court-appointed attorney for Mr. Leotis Branigh.

2. Attached to this affidavit at Exhibit "A" are true and accurate copies of police reports received by Mr. Branigh and me. These reports were received from the State of

ORIGINAL 704

Idaho after discovery requests in the above-entitled action.

3. All documents attached to this affidavit at Exhibit "A" are incorporated herein as though fully set forth.

DATED this 24TH day of November 2008.

Charles E. Kovis

Charles E. Kovis

SUBSCRIBED and SWORN to before me this 24 day of November 2008.

LISA A. BAUSCH NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at Moscow therein.

My commission expires: 4/3/09

CERTIFICATE OF SERVICE

I hereby certify that on the 24TH day of November, 2008, a true and correct copy of this *Affidavit of Charles E. Kovis in Support of Motion To Determine Competency* was hand-delivered to:

DANIEL SPICKLER
PROSECUTING ATTORNEY
P.O. BOX 1267
LEWISTON, IDAHO 83501

Charles E. Kovis

```
Incident Number: 06-L20590
Nature: Suicidal Person   Case Number:                        Image:
  Addr= [redacted]; #23                     Area: D5E   E OF 10TH, ORC
  City: Lewiston         ST: ID  Zip: 83501      Contact: Inland
+- Complainant&      29521 ---------------------------------------------------+
| Lst: JOHNSTON                    Fst: MICHAEL          Mid: SCOTT           |
| DOB: [redacted]  SSN: [redacted]  Adr: [redacted]                           |
| Rac: W Sx: M Tel: [redacted]     Cty: Lewiston         ST: ID Zip: 83501    |
+-----------------------------------------------------------------------------+
  Offense Codes: SUIS                          Reported: SUIC  Observed: SUIS
  Circumstances:
Rspndg Officers: Pedersen Mike      Piche' Ted
Rspnsbl Officer: Piche' Ted         Agency: LPD1          CAD Call ID:    854550
    Received By: Schaffner J              Last RadLog: 13:23:58 11/23/2006  CMPLT
   How Received: 9  911 Line                Clearance: RPT  Written Incident Repo
  When Reported: 12:55:51 11/23/2006      Disposition: INA  Disp Date: 11/23/2006
Occurrd between: 12:55:40 11/23/2006     Judicial Sts:
            and: 12:55:51 11/23/2006       Misc Entry:
MO:
 Narrative: (See below)
Supplement:
```

= =

INVOLVEMENTS:

Type	Record #	Date	Description	Relationship
NM	28187	11/23/2006	ANDERSON, NADINE BEVERLEY	Mother of desiree
NM	29521	11/23/2006	JOHNSTON, MICHAEL SCOTT	*Complainant
NM	122506	11/23/2006	JOHNSTON, DESIREE DAWNE	Involved
VH	107940	11/23/2006	RED 1996 FORD MUSTANG ID	Involved
CA	854550	11/23/2006	12:55 11/23/2006 Suicidal Pers	*Initiating Call

LAW Incident Offenses Detail:

Offense Codes

Seq	Code	Amount
1	SUIS Suicidal Subject	0.00

LAW Incident Responders Detail

Responding Officers

Seq	Name	Unit
1	Pedersen Mike	159
2	Piche' Ted	214

Main Radio Log Table:

Time/Date	Typ	Unit	Code	Zone	Agnc	Description
13:23:58 11/23/2006	1	214	CMPLT	D5E	LPD1	(MDC) Completed call incid#=06
13:14:51 11/23/2006	1	159	4	D5E	LPD1	incid#=06-L20590 status check

Time/Date	Typ	Unit	Code	Zone	Agnc	Description
13:14:51 11/23/2006	l	214	4	D5E	LPD1	incid#=06-L20590 status check
13:10:30 11/23/2006	l	159	23	D5E	LPD1	incid#=06-L20590 with 214/and
13:10:04 11/23/2006	l	214	23	D5E	LPD1	incid#=06-L20590 2100 burrelle
13:07:55 11/23/2006	l	159	17	D5E	LPD1	incid#=06-L20590 2100 grelle a
13:07:55 11/23/2006	l	214	17	D5E	LPD1	incid#=06-L20590 2100 grelle a
13:07:42 11/23/2006	l	214	4	D5E	LPD1	west bound grelle ave 2100 blk
13:06:50 11/23/2006	l	159	28	D5E	LPD1	n101348
13:02:13 11/23/2006	l	214	ARRVD	D5E	LPD1	(MDC) Arrived on scene incid#=
12:59:35 11/23/2006	l	159	4	D5E	LPD1	9th and preston
12:59:10 11/23/2006	l	159	ENRT	D5E	LPD1	incid#=06-L20590 Enroute to a
12:59:10 11/23/2006	l	214	ENRT	D5E	LPD1	incid#=06-L20590 Enroute to a

Narrative:

Lewiston Police Department

06-L20590
Sgt. Ted Piche' #214
November 23, 2006
Typed by: #364

On 11/23/06 at about 1255 hours, the Communications center broadcast a suicidal person that had just left the area of 1029 Cedar Avenue #23 in Lewiston. The suspect was reported to be a Desiree Johnston, aka Desiree Anderson. The complainant, Michael Johnston, provided information that his ex-wife was suicidal and possibly going to her residence to take an overdose of pills.

Officers started checking the area for the red Mustang that Desiree Anderson was reported to be driving. Approximately 5 minutes later, a deputy from the Nez Perce County Sheriff's Department located the vehicle in the 2200 block of Grelle. I requested that he stop the vehicle and contact the driver. Shortly after that, I met with Deputy Santos at the location, 2200 Grelle. Deputy Santos had already contacted Desiree Johnston.

While talking with Johnston, she stated that she is not suicidal and that she had only had a dispute with her husband. Desiree stated that her husband had changed plans for Thanksgiving dinner today and that it upset her and the children. She stated that the dinner was supposed to be at her residence and he changed that plan to his residence.

I talked with Desiree and she stated that she is not suicidal, only upset with her ex-husband. She stated that she is taking some prescription medication, however, has no intention of harming herself. Desiree stated that she just wanted to be left alone. Desiree stated that she was going to go to her residence, where she could clean up, as she had been crying over this incident. Desiree said that she had a friend that she would go see and that she did not need any counseling or police intervention.

Desiree Johnston left my location. I requested that the Communications Center contact the complainant and a family member to let them know that we had located Johnston.

End of Report.

Sgt. Ted Piche' #214

Incident Number: 07-L5527
Nature: Suicidal Person Case Number: Image:
Addr= [redacted] #17 Area: D5E E OF 10TH, ORC
City: Lewiston ST: ID Zip: 83501 Contact:

+- Complainant& 28187 --+
| Lst: ANDERSON Fst: NADINE Mid: BEVERLEY |
| DOB: [redacted] SSN: [redacted] Adr= [redacted]; #17 |
| Rac: W Sx: F Tel: [redacted] Cty: Lewiston ST: ID Zip: 83501 |
+--+

Offense Codes: SUIS MPER Reported: SUIC Observed: SUIS
Circumstances:
Rspndg Officers: Hopple Brandon
Rspnsbl Officer: Hopple Brandon Agency: LPD1 CAD Call ID: 864111
Received By: Hesler Sue Last RadLog: 11:58:54 04/01/2007 CMPLT
How Received: T Telephone Clearance: RPT Written Incident Repo
When Reported: 11:08:04 04/01/2007 Disposition: INA Disp Date: 04/01/2007
Occurrd between: 11:08:04 04/01/2007 Judicial Sts:
and: 11:08:04 04/01/2007 Misc Entry:
MO:
Narrative: (See below)
Supplement: (See below) (See below)

= =

INVOLVEMENTS:

Type	Record #	Date	Description	Relationship
NM	18742	04/01/2007	ANDERSON, DESIREE DAWNE	Involved
NM	28187	04/01/2007	ANDERSON, NADINE BEVERLEY	*Complainant
NM	29521	04/01/2007	JOHNSTON, MICHAEL SCOTT	Contacted
NM	173947	04/01/2007	UNICEL,	Contacted
VH	110732	04/01/2007	BLU 1989 NISS MAX ID	Mentioned
CA	864111	04/01/2007	11:08 04/01/2007 Suicidal Pers	*Initiating Call

LAW Incident Offenses Detail:
Offense Codes

Seq	Code	Amount
1	SUIS Suicidal Subject	0.00
2	MPER Missing Person	0.00

LAW Incident Responders Detail
Responding Officers

Seq	Name	Unit
1	Hopple Brandon	368

Main Radio Log Table:

Time/Date	Typ	Unit	Code	Zone	Agnc	Description
11:58:54 04/01/2007	1	368	CMPLT	D5E	LPD1	(MDC) Completed call incid#=07

Time/Date	Typ	Unit	Code	Zone	Agnc	Description
11:42:24 04/01/2007	l	368	NMINQ	D4D	LPD1	MDC: name=ANDERSON, DES*
11:21:33 04/01/2007	l	368	ARRVD	D5E	LPD1	(MDC) Arrived on scene incid#=
11:17:27 04/01/2007	l	368	ENRT	D5E	LPD1	(MDC) Enroute to a call incid#
11:15:52 04/01/2007	l	368	ASSGN	D5E	LPD1	incid#=07-L5527 Assigned to a

Narrative:

Lewiston Police Department

07-L5527
Officer Hopple, #368
01 April 07
Typed by: #366

On 04-01-07 at approximately 1108 hours, I was dispatched to 1029 Cedar Avenue #17 in reference to a report of a suicidal person. Dispatch advised I would be contacting the victim's mother, Nadine Anderson. Nadine was reluctant to give out too much information over the phone as the victim's child was at the residence. When I arrived I made contact with Nadine who wanted to report her daughter, Desiree Anderson, as possibly being suicidal. Nadine told me Desiree's ex-husband, who lives just across the road in another trailer, had the voice mail messages from Desiree on his phone.

At about this time, Desiree's ex-husband, Michael Johnston, came over and met with me. Johnston told me on yesterday's date he had received several voice mail messages from Desiree that were suicidal in nature. Johnston told me he did not check the messages until today and at that time notified her mother who in turned called the police.

Johnston allowed me to listen to the messages on his cell phone. The first message came in on 03-31-07 at approximately 1530 hours. At that time she only left a voice mail message stating that she wanted him to turn on his phone. The message was mainly requesting him to turn on his phone, and based on her voice I could tell she was mad. The second voice mail message came in at 2016 hours. Based on her voice, it sounded like she was upset and depressed. She made comments such as she was on her way out of town and she felt helpless and alone. She requested Johnston take care of the boys and not to screw them up anymore than she had. She also told them goodbye and that she loved them.

The next message came in at 2025 hours. She stated that she did not feel love or caring. She stated that she loved him and hopes that she misses them very much. She had mentioned that she had hoped to talk to him at least one more time. She again requested that he take care of their boys and to be safe and have a safe life.

The next message came in at 2036 hours. On this message she states that she hopes that whatever she does, that it works this time. She told Johnston that she won't be in his yard this time and it would be awhile before anyone knows where she went. Johnston told me about 5 or 6 months ago, Desiree had attempted suicide by taking a bunch of pills and alcohol. He stated he had found her on his front lawn during the winter time without a jacket on.

The next message that is left on the cell phone, Desiree requests that he tells her sister that she loves her and that he makes sure the boys write to her. She also told him to tell her sister that she was sorry.

I asked Johnston if he believed she was just saying this as she was just going to leave town and not come back or if he believed that she was

suicidal. Johnston told me he believed she was suicidal. I asked Johnston and Nadine where she may have possibly gone. Both told me she may possibly go up to Waha near Zaza Road because that's where they used to go and party in high school. They also mentioned they had family property in Pomeroy, Washington. Nadine told me the family is not there at this time and she may possibly go there. I later had dispatch contact Garfield County Sheriff's Office and request they check the property for Desiree and/or her vehicle. I also later contacted Nez Perce County and requested that they check the Waha area for Desiree.

I questioned Nadine and Johnston about any information they could give me to help me locate Desiree. They were unable to give me any additional information. I asked Johnston when the last time he saw Desiree. He told me he saw her on yesterday's date at approximately 1530 hours. He stated he saw her in her vehicle driving down Thain Road. I asked Nadine the last time she saw Desiree. Nadine told me Desiree had shown up at her residence last night at approximately 1930 hours. She stated Desiree told her that she was moving out of her aunt's residence on Lindsey Creek Road. She stated she requested her mother take her plants or she would have to take throw them away. Nadine told me Desiree was at her house approximately 10 minutes and then she left. She stated a short while later she received a phone call from Desiree asking if she could come back to the house to use the restroom. She stated that Desiree showed up, used the restroom and left and hasn't been seen since.

I asked Nadine if Desiree said anything about suicide or being depressed and she told me no.

I obtained all the necessary information to complete a missing person report form. I responded to the station and gave the form to dispatch so that they could enter Desiree in to NCIC for an attempt to locate. I had previously questioned Johnston about attempting to contact Desiree on her cell phone. Johnston told me every time he calls the phone rings once and then it goes to her voice mail. I asked Johnston if he had left any encouraging messages on his voice mail and he told me yes. He stated messages such as they want her to come home and that everybody loves her.

I gave the information on Desiree's cell phone to include cell phone provider to dispatch and request dispatch contact the cell phone provider to see if they could track her phone. Dispatch advised that Unicel, (the cell phone provider,) requested they fax a copy to them with the information. Dispatch later received information that Unicel could not specifically track her down unless she calls again.

I re contacted Johnston and asked him about any friends she might go to or any friends she could have spoken with about being depressed and suicidal. Johnston told me she already contacted two of her friends and advised they had not heard from her. I asked Johnston if Desiree was currently working and he told me no. He stated she had been working at the Holiday Inn Express, but he heard she had quit yesterday.

I responded to the Holiday Inn Express and spoke with the front desk clerk. The front desk clerk as well as Desiree's immediate supervisor, both told me Desiree was in there yesterday and she did not quit her job. I asked both of them if she appeared to be depressed or had mentioned anything about suicide and both of them told me no. Both did tell me they had little contact with Desiree. I requested both of them to contact LPD if they hear from her and they told me they would.

At approximately 1530 hours I received a phone call from Johnston who stated that he had just received a phone call from Desiree. He stated Desiree told him that she was back in town and had to stop and go buy some cigarettes. He said she told him that she was on her way back to where she had come from. I asked him if she had told him where she had been. He stated that she had only mentioned that she was on her way back to the mountains. I asked Johnston if she had given any more information as to what she was doing or where she was going and he told me no. I requested Johnson contact us again if she contacts by phone and he told me I would.

At approximately 1700 hours, dispatch advised me Desiree had shown up at her mother's residence and everything was ok. I did request swing shift to send an officer to Nadine's trailer to speak with Desiree to check her welfare.

Dispatch has removed Desiree from NCIC.

End of report

Law Supplemental Narrative:

Supplemental Narratives

Seq	Name	Date	Narrative
1	Hesler Sue	17:01:53 04/01/2007	

1702 hrs compl called and adv Desiree is now at her residence and is OK - no more contact needed #322 ncic.atl canceled #322

Law Supplemental Narrative:

Supplemental Narratives

Seq	Name	Date	Narrative
2	Krakalia Nick	00:24:18 04/02/2007	

Lewiston Police Supplemental Narrative

07-L5527
Ofc N. Krakalia #237
April 1, 2007
363

When I arrived at work this date, I had a conversation with Officer Hopple who requested I do some follow up on a suicidal subject call he had earlier today at 1029 Cedar Avenue #17 involving Nadene Anderson as the complainant and her adult daughter Desiree Anderscn, being the possible suicidal subject. He further advised that an ATL had been put out on Desiree and it appears she has returned home and he just wanted to insure she was not going to attempt to hurt herself.

After briefing I went to 1029 Cedar Avenue #17 and contacted the mother, Nadine Anderson. She stated her daughter, Desiree, was across the court visiting at another trailer and she appeared to be fine and as far as she knew was not thinking of hurting herself any longer. I then told her I needed to speak to her daughter, Nadine then became hesitant and stated that she had not told her daughter that the police had been called and had been looking for her today. I then suggested she phone to the trailer where she's as so I could hear the phone conversation and have her ask Desiree if she had any intentions of hurting herself and the mother complied.

I was able to hear the phone conversation and Nadine asked her daughter how she was doing, her daughter in a cheerful voice said she was doing fine. Her mother then asked her if she any thoughts of hurting herself any longer today or tomorrow. Desiree clearly stated no, her answer still cheerful and seemed sincere. I then cleared.

End of report.
Ofc N. Krakalia #237

Incident Number: 06-L18374
Nature: Welfare Check Case Number: Image:
Addr= [redacted]; #1 Area: ORCES ORCHARD ELEMEN
City: Lewiston ST: ID Zip: 83501 Contact: desirae anderson

+- Complainant& 29521 ---+
| Lst: JOHNSTON Fst: MICHAEL Mid: SCOTT |
| DOB: [redacted] SSN: [redacted] Adr: 1029 CEDAR AVE#23 |
| Rac: W Sx: M Tel: [redacted] Cty: Lewiston ST: ID Zip: 83501 |
+--+

Offense Codes: WELF Reported: WELF Observed:
Circumstances:
Rspndg Officers: Metcalf Jim W Hill George
Rspnsbl Officer: Metcalf Jim W Agency: LPD1 CAD Call ID: 851968
Received By: Schaffner J Last RadLog: 16:15:10 10/18/2006 CMPLT
How Received: T Telephone Clearance: ADV Advised
When Reported: 15:47:53 10/18/2006 Disposition: INA Disp Date: 10/18/2006
Occurrd between: 15:47:53 10/18/2006 Judicial Sts:
and: 15:47:53 10/18/2006 Misc Entry:
MO:
Narrative: (See below)
Supplement:

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INVOLVEMENTS:

Type	Record #	Date	Description	Relationship
NM	29521	10/18/2006	JOHNSTON, MICHAEL SCOTT	*Complainant
NM	122506	10/18/2006	JOHNSTON, DESIREE DAWNE	Suspect
CA	851968	10/18/2006	15:47 10/18/2006 Welfare Check	*Initiating Call

LAW Incident Offenses Detail:
Offense Codes

Seq	Code	Amount
1	WELF Welfare Check	0.00

LAW Incident Responders Detail
Responding Officers

Seq	Name	Unit
1	Metcalf Jim W	T326
2	Hill George	296

Main Radio Log Table:

Time/Date	Typ	Unit	Code	Zone	Agnc	Description
16:15:10 10/18/2006	1	T326	CMPLT	D5E	LPD1	(MDC) Completed call incid#=06
16:13:28 10/18/2006	1	296	CMPLT	D5E	LPD1	(MDC) Completed call incid#=06
16:08:12 10/18/2006	1	296	ARRVD	D5E	LPD1	(MDC) Assisting unit 326 incid
16:08:05 10/18/2006	1	T326	ARRVD	D5E	LPD1	(MDC) Arrived on scene incid#=

Time/Date	Typ	Unit	Code	Zone	Agnc	Description
16:07:51 10/18/2006	1	296	CMPLT	D5E	LPD1	(MDC) Completed call incid#=06
16:04:56 10/18/2006	1	296	23	D5E	LPD1	incid#=06-L18374 Arrived at Sc
16:04:04 10/18/2006	1	T326	ENRT	D5E	LPD1	(MDC) Enroute to a call incid#
16:03:28 10/18/2006	1	T326	ASSGN	D5E	LPD1	incid#=06-L18374 Assigned to a

Narrative:
16:14:48 10/18/2006 - Metcalf Jim W
Contacted Desiree Anderson, she seemed to be fine, stated she had not been useing drugs or alcohol. Her sonJohnny, 7yoa was also present.

Incident Number: 06-N2504
Nature: Wanted Person Case Number: Image:
Addr= RESERVATION LINE Area:
City: Lewiston ST: ID Zip: 83501 Contact: 17

+- Complainant& 211 ---
| Lst: NEZ PERCE COUNTY SHERIFF Fst: Mid: |
| DOB: / / SSN: - - Adr= 1221 F Street |
| Rac: Sx: Tel: (208)799-3131 Cty: Lewiston ST: ID Zip: 83501 |
+---

Offense Codes: ATL Reported: ATL Observed:
Circumstances:
Rspndg Officers: Wilson Kevin Thomas Joe A Santos Patrick
Rspnsbl Officer: Wilson Kevin Agency: NPCS CAD Call ID: 0604-0291
Received By: Morrow Brenda Last RadLog: 13:36:02 04/15/2006 CMPLT
How Received: O Officer Report Clearance: RPT Written Incident Repo
When Reported: 12:31:23 04/15/2006 Disposition: CAA Disp Date: 04/15/2006
Occurrd between: 12:31:23 04/15/2006 Judicial Sts:
and: 12:31:23 04/15/2006 Misc Entry:
MO:
Narrative: (See below)
Supplement:

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INVOLVEMENTS:

Type	Record #	Date	Description		Relationship
JM	06-J1388	04/15/2006	Transport Broken Seal	+	*Arrest/Offense
NM	211	04/15/2006	NEZ PERCE COUNTY SHERIFF,		*Complainant
NM	3124	04/15/2006	FRARY, ROBERT DION		Arrested/Warrant
NM	29521	04/15/2006	JOHNSTON, MICHAEL SCOTT		Cited/open container
NM	79319	04/15/2006	VEVLE, WILLIAM ALLEN		Cited/open container
CT	N26133	04/15/2006	Transport Broken Seal		Citation
CT	N26134	04/15/2006	Transport Broken Seal		Citation
VH	102556	04/15/2006	SIL 1985 FORD F15 ID		Involved
CA	0604-0291	04/15/2006	12:31 04/15/2006 Wanted Person		*Initiating Call

LAW Incident Offenses Detail:
Offense Codes

Seq	Code		Amount
1	ATL	Attempt to Locate	0.00

LAW Incident Responders Detail
Responding Officers

Seq	Name	Unit
1	Wilson Kevin	10
2	Thomas Joe A	26
3	Santos Patrick	13

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

Main Radio Log Table:

Time/Date	Typ	Unit	Code	Zone	Agnc	Description
13:36:02 04/15/2006	l	10	CMPLT	NPCS3	NPCS	incid#=06-N2504 Completed call
13:10:29 04/15/2006	l	10	23	NPCS3	NPCS	incid#=06-N2504 jail, em 42.8
12:52:59 04/15/2006	l	10	82	NPCS3	NPCS	incid#=06-N2504 bm32.5 call=4
12:50:23 04/15/2006	l	10	14	NPCS3	NPCS	incid#=06-N2504 frary bond/50
12:35:42 04/15/2006	l	10	28	NPCS3	NPCS	incid#=06-N2504 nl10320/ 1985
12:34:21 04/15/2006	l	10	14	NPCS3	NPCS	incid#=06-N2504 confirmed 29
12:34:21 04/15/2006	l	10	14	NPCS3	NPCS	+ ohnston call=481
12:33:21 04/15/2006	l	10	82	NPCS3	NPCS	incid#=06-N2504 Prisoner in Cu
12:32:22 04/15/2006	l	10	23	NPCS3	NPCS	incid#=06-N2504 Arrived at Sce

Narrative:

Nez Perce County Sheriff's Department

Date and Time: Sat Apr 15 13:38:06 PDT 2006

Report Type: Wanted Person/Invalid Driver/Open Container x 3

Reporting Officer: K. Wilson

On the above date at about 1220 hours I was patrolling east bound in the 2800 block of Powers Ave. when I saw a silver 1985 Ford pickup traveling east in front of me in about the 2900 block. I saw that the vehicle was traveling over the posted speed limit of 35 miles per hour and estimated the vehicles speed to be between 55 and 60 miles per hour. After making sure there was no traffic behind me I stopped my patrol vehicle and activated my radar in a stationary mode. I obtained a radar reading of 60 miles per hour. There were no other vehicles traveling east or west when I obtained this speed.

I activated my overhead emergency lights and attempted to catch up to the vehicle. I watched as the vehicle turned south onto Reservation Line Road. I saw that there were three subjects inside of the vehicle. I turned off of East Powers and saw that the vehicle was accelerating. I activated my audible siren and caught up to the vehicle bearing Idaho license plate N110320 about 1/4 miles south on Manns Lake.

While I was stopping the vehicle I saw the two passengers who were later identified as Michael S. Johnston d.o.b. [redacted] and William A. Vevle d.o.b. [redacted] make several furtive movements inside of the vehicle. I watched as both subjects reached down to the floor boards of the vehicle as if they were hiding something. I told the driver of the vehicle who was later identified as Robert D. Frary d.o.b. [redacted] to shut the vehicle off and to throw the keys out of the window. I contacted Frary and asked him to step from the vehicle. When Frary stepped from the vehicle I saw three opened cans of Keystone Light beer fall from an area on the floor board and pour out. I placed handcuffs on Frary and advised him that he was being detained at this time. I pat searched Frary and placed him in the back seat of my patrol vehicle.

Deputy Thomas arrived on scene and contacted Vevle and Johnston. A drivers and records check on Frary showed that he has an invalid drivers license and that he also has a bench warrant through Lewis County. I had dispatch confirm the warrant and was advised that Lewis County would extradite. I advised Frary that he was under arrest for the warrant. I spoke to Johnston and Vevle and asked them who the open containers belonged too. Both subjects stated that they each had an open container. I saw that all three of the cans were about 3/4 empty, smelled of an alcoholic beverage and all cans were cold to the touch. I issued Vevle citation #26133 and Johnston citation #26134 charging both subjects with open container passenger.

I asked Frary if he knew who the open containers belonged too and he stated that he and his passengers each had one can open. I asked Frary if he wanted one of the subjects to take control of the vehicle. Frary requested that Johnston take control of the vehicle. A search

incident to arrest revealed an open case of Keystone Light beer, 12 ounce cans. I saw that there were 9 cans left in the case. The cans were cold to the touch. I transported Frary to the jail and issued him citation #26135 charging him with having an invalid drivers license and open container. I read Frary warrant#Cr-2000-0000190 and turned him over to jail staff for booking.

See Deputy Thomas' report for further.

_____

Cpl. K. Wilson #2517

```
Long-Term Call ID:    854550
Active Call:          Nature: Suicidal Person  Type: 1    Priority: 1
Address= [redacted]                                  City: LEW  Lewiston
Info: (See below)
Between: 11TH ST & 10TH ST
Zones:  &          &          &                      Alarm Number:
Directions:

+- Complainant&     29521 -------------------------------------------------+
| Lst: JOHNSTON [redacted]          Fst: MICHAEL          Mid: SCOTT        |
| Adr: [redacted]                                          DOB: [redacted]  |
| Cty: Lewiston           ST: ID  Zip: 83501               SSN: [redacted]  |
| Tel: [redacted]             Race: W Sex: M  Prev Calls&    Wants&    Adr& |
| Alrt: DOMV,DUSR                                                            |
+----------------------------------------------------------------------------+
Contact: Inland                          Tel: (208)790-2740
Address: 1552 Richardson Avenue - NW Sector
Calls&    Dupl&    Names&    w/Alrts&    Wants&    Prem&    Adr&
  How Rcvd: 9 911 Line               Occurred between: 12:55:40 11/23/2006
   Rcvd by: Schaffner J                            and: 12:55:51 11/23/2006
Hld Until:   :  :    /  /                    When Rptd: 12:55:51 11/23/2006

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NVOLVEMENTS:

Type	Record #	Date	Description	Relationship
LW	06-L20590	11/23/2006	Suicidal Person	*Initiating Call
NM	29521	11/23/2006	JOHNSTON, MICHAEL SCOTT	*Complainant

Call Taker Comments:

desiree anderson/johnston just left the above res and is poss suicidal. poss pills on her such as sleeping. she lives at the apts across from orchards elem same side of thain oposite side of orchards. driving a red ford mustang plate n1576.
13:01:40 11/23/2006 - Schaffner J
desiree is on cell phone with son at the cedar ave res

```
Long-Term Call ID:    851965
Active Call:        Nature: Information      Type: i    Priority: 3
Address= [redacted]                                  City: LEW  Lewiston
Info: (See below)
Between: 13TH ST & THAIN RD
Zones:  &        &        &                     Alarm Number:
Directions:

+-- Complainant&     29521 ----------------------------------------------+
| Lst: JOHNSTON                  Fst: MICHAEL          Mid: SCOTT          |
| Adr: [redacted]                                      DOB: [redacted]     |
| Cty: Lewiston          ST: ID  Zip: 83501            SSN: [redacted]     |
| Tel: [redacted]           Race: W Sex: M  Prev Calls&    Wants&    Adr&  |
| Alrt: DOMV,DUSR                                                          |
+--------------------------------------------------------------------------+
Contact:                                  Tel: (   )   -
Address:
Calls&      Dupl&     Names&     w/Alrts&     Wants&     Prem&     Adr&
 How Rcvd: T Telephone               Occurred between: 15:08:07 10/18/2006
   Rcvd by: Klaudt Deb                            and: 15:08:07 10/18/2006
Hld Until:   :  :     /  /                When Rptd: 15:08:07 10/18/2006
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NVOLVEMENTS:

Type	Record #	Date	Description	Relationship
NM	29521	10/18/2006	JOHNSTON, MICHAEL SCOTT	*Complainant

Call Taker Comments:

Called to adv his ex wife Desirae Anderson is suicidal, she took a bunch of pills last night and drank alcohol, he found her unc in his backyard when he came home from work. He got her up and made her walk and vomit. She told him that she was going to attempt this night after night until she was successful. He just spoke to her approx 20 min ago at her residence. She has their 12 and 7 year old sons living with her. She asked him if he wanted them for the evening.

Johnston believes if we try to contact her it will make it worse, he did not specify worse by said he believed she would deny it. He did not call medics nor police on last nights incident.

Johnstons cell # 790-2740
work # 843-7260 ext 207

Info given to Sgt Pedersen

Long-Term Call ID: 851968
Active Call: Nature: Welfare Check Type: 1 Priority: 1
Address= [redacted] #1 City: LEW Lewiston
Info: (See below)
Between: 13TH ST & THAIN RD
Zones: & & & Alarm Number:
Directions:

+- Complainant& 29521 ---+
| Lst: JOHNSTON Fst: MICHAEL Mid: SCOTT |
| Adr: [redacted] DOB: [redacted] |
| Cty: Lewiston ST: ID Zip: 83501 SSN: [redacted] |
| Tel: [redacted] Race: W Sex: M Prev Calls& Wants& Adr& |
| Alrt: DOMV,DUSR |
+--+

Contact: desirae anderson Tel: ( ) -
Address:
Calls& Dupl& Names& w/Alrts& Wants& Prem& Adr&
How Rcvd: T Telephone Occurred between: 15:47:53 10/18/2006
Rcvd by: Schaffner J and: 15:47:53 10/18/2006
Hld Until: 16:00:00 10/18/2006 When Rptd: 15:47:53 10/18/2006

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NVOLVEMENTS:

.ype	Record #	Date	Description	Relationship
LW	06-L18374	10/18/2006	Welfare Check	*Initiating Call
NM	29521	10/18/2006	JOHNSTON, MICHAEL SCOTT	*Complainant

Call Taker Comments:

Called to adv his ex wife Desirae Anderson is suicidal, she took a bunch of pills last night and drank alcohol, he found her unc in his backyard when he came home from work. He got her up and made her walk and vomit. She told him that she was going to attempt this night after night until she was successful. He just spoke to her approx 20 min ago at her residence. She has their 12 and 7 year old sons living with her. She asked him if he wanted them for the evening.

Johnston believes if we try to contact her it will make it worse, he did not specify worse by said he believed she would deny it. He did not call medics nor police on last nights incident.

Johnstons cell # 790-2740
work # 843-7260 ext 207

Info given to Sgt Pedersen

this was originally added as an informational call and per 159 to do a welfare check on subject after 1600 hours as the children should be gone by then.

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

IDAHO SECRETARY OF STATE
Viewing Business Entity

Ben Ysursa, Secretary of State

[New Search] [Back to Summary]
[Get a certificate of existence for NEXTEL WEST CORP.]

NEXTEL WEST CORP.

6500 SPRINT PARKWAY
OVERLAND PARK, KS USA 66251

Type of Business:	CORPORATION, GENERAL BUSINESS
Status:	GOODSTANDING, ANREPT SENT 03 Dec 2007
State of Origin:	DELAWARE
Date of Origination/Authorization:	24 Feb 1993
Current Registered Agent:	CORPORATION SERVICE COMPANY 1401 SHORELINE DR STE 2 BOISE, ID 83702
Organizational ID / Filing Number:	C101198
Number of Authorized Stock Shares:	
Date of Last Annual Report:	03 Jan 2008

Original Filing:

[Help Me Print/View TIFF]

Filed 24 Feb 1993	CERTIFICATE OF AUTHORITY	View Image (PDF format) View Image (TIFF format)

Amendments:

[Help Me Print/View TIFF]

Amendment Filed 15 Aug 1994	NAME CHANGED TO ONECOMM CORPORATION, N.A.	View Image (PDF format) View Image (TIFF format)
Amendment Filed 10 Jun 1997	NAME CHANGED TO NEXTEL WEST CORP.	View Image (PDF format) View Image (TIFF format)

Annual Reports:

[Help Me Print/View TIFF]

Report for year 2008	ANNUAL REPORT	View Document Online
Report for year 2007	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2006	ANNUAL REPORT	View Document Online
Report for year 2005	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT OF MOTION TO DETERMINE COMPETENCY

Report for year 2004	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2002	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2002	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2001	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2000	CHNG RA/RO	View Image (PDF format) View Image (TIFF format)
Report for year 1999	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1998	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1998	CHNG RA/RO	View Image (PDF format) View Image (TIFF format)
Report for year 1997	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1996	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1996	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1995	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1995	MISCELLANEOUS	View Image (PDF format) View Image (TIFF format)
Report for year 1994	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1993	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1993	CHNG RA/RO	View Image (PDF format) View Image (TIFF format)
Report for year 1993	CHNG RA/RO	View Image (PDF format) View Image (TIFF format)

Idaho Secretary of State's Main Page State of Idaho Home Page

Comments, questions or suggestions can be emailed to: sosinfo@sos.idaho.gov

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

State of Idaho

Department of State

CERTIFICATE OF AUTHORITY
OF

CENCALL, INC.

I, PETE T. CENARRUSA, Secretary of State of the State of Idaho, hereby certify that duplicate originals of an Application of CENCALL, INC. for a Certificate of Authority to transact business in this State, duly signed and verified pursuant to the provisions of the Idaho Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Certificate of Authority to CENCALL, INC. to transact business in this State under the name CENCALL, INC. and attach hereto a duplicate original of the Application for such Certificate.

Dated: February 24, 1993

GREAT SEAL OF THE STATE OF IDAHO

Pete T. Cenarrusa
SECRETARY OF STATE

By Valerie Taylor

APPLICATION FOR CERTIFICATE OF AUTHORITY

(Profit Corporation)

FEB 24 11 21 AM '93
SECRETARY OF STATE

To the Secretary of State of Idaho

Pursuant to Section 30-1-110, Idaho Code, the undersigned Corporation hereby applies for a Certificate of Authority to transact business in your State, and for that purpose submits the following statement:

1. The name of the corporation is CenCall, Inc.

2. The name which it shall use in Idaho is _____

(To be used only when required to avoid a conflict with a name already on file. Must be accompanied by a Board of Directors resolution adopting assumed name in Idaho.)

3. It is incorporated under the laws of Delaware

4. The date of its incorporation is May 15, 1989 and the period of its duration is perpetual.

5. The address of its principal office in the state or country under the laws of which it is incorporated is Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801

6. The address to which correspondence should be addressed, if different from that in item 5.
3200 Cherry Creek South Drive, Suite 230, Denver, Colorado 80209

7. The street address of its proposed registered office in Idaho is 702 West Idaho, Suite 810 Boise, ID 83702, and the name of its proposed registered agent in Idaho at that address is Corporation Service Company c/o Holden, Kidwell, Hahn & Crapo

8. The purpose or purposes which it is proposed to pursue in the transaction of business in Idaho are:
Operating and providing specialized mobile radio and telecommunications services.

(Continued on reverse)

Submit application and certificate of status to:

Office of the Secretary of State
Division of Corporations
Statehouse, Room 203
Boise, Idaho 83720

Secretary of State, STATE OF IDAHO
19930224 0900 53920 2
CK #: 8513 CUST# 1
CORPORATIO 1@ 70.00= 70.00

ACA795 Profit

File Two Copies along with a Certificate of Corporate Status or Existence

Fee: $60

9. The names and respective addresses of its directors and officers are:

Name	Office	Address
Robert F. McKenzie	President	3200 Cherry Creek South Drive, Suite 230 Denver, Colorado 80209
Mark A. Peters	Secretary	3200 Cherry Creek South Drive, Suite 230 Denver, Colorado 80209
Mark A. Peters	Treasurer	3200 Cherry Creek South Drive, Suite 230 Denver, Colorado 80209
Stephen W. Schovee	Chief Executive Officer	3200 Cherry Creek South Drive, Suite 230 Denver, Colorado 80209
	--SEE EXHIBIT A--	

10. The corporation accepts and shall comply with the provisions of the Constitution and the laws of the State of Idaho.

11. This application is accompanied by a Certificate of Corporate Status or Existence, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated.

Dated: February 15, 1993

CenCall, Inc.
(Corporation name)

By _____
its President/Vice President (please specify)

and _____
its Secretary/Assistant Secretary (please specify)

STATE OF Colorado)
) ss:
COUNTY OF Denver)

I, Mary K. Dee, a notary public, do hereby certify that on this 15th day of February, 19 93, personally appeared before me Robert F. McKenzie and Mark A. Peters, who being by me first duly sworn, declared that they are the President and Secretary respectively of CenCall, Inc.

that they signed the foregoing documents as President and Secretary respectively of the corporation and that the statements therein contained are true.

My Commission Expires 6/22/94.

Mary K. Dee
Notary Public

EXHIBIT A

CENCALL, INC.
BOARD OF DIRECTORS

Robert F. McKenzie
CenCall, Inc.
3200 Cherry Creek South Drive
Suite 230
Denver, Colorado 80209

Steven C. Halstedt (Chairman)
The Centennial Funds
1999 Broadway
Suite 2100
Denver, Colorado 80202

Greg Herman
SMR Network, Inc.
1628 NW Everett St.
Portland, Oregon 97209

Robert M. Van Degna
Fleet Venture Partners
111 Westminster St.
Providence, Rhode Island 02903

Robert A. Brooks
Brooks Telecommunications Corp.
101 S. Hanley Road, 19th Floor
St. Louis, Missouri 63105

Richard J. Brekka
CIBC Wood Gundy Capital
425 Lexington Avenue
New York, New York 10017

William A. Johnson
Hancock Venture Partners
One Financial Center
44th Floor
Boston, Masschusetts 02111

Stephen W. Schove
CenCall Holdings, Inc.
3200 Cherry Creek South Drive
Suite 230
Denver, Colorado 80209

State of Delaware

Office of the Secretary of State

FEB 24 11 2. 0H '93

SECRETARY OF STATE

I, WILLIAM T. QUILLEN, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY CENCALL, INC. IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE DATE SHOWN BELOW.

* * * * * * * * * * *

William T. Quillen

William T. Quillen, Secretary of State

AUTHENTICATION: 3795526

DATE: 02/23/1993

713054007

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

State of Idaho

Department of State

AMENDED CERTIFICATE OF AUTHORITY
OF

CENCALL, INC.
File Number C 101198

I, PETE T. CENARRUSA, Secretary of State of the State of Idaho, hereby certify that duplicate originals of an Application of CENCALL, INC. for an Amended Certificate of Authority to transact business in this State, duly signed and verified pursuant to the provisions of the Idaho Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Amended Certificate of Authority to ONECOMM CORPORATION, N.A. to transact business in this State under the name ONECOMM CORPORATION, N.A. and attach hereto a duplicate original of the Application for such Amended Certificate.

Dated: August 15, 1994

GREAT SEAL OF THE STATE OF IDAHO

Pete T. Cenarrusa
SECRETARY OF STATE

By Sally J. Clark

APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY

SEC. OF STATE
94 AUG 15 AM 10 51

To the Secretary of State of Idaho:

Pursuant to Section 30-1-118, ***Idaho Code***, the undersigned Corporation hereby applies for an amended certificate of authority to transact business in the State of Idaho and for that purpose submits the following statement.

1. A Certificate of Authority was issued to the corporation by your office on February 24, 19 93, authorizing it to transact business in the State of Idaho under the name of CenCall, Inc.
2. Its corporate name has been changed to OneComm Corporation, N.A.

   (Note: If the corporation name has not been changed, insert "No change.")
3. The name which it shall use hereafter in the State of Idaho is

   It desires to pursue in the transaction of business in the State of Idaho purposes other than or in addition to those set forth in its prior application for certificate of authority, as follows:

   No Change

   (Note: If no additional changes are proposed, insert "No change.")

Dated June 22, 1994

OneComm Corporation, N.A.
(Corporation Name)

By _____
Its President/Vice President (please specify)
Michael R. Carper

And _____
Its Secretary/Assistant Secretary (please specify)
Louise M. Pickford

STATE OF COLORADO)
)ss:
COUNTY OF BOULDER)

I, Guy Williams, a notary public, do hereby certify that on this 22nd day of June, 19 94, personally appeared before me Michael R. Carper, who being by me first duly sworn, declared that (s)he is the Vice President of OneComm Corporation, N.A.

that (s)he signed the foregoing documents as Vice President of the corporation and that the statements therein contained are true.

Guy Williams
Notary Public

My Commission Expires
Jan. 25, 1997

Submit application and filing fee to:

Office of the Secretary of State
Division of Corporations
Statehouse, Room 203
Boise, Idaho 83720

Secretary of State use only

IDAHO SECRETARY OF STATE
19940815 0900 20922 2
CK #: 12882 CUST# 5835
CORP
1@ 30.00= 30.00

ACA593 *File two copies. If a name change, attach certificate of fact from state of incorporation.* *Fee: $30.00*

(IDAHO 2515 7/20/93)
CT SYSTEM

State of Delaware

Office of the Secretary of State

I, WILLIAM T. QUILLEN, SERCRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THAT THE SAID "CENCALL, INC.", FILED A CERTIFICATE OF AMENDMENT, CHANGING ITS NAME TO "ONECOMM CORPORATION, N.A.", THE THIRTEENTH DAY OF JUNE, A.D. 1994, AT 4:30 O'CLOCK P.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE NOT HAVING BEEN CANCELLED OR DISSOLVED SO FAR AS THE RECORDS OF THIS OFFICE SHOW AND IS DULY AUTHORIZED TO TRANSACT BUSINESS.

94 AUG 15 AM 10 52

SEC. OF STATE

William T. Quillen

William T. Quillen, Secretary of State

2196427 8320

AUTHENTICATION: 7167641

944120613

DATE: 06-30-94

State of Idaho

Department of State

AMENDED CERTIFICATE OF AUTHORITY
OF

ONECOMM CORPORATION, N.A.
File Number C 101198

I, PETE T. CENARRUSA, Secretary of State of the State of Idaho, hereby certify that duplicate originals of an Application of ONECOMM CORPORATION, N.A. for an Amended Certificate of Authority to transact business in this State, duly executed pursuant to the provisions of the Idaho Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Amended Certificate of Authority to NEXTEL WEST CORP. to transact business in this State under the name NEXTEL WEST CORP. and attach hereto a duplicate original of the Application for such Amended Certificate.

Dated: June 10, 1997

GREAT SEAL OF THE STATE OF IDAHO

Pete T. Cenarrusa
SECRETARY OF STATE

By Sally J. Clark

APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY

Jun 10 3 00 PM '97

SECR... STATE
STATE ... IDAHO

To the Secretary of State of the State of Idaho:

Pursuant to Section 30-1-118, **Idaho Code**, the undersigned Corporation hereby applies for an amended certificate of authority to transact business in the State of Idaho and for that purpose submits the following statement.

1. A Certificate of Authority was issued to the corporation by your office on June 29 19 94 authorizing it to transact business in the State of Idaho under the name of ONECOMM CORPORATION, N.A.

2. Its corporate name has been changed to NEXTEL WEST CORP.
(Note: If the corporation name has not been changed, insert "No change.")

3. The name which it shall use hereafter in the State of Idaho is NEXTEL WEST CORP.

4. It desires to pursue in the transaction of business in the State of Idaho purposes other than or in addition to those set forth in its prior application for certificate of authority, as follows: no change
(Note: If no additional purposes are proposed, insert "No change.")

Dated: June 1, 1997 NEXTEL WEST CORP.
(Corporation Name)

By [signature] Michael R. Carper
(Its President, ~~Vice President, Secretary,~~ or Assistant Secretary ~~(please specify)~~)

Submit application and filing fee to:

Office of the Secretary of State
Division of Corporations

Secretary of State use only IDAHO SECRETARY OF STATE
DATE 06/10/1997
0256 100937 14
CK #: 1085 CUST# 19577
AMEND CERT 1@ 30.00= 30.00

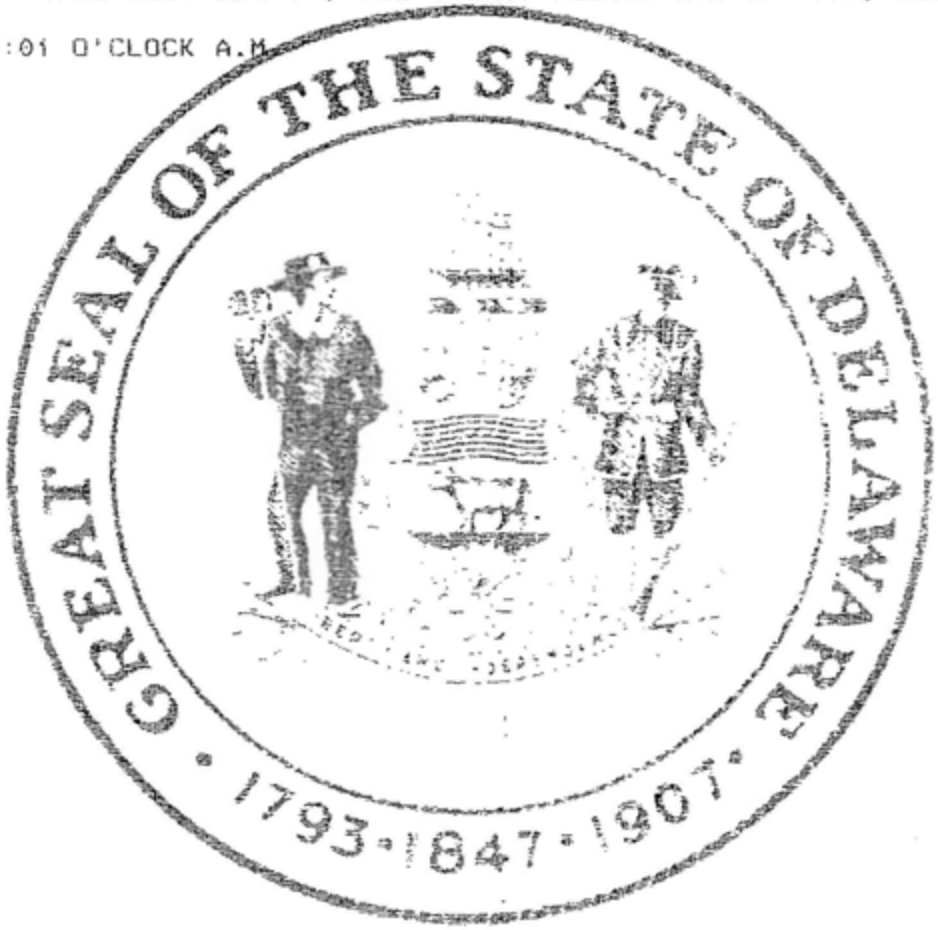
#=

File two copies.
If a name change, attach certificate to of Act from sate of Incorporation.
Fee: $30.00

State of Delaware

Office of the Secretary of State

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THAT THE SAID "ONECOMM CORPORATION, N.A.", FILED A CERTIFICATE OF MERGER, CHANGING ITS NAME TO "NEXTEL WEST CORP.", THE TWENTY-SECOND DAY OF MAY, A.D. 1997, AT 9:01 O'CLOCK A.M.



Edward J. Freel

Edward J. Freel, Secretary of State

2196427 8320

971187377

8501881

AUTHENTICATION:

06-09-97

DATE:

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

IDAHO SECRETARY OF STATE
Viewing Business Entity

Ben Ysursa, Secretary of State

[New Search] [Back to Summary]
[Get a certificate of existence for NEXTEL WEST CORP.]

NEXTEL WEST CORP.

6500 SPRINT PARKWAY
OVERLAND PARK, KS USA 66251

Type of Business:	CORPORATION, GENERAL BUSINESS
Status:	GOODSTANDING, ANREPT SENT 03 Dec 2007
State of Origin:	DELAWARE
Date of Origination/Authorization:	24 Feb 1993
Current Registered Agent:	CORPORATION SERVICE COMPANY 1401 SHORELINE DR STE 2 BOISE, ID 83702
Organizational ID / Filing Number:	C101198
Number of Authorized Stock Shares:	
Date of Last Annual Report:	03 Jan 2008

Original Filing:

[Help Me Print/View TIFF]

Filed 24 Feb 1993	CERTIFICATE OF AUTHORITY	View Image (PDF format) View Image (TIFF format)

Amendments:

[Help Me Print/View TIFF]

Amendment Filed 15 Aug 1994	NAME CHANGED TO ONECOMM CORPORATION, N.A.	View Image (PDF format) View Image (TIFF format)
Amendment Filed 10 Jun 1997	NAME CHANGED TO NEXTEL WEST CORP.	View Image (PDF format) View Image (TIFF format)

Annual Reports:

[Help Me Print/View TIFF]

Report for year 2008	ANNUAL REPORT	View Document Online
Report for year 2007	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2006	ANNUAL REPORT	View Document Online
Report for year 2005	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

Report for year 2004	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2002	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2002	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2001	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 2000	CHNG RA/RO	View Image (PDF format) View Image (TIFF format)
Report for year 1999	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1998	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1998	CHNG RA/RO	View Image (PDF format) View Image (TIFF format)
Report for year 1997	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1996	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1996	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1995	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1995	MISCELLANEOUS	View Image (PDF format) View Image (TIFF format)
Report for year 1994	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1993	ANNUAL REPORT	View Image (PDF format) View Image (TIFF format)
Report for year 1993	CHNG RA/RO	View Image (PDF format) View Image (TIFF format)
Report for year 1993	CHNG RA/RO	View Image (PDF format) View Image (TIFF format)

Idaho Secretary of State's Main Page State of Idaho Home Page

Comments, questions or suggestions can be emailed to: sosinfo@sos.idaho.gov

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

State of Idaho

Department of State

CERTIFICATE OF AUTHORITY
OF

CENCALL, INC.

I, PETE T. CENARRUSA, Secretary of State of the State of Idaho, hereby certify that duplicate originals of an Application of CENCALL, INC. for a Certificate of Authority to transact business in this State, duly signed and verified pursuant to the provisions of the Idaho Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Certificate of Authority to CENCALL, INC. to transact business in this State under the name CENCALL, INC. and attach hereto a duplicate original of the Application for such Certificate.

Dated: February 24, 1993

GREAT SEAL OF THE STATE OF IDAHO

Pete T. Cenarrusa
SECRETARY OF STATE

By Valerie Taylor

APPLICATION FOR CERTIFICATE OF AUTHORITY

(Profit Corporation)

FEB 24 11 21 AM '93
SECRETARY OF STATE

To the Secretary of State of Idaho

Pursuant to Section 30-1-110, Idaho Code, the undersigned Corporation hereby applies for a Certificate of Authority to transact business in your State, and for that purpose submits the following statement:

1. The name of the corporation is CanCall, Inc.

2. The name which it shall use in Idaho is _____

(To be used only when required to avoid a conflict with a name already on file. Must be accompanied by a Board of Directors resolution adopting assumed name in Idaho.)

3. It is incorporated under the laws of Delaware

4. The date of its incorporation is May 15, 1989 and the period of its duration is perpetual.

5. The address of its principal office in the state or country under the laws of which it is incorporated is Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801

6. The address to which correspondence should be addressed, if different from that in item 5.
3200 Cherry Creek South Drive, Suite 230, Denver, Colorado 80209

7. The street address of its proposed registered office in Idaho is 702 West Idaho, Suite 810 Boise, ID 83702, and the name of its proposed registered agent in Idaho at that address is Corporation Service Company c/o Holden, Kidwell, Hahn & Crapo

8. The purpose or purposes which it is proposed to pursue in the transaction of business in Idaho are:
Operating and providing specialized mobile radio and telecommunications services.

(Continued on reverse)

Submit application and certificate of status to:

Office of the Secretary of State
Division of Corporations
Statehouse, Room 203
Boise, Idaho 83720

IDAHO SECRETARY OF STATE
Secretary of State
19930224 0900 53920 2
CK #: 8513 CUST# 1
CORPORATIO 10 70.00= 70.00

ACA786
Profit

File Two Copies along with a Certificate of Corporate Status or Existence

Fee: $60

AFFIDAVIT OF CHARLES E. LOWIS IN SUPPORT OF MOTION TO DETERMINE COMPETENCY

9. The names and respective addresses of its directors and officers are:

Name	Office	Address
Robert F. McKenzie	President	3200 Cherry Creek South Drive, Suite 230 Denver, Colorado 80209
Mark A. Peters	Secretary	3200 Cherry Creek South Drive, Suite 230 Denver, Colorado 80209
Mark A. Peters	Treasurer	3200 Cherry Creek South Drive, Suite 230 Denver, Colorado 80209
Stephen W. Schoves	Chief Executive Officer	3200 Cherry Creek South Drive, Suite 230 Denver, Colorado 80209
	--SEE EXHIBIT A--	

10. The corporation accepts and shall comply with the provisions of the Constitution and the laws of the State of Idaho.

11. This application is accompanied by a Certificate of Corporate Status or Existence, duly authenticated by the proper officer of the state or country under the laws of which it is incorporated.

Dated: February 15, 1993

CenCall, Inc.
(Corporation name)

By _____
its President/Vice President (please specify)

and _____
its Secretary/Assistant Secretary (please specify)

STATE OF Colorado)
) ss:
COUNTY OF Denver)

I, Mary K. Dee, a notary public, do hereby certify that on this 15th day of February, 19 93, personally appeared before me Robert F. McKenzie and Mark A. Peters, who being by me first duly sworn, declared that they are the President and Secretary respectively of CenCall, Inc.,

that they signed the foregoing documents as President and Secretary respectively of the corporation and that the statements therein contained are true.

My Commission Expires 6/22/94.

Mary K. Dee
Notary Public

6592r

EXHIBIT A

CENCALL, INC.
BOARD OF DIRECTORS

Robert F. McKenzie
CenCall, Inc.
3200 Cherry Creek South Drive
Suite 230
Denver, Colorado 80209

Steven C. Halstedt (Chairman)
The Centennial Funds
1999 Broadway
Suite 2100
Denver, Colorado 80202

Greg Herman
SMR Network, Inc.
1628 NW Everett St.
Portland, Oregon 97209

Robert M. Van Degna
Fleet Venture Partners
111 Westminster St.
Providence, Rhode Island 02903

Robert A. Brooks
Brooks Telecommunications Corp.
101 S. Hanley Road, 19th Floor
St. Louis, Missouri 63105

Richard J. Brekka
CIBC Wood Gundy Capital
425 Lexington Avenue
New York, New York 10017

William A. Johnson
Hancock Venture Partners
One Financial Center
44th Floor
Boston, Masschusetts 02111

Stephen W. Schove
CenCall Holdings, Inc.
3200 Cherry Creek South Drive
Suite 230
Denver, Colorado 80209

State of Delaware

Office of the Secretary of State

FEB 24 11 2. 6H '93

SECRETARY OF STATE

I, WILLIAM T. QUILLEN, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY CENCALL, INC. IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE SO FAR AS THE RECORDS OF THIS OFFICE SHOW, AS OF THE DATE SHOWN BELOW.

* * * * * * * * * * *

William T. Quillen

William T. Quillen, Secretary of State

AUTHENTICATION: 3795526

DATE: 02/23/1993

713054007

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT OF MOTION TO DETERMINE COMPETENCY

State of Idaho

Department of State

AMENDED CERTIFICATE OF AUTHORITY
OF

CENCALL, INC.
File Number C 101198

I, PETE T. CENARRUSA, Secretary of State of the State of Idaho, hereby certify that duplicate originals of an Application of CENCALL, INC. for an Amended Certificate of Authority to transact business in this State, duly signed and verified pursuant to the provisions of the Idaho Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Amended Certificate of Authority to ONECOMM CORPORATION, N.A. to transact business in this State under the name ONECOMM CORPORATION, N.A. and attach hereto a duplicate original of the Application for such Amended Certificate.

Dated: August 15, 1994

GREAT SEAL OF THE STATE OF IDAHO

Pete T. Cenarrusa
SECRETARY OF STATE

By Sally J. Clark

APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY

SEC. OF STATE
94 AUG 15 AM 10 51

To the Secretary of State of Idaho:

Pursuant to Section 30-1-118, ***Idaho Code***, the undersigned Corporation hereby applies for an amended certificate of authority to transact business in the State of Idaho and for that purpose submits the following statement.

1. A Certificate of Authority was issued to the corporation by your office on February 24, 19 93, authorizing it to transact business in the State of Idaho under the name of CenCall, Inc.
2. Its corporate name has been changed to OneComm Corporation, N.A.

(Note: If the corporation name has not been changed, insert "No change.")

3. The name which it shall use hereafter in the State of Idaho is _____

It desires to pursue in the transaction of business in the State of Idaho purposes other than or in addition to those set forth in its prior application for certificate of authority, as follows:

No Change

(Note: If no additional changes are proposed, insert "No change.")

Dated June 22, 1994

OneComm Corporation, N.A.
(Corporation Name)

By _____
Its President/Vice President (please specify)
Michael R. Carper

And _____
Its Secretary/Assistant Secretary (please specify)
Louise M. Pickford

GUY WILLIAMS NOTARY PUBLIC STATE OF COLORADO

STATE OF _____)
)ss:
COUNTY OF _____)

I, Guy Williams, a notary public, do hereby certify that on this 22nd day of June, 19 94, personally appeared before me Michael R. Carper, who being by me first duly sworn, declared that (s)he is the Vice President of OneComm Corporation, N.A.

that (s)he signed the foregoing documents as Vice President of the corporation and that the statements therein contained are true.

Guy Williams
Notary Public

My Commission Expires
Jan. 25, 1997

Submit application and filing fee to:

Office of the Secretary of State
Division of Corporations
Statehouse, Room 203
Boise, Idaho 83720

Secretary of State use only

IDAHO SECRETARY OF STATE
19940815 0900 20922 2
CK #: 12882 CUST# 5835
CORP
1@ 30.00= 30.00

ACA593 *File two copies. If a name change, attach certificate of fact from state of incorporation.* **Fee: $30.00**

IDAHO CT SYSTEM

State of Delaware

Office of the Secretary of State

I, WILLIAM T. QUILLEN, SERCRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THAT THE SAID "CENCALL, INC.", FILED A CERTIFICATE OF AMENDMENT, CHANGING ITS NAME TO "ONECOMM CORPORATION, N.A.", THE THIRTEENTH DAY OF JUNE, A.D. 1994, AT 4:30 O'CLOCK P.M.

AND I DO HEREBY FURTHER CERTIFY THAT THE AFORESAID CORPORATION IS DULY INCORPORATED UNDER THE LAWS OF THE STATE OF DELAWARE AND IS IN GOOD STANDING AND HAS A LEGAL CORPORATE EXISTENCE NOT HAVING BEEN CANCELLED OR DISSOLVED SO FAR AS THE RECORDS OF THIS OFFICE SHOW AND IS DULY AUTHORIZED TO TRANSACT BUSINESS.

94 AUG 15 AM 10 52

SEC. OF STATE

William T. Quillen

William T. Quillen, Secretary of State

2196427 8320

AUTHENTICATION: 7167641

DATE: 06-30-94

State of Idaho

Department of State

AMENDED CERTIFICATE OF AUTHORITY
OF

ONECOMM CORPORATION, N.A.
File Number C 101198

I, PETE T. CENARRUSA, Secretary of State of the State of Idaho, hereby certify that duplicate originals of an Application of ONECOMM CORPORATION, N.A. for an Amended Certificate of Authority to transact business in this State, duly executed pursuant to the provisions of the Idaho Business Corporation Act, have been received in this office and are found to conform to law.

ACCORDINGLY and by virtue of the authority vested in me by law, I issue this Amended Certificate of Authority to NEXTEL WEST CORP. to transact business in this State under the name NEXTEL WEST CORP. and attach hereto a duplicate original of the Application for such Amended Certificate.

Dated: June 10, 1997

GREAT SEAL OF THE STATE OF IDAHO

Pete T. Cenarrusa
SECRETARY OF STATE

By Sally J. Clark

APPLICATION FOR AMENDED CERTIFICATE OF AUTHORITY

Jun 10 3 00 PM '97

SECR... STATE
STATE ... IDAHO

To the Secretary of State of the State of Idaho:

Pursuant to Section 30-1-118, **Idaho Code**, the undersigned Corporation hereby applies for an amended certificate of authority to transact business in the State of Idaho and for that purpose submits the following statement.

1. A Certificate of Authority was issued to the corporation by your office on June 29 19 94

authorizing it to transact business in the State of Idaho under the name of

ONECOMM CORPORATION, N.A.

2. Its corporate name has been changed to

NEXTEL WEST CORP.

(Note: If the corporation name has not been changed, insert "No change.")

3. The name which it shall use hereafter in the State of Idaho is

NEXTEL WEST CORP.

4. It desires to pursue in the transaction of business in the State of Idaho purposes other than or in addition to those set forth in its prior application for certificate of authority, as follows:

no change

(Note: If no additional purposes are proposed, insert "No change.")

Dated: June 1, 1997 NEXTEL WEST CORP.
(Corporation Name)

By
(Its President, Vice President, Secretary, or Assistant Secretary ~~(please specify)~~)

Michael R. Carper

Submit application and filing fee to:

Office of the Secretary of State
Division of Corporations

File two copies.
If a name change, attach certificate to of Act from sate of Incorporation.
Fee: $30.00

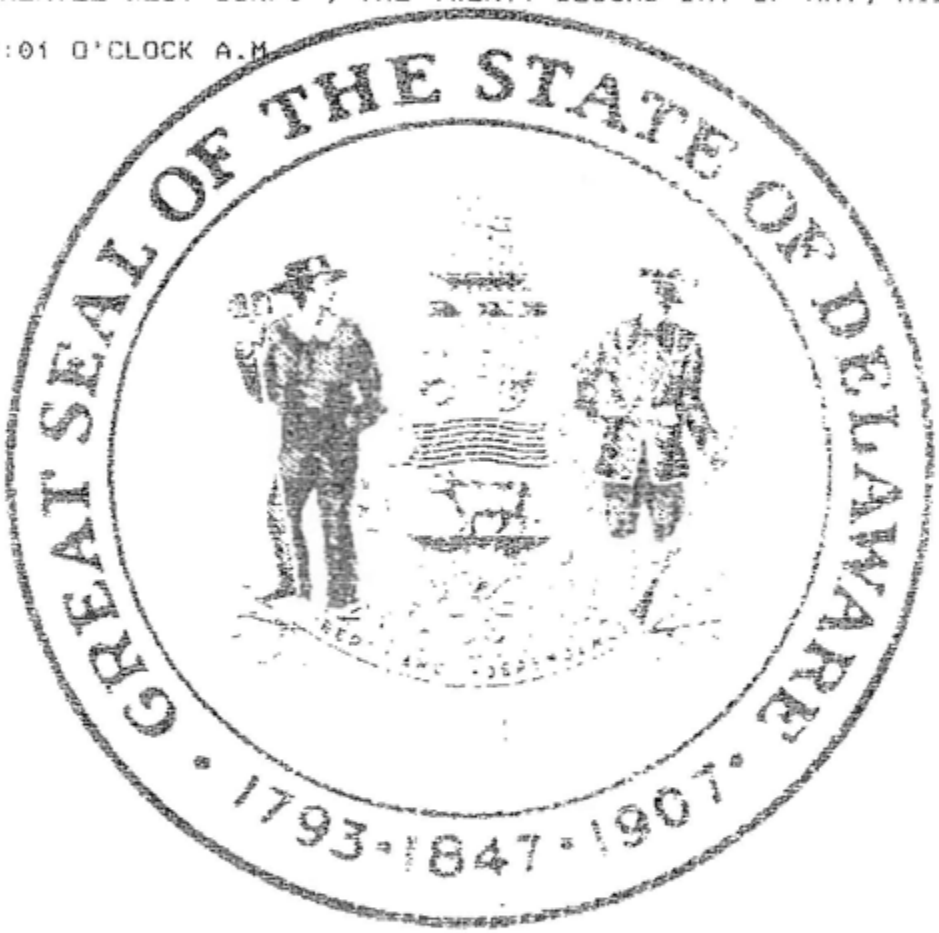
Secretary of State use only IDAHO SECRETARY OF STATE
DATE 06/10/1997
0256 100937 14
CK #: 1085 CUST# 19577
AMEND CERT 1@ 30.00= 30.00

#:

State of Delaware

Office of the Secretary of State

I, EDWARD J. FREEL, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THAT THE SAID "ONECOMM CORPORATION, N.A.", FILED A CERTIFICATE OF MERGER, CHANGING ITS NAME TO "NEXTEL WEST CORP.", THE TWENTY-SECOND DAY OF MAY, A.D. 1997, AT 9:01 O'CLOCK A.M.



Edward J. Freel

Edward J. Freel, Secretary of State

2196427 8320

971187377

8501881

AUTHENTICATION:

06-09-97

DATE:

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO, Plaintiff, v. LEOTIS B. BRANIGH III, Defendant.	CASE NO. CR06-07149 OPINION AND ORDER ON DEFENDANT'S MOTION TO DISMISS AND MOTION IN LIMINE

This matter is before the Court on Defendant's Motion to Dismiss and Motion in Limine. The Court heard oral arguments on the motions on November 25, 2008. Defendant Leotis B. Branigh III was represented by attorney Charles E. Kovis. The State was represented by Prosecuting Attorney Daniel L. Spickler. The Court, having considered the motions, affidavits and briefs filed by the parties, having heard oral arguments of counsel, and being fully advised in the matter, hereby renders its decision.

MOTION TO DISMISS

Defendant Branigh contends that by charging him with murder the State has violated his right against double jeopardy under the Fifth Amendment of the United States Constitution as he has already once been placed in jeopardy for the same offense. Defendant contends police endangered his life and/or limb the first time when they pursued him at high speed in marked patrol units with emergency lights flashing, shot at his vehicle in order to disable it, and then arrested him. It is Defendant's contention that by charging him and causing him to stand trial for murder, his life and/or limb is endangered a second time for the same offense. Defendant argues that the plain language of the Fifth Amendment supports his position. The Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment 5.

The Defendant contends the plain language of the Fifth Amendment supports his position, emphasizing the words "nor shall any person . . . for the same offense . . . be twice put in jeopardy of life or limb." While the Court finds the Defendants argument creative, it does not find support for the Defendant's position in the language of the Fifth Amendment. When the language relied on by the Defendant is read in context of the full text of the Amendment, it provides that no person shall be held to answer twice for the same offense, as answering for an offense places a person's life or limb in jeopardy. Adopting the interpretation argued by the Defendant would work an absurdity, as all that would be necessary to avoid prosecution for

criminal activity is to flee or resist arrest to such a degree that police officers are forced to take serious measures to execute an arrest. Neither the Constitution nor any court would support an individual creating their own "jeopardy" and thereby acquiring 5th Amendment immunity from further prosecution.

In the instant matter, Defendant Branigh is being held to answer only now for the alleged offense of murdering Michael Johnston. Since jeopardy will not attach until such time as a jury is sworn to try the issue, Defendant Branigh is not being held a second time to answer for the same offense.

MOTION IN LIMINE – CELL PHONE RECORDS

Defendant's Motion in Limine seeks to prevent the State from submitting as evidence at trial the electronically stored cell phone records of the Defendant obtained by means of a search warrant. Defendant asserts the records were obtained by means of a lawful search warrant that was unlawfully executed and, because the records were unlawfully obtained, they cannot be used as evidence at trial. In the instant case, a Lewiston City police officer contacted the local Nextel-Sprint office to inquire about obtaining the cell phone records of Defendant Branigh. The local office told the officer he would have to contact the company's Overland Park, Kansas office where the records are stored.

On October 4 JMB, 2008, the Officer obtained a search warrant from Nez Perce County Magistrate Kalbfleisch for the electronically stored cell phone records of the Defendant.[1] The search warrant listed the premises to be searched as Sprint Nextel Corporate Security, Subpoena Compliance, located at 6480 Sprint Parkway in Overland Park, Texas (Fax #913-315-0736). Upon the suggestion of the Kansas office of Nextel-Sprint, which the officer had contacted by

[1] Attached as Appendix 1.

telephone, the officer faxed the search warrant to the fax number supplied and listed in the warrant.[2] Subsequently, the cell phone records were provided by mail to the Lewiston City Police Department. However, the records failed to include a letter of certification/authenticity so, on November 29, 2007, the Officer obtained a second search warrant from Nez Perce County Magistrate Gaskill for the records and a letter of certification/authenticity.[3] The second search warrant described the premises to be searched identically to the first warrant. The second warrant was then faxed to the fax number on the warrant as supplied by Nextel-Sprint.

Idaho Code § 19-4408 reads:

> A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it. Service of a warrant may be made by the officers mentioned in its directions in person, by mail or facsimile transmission, or by electronic mail. Unless an investigation necessitates otherwise, the officer should attempt notification on the person whom it is served prior to electronic mail service.

Idaho Criminal Rule 41(a) reads:

> (a) Authority to Issue Warrant. A search warrant authorized by this rule may be issued by a district judge or magistrate *within the judicial district wherein the property or person sought is located* upon request of a law enforcement officer or any attorney for the state of Idaho. [emphasis added].

The Defendant contends the Idaho search warrant, while lawfully obtained, was unlawfully executed as it was not executed upon a Nextel-Sprint business located within the judicial district where the search warrant was obtained, as required by I.C.R. 41(a). Instead, the search warrant was sent by fax to another state well outside the judicial district where the search warrant was issued.

---

[2] The Court takes judicial notice that area code 913 includes Overland Park, Kansas.
[3] Attached as Appendix 2.

The State first argues that the procedure followed was that suggested by Nextel-Sprint, implying it must be proper since it was recognized by the Kansas office of Nextel-Sprint. The State further argues that the question is not one of geography but one of personal jurisdiction. The State reasons that, because Nextel-Sprint is registered in Idaho as a foreign corporation doing business in Idaho, it is subject to the Court's personal jurisdiction and therefore, a search warrant issued by an Idaho judge carries the same force and authority when executed upon the Overland Park, Kansas Nextel-Sprint office as it would if the search warrant had been issued by a court in the judicial district where the Kansas office is located. The Court is not persuaded. The fact that a court has personal jurisdiction over a business entity has no bearing on the geographical limitations placed on search warrants by either statute and by rule. Neither can a business entity determine the proper procedure for execution of a state issued search warrant.

The State has provided the Court with no authority that would allow a search warrant to be served on a location outside of the judicial district where the warrant is obtained. The language of I.C.R. 41(a) is clear and unambiguous. Barring authority that supersedes or trumps the Rule, of which the State has presented none, the Court finds the search warrant, while lawfully obtained, was unlawfully executed and, as a result, the cell phone records obtained by means of the search warrant were unlawfully obtained. Nevertheless, the Court's ruling does not foreclose admission of the Defendant's cell phone records if the State can present records that are shown to be lawfully obtained and a proper foundation for the admission of the records is established.

ORDER

Defendant's Motion to Dismiss is hereby DENIED.

Defendant's Motion in Limine re Cell Phone Records is hereby GRANTED.

Dated this 28 day of November 2008.

JEFF M. BRUDIE, District Judge

FILED

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

2007 NOV -1 A 8:51

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE MATTER OF THE APPLICATION FOR A SEARCH WARRANT.	)	CASE NO.
	)	SEARCH WARRANT (Day and Night)

STATE OF I D A H O)
: ss.
County of Nez Perce)

THE STATE OF IDAHO, TO ANY SHERIFF, CONSTABLE, MARSHAL, OR POLICEMAN IN THE COUNTY OF NEZ PERCE:

PROOF by Affidavit having been this day made before me by one: Ofc. Brandon Hopple of the Lewiston Police Department, showing that there is reasonable cause to believe that certain property hereinafter described is located in or upon the following described premise: Sprint Nextel Corporate Security, Subpoena Compliance, located at 6480 Sprint Parkway in Overland Park, Texas (Fax #913-315-0736).

That the property referred to and sought consists of printouts of all incoming and outgoing text messages for cell phone number 208-305-8257; and the call detail records to include all incoming and outgoing calls for cell phone number 208-305-8257 for the period of 09-01-2007 until 10-02-07.

YOU ARE THEREFORE COMMANDED, at any time of the day or night to make immediate search of the above-described premises, persons and/or vehicle, for the property described above; and if you find the same or any part thereof to bring it forthwith before me at the Nez Perce County Courthouse in the City of Lewiston, Nez Perce County, Idaho.

RETURN to this Warrant is to be made to the above-entitled Court within FOURTEEN

(14) days from the date hereof.

GIVEN UNDER MY HAND and DATED this 4TH day of October, 2007.

JUDGE/MAGISTRATE

FILED

2007 NOV 29 P 3:50

PATTY O. WEESE
CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

IN THE MATTER OF THE APPLICATION FOR A SEARCH WARRANT.	)	CASE NO.
	)	SEARCH WARRANT (Day and Night)

STATE OF I D A H O)
: ss.
County of Nez Perce)

THE STATE OF IDAHO, TO ANY SHERIFF, CONSTABLE, MARSHAL, OR POLICEMAN IN THE COUNTY OF NEZ PERCE:

PROOF by Affidavit having been this day made before me by one: Ofc. Brandon Hopple of the Lewiston Police Department, showing that there is reasonable cause to believe that certain property hereinafter described is located in or upon thefollowing described premise: Sprint Nextel Corporate Security, Subpoena Compliance, located at 6480 Sprint Parkway in Overland Park, Texas (Fax #913-315-0736).

That the property referred to and sought consists of subscriber information, to include name, address, date of birth, social security information, or any other identifying information regarding the account holder or holders for cell phone number 208-305-8257 during the period of 09-01-2007 through 10-02-2007; and a certification/authentication letter on records requested and already provided to the Lewiston Police Department for Sprint/Nextel case number 2007-193092.

YOU ARE THEREFORE COMMANDED, at any time of the day or night to make immediate search of the above-described premises, persons and/or vehicle, for the property described above; and if you find the same or any part thereof to bring it forthwith before me at the Nez Perce County Courthouse in the City of Lewiston, Nez Perce County,

Idaho.

RETURN to this Warrant is to be made to the above-entitled Court within FOURTEEN (14) days from the date hereof.

GIVEN UNDER MY HAND and DATED this 29th day of Nov, 2007.

JUDGE/MAGISTRATE

CERTIFICATE OF MAILING

FILED

2008 NOV 28 PM 1 43

PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

I hereby certify that on this _____ day of February, 2008 that true copies of the foregoing Notice of Hearing were:

_____Hand delivered
_____Delivered via Valley Messenger Service
_____Mailed
__X__Facsimile

Daniel L. Spickler

Nez Perce County Prosecuting Attorney

And

Charles E. Kovis HANDED

Attorney for Defendant

CLERK OF DISTRICT COURT SECOND JUDICIAL DISTRICT NEZ PERCE COUNTY · STATE OF IDAHO · EX-OFFICIO AUDITOR AND RECORDER

PATTY O. WEEKS
CLERK OF THE COURT

By _____
Deputy

ORIGINAL

DANIEL L. SPICKLER
Nez Perce County Prosecuting Attorney
Post Office Box 1267
Lewiston, Idaho 83501
Telephone: (208) 799-3073
Idaho State Bar No. 2923

FILED
2008 DEC 2 PM 1 05
PATTY O. WEEKS
CLERK OF THE DIST. COURT
DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

THE STATE OF IDAHO,	)	CASE NO. CR2007-0008107
Plaintiff,	)	MOTION FOR RECONSIDERATION
vs.	)	
LEOTIS B. BRANIGH III,	)	
Defendant.	)	

COMES NOW, DANIEL L. SPICKLER, Prosecuting Attorney for Nez Perce County, Idaho, in the above-entitled matter and moves the above-entitled Court to reconsider it's Opinion and Order on Defendant's Motion in Limine filed on December 1, 2008.

This Motion is made and based upon the Brief in Support of Motion for Reconsideration, and on the records on file herein.

DATED this 2nd day of December 2008.

DANIEL L. SPICKLER
Prosecuting Attorney

AFFIDAVIT OF SERVICE

I declare under penalty of perjury that a full, true, complete and correct copy of the foregoing MOTION FOR RECONSIDERATION was

(1) _____ hand delivered, or

(2) _____ hand delivered via court basket, or

(3) ✓ sent via facsimile, or

(4) _____ mailed, postage prepaid, by depositing the same in the United States Mail.

ADDRESSED TO THE FOLLOWING:

Charles E. Kovis
Attorney at Law
P.O. Box 9292
Moscow, ID 83843

DATED this 2nd day of December 2008.

Shelly L. Damato

SHELLY L. DAMATO
Executive Sr. Legal Assistant

ORIGINAL

FILED

2008 DEC 2 PM 1 06

PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

DANIEL L. SPICKLER
Nez Perce County Prosecuting Attorney
Post Office Box 1267
Lewiston, Idaho 83501
Telephone: (208) 799-3073
Idaho State Bar No. 2923

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

THE STATE OF IDAHO,	)	CASE NO. CR2007-0008107
Plaintiff,	)	BRIEF IN SUPPORT OF STATE'S MOTION FOR RECONSIDERATION
vs.	)	
LEOTIS B. BRANIGH III,	)	
Defendant.	)	

COMES NOW, DANIEL L. SPICKLER, Prosecuting Attorney for Nez Perce County, Idaho, in the above-entitled matter and hereby respectfully submits the following Brief in Support of State's Motion for Reconsideration regarding Text Messages obtained from Defendant's Electronic Communications Service Provider

The State apologizes to the Court for failing to timely provide specific references to the State's authority to issue a Search Warrant for stored wire and electronic communications and transactional records and to have said Warrant served extra-territorially.

1. AUTHORITY FOR EXTRA-TERRITORIAL SERVICE OF WARRANT

Authority for both Federal and State Courts to issue extra-territorial search warrants is provided by 18 U.S.C. 2701 *et. seq.* (the Electronic Communication Privacy Act). The USA Patriot Act (Public Law 107-56) broadened the provisions of 18 U.S.C.

2703 to include stored wire and electronic communications. Definitions applicable to the ECPA are adopted from 18 U.S.C. 2510.

Section 220 of the USA Patriot Act is entitled "Nationwide Service of Warrants for Electronic Evidence", and modified the provisions of the ECPA.

As stated in *Commentary, Chapter 121, Stored Wire and Electronic Communications and Transactional Records Access, National Institute for Trial Advocacy, James A. Adams (2008)*:

> Authorization for obtaining the contents of stored communications depends on two variables – the type of facility controlling the storage and the duration of the storage. To gain access to the content of materials stored in an "Electronic Communications System" (defined in 18 U.S.C. 2510 (14)) that have been stored for 180 days or less, the government can require disclosure only by resorting to a Fourth Amendment search warrant. The search warrant issuance process was amended to permit issuance by any judge having jurisdiction over the offense (emphasis added) regardless of the locus of the electronic storage system. Thus, such warrants are valid nationwide regardless of where they are issued.

The relevant statute, Title 18 U.S.C. 2703 (a), provides in pertinent part that:

> A governmental entity may require the disclosure by a provider of electronic communications service of the contents of a wire or electronic communication that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedures by a court with jurisdiction over the offense under investigation or equivalent state warrant.

The Federal Rules of Criminal Procedure do not apply to state judges or state law enforcement. The State must only comply with Fourth Amendment requirements of probable cause. *United States v. Katoa*, (2004, CA10 Utah) 379 F.3d 1203, cert denied (2005 US) 2005 US Lexis 1888; *U.S. v. McKeever*, (1990, CA5 Tex) 905 F.2d 829; *U.S. v. Piver*, (1990, CA9 OR) 899 F.2d 881.

A rather complete discussion of the reasoning behind the Federal Legislation is given *In the Matter of the Search of, Yahoo, Incorporated*, 701 First Avenue, Sunnyvale, California 94089, (2007 US Dist , Ariz):

> Common sense dictates the result reached herein. Judicial and prosecutorial efficiency is better served by permitting the federal district court for the district where the crime allegedly occurred to preside over both the investigation and prosecution of that crime. Commentators have suggested that one reason for the amendments effected by Section 220 of the Patriot Act was to alleviate the burden placed on federal district courts in the Eastern District of Virginia and the Northern District of California where major internet service providers ("ISPs") AOL and Yahoo, respectively, are located. See, Paul K. Ohm, *Parallel Effect Statutes* [*12] *and E-mail "Warrants": Reframing the Internet Surveillance Debate,* 72 Geo.Wash.L.Rev. 1599, 1613-15 (Aug. 2004); Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens,* 72 Geo.Wash.L.Rev. 1375, 1454 (Aug. 2004) (stating that the "effect of the change was to shift the responsibility for issuance of the order from the court where the service provider is located to the court with jurisdiction over the offense being investigated; prior to passage of the USA Patriot Act, a disproportionate number of such orders were issued in the Eastern District of Virginia, where AOL is located."); Franklin E. Fink, *The Name Behind the Screenname: Handling Information Requests Relating to Electronic Communications,* 19 No. 11 Computer & Internet Law 1, 6-7 (Nov. 2002) (stating that "[t]his provision was intended to relieve the burden on district courts in which major communications providers are located, such as the Northern District of California and Eastern District of Virginia."). Indeed, the House Judiciary Committee's Report accompanying the USA Patriot Act explains that § 2703(a) "attempts to address the investigative delays caused by the cross-jurisdictional nature of the Internet." Paul K. Ohm, *Parallel Effect Statutes and E-mail "Warrants": Reframing the Internet Surveillance Debate,* 72 Geo.Wash.L.Rev. at 1614-15, n. 80 (Aug. 2004) (citing H.R. Rep. No. 107-236, pt. 1 at 57 (2001)). The Committee's Report further explains that requiring an investigator to coordinate with agents, prosecutors, and judges in the district where the ISP is located would cause time delays that "could be devastating to an investigation, especially where additional criminal or terrorists acts are planned." *Id.* (emphasis added). Additionally, requiring an Arizona federal agent investigating a crime committed in Arizona to travel to California or Virginia to obtain an out-of-district search warrant from a California or Virginia magistrate judge for electronically-

stored communications would, in my view, unnecessarily increase the cost of federal investigations.

2. 18 U.S.C. 2703(a) is applicable to the States.

Lest there be any confusion about the referenced statute's applicability to the states, the Court's opinion in *Ameritech v. McCann*, 403 F.3d 908; 2005 U.S. App. LEXIS 5941 discusses the issue regarding applicability of the ECPA to the states (in the context of 18 USC 2706, which deals with the requirement that governmental entities are responsible for reasonable costs incurred by the service provider):

> "A governmental entity" is considerably broader than "the federal government." The point of § 2706 is not to distinguish the federal government from other governments, but to distinguish the public from the private sector. Any private actor who wants information from a phone company will have to negotiate and pay for the service, when §2702 allows disclosure at all. Governments have a power of compulsion, and §2706 attaches a price tag to the use of that power, just as the Constitution's takings clause requires compensation for other uses of governmental power to obtain private property.
>
> Although the Electronic Communications Privacy Act does not define the term "governmental entity," it uses that phrase in several sections in ways that make application to state and local governments unmistakable. For example, §2703 specifies how a "governmental entity" can go about obliging a phone company to hand over records. The statute gives examples, such as "an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena", §2703(b)(1)(B)(i). Other options include a "State warrant" (referred to in three subsections) and a "Federal or State grand jury or trial subpoena" (in § 2703(c)(2)). Then there is § 2703(d), which distinguishes what "a State governmental authority" must do from how a federal governmental body proceeds, an odd reference indeed if the category "governmental entity" does not include states.
>
> The language of § 2703 and § 2706 taken together is enough to satisfy any plain-statement requirement for application of federal law to the states. Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991). Although the

> Congressional Budget Office expressed an opinion that the 1986 law would not impose new costs on states, this view--on which Congress did not vote, and the President did not sign--cannot alter the meaning of enacted statutes. It suggests instead that the CBO erred (or perhaps thought that compensable demands would be so rare that the expenses under § 2706 would not make a dent in a governmental budget).
>
> Next in line is the District Attorney's argument that § 2706 does not preempt state law. It does not contain an express declaration of preemption, the District Attorney observes, and therefore (he says) does not supersede state law. Since when has such a declaration been required? The Constitution's supremacy clause does all the heavy lifting. Federal statutes prevail over state and local statutes to the extent of any inconsistency, whether or not Congress so declares one statute at a time. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 489, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987).

3. Defendant lacks standing to raise constitutional violation issues.

In addition to the grounds asserted above, the State contends the Defendant is without standing to contest the State's obtaining records belonging to Sprint/Nextel. The records may be about the Defendant, but they do not belong to him.

The Court, in *Albert Terrill Jones v. United States of America*, 2006 U.S. Dist. LEXIS 31892, observed:

> "A person has an expectation of privacy protected by the Fourth Amendment if he has a subjective expectation of privacy, and if society is prepared to recognize that expectation as objectively reasonable." *United States v. Miravalles,* 280 F.3d 1328, 1331 (11th Cir. 2002) (citing *Katz v. United States,* 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring). An individual's right to privacy is limited however. "[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 1624, 48 L. Ed. 2d 71 (1976) (limited by statute).

> We have not addressed previously the existence of a legitimate expectation of privacy in text messages or e-mails. Those circuits that have addressed the question have compared e-mails with letters sent by postal mail. Although letters are protected by the Fourth Amendment, "if a letter is sent to another, the sender's expectation of privacy ordinarily terminates upon delivery." *United States v. King,* 55 F.3d 1193, 1195-96 (6th Cir. 1996)(citations omitted). Similarly, an individual sending an e-mail loses "a legitimate expectation of privacy in an e-mail that had already reached its recipient." *Guest v. Leis,* 255 F.3d 325, 333 (6th Cir. 2001); *United States v. Lifshitz,* 369 F.3d 173, 190 (2d Cir. 2004). *See also United States v. Maxwell,* 45 M.J. 406, 418 (C.A.A.F. 1996) ("Drawing from these parallels, we can say that the transmitter of an e-mail message enjoys a reasonable expectation that police officials will not intercept the transmission without probable cause and a search warrant. However, once the transmissions are received by another person, the transmitter no longer controls its destiny."), *cited in Guest,* 255 F.3d at 333.

CONCLUSION

Since this Court has already determined the search warrant was properly issued upon probable cause, and that this Court has jurisdiction over the offense of First Degree Murder committed in Nez Perce County, Idaho, for the reasons and on the grounds disclosed above, the State respectfully requests this Court to Reconsider its decision regarding the admissibility of Defendant's text messages and deny Defendant's Motion in Limine.

DATED this 2nd day of December 2008.

DANIEL L. SPICKLER
Prosecuting Attorney

AFFIDAVIT OF SERVICE

I declare under penalty of perjury that a full, true, complete and correct copy of the foregoing BRIEF IN SUPPORT OF STATE'S MOTION FOR RECONSIDERATION was

(1) _____ hand delivered, or

(2) _____ hand delivered via court basket, or

(3) ✓ sent via facsimile, or

(4) _____ mailed, postage prepaid, by depositing the same in the United States Mail.

ADDRESSED TO THE FOLLOWING:

Charles E. Kovis
Attorney at Law
P.O. Box 9292
Moscow, ID 83843

DATED this 2nd day of December 2008.

Shelly L. Damato

SHELLY L. DAMATO
Executive Sr. Legal Assistant

*2007 U.S. Dist. LEXIS 37601, **

In the Matter of the **Search** of, Yahoo, Incorporated, 701 First Avenue, Sunnyvale, California 94089

No. 07-3194-MB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

2007 U.S. Dist. LEXIS 37601

May 21, 2007, Decided
May 22, 2007, Filed

CASE SUMMARY

PROCEDURAL POSTURE: The United States (Government) moved for an order authorizing an out-of-district **search warrant** for the contents of electronically-stored communications, pursuant to 18 U.S.C.S. § 2703(a). The subject of the **search warrant**, a California-based Internet **service** provider (ISP), challenged the scope of the **warrant** that could be issued by the United States District Court for the District of Arizona.

OVERVIEW: A computer user outside the United States criminally hacked into a Government computer located in Yuma, Arizona. The Government subpoenaed the ISP's records, which indicated that the hacker was accessing an unauthorized E-mail account from computers assigned internet protocol addresses in a European country. The Government filed a motion seeking an out-of-district **search warrant** pursuant to 18 U.S.C.S. § 2703(a) to **search** and seize electronic information, including electronically-stored communications, associated with the unauthorized E-mail account stored on the ISP's computer servers located in California. The court concluded that Fed. R. Crim. P. 41 could not reasonably be interpreted to limit the **extra-territorial** scope of § 2703(a). Congress clearly intended that a district court had the authority under the Electronic Communications Privacy Act, 18 U.S.C.S. §§ 2701-2712, to obtain such records from other jurisdiction.

OUTCOME: The Government's motion to authorize an out-of-district **search warrant** for the contents of electronically-stored communications held by the ISP provider was granted.

CORE TERMS: search warrant, out-of-district, electronic, Federal Rules, issuance, electronic communication, electronically-stored, authorize, provider, e-mail, yahoo, USA Patriot Act, internet, issuing, unauthorized, federal district, interpreting, ambiguous, seizure, territorial jurisdiction, seize, Patriot Act, federal law, governmental entity, legislative history, committee reports, procedural aspects, subject-matter, meaningless, disclosure

LEXISNEXIS® HEADNOTES Show

JUDGES: [*1] Lawrence O. Anderson, United States magistrate Judge.

OPINION BY: Lawrence O. Anderson

OPINION

ORDER

This matter is before the Court on the motion of the United States for an order authorizing an out-of-district **search warrant** for the contents of electronically-stored communications pursuant to Title 18 U.S.C. § 2703(a).

I. Background

BRIEF IN SUPPORT OF STATE'S
MOTION FOR RECONSIDERATION

77e

The United States asserts that on February 23, 2006, an unidentified individual obtained unauthorized access to a United States government computer (the "victim computer"), located in Yuma, Arizona, which is the property of a governmental agency. A forensic examination revealed that the unauthorized individual exfiltrated a text file from the victim computer to an e-mail address, xxxx_xxx@yahoo.com [1] (the "unauthorized e-mail account").

FOOTNOTES

1 Obviously, this is not the actual email address and is used to protect the pending criminal investigation.

The Government has subpoenaed Yahoo, Inc.'s ("Yahoo") records which indicate that the user is accessing **[*2]** the unauthorized e-mail account from computers assigned internet protocol ("IP") addresses in a southeastern European country. [2] On December 15, 2006 and March 9, 2007, the Government issued requests to Yahoo pursuant to Title 18 U.S.C. § 2703(f) [3] to preserve existing records associated with the unauthorized e-mail account pending issuance of more formal legal process. The Government contends that the Yahoo computer servers located in Sunnyvale, California contain data, including stored electronic mail communications, for a particular subscriber associated with the unauthorized e-mail account.

FOOTNOTES

2 The Electronic Communications Privacy Act ("ECPA"), Title 18 U.S.C. §§ 2701-2712, permits the Government to compel production of certain types of information, including basic user information, using a subpoena. Title 18 U.S.C. § 2703(c)(2).

3 To minimize the risk that electronic information will be lost, Title 18 U.S.C. § 2703(f) permits the Government to direct network **service** providers to preserve records pending the issuance of compulsory legal process. Title 18 U.S.C. § 2703(f).

[*3] On May 8, 2007, the Government filed a motion seeking an out-of-district **search warrant** pursuant to Title 18 U.S.C. § 2703(a) to **search** and seize electronic information, including electronically-stored communications, associated with the unauthorized e-mail account stored on computer servers located in Sunnyvale, California. The Court granted that motion, issued the **search warrant** and now explains its ruling.

The question presented is whether the District Court of Arizona may properly issue a **search warrant** ordering the **search** and production of electronic evidence pursuant to § 2703(a) where the **warrant** is directed to an out-of-district internet **service** provider located in California.

II. Analysis

The relevant statute, Title 18 U.S.C. § 2703(a), provides, in pertinent part, that:

> A governmental entity may require the disclosure by a provider of electronic communication **service** of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a **warrant** issued *using the procedures described in* the **[*4]** Federal Rules of Criminal Procedure *by a court with jurisdiction over the offense under investigation* or equivalent State **warrant.**

Id. (emphasis added). The Government argues that this provision authorizes this Court to issue a **warrant** to **search** and seize contents of electronically-stored communications which are contained on Yahoo's computer servers in Sunnyvale, California. As discussed below, the Court agrees that § 2703(a) grants this Court such authority.

A. Statutory Interpretation

In interpreting a statute, federal courts "'look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.'" *United States v. Hockings,* 129 F.3d 1069, 1071 (9th Cir. 1997) (quoting *Northwest Forest Resource Council v. Glickman,* 82 F.3d 825, 830 (9th Cir. 1996)). If the provision is ambiguous, the court looks to legislative history. *Id.* Statutory language is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different ways. *United States v. Quarrell,* 310 F.3d 664, 669 (10th Cir. 2002). **[*5]**

It is "a fundamental canon that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (quoting *Davis v. Michigan Dep't of Treasury,* 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989)). If necessary to discern Congress' intent, the court may read statutory terms in view of the purpose of the statute. The structure and purpose of a statute may also provide guidance in determining the plain meaning of its provisions. *K Mart Corp. v. Cartier, Inc.,* 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *United States v. Lewis,* 67 F.3d 225, 228-29 (9th Cir. 1995) ("Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme."). To determine Congress' intent in enacting a statute, courts may also consult a variety of sources including rules of statutory construction and interpretation, and

extrinsic information such **[*6]** as the statute's expressed purpose, discussions in committee reports, accepted and rejected amendments, and statements made in congressional floor debates. *U.S. v. McNab,* 331 F.3d 1228, 1238 (11th Cir. 2003).

Federal courts are advised to avoid interpreting a statute in such a way that renders a word or phrase redundant or meaningless. *Gustafson v. Alloyd Co., Inc.,* 513 U.S. 561, 562, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995); *Kungys v. United States,* 485 U.S. 759, 778, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988). Such courts should also presume that when Congress alters the words of a statute, it does so with an intent to change the statute's meaning. *United States v. Wilson,* 503 U.S. 329, 336, 112 S. Ct. 1351, 117 L. Ed. 2d 593 (1992). Mindful of these rules of statutory interpretation, the Court will consider the meaning, scope and limitations of § 2703(a).

B. Title 18 U.S.C. § 2703(a)

The issue before the Court requires analysis of § 2703(a), as amended by Section 220 of the Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001, PL 107-56 (HR 3162) (the "USA Patriot Act"). Before amendment by the USA Patriot Act in 2001, § 2703(a) provided **[*7]** that:

> A governmental entity may require the disclosure by a provider of electronic communications **service** of the contents of a wire or electronic communication, that is in electronic storage in an electronic communication system for one hundred and eighty days or less, only pursuant to a **warrant** issued *under* the Rules of Criminal Procedure or equivalent State **warrant.**

18 U.S.C. § 2703 (1998) (emphasis added), amended by PL 107-56 (HR 3162), 2001.

Section 220 of the USA Patriot Act, entitled "Nationwide **Service** of **Search Warrants** for Electronic Evidence," amended § 2703(a) so it now provides that:

> A governmental entity may require the disclosure by a provider of electronic communication **service** of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a **warrant** *issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation* or equivalent State **warrant.**

Title 18 U.S.C. § 2703(a) (emphasis added), **[*8]** as amended by PL 107-56 (HR 3162), 2001.

Section 220 of the Patriot Act made two changes to § 2703(a). First, **search warrants** may now be issued "*using the procedures described in* the Federal Rules of Criminal Procedure," rather than "*under*" those Rules. Second, **search warrants** may now be issued "by a court with jurisdiction over the offense." Title 18 U.S.C. § 2703(a). The Court will now analyze the meaning of these two statutory phrases.

1. "Jurisdiction over the Offense"

The Court first considers the meaning of the phrase "jurisdiction over the offense" as used in § 2703(a). The Supreme Court has recently noted that "[j]urisdiction is a 'word of many, too many, meanings.'" *Rockwell Int'l Corp. v. United States,* U.S. , 127 S.Ct. 1397, 1405, 167 L. Ed. 2d 190 (2007) (quoting *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). Section 2703(a) does not specify whether Congress intended the word "jurisdiction" to mean subject-matter, personal, or territorial jurisdiction.

The issue *sub judice* appears to be an issue of first impression in the Ninth Circuit. In view of the lack of **[*9]** any controlling or persuasive case law in the Ninth Circuit discussing § 2703(a), the Court looks outside the Ninth Circuit to a District of Florida decision which held that § 2703 (a) authorizes a federal district court where the crime allegedly occurred to issue out-of-district **warrants** for the seizure of stored electronic communications. *In Re **Search** Warrant,* 19 Fla.L.Weekly Fed. D. 309 at 13, No. 6:05-MC-168-Orl-31JGG, 2005 U.S. Dist. LEXIS 44507 (M.D. Fla. Dec. 23, 2005). Although this not a published order, it reversed a magistrate judge's published order that declined to authorize an out-of-district **search warrant** that sought to seize electronic data maintained by a "dot-com" web site located in the Northern District of California. See, *In Re: **Search** Warrant,* 362 F.Supp.2d 1298 (M.D. Fla. 2003).

The Court agrees with the district judge's conclusion in *In Re **Search** Warrant,* 19 Fla.L. Weekly Fed. D. 309 at 13, No. 6:05-MC-168-Orl-31JGG, 2005 U.S. Dist. LEXIS 44507 (M.D. Fla. Dec. 23, 2005), that Congress intended "jurisdiction" to mean territorial jurisdiction. Title 18 U.S.C. § 3231 gives federal district courts original subject matter jurisdiction over all **[*10]** violations of federal law. Title 18 U.S.C. § 3231 (stating that "district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."). Because all federal courts have subject-matter jurisdiction over violations of federal law, interpreting jurisdiction to mean "subject-matter jurisdiction" would render these words meaningless and contrary to the rule of statutory construction that a statute should "be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001).

Federal district courts have territorial jurisdiction over those crimes that occur in their district. *U.S. v. Schiefen,* 139 F.3d 638, 639 (8th Cir. 1998). Concluding that "jurisdiction" means territorial jurisdiction is consistent with the legislative history of the USA Patriot Act. Legislative history of the USA Patriot Act indicates that Congress intended that amendments made by the Patriot Act to apply to "all types of criminal and foreign intelligence investigations. **[*11]** " 147 Cong.Rec. S10990-02 at S10991, 107 Congress, 1st Session, October 25, 2001, 2001 WL 1297566. The legislative history indicates that Section 220 of the USA Patriot Act, "Nationwide **Service** of **Warrants** for Electronic Evidence' - permits a

single court having jurisdiction over the offense to issue a **search warrant** for e-mail that would be valid anywhere in the United States." 147 Cong.Rec. H7159-03 at H7197-98, 107<th> Congress, 1<st> Session, October 23, 2001, 2001 WL 1266413; USA Patriot Act § 220, 115 Stat. at 291.

Common sense dictates the result reached herein. Judicial and prosecutorial efficiency is better served by permitting the federal district court for the district where the crime allegedly occurred to preside over both the investigation and prosecution of that crime. Commentators have suggested that one reason for the amendments effected by Section 220 of the Patriot Act was to alleviate the burden placed on federal district courts in the Eastern District of Virginia and the Northern District of California where major internet **service** providers ("ISPs") AOL and Yahoo, respectively, are located. See, Paul K. Ohm, *Parallel Effect Statutes* **[*12]** *and E-mail "**Warrants**": Reframing the Internet Surveillance Debate,* 72 Geo.Wash.L.Rev. 1599, 1613-15 (Aug. 2004); Patricia L. Bellia, *Surveillance Law Through Cyberlaw's Lens,* 72 Geo.Wash.L.Rev. 1375, 1454 (Aug. 2004) (stating that the "effect of the change was to shift the responsibility for issuance of the order from the court where the **service** provider is located to the court with jurisdiction over the offense being investigated; prior to passage of the USA Patriot Act, a disproportionate number of such orders were issued in the Eastern District of Virginia, where AOL is located."); Franklin E. Fink, *The Name Behind the Screenname: Handling Information Requests Relating to Electronic Communications,* 19 No. 11 Computer & Internet Law 1, 6-7 (Nov. 2002) (stating that "[t]his provision was intended to relieve the burden on district courts in which major communications providers are located, such as the Northern District of California and Eastern District of Virginia."). Indeed, the House Judiciary Committee's Report accompanying the USA Patriot Act explains that § 2703(a) "attempts to address the investigative delays caused by the cross-jurisdictional **[*13]** nature of the Internet." Paul K. Ohm, *Parallel Effect Statutes and E-mail "**Warrants**": Reframing the Internet Surveillance Debate,* 72 Geo.Wash.L.Rev. at 1614-15, n. 80 (Aug. 2004) (citing H.R. Rep. No. 107-236, pt. 1 at 57 (2001)). The Committee's Report further explains that requiring an investigator to coordinate with agents, prosecutors, and judges in the district where the ISP is located would cause time delays that "could be devastating to an investigation, especially where additional criminal or terrorists acts are planned." *Id.* (emphasis added). Additionally, requiring an Arizona federal agent investigating a crime committed in Arizona to travel to California or Virginia to obtain an out-of-district **search warrant** from a California or Virginia magistrate judge for electronically-stored communications would, in my view, unnecessarily increase the cost of federal investigations. [4]

FOOTNOTES

[4] Occasionally, an entity subject to a valid **search warrant** and an investigating agent located in a different district may mutually agree, similar to production of documents via a subpoena *duces tecum,* to production of the sought-after records by fax or mail without the necessity of the agent traveling to the outside district; provided, of course, the **search warrant** was properly authorized.

[*14] In light of the foregoing discussion, the Court concludes that when Congress amended Section 2703(a) via Section 220 of the USA Patriot Act to add the phrase "a court with jurisdiction over the offense," Congress intended to authorize the federal district court located in the district where the alleged crime occurred to issue out-of-district **warrants** for the seizure of electronically-stored communications. This Court has jurisdiction over alleged crimes that occurred in Yuma, Arizona which, of course, is within the District of Arizona. Thus, § 2703 (a) authorizes this Magistrate Judge to issue an out-of-district **warrant** for the **search** and seizure of electronically-stored communications located in California.

2. Federal Rule of Criminal Procedure 41

Section 2703(a), however, should not be viewed in isolation. Section 2703(a) provides that when "a court with jurisdiction over the offense" issues an out-of-district **warrant** for the seizure of electronic communications, it must do so "*using the procedures described in* the Federal Rules of Criminal Procedure." Title 18 U.S.C. § 2703(a) (emphasis added). Although **[*15]** § 2703 (a) references the Federal Rules of Criminal Procedure generally, in view of the purpose of that section, it is clear that Congress intended that the specific provisions of the Federal Rules which govern **search warrants** would apply to § 2703 (a). Federal Rule of Criminal Procedure 41 addresses the issuance of **search warrants**. Thus, the Court must consider the interplay between Federal Rule of Criminal Procedure 41, which discusses the issuance of **search warrants**, and § 2703(a).

Having concluded that § 2703(a)'s reference to the "Federal Rules of Criminal Procedure" means Rule 41, the phrase "using the procedures described in" the Federal Rules remains ambiguous. A reasonable person could conclude that this phrase requires compliance with *all* of the provisions contained in Rule 41 as the Florida Magistrate Judge did in *In Re: **Search** Warrant,* 362 F.Supp.2d 1298 (M.D. Fla. 2003). Alternatively, a reasonable person could also conclude that the "procedures described in" refers only to the provisions of Rule 41 which are procedural in nature. Because both interpretations are **[*16]** reasonable, the phrase "using the procedures described in the Federal Rules" is ambiguous. *Quarrell,* 310 F.3d at 669 (stating that statutory language is ambiguous if reasonable minds could interpret the same language in two or more ways.)

In view of this ambiguity, the Court must determine which interpretation aligns with Congress' intent in amending § 2703(a). *Id.* For the reasons discussed below, the Court concludes that the phrase "using the procedures described in" only refers to the specific provisions of Rule 41 which detail the procedures for obtaining and issuing **search warrants**. A fundamental canon of statutory construction provides that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *United States v. Smith,* 155 F.3d 1051, 1057 (9th Cir.1998) (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S. Ct. 311, 62 L. Ed. 2d 199 (1979)). The word "procedure" is defined as "a series of steps taken to accomplish an end," American Heritage Dictionary, 4<th> Ed. (2000), [5] or "a specific method or course of action," Black's Law Dictionary, 7<th> Ed. (1999). The common definition of "procedure" supports **[*17]** the

conclusion that § 2703(a) incorporates only those provisions of Rule 41 which discuss "steps to be taken" or the "specific method" of issuing a **warrant.**

FOOTNOTES

5 This definition found in the American Heritage Dictionary can be accessed electronically at education.yahoo.com/reference.

Interpreting "using the procedures" to refer only to the provisions in Rule 41 that describe "steps" or a "specific method" related to issuing a **warrant** gives meaning to Congress' amendment of § 2703(a) by the USA Patriot Act. Prior to the USA Patriot Act, § 2703(a) authorized the issuance of a **warrant** "under" the Rules of Criminal Procedure. See, PL 107-56, § 220(a)(1)(amending § 2703(a) by "striking 'under the Federal Rules of Criminal Procedure' every place it appears and inserting using the procedures described in the Federal Rules of Criminal Procedure. . . ."). The use of the word "under", a broad term, [6] in the prior version of § 2703(a), required that the issuance of a **warrant** comply with all of the provisions of Rule 41. **[*18]** Rules of statutory construction require the Court to assume that by changing "under" to "using the procedures described in" the Federal Rules, Congress intended to change the scope of Rule 2703(a). *Wilson,* 503 U.S. at 336. The phrase "using the procedures described in" narrowly focuses on the procedural aspects of obtaining and issuing a **search warrant.** The word "procedures" is modified by "described in," which expresses Congress' intent that only some aspects -- the procedural aspects -- of Rule 41 apply to § 2703(a). See, *Jarecki v. G.D. Searle & Co.,* 367 U.S. 303, 307, 81 S. Ct. 1579, 6 L. Ed. 2d 859, 1961-2 C.B. 254 (1961) (stating that under the doctrine of *noscitur a sociis,* the meaning of a word in a statute may be ascertained in reference to the meaning of the accompanying words. This rule avoids assigning a word a meaning that is so broad that it is inconsistent with accompanying words and, thus gives "unintended breadth to the Acts of Congress."). If all parts of Rule 41 were procedural, the phrase "described in" would be surplusage and contrary to the rule of construction that provides that a court should avoid interpreting a statute in a manner that renders a word or phrase meaningless **[*19]** or redundant. *Gustafson,* 513 U.S. at 562; *Kungys,* 485 U.S. at 778.

FOOTNOTES

6 "Under" is defined as "in view of," such as "under these conditions," American Heritage Dictionary, 4<th> Ed. (2000), and as "inferior" or "subordinate." Black's Law Dictionary, 7<th> Ed. (1999).

Applying this interpretation of § 2703(a), the Court finds that several portions of Rule 41 do not concern the procedures related to the issuance of a **search warrant** and, therefore, do not apply to the issuance of a **warrant** under § 2703(a). First, Rule 41(a), "Scope and Definitions," does not describe any procedure. Rule 41(g) and (h) discuss "Motion[s] to Return Property" and "Motion[s] to Suppress." These subsections do not contain any procedures relevant to issuing a **search warrant.** Similarly, Rule 41(b), entitled "Authority to Issue a **Warrant,**" does not discuss the procedure by which a **search warrant** is to be issued. Rather, Rule 41(b) discusses the authority of a magistrate judge to issue a **warrant** in three circumstances. Specifically, Rule 41(b), provides in part that:

> **[*20]** (b) **Authority to Issue a Warrant.** At the request of a federal law enforcement officer or an attorney for the government;
>
> (1) a magistrate judge with authority in the district - or if none is reasonably available, a judge of a state court of record in the district - has the authority to issue a **warrant** to **search** for and seize a person or property located within the district;
>
> (2) a magistrate judge with authority in the district has authority to issue a **warrant** for a person or property outside the district if the person or property is located within the district when the **warrant** is issued but might move or be moved outside the district before the **warrant** is executed;
>
> (3) in an investigation of domestic or international terrorism (as defined in section 2331 of title 18, United States Code), by a Federal magistrate judge in any district in which activities related to the terrorism may have occurred, for a **search** of property or for a person within or outside the district.

Fed.R.Crim.P. 41(b), as amended December 1, 2007. This subsection only discusses whether a **warrant** may issue in certain circumstances, **[*21]** and does not discuss *procedures* for issuing a **warrant.** Rule 41(b) is not procedural in nature and, therefore, does not apply to § 2703(a). This conclusion is supported by Rule 41(a)(1) which provides that "[t]his rule does not modify any statute regulating **search** or seizure, or the issuance and execution of a **search warrant** in special circumstances." Fed.R.Crim.P. 41(a). Section 2703(a) which authorizes out-of-district **search warrants** on internet **service** providers is a statute which regulates the issuance of **warrants** in "special circumstances." Accordingly, Rule 41 (a) expresses Congress' intent that Rule 41(b) does not limit a district court's authority granted in § 2703(a).

In contrast to the foregoing subsections, several other provisions in Rule 41 specifically discuss procedures related to issuing a **warrant.** For example, Rule 41(e) enumerates procedures for issuing a **warrant.** Rule 41(e) describes the contents of the **warrant** and the manner in which a **warrant** should be executed. Fed.R.Crim.P. 41(e). Similarly, Fed.R.Crim.P. 41(d) describes procedures **[*22]** for requesting a **warrant** in the presence of a magistrate judge. *Id.* Thus, these procedural aspects of Rule 41 apply to § 2703(a).

III. Conclusion

In conclusion, the Court finds that Title 18 U.S.C. § 2703(a) authorizes a federal district court, located in the district where the alleged crime occurred, to issue **search warrants** for the production of electronically-stored evidence located in another district. The **warrant** must be issued in compliance with the procedures described in Federal Rule of Criminal Procedure 41. Federal Rule of Criminal Procedure 41(b), however, does not limit the authority of a district court to issue out-of-district **warrants** under § 2703(a) because Rule 41(b) is not procedural in nature and, therefore, does not apply to § 2703(a). Thus, this Court concludes that § 2703(a) authorizes an Arizona magistrate judge to issue an out-of-district **search warrant** for the contents of communications electronically-stored in California when the alleged crime occurred in the District of Arizona.

Accordingly,

IT IS ORDERED that the Government's **[*23]** motion to authorize an out-of-district **search warrant** for the contents of electronically-stored communications held by Yahoo in Sunnyvale, California is **GRANTED.** The subject **search warrant** is issued.

Dated this 21<st> day of May, 2007

Lawrence O. Anderson

United States magistrate Judge

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18 USCS § 2510

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 119. WIRE AND ELECTRONIC COMMUNICATIONS INTERCEPTION AND INTERCEPTION OF ORAL COMMUNICATIONS

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18 USCS § 2510

NITA Commentary:

Review expert commentary from The National Institute for Trial Advocacy preceding 18 USCS § 2510 (relating to video surveillance).Review expert commentary from The National Institute for Trial Advocacy following 18 USCS § 2516 (relating to wire and electronic communications).Review expert commentary from The National Institute for Trial Advocacy preceding 18 USCS § 2701 (relating to computer records).Review expert commentary from The National Institute for Trial Advocacy following 18 USCS § 3117 (relating to electronic tracking and thermal imaging devices).

§ 2510. Definitions

As used in this chapter [18 USCS §§ 2510 et seq.]--

(1) "wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation, but such term does not include any electronic communication;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.[;]

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than--

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a provider of wire or electronic communication service in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business; or (ii) being used by a provider of wire or electronic communication service in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter [18 USCS §§ 2510 et seq.], and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire, oral, or electronic communication, includes any information concerning the substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means--

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire, oral, or electronic communications;

(10) "communication common carrier" has the meaning given that term in section 3 of the Communications Act of 1934 [47 USCS § 153];

(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed;

(12) "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include--

(A) any wire or oral communication;

(B) any communication made through a tone-only paging device;

(C) any communication from a tracking device (as defined in section 3117 of this title [18 USCS § 3117]); or

(D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds;

(13) "user" means any person or entity who--

(A) uses an electronic communication service; and

(B) is duly authorized by the provider of such service to engage in such use;

(14) "electronic communications system" means any wire, radio, electromagnetic, photooptical or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications;

(15) "electronic communication service" means any service which provides to users thereof the ability to send or receive wire or electronic communications;

(16) "readily accessible to the general public" means, with respect to a radio communication, that such communication is not--

(A) scrambled or encrypted;

(B) transmitted using modulation techniques whose essential parameters have been withheld from the public with the intention of preserving the privacy of such communication;

(C) carried on a subcarrier or other signal subsidiary to a radio transmission;

(D) transmitted over a communication system provided by a common carrier, unless the communication is a tone only paging system communication; or

(E) transmitted on frequencies allocated under part 25, subpart D, E, or F of part 74, or part 94 of the Rules of the Federal Communications Commission, unless, in the case of a communication transmitted on a frequency allocated under part 74 that is not exclusively allocated to broadcast auxiliary services, the communication is a two-way voice communication by radio;

(17) "electronic storage" means--

(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and

(B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication;

(18) "aural transfer" means a transfer containing the human voice at any point between and including the point of origin and the point of reception;

(19) "foreign intelligence information", for purposes of section 2517(6) of this title [18 USCS § 2517(6)], means--

(A) information, whether or not concerning a United States person, that relates to the ability of the United States to protect against--

(i) actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;

(ii) sabotage or international terrorism by a foreign power or an agent of a foreign power; or

(iii) clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power; or

(B) information, whether or not concerning a United States person, with respect to a foreign power or foreign territory that relates to--

(i) the national defense or the security of the United States; or

(ii) the conduct of the foreign affairs of the United States;

(20) "protected computer" has the meaning set forth in section 1030 [18 USCS § 1030]; and

(21) "computer trespasser"--

(A) means a person who accesses a protected computer without authorization and thus has no reasonable expectation of privacy in any communication transmitted to, through, or from the protected computer; and

(B) does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer.

History:

(Added June 19, 1968, P.L. 90-351, Title III, § 802, 82 Stat. 212; Oct. 21, 1986, P.L. 99-508, Title I, § 101(a),

(c)(1)(A), (4) 100 Stat. 1848, 1851; Oct. 25, 1994, P.L. 103-414, Title II, §§ 202(a), 203, 108 Stat. 4290, 4291; April 24, 1996, P.L. 104-132, Title VII, Subtitle B, § 731, 110 Stat. 1303; Oct. 26, 2001, P.L. 107-56, Title II, §§ 203(b)(2), 209(1), and 217(1), 115 Stat. 280, 283, 291; Dec. 28, 2001, P.L. 107-108, Title III, § 314(b), 115 Stat. 1402; Nov. 2, 2002, P.L. 107-273, Div B, Title IV, § 4002(e)(10), 116 Stat. 1810.)

History; Ancillary Laws and Directives:

1. Explanatory notes
2. Amendments
3. Short titles
4. Other provisions

1. Explanatory notes:
The bracketed semicolon has been inserted in para. (4) as the punctuation probably intended by Congress.

2. Amendments:

1986. Act Oct. 21, 1986 (effective and applicable as provided by § 111 of such Act, which appears as a note to this section), in para. (1), substituted "any aural transfer" for "any communication", and inserted "(including the use of such connection in a switching station)", deleted "as a common carrier" following "person engaged", and inserted "or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication, but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit"; in para. (2), inserted ", but such term does not include any electronic communication"; in para. (4), inserted "or other" following "aural", and inserted ", electronic,"; in para. (5), in the introductory matter, substituted "wire, oral, or electronic" for "wire or oral", in subpara. (a), in cl. (i), substituted "provider of wire or electronic communication service" for "communications common carrier", and inserted "or furnished by such subscriber or user for connection to the facilities of such service and used in the ordinary course of its business", and in cl. (ii), substituted "provider of wire or electronic communication service" for "communications common carrier"; in para. (8), substituted "wire, oral, or electronic" for "wire or oral" and deleted "identity of the parties to such communication or the existence," following "concerning the"; in para. (9)(b), substituted "wire, oral, or electronic" for "wire or oral"; in para. (10), deleted "and" following the semicolon; in para. (11), substituted "wire, oral, or electronic" for "wire or oral", and substituted a semicolon for the concluding period; and added paras. (12)-(18).

1994. Act Oct. 25, 1994, in para. (1), deleted ", but such term does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit" following "storage of such communication", in para. (12), deleted subpara. (A), which read: "the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;", and redesignated subparas. (B), (C), and (D), as subparas. (A), (B), and (C), respectively, and, in para. (16), in subpara. (D), deleted "or" after the concluding semicolon, in subpara. (E), inserted "or" after the concluding semicolon, and added subpara. (F).

1996. Act April 24, 1996, in para. (12), in subpara. (B), deleted "or" after the concluding semicolon, in subpara. (C), added "or" after the concluding semicolon, and added subpara. (D) and, in para. (16), in subpara. (D), added "or" after the concluding semicolon, in subpara. (E), deleted "or" after the concluding semicolon, and deleted subpara. (F), which read: "an electronic communication;".

2001. Act Oct. 26, 2001, in para. (1), deleted "and such term includes any electronic storage of such communication" following "commerce", in para. (14), inserted "wire or", in para. (17)(B), deleted "and" following the concluding semicolon, in para. (18), substituted "; and" for a concluding period, and added para. (19).

Such Act further, in para. (18), deleted "and" following the concluding semicolon, in para. (19)(B)(ii), substituted the concluding semicolon for a period, and added paras. (20) and (21).

Act Dec. 28, 2001, in para. (19), in the introductory matter, inserted ", for purposes of section 2517(6) of this title,".

2002. Act Nov. 2, 2002, in para. (10), substituted "has the meaning given that term in section 3 of the Communications Act of 1934" for "shall have the same meaning which is given the term 'common carrier' by section 153(h) of title 47 of the United States Code".

3. Short titles:

Act Oct. 21, 1986, P.L. 99-508, § 1, 100 Stat. 1848, provides: "This Act may be cited as the 'Electronic Communications Privacy Act of 1986'.".

Act Nov. 21, 1997, P.L. 105-112, § 1, 111 Stat. 2273, provides: "This Act [amending 18 USCS § 2512] may be cited as the 'Law Enforcement Technology Advertisement Clarification Act of 1997'.".

4. Other provisions:

Congressional findings. Act June 19, 1968, P.L. 90-351, Title III, § 801, 82 Stat. 211, provides:

"On the basis of its own investigations and of published studies, the Congress makes the following findings:

"(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

"(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

"(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

"(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court. Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused.".

National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance. Act June 19, 1968, P.L. 90-351, Title VIII, § 804, 82 Stat. 223; Oct. 15, 1970, P.L. 91-452, Title XII, § 1212, 84 Stat. 961; Jan. 2, 1971, P.L. 91-644, Title VI, § 20, 84 Stat. 1893; Act Jan. 2, 1975, P.L. 93-609, §§ 1-3, 88 Stat 1972; Dec. 23, 1975, P.L. 94-176, 89 Stat. 1031, which formerly appeared as a note to this section, provided for the establishment, composition, powers and duties, and compensation of a National Commission for the review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance and further provided for the termination of the Commission sixty days after the submission of its final report to the President and Congress, which was to be submitted on or before April 20, 1976.".

Intelligence activities. Act Oct. 21, 1986, P.L. 99-508, Title I, § 107, 100 Stat. 1858, provides:

"(a) In general. Nothing in this Act or the amendments made by this Act [for full classification consult USCS Tables volumes] constitutes authority for the conduct of any intelligence activity.

"(b) Certain activities under procedures approved by the Attorney General. Nothing in chapter 119 or chapter 121 of title 18, United States Code, shall affect the conduct, by officers or employees of the United States Government in accordance with other applicable Federal law, under procedures approved by the Attorney General of activities intended to--

"(1) intercept encrypted or other official communications of United States executive branch entities or United States Government contractors for communications security purposes;

"(2) intercept radio communications transmitted between or among foreign powers or agents of a foreign power as defined by the Foreign Intelligence Surveillance Act of 1978; or

"(3) access an electronic communication system used exclusively by a foreign power or agent of a foreign power as defined by the Foreign Intelligence Surveillance Act of 1978.".

Effective dates and application of Oct. 21, 1986 amendments. Act Oct. 21, 1986, P.L. 99-508, Title I, § 111, 100 Stat. 1859, provides:

"(a) In general. Except as provided in subsection (b) or (c), this title and the amendments made by this title [generally amending 18 USCS §§ 2510 et seq.; for full classification, consult USCS Tables volumes] shall take effect 90 days after the date of the enactment of this Act and shall, in the case of conduct pursuant to a court order or extension, apply only with respect to court orders or extensions made after this title takes effect.

"(b) Special rule for State authorizations of interceptions. Any interception pursuant to section 2516(2) of title 18 of the United States Code which would be valid and lawful without regard to the amendments made by this title [generally amending 18 USCS §§ 2510 et seq.; for full classification, consult USCS Tables volumes] shall be valid and lawful notwithstanding such amendments if such interception occurs during the period beginning on the date such amendments take effect and ending on the earlier of--

"(1) the day before the date of the taking effect of State law conforming the applicable State statute with chapter 119 of title 18, United States Code [18 USCS §§ 2510 et seq.], as so amended; or

"(2) the date two years after the date of the enactment of this Act.

"(c) Effective date for certain approvals by Justice Department officials. Section 104 of this Act [amending 18 USCS § 2516(1)] shall take effect on the date of enactment of this Act.".

Repeal of sunset provision for Title II of Act Oct. 26, 2001. Act Oct. 26, 2001, P.L. 107-56, Title II, § 224, 115 Stat. 295; Dec. 30, 2005, P.L. 109-160, § 1, 119 Stat. 2957; Feb. 3, 2006, P.L. 109-170, § 1, 120 Stat. 3, which formerly appeared as a note to this section, was repealed by Act March 9, 2006, P.L. 109-177, Title I, § 102(a), 120 Stat. 194. Such note provided that certain provisions of Title II of Act Oct. 26, 2001, the USA PATRIOT Act, would cease to have effect on March 10, 2006, except that such provisions would continue in effect with respect to any particular foreign intelligence investigation that began before the termination date, or with respect to any particular offense or potential offense that began or occurred before the termination date.

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Bureau of Industry and Security, Department of Commerce--The Commerce Control List, 15 CFR Part 774.

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Emerging Issues Analysis

Posner on The Obtain/Use Surveillance Dichotomy

The government's surveillance power has increased significantly. For instance, the Protect America Act of 2007 has expanded the government's power to conduct warrantless surveillance under the Foreign Intelligence Surveillance Act. But how can this information be used, and how can the use be opposed? In this expert commentary, Steve C. Posner discusses the dichotomy between surveillance and use of surveilled information in criminal prosecutions.

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I.IN GENERAL

1. Constitutionality, generally

Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) is constitutional. United States v Iannelli (1973, CA3 Pa) 477 F2d 999, affd (1975) 420 US 770, 43 L Ed 2d 616, 95 S Ct 1284; United States v Kohne (1973, WD Pa) 358 F Supp 1053, affd without op (1973, CA3 Pa) 485 F2d 679 and affd without op (1973, CA3 Pa) 485 F2d 682 and cert den (1973) 414 US 878, 38 L Ed 2d 224, 94 S Ct 2624

affd without op (1973, CA3 Pa) 487 F2d 1394 and affd without op (1973, CA3 Pa) 487 F2d 1395 and affd without op (1973, CA3 Pa) 487 F2d 1396; Washburn v State (1973) 19 Md App 187, 310 A2d 176.

Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510 et seq.) is not unconstitutional on its face. United States v Tortorello (1973, CA2 NY) 480 F2d 764, cert den (1973) 414 US 866, 38 L Ed 2d 86, 94 S Ct 63; United States v Leta (1971, MD Pa) 332 F Supp 1357.

Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) absolutely prohibits electronic surveillance by federal government except under carefully defined circumstances and only after securing judicial authority; 18 USCS §§ 2510 et seq. was written to create limited authority for electronic surveillance and investigation of specified crimes thought to lie within province of organized criminal activity and it was designed to conform to prevailing constitutional standards. United States v Kalustian (1975, CA9 Cal) 529 F2d 585.

Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510 et seq.) does not violate USCS Constitution, Amendments 1, 4, 5. United States v Best (1973, SD Ga) 363 F Supp 11.

18 USCS §§ 2510-2520 are constitutional. United States v Webster (1979, DC Md) 473 F Supp 586, affd (1981, CA4 Md) 639 F2d 174, 7 Fed Rules Evid Serv 998, 68 **ALR Fed** 928, cert den (1981) 454 US 857, 70 L Ed 2d 152, 102 S Ct 307 and mod, in part (1982, CA4 Md) 669 F2d 185, cert den (1982) 456 US 935, 72 L Ed 2d 455, 102 S Ct 1991.

Since telephone is instrumentality of interstate commerce, Congress has plenary power under Constitution to regulate its abuse; Omnibus Crime Control and Safe Streets Act does not violate due process as it applies to interspousal wiretapping. Kratz v Kratz (1979, ED Pa) 477 F Supp 463 (criticized in Kirkland v Franco (2000, ED La) 92 F Supp 2d 578).

18 USCS §§ 2510-2520, is facially constitutional. Whitaker v Garcetti (2003, CD Cal) 291 F Supp 2d 1132, affd in part and revd in part on other grounds, remanded, vacated on other grounds, in part, claim dismissed, request den (2007, CA9 Cal) 486 F3d 572, 67 FR Serv 3d 1167 and (Abrogated on other grounds as stated in Walden v City of Providence (2007, DC RI) 495 F Supp 2d 245, 26 BNA IER Cas 580).

2.--Fourth Amendment

Fourth Amendment does not require that electronic surveillance order issued by court under Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) include specific authorization to enter covertly premises described in order; in interpreting statute, United States Supreme Court will respect policy of Congress so as not to impute to statute self-defeating, if not disingenuous purpose; effect of detailed restrictions of 18 USCS § 2518 on court with respect to authorization of "wiretapping" and "bugging" is to guarantee that wiretapping or bugging occur only when there is genuine need for it and only to extent that it is needed, and once such need has been demonstrated in accord with requirements of § 2518, courts have broad authority to approve interception of wire and oral communications, subject to constitutional limitations. Dalia v United States (1979) 441 US 238, 60 L Ed 2d 177, 99 S Ct 1682.

Statutory procedures of Title III, Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) comport with Fourth Amendment and with rigid requirement for constitutionally permissible court-supervised interceptions as formulated by Supreme Court, and are therefore constitutional. United States v Cafero (1973, CA3 Pa) 473 F2d 489, cert den (1974) 417 US 918, 41 L Ed 2d 223, 94 S Ct 2622.

Suppression of evidence obtained as result of court-authorized electronic interception on ground that 18 USCS §§ 2510-2520 is unconstitutional on its face in that it fails to meet requirements for lawful electronic surveillance imposed by Fourth Amendment was error, since warrant and notice requirements of 18 USCS § 2518 are justifiably directed to protection of primary target of search, it being literally impossible to determine from typical telephone or face-to-face conversation who might be entitled to notice. United States v Whitaker (1973, CA3 Pa) 474 F2d 1246, cert den (1973) 412 US 950, 37 L Ed 2d 1003, 93 S Ct 3014 and cert den (1973) 412 US 953, 37 L Ed 2d 1006, 93 S Ct 3003.

Because of precise and discriminate requirements and provision for close judicial supervision contained in 18 USCS §§ 2515-2520, Title III of Omnibus Crime Control Act of 1968 (18 USCS §§ 2510-2520) does not violate Fourth Amendment, and is constitutional. United States v Bobo (1973, CA4 SC) 477 F2d 974, cert den (1975) 421 US 909, 43 L Ed 2d 774, 95 S Ct 1557.

Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS §§ 2510-2520, does not unconstitutionally authorize such broad intrusions as to violate Fourth Amendment, allowing obtaining of testimonial evidence of crimes in violation of Fourth and Fifth Amendments, violate First Amendment rights of free speech, allow search for which no notice prior to entry is required, or allow interceptions without establishment of probable cause. United States v Sklaroff (1975, CA5 Fla) 506 F2d 837, cert den (1975) 423 US 874, 96 S Ct 142, 46 L Ed 2d 105 and (Overruled as stated in United States v McWilliams (2008, SD W Va) 530 F Supp 2d 813).

18 USCS §§ 2510-2520, which permit wire tapping and electronic surveillance, do not contravene USCS Constitution, Amendments 1, 4, 5, 6. United States v Diadone (1977, CA5 Tex) 558 F2d 775, reh den (1977, CA5 Tex) 562 F2d 1257 and reh den (1977, CA5 Tex) 562 F2d 1258 and cert den (1978) 434 US 1064, 98 S Ct 1239, 55 L Ed 2d 765 and cert den (1978) 434 US 1064, 98 S Ct 1239, 55 L Ed 2d 765 and cert den (1978) 434 US 1064, 98 S Ct 1239, 55 L Ed 2d 765 and (Overruled as stated in United States v McWilliams (2008, SD W Va) 530 F Supp 2d 813).

18 USCS §§ 2510-2520 do not violate Fourth Amendment. United States v Bailey (1979, CA9 Wash) 607 F2d 237, cert

den (1980) 445 US 934, 63 L Ed 2d 769, 100 S Ct 1327.

Interception of 2 narcotics-related phone calls made by inmate on telephone accessible to many other inmates did not violate Fourth Amendment, where wiretap order authorized interception of only narcotics-related conversations of certain individuals, some of them unnamed, and government's interceptions were carefully circumscribed. United States v Figueroa (1985, CA2 NY) 757 F2d 466, cert den (1985) 474 US 840, 88 L Ed 2d 100, 106 S Ct 122.

Neither Fourth Amendment nor federal Wiretap Statute, Title III of federal Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS §§ 2510-2520, proscribes interception and use of audio or visual data of persons who are not specifically named in application seeking judicial authorization of such interception; therefore, plumbing inspector who was convicted of improperly accepting monetary payments could not argue that there was not probable cause supporting order authorizing installation of video cameras in vehicles that were used during inspections on ground that only information supporting order was not particularized as to him. United States v Urban (2005, CA3 Pa) 404 F3d 754, cert den (2005) 546 US 1030, 126 S Ct 732, 163 L Ed 2d 568 and cert den (2005) 546 US 1030, 126 S Ct 732, 163 L Ed 2d 568 and subsequent app (2007, CA3 Pa) 240 Fed Appx 528.

Provisions of Omnibus Crime Control and Safe Streets Act, §§ 2510-2520 of Title 18, do not permit unconstitutional invasion of privacy. United States v Sklaroff (1971, SD Fla) 323 F Supp 296.

Omnibus Criminal Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) is sufficiently circumscribed to comply with guaranties of USCS Constitution Amendment 4 and, therefore, is constitutional. United States v Cantor (1971, ED Pa) 328 F Supp 561, affd (1972, CA3 Pa) 470 F2d 890; United States v Focarile (1972, DC Md) 340 F Supp 1033, affd (1972, CA4 Md) 469 F2d 522, affd (1974) 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820 and affd without op (1973, CA4 Md) 473 F2d 906, cert den (1973) 411 US 952, 36 L Ed 2d 414, 93 S Ct 1931; United States v Curreri (1973, DC Md) 363 F Supp 430.

Failure of 18 USCS §§ 2510 et seq. to proscribe unconsented and unannounced entries does not render it unconstitutional under Fourth Amendment. United States v Giacalone (1977, ED Mich) 455 F Supp 26.

Military judge did not abuse its discretion when it denied servicemember's motion to suppress evidence given by Internet service provider without warrant that showed that servicemember had signed up for Internet service because servicemember did not have reasonable expectation of privacy in information showing that he had subscribed. United States v Ohnesorge (2005, NMCCA) 60 MJ 946, 2005 CCA LEXIS 51.

3.--Tenth Amendment

Omnibus Crime Control Act and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) does not violate Tenth Amendment "affirmative limits on federal action affecting states under Commerce Clause," where § 2515 prohibits state's use of anonymously received surreptitious recording of telephone conversations in its investigation/prosecution of public corruption since communication was intercepted in violation of § 2511, because current Supreme Court view is that Congress may intrude into area of state criminal law and that Tenth Amendment is more truism than it is active limitation on Congress. Michigan v Meese (1987, ED Mich) 666 F Supp 974, affd without op (1988, CA6 Mich) 850 F2d 692, withdrawn by publisher, reported in full (1988, CA6 Mich) 853 F2d 395, cert den (1988) 488 US 980, 102 L Ed 2d 560, 109 S Ct 528.

4. Purpose

Title III of Omnibus Crime Control and Safe Streets Act (18 USCS §§ 2510-2520), which authorizes use of electronic surveillance for specified classes of crimes, represents comprehensive attempt by Congress to promote more effective control of crime while protecting privacy of individual thought and expression. United States v United States Dist. Court (1972) 407 US 297, 32 L Ed 2d 752, 92 S Ct 2125.

Purpose of Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) is to prohibit, on pain of criminal and civil penalties, all interceptions of oral and wire communications except those specifically provided for in Act, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with investigation of serious crimes listed in 18 USCS § 2516. United States v Giordano (1974) 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820.

Restrictions of Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510 et seq.)--generally prohibiting interception of wire, electronic, and oral communications--are intended to protect important government interest in privacy of communication, thereby encouraging uninhibited exchange of ideas and information among private parties. Bartnicki v Vopper (2001) 532 US 514, 121 S Ct 1753, 149 L Ed 2d 787, 2001 CDOS 4037, 2001 Daily Journal DAR 4961, 167 BNA LRRM 2199, 29 Media L R 1737, 143 CCH LC P 59221, 2001 Colo J C A R 2488, 14 FLW Fed S 254.

18 USCS §§ 2510 et seq. has dual purpose of protecting privacy of wire and oral communications and of delineating on uniform basis circumstances and conditions under which interception of wire and oral communications may be authorized. United States v Cafero (1973, CA3 Pa) 473 F2d 489, cert den (1974) 417 US 918, 41 L Ed 2d 223, 94 S Ct 2622.

Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520), which sets forth comprehensive legislative scheme regulating interception of oral and wire communications, attempts to strike delicate balance between

need to protect persons from unwarranted electronic surveillance and preservation of law enforcement tools needed to fight organized crime. United States v Phillips (1976, CA8 Mo) 540 F2d 319, cert den (1976) 429 US 1000, 50 L Ed 2d 611, 97 S Ct 530.

Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510 et seq.) is comprehensive statute designed to regulate strictly interception and disclosure of wire and oral communication; it has as its dual purpose (1) protecting privacy of wire and oral communications, and (2) delineating on uniform basis circumstances and conditions under which interception of such communications may be authorized; legislative history of Title III makes it clear, as do elaborate authorization and disclosure provisions of statute itself, that protection of privacy was overriding congressional concern of Act. United States v Cianfrani (1978, CA3 Pa) 573 F2d 835, 3 Media L R 1961 (criticized in United States v McVeigh (1997, CA10 Colo) 119 F3d 806, 25 Media L R 1937, 1997 Colo J C A R 1124).

18 USCS §§ 2510 et seq. has 2 purposes: protecting privacy of wire and oral communications and delineating on uniform basis circumstances and conditions under which interception of wire and oral communications may be authorized. Providence Journal Co. v FBI (1979, CA1 RI) 602 F2d 1010, 5 Media L R 1390, 52 **ALR Fed** 173, cert den (1980) 444 US 1071, 62 L Ed 2d 752, 100 S Ct 1015.

18 USCS §§ 2510 et seq. was directed against use of sophisticated electronic equipment and not against long-accepted use of rudimentary material. United States v Miller (1983, CA1 Mass) 720 F2d 227, cert den (1984) 464 US 1073, 79 L Ed 2d 220, 104 S Ct 984.

Purpose of 18 USCS §§ 2510-2520 is to provide law enforcement officials with tools necessary to combat crime without unnecessarily infringing upon right of individual privacy. United States v Carneiro (1988, CA9 Wash) 861 F2d 1171.

Procedures and remedies of 18 USCS §§ 2510-2520 have 2 dominant purposes: to prevent improper invasions of privacy and to provide compensation when such invasions occur. Zweibon v Mitchell (1979, App DC) 196 US App DC 265, 606 F2d 1172, cert den (1981) 453 US 912, 69 L Ed 2d 997, 101 S Ct 3147, reh den (1981) 453 US 928, 69 L Ed 2d 1024, 102 S Ct 892 and reh den (1981) 453 US 928, 69 L Ed 2d 1025, 102 S Ct 892.

Major purpose of 18 USCS §§ 2510-2520 was to prohibit electronic surveillance by law enforcement officers acting without court authorization. Kratz v Kratz (1979, ED Pa) 477 F Supp 463 (criticized in Kirkland v Franco (2000, ED La) 92 F Supp 2d 578).

Protection of privacy was overriding congressional concern in enacting 18 USCS §§ 2510-2520; Act represents attempt by Congress to establish system of safeguards to electronic surveillance. United States v Clemente (1979, SD NY) 482 F Supp 102, affd without op (1980, CA2 NY) 633 F2d 207 and affd without op (1980, CA2 NY) 633 F2d 207.

Purpose of 18 USCS §§ 2510-2520 is to protect privacy of wire and oral communications and to delineate on uniform basis circumstances and conditions under which interception of wire and oral communications may be authorized. Sikes v Segers (1979) 266 Ark 654, 587 SW2d 554.

5. Construction, generally

Although Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) does not refer explicitly to covert entry, language, structure, and history of statute indicate that Congress has conferred upon courts--ancillary to their responsibility for reviewing and approving electronic surveillance applications under statute--power to authorize law enforcement officer's covert entry into private premises (that is, officer's physical entry into premises without owner's permission or knowledge) for installation of "bugging" equipment. Dalia v United States (1979) 441 US 238, 60 L Ed 2d 177, 99 S Ct 1682.

If 18 USCS §§ 2510-2520 are to survive constitutional challenge under Fourth Amendment, they must be given as limited construction as is warranted by language used. Application of United States (1970, CA9 Nev) 427 F2d 639 (superseded by statute as stated in United States v Illinois Bell Tel. Co. (1976, CA7 Ill) 531 F2d 809) and (superseded by statute on other grounds as stated in Company v United States (In re United States) (2003, CA9 Nev) 349 F3d 1132, 2003 CDOS 9891).

Since 18 USCS §§ 2510 et seq. prohibits warrantless eavesdropping except under national security powers of President and emergency situations and since it serves as national standard by which validity of state legislation is determined, it is to be strictly construed. United States v Capra (1974, CA2 NY) 501 F2d 267, cert den (1975) 420 US 990, 43 L Ed 2d 670, 95 S Ct 1424.

18 USCS §§ 2510-2520 does not authorize federal courts to permit visual electronic surveillance of private promises, since statute only sanctions interception of wire or oral communications. United States v Biasucci (1986, CA2 NY) 786 F2d 504, cert den (1986) 479 US 827, 93 L Ed 2d 54, 107 S Ct 104 and cert den (1986) 479 US 827, 93 L Ed 2d 56, 107 S Ct 107.

Summary judgment in favor of defendants on prisoner's claim of violation of Federal Wiretap Act, 18 USCS §§ 2510 et seq., was affirmed because defendants provided considerable evidence that prisoner had reasonable opportunity to discover wiretap violation before indictment; further, since recordings were of prisoner, and prisoner presumably requested disclosure of recordings during discovery in his criminal prosecution, prisoner and his attorney were not considered third parties, and any disclosure made pursuant to Fed. R. Crim. P. 16 did not constitute illegal disclosure under 18 USCS § 2511; therefore, prisoner's claims were barred by two-year statute of limitations set forth under 18 USCS § 2520. Lanier v Bryant (2004, ND Miss) 332 F Supp 2d 959, 2004 US Dist LEXIS App 203P.

Denial of satellite television provider's claims against accused pirates was reversed because (1) provider's satellite broadcasts were "electronic communications" as defined by Electronic Communications Privacy Act of 1986, 18 USCS §§ 2510-2521, (2) private right of action was available under 18 USCS §§ 2511(1)(a) and 2520 for unauthorized interception of encrypted satellite television broadcasts, and (3) Communications Act did not provide sole remedy. DirecTV Inc. v Pepe (2005, CA3 NJ) 431 F3d 162, 78 USPQ2d 1612.

Where Government intended to introduce defendant's telephone conversations recorded while defendant was in prison, it was not erroneous to deny defendant's motion to suppress recorded conversations, because consent alone sufficed to admit recorded conversations under Federal Wiretap Act, 18 USCS §§ 2510-2522. United States v Moore (2006, CA5 La) 452 F3d 382, cert den (2006, US) 127 S Ct 423, 166 L Ed 2d 299 and subsequent app (2007, CA5 La) 238 Fed Appx 13, cert den (2007, US) 128 S Ct 710, 169 L Ed 2d 558.

Since Congress conceived of electronic surveillance as means of combating infiltration of American society by organized crime, where organized crime is involved, scope of permissible surveillance expands. United States v Clemente (1979, SD NY) 482 F Supp 102, affd without op (1980, CA2 NY) 633 F2d 207 and affd without op (1980, CA2 NY) 633 F2d 207.

Only "aggrieved person" may challenge particular wiretap. United States v Lavin (1985, ED Pa) 604 F Supp 350.

Wiretap evidence obtained in Puerto Rico is subject to law of First Circuit, rather than Second Circuit where case is being tried, regardless of whether Second Circuit has more stringent exclusionary device, because there is no logical basis for conclusion that forum should reward or punish government with either more lenient or more severe penalty than that applied by courts of jurisdiction where conduct occurred. United States v Gerena (1987, DC Conn) 667 F Supp 911 (criticized in Northern Tankers (Cyprus) v Backstrom (1996, DC Conn) 934 F Supp 33).

Computer book/magazine/game publisher is awarded judgment for more than $ 50,000 against U.S. Secret Service, where agents obtained warrant and seized computers, disks, and other materials of publisher under false notion that employee had sensitive, proprietary computer document that had been wrongfully made available to public via computer bulletin boards, because seizure of work product materials violated 42 USCS § 2000aa-6 and 18 USCS § 2703, even though seizure could not constitute interception of "electronic communication" so as to bring into play statutory scheme at 18 USCS §§ 2510 et seq. Steve Jackson Games v United States Secret Serv. (1993, WD Tex) 816 F Supp 432, affd (1994, CA5 Tex) 36 F3d 457 (criticized in Goodspeed v Harman (1999, ND Tex) 39 F Supp 2d 787) and (superseded by statute on other grounds as stated in Konop v Hawaiian Airlines, Inc. (2001, CA9 Cal) 236 F3d 1035, 2001 CDOS 199, 2001 Daily Journal DAR 311, 166 BNA LRRM 2195, 142 CCH LC P 10872) and (criticized in Guest v Leis (2001, CA6 Ohio) 255 F3d 325, 2001 FED App 206P).

Electronic Communications Privacy Act, 18 USCS §§ 2510-2711 did not provide exclusion of evidence as remedy for violation. United States v Ohnesorge (2005, NMCCA) 60 MJ 946, 2005 CCA LEXIS 51.

6.--Definitions

Assertion that since private individual would be liable for alleged interception of plaintiff's communications, plaintiff could maintain direct suit against United States is without merit since "person," as used in 18 USCS § 2520 and defined by § 2510(6), excluded United States; reading of 2 statutes so as to permit plaintiff to sue United States would frustrate intent of Congress in enacting § 2510 by rendering statutory definition of "person" in that section meaningless. Spock v United States (1978, SD NY) 464 F Supp 510 (criticized in Lukas v Triborough Bridge & Tunnel Auth. (1993, ED NY) 1993 US Dist LEXIS 21065) and (criticized in Terkel v AT&T Corp. (2006, ND Ill) 441 F Supp 2d 899).

No court order is required under 18 USCS § 3122 and 28 USCS § 1651 to use cellular telephone digital analyzer, where digital analyzer is to be used to detect electronic serial number, cellular telephone's own number, and numbers called by cellular telephone but not contents of any communication, because use of such device to detect these numbers does not violate proscriptions of 18 USCS §§ 2510 et seq., which define "contents" of communication as including any information covering substance, purport, or meaning of that communication. In re United States (1995, CD Cal) 885 F Supp 197.

Computer salesman's challenge to employer's use of video surveillance system is denied summarily, where salesman acknowledged in his deposition that videotape had no sound, because, in absence of any record of "human voice at any point between and including point of origin and point of reception," as is required for "aural transfer" as used in 18 USCS § 2510, federal wiretapping prohibitions are inapplicable. Audenreid v Circuit City Stores, Inc. (2000, ED Pa) 97 F Supp 2d 660, 16 BNA IER Cas 651 (criticized in Kline v Sec. Guards, Inc. (2003, ED Pa) 2003 US Dist LEXIS 15476).

In action by husband, partner, and their closely held corporation against wife for recording corporation's telephone communications on telephone line located in couple's home under Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS §§ 2510 et seq., exception for inter-spousal eavesdropping in context of domestic dispute did not apply as calls were mostly non-domestic communications, and there were fact issues as to whether telephone extension requirement for inter-spousal exception was met. Britton v Britton (2002, DC Me) 223 F Supp 2d 276.

Definition of "electronic storage" in 18 USCS § 2510(17)(B) includes storage after transmission of copy of electronic communication made for purpose of backup protection. Quon v Arch Wireless Operating Co. (2004, CD Cal) 309 F Supp 2d 1204.

Definition of "user" in 18 USCS § 2510(13) is unambiguous and controlling; court must apply ordinary definition of

"use," which is to put into action or service, avail oneself of, employ. Quon v Arch Wireless Operating Co. (2004, CD Cal) 309 F Supp 2d 1204.

Cell phone service providers indisputably fit within definition of provider of electronic communication service. In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 76 (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Because location of cell tower in relation to point of origin (or termination) of call discloses nothing about substance of call itself, it is "noncontent" information within meaning of Stored Communications Act, 18 USCS §§ 2701 et seq. In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 76 (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

7. Extra-territorial application

Where defendant, citizen of Italy allegedly illegally abducted from Uruguay, alleged that he was victim of unlawful wiretapping conducted at direction of United States employees in violation of 18 USCS §§ 2510, 2518, and Fourth Amendment and that employee of public telephone company who was bribed by American agents to conduct illegal surveillance had subsequently been arrested, indicted and imprisoned in Uruguay, defendant was entitled to invoke 18 USCS § 3504, and absent written, sworn denial of wiretap allegation by prosecution, defendant was entitled to evidentiary hearing on his wiretap allegations as to violation of his constitutional rights, but 18 USCS §§ 2510 et seq. has no application outside United States. United States v Toscanino (1974, CA2 NY) 500 F2d 267, reh den (1974, CA2) 504 F2d 1380 and (criticized in United States v Noriega (1997, CA11 Fla) 117 F3d 1206, 47 Fed Rules Evid Serv 786, 11 FLW Fed C 103) and (criticized in State v Nysus (2001, App) 2001 NMCA 23, 130 NM 431, 25 P3d 270) and (criticized in Weilburg v Sims (2005, CA7 Ill) 132 Fed Appx 665) and (criticized in United States v Padilla (2007, SD Fla) 2007 US Dist LEXIS 26077).

District Court ruling that introduction of telephone conversations intercepted by Canadian wiretaps placed by that country's police without judicial authorization was not prohibited by 18 USCS §§ 2510-2520 even though conversations traveled in part over United States communications system would be affirmed. United States v Cotroni (1975, CA2 NY) 527 F2d 708, cert den (1976) 426 US 906, 48 L Ed 2d 830, 96 S Ct 2226.

18 USCS §§ 2510 et seq. has no application outside United States; therefore, interceptions of telephone conversations made in Canada by Canadian officials, lawful under Canadian law, are admissible in extradition hearing, even though interceptions would have violated 18 USCS §§ 2510 et seq. Stowe v Devoy (1978, CA2 NY) 588 F2d 336, cert den (1979) 442 US 931, 61 L Ed 2d 299, 99 S Ct 2862.

Evidence derived from Canadian wiretaps is admissible in criminal prosecution in United States where institution of interception is for investigation of Canadian offense, interception is not product of cooperative effort between Canadian and American authorities, and interception is conducted within limits of Canadian law even though if interception were to occur in United States under same circumstances, evidence derived therefrom would be inadmissible. United States v Delaplane (1985, CA10 Colo) 778 F2d 570, 19 Fed Rules Evid Serv 1347, cert den (1986) 479 US 827, 93 L Ed 2d 54, 107 S Ct 104.

Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520) is inapplicable to electronic surveillance abroad; to extent that plaintiff's cause of action against various government officials alleged that plaintiff was subject to illegal electronic surveillance by such officials in foreign country, action could not be brought under 18 USCS §§ 2510-2520 as they have no extra territorial effect. Berlin Democratic Club v Rumsfeld (1976, DC Dist Col) 410 F Supp 144.

Evidence derived from wiretap was not admissible in federal prosecution where evidence established that interception was unlawful under Canadian Law on content of interceptive conversation could not be used in evidence against defendants in Canada. United States v Phillips (1979, MD Fla) 479 F Supp 423, 79-2 USTC P 9732, 45 AFTR 2d 526.

18 USCS § 2510 is inapplicable extra-territorially; although no United States court could authorize extra-territorial wiretap, it does not follow that interception of such is therefore illegal. United States v Bennett (1982, DC Puerto Rico) 538 F Supp 1045.

Wiretap evidence of narcotics conspiracy need not be suppressed, even though New York judge issued order for electronic surveillance which included "slave" device connecting Maryland telephone to New York monitoring station, because jurisdiction to order "interception" under 18 USCS § 2510(4) vests either in location where conversations are actually heard or where mechanical device is inserted. United States v Burford (1991, SD NY) 755 F Supp 607, affd without op (1992, CA2 NY) 986 F2d 501.

Federal wiretap statute (18 USCS § 2510) does not apply to wiretap in Canada initiated by Canadian authorities. State v Nieuwenhuis (1985, App) 146 Ariz 477, 706 P2d 1244.

8. Relationship with state law, generally

Wiretap evidence obtained in violation of neither Constitution nor federal law is admissible in federal court, even though obtained in violation of prosecutorial rules of state law. United States v Keen (1974, CA9 Wash) 508 F2d 986, cert den

(1975) 421 US 929, 44 L Ed 2d 86, 95 S Ct 1655.

18 USCS § 2516(2) provides for state court authorizations of interceptions of wire or oral communications in conformity with applicable state statute, and thus, conclusion that state law governs validity of warrants issued by state courts is in no way inconsistent with general rule that federal law governs admissibility of wiretap evidence in federal criminal cases, because federal statute includes relevant state law in context of state court authorizations. United States v Nelligan (1978, CA5 Fla) 573 F2d 251.

Execution of federal wiretap order by District of Columbia Metropolitan Police Department members of federal DEA joint task force does not constitute violation of 18 USCS § 2510. United States v Lyons (1982, CA4 Md) 695 F2d 802, 12 Fed Rules Evid Serv 203.

State law governing electronic surveillance cannot be less protective of privacy than federal electronic surveillance statutes. United States v McKinnon (1983, CA1 Mass) 721 F2d 19.

In enacting wiretap provisions of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520), Congress did not intend to occupy entire field of electronic surveillance to exclusion of state regulation; state wiretap provisions based on type of surveillance, that is, whether it is wiretapping or eavesdropping does not conflict with scheme of federal act based on type of communication, that is whether it is wire or oral. People v Conklin (1974) 11 Cal 3d 648, reported at (1974) 12 Cal 3d 259, 114 Cal Rptr 241, 522 P2d 1049, app dismd (1974) 419 US 1064, 42 L Ed 2d 661, 95 S Ct 652.

18 USCS §§ 2510-2520 was not intended to occupy entire field of wiretapping, and where state statute does not impair attainment of federal objectives, but rather aids in fulfilling purposes of federal law, state statute is enforceable. Tavernetti v Superior Court of San Diego County (1978) 22 Cal 3d 187, 148 Cal Rptr 883, 583 P2d 737.

9.--Pre-emption

In prosecution for violation of provisions of Comprehensive Drug Abuse Prevention and Control Act of 1970, allowing into evidence tape recordings taken by undercover government agent of his conversations with defendants was not error on ground that California law prohibited interception of telephone conversations even when one of parties has given prior consent to interception, since such state law is inconsistent with 18 USCS § 2511(2)(c). United States v Johnson (1973, CA9 Cal) 484 F2d 165, cert den (1973) 414 US 1112, 38 L Ed 2d 739, 94 S Ct 842 and cert den (1974) 415 US 922, 39 L Ed 2d 477, 94 S Ct 1424.

On appeal of conviction of defendants, corporation officers and state governor, of violation of 18 USCS §§ 1951, 1952, on ground that it was error for trial court to receive in evidence conversations of state officer informant with Governor and other principals in conspiracy which were recorded since state statute made unlawful recording of telephone conversation with another without such person's permission and prohibited introduction into evidence of such recorded conversations, statute was in conflict with 18 USCS § 2511 and federal statute as to validity of interception and admissibility of evidence governed. United States v Hall (1976, CA10 Okla) 536 F2d 313, cert den (1976) 429 US 919, 50 L Ed 2d 285, 97 S Ct 313.

18 USCS § 2518 pre-empts inconsistent state provision purporting to govern disposition of recordings, logs, transcripts and other items pertaining to intercepted communications authorized by court order. State v Siegel (1971) 13 Md App 444, 285 A2d 671, affd (1972) 266 Md 256, 292 A2d 86.

18 USCS §§ 2510 et seq. pre-empt state law authorizing broader orders. People v Shapiro (1980) 50 NY2d 747, 431 NYS2d 422, 409 NE2d 897.

Although Congress attempted to pre-empt field of wiretapping and eavesdropping in enacting 18 USCS §§ 1510 et seq., state legislation is permitted as long as it is not less restrictive than federal statute. Commonwealth v Look (1980) 379 Mass 893, 402 NE2d 470, cert den (1980) 449 US 827, 66 L Ed 2d 31, 101 S Ct 91.

By enacting 18 USCS §§ 2510 et seq. Congress did not intend to pre-empt state legislation in field of electronic surveillance; states are free to devise their own statutory schemes, although before state officials can lawfully monitor oral and wire communications, state legislature is required to specifically authorize such activities; if state chooses to enact legislation, scheme must be at least as restrictive as regulations in 18 USCS §§ 2510 et seq. State v Hanley (1979) 185 Mont 459, 605 P2d 1087.

Title III of Omnibus Crime Control and Safe Streets Act, 18 USCS §§ 2510 et seq. has pre-empted field of wiretap and established minimum standards for admissibility of evidence procured through electronic or mechanical eavesdropping, and scope of Title III's authority extends to both federal and state courts. Pulawski v Blais (1986, RI) 506 A2d 76.

When it enacted 18 USCS §§ 2510-2520, Congress intended that states be permitted to supplement federal law and that state laws on subject of wiretapping would be pre-empted only if they were more permissive than federal law. People v Conklin (1973, App) 107 Cal Rptr 771, superseded on other grounds (1974) 12 Cal 3d 259, 114 Cal Rptr 241, 522 P2d 1049, app dismd (1974) 419 US 1064, 42 L Ed 2d 661, 95 S Ct 652.

In passing Title III of Omnibus Crime Control and Safe Streets Act (18 USCS §§ 2510-2520), Congress pre-empted field of interception of wire communications; however, states are also permitted to regulate wiretaps, provided their standards are at least as strict as those set forth in federal act. State v McGillicuddy (1977, Fla App D2) 342 So 2d 567.

18 USCS § 2516(2) authorizes interception of oral or wire communication and use of such interceptions as evidence if state statute so permits and authorizing state statute meets minimum requirements of 18 USCS § 2516 and since federal law governs, more strict provision, whether federal or state, must be followed. State v Kolosseus (1977) 198 Neb 404, 253 NW2d 157.

10.--State statutes more stringent than federal requirements

Interpretation of state wiretap statute, whether proceedings be federal or state, can never be controlling where state statute might impose requirements less stringent than controlling standard of 18 USCS §§ 2510-2520; if state should set forth procedures more exacting than those of federal statute, however, validity of interceptions and orders of authorization by which they were made would have to comply with that test as well. United States v Marion (1976, CA2 NY) 535 F2d 697 (criticized in United States v Amanuel (2005, WD NY) 418 F Supp 2d 244).

State may establish more strict standards than 18 USCS §§ 2510 et seq. mandates, but may not utilize less restrictive standards; fact that state statute does not track provisions of 18 USCS §§ 2510 et seq. does not invalidate evidentiary use of state-court authorized wiretaps otherwise obtained in compliance with substantive procedures of 18 USCS §§ 2510 et seq. United States v Curreri (1974, DC Md) 388 F Supp 607.

Plaintiff's claim that federal prosecutors and law enforcement agents violated 18 Pa. Cons. Stat. § 5704(2)(ii), part of Pennsylvania Wiretap Act, 18 Pa. Cons. Stat. §§ 5701 et seq., was preempted by Federal Wiretap Act, 18 USCS §§ 2510 et seq., as federal statute did not require state approval for warrantless wiretaps where one party had consented to be recorded. Bansal v Russ (2007, ED Pa) 513 F Supp 2d 264.

18 USCS §§ 2510-2520 does not preclude application of state standards which apply more restrictive rules to wiretapping situations. Warden v Kahn (1979, 1st Dist) 99 Cal App 3d 805, 160 Cal Rptr 471 (criticized in Nagy v Whittlesey Automotive Group (1995, 4th Dist) 40 Cal App 4th 1238, 47 Cal Rptr 2d 395, 95 CDOS 9350, 95 Daily Journal DAR 16235, 11 BNA IER Cas 389).

State standards for authorizing wiretaps must provide at least minimum requirements of 18 USCS §§ 2510 et seq.; state standards, however, may be more stringent; state statutes are not required to be carbon copies of federal law. Cox v State (1979) 152 Ga App 453, 263 SE2d 238.

State may enact wiretap laws that give its citizens greater protection than does federal wiretap law, and courts may construe their own state's wiretap law so as to afford their citizens additional protection. State v Catania (1981) 85 NJ 418, 427 A2d 537 (criticized in State v Purnell (1999) 161 NJ 44, 735 A2d 513).

Interpretation of state wire tap statute is not controlling where it imposes requirements less stringent than controlling standard of 18 USCS §§ 2510 et seq.; if state sets forth procedures more exacting than those of federal statute, validity of interceptions and orders of authorization must comply with that test as well. Evans v State (1984) 252 Ga 312, 314 SE2d 421, cert den (1984) 469 US 826, 83 L Ed 2d 50, 105 S Ct 106.

Limitations set by 18 USCS § 2516 are to be observed by state authorities, but state is not prohibited from imposing even more restrictive requirements than are set out in federal statute. Application of Olander (1973) 213 Kan 282, 515 P2d 1211.

If state wiretap statute is more permissive than federal act (18 USCS §§ 2510-2520) any wiretap authorized thereunder is fatally defective and evidence thereby obtained is inadmissible under 18 USCS § 2515; only discretion left to state in eavesdropping area was whether to enact eavesdropping legislation more restrictive than provisions of federal act; however, since federal act was not self-executing, if state desired authorized eavesdropping, enactment of state legislation was necessary. State v Dowdy (1977) 222 Kan 118, 563 P2d 425.

11.--Miscellaneous

Federal occupation of field of wiretapping allows only state regulation which complies with federal procedure; however, it is not enough for defense to show that various provisions of state statute might countenance procedures in violation of federal standards, and defendants must show that such improper procedures were used in their case. United States v Smith (1984, CA1 Mass) 726 F2d 852, cert den (1984) 469 US 841, 83 L Ed 2d 82, 105 S Ct 143.

Evidence obtained by eavesdropping authorized by state statute was properly suppressed where state procedure for obtaining eavesdrop orders was more permissive than 18 USCS § 2516(2) and did not comply with Title III of Omnibus Crime Control and Safe Streets Act [18 USCS §§ 2510-2520] in key respects essential to federal regulatory scheme. State v Farha (1975) 218 Kan 394, 544 P2d 341, cert den (1976) 426 US 949, 49 L Ed 2d 1186, 96 S Ct 3170.

On People's appeal of defendant's motion to suppress evidence in his prosecution for possession and use of heroin, on ground that telephone call monitored by motel employee violated federal and state eavesdropping statutes, People's contention that 18 USCS §§ 2510-2520 preempted field, thus causing state statute to be ineffective, was untenable; state statute was more stringent in that it contained no "aggrieved person" limitation, and state statute did not produce result inconsistent with objective of federal statute, so that both statutes were applicable. People v Warner (1975) 65 Mich App 267, 237 NW2d 488, app dism (1976) 401 Mich 1801, 258 NW2d 385.

Unpublished Opinions

Unpublished: Plaintiffs' motion to remand was denied because complaint stated federal cause of action under Electronic Communications Privacy Act, 18 USCS §§ 2510 et seq., and defendant did not waive its right of removal in its proposed protective order, it merely stipulated to jurisdiction in state court for purposes of proposed protective order; furthermore, pursuant to 28 USCS § 1450, all injunctions, orders, and other proceedings had in state court action prior to removal would remain in full force and effect until dissolved or modified by court. MediterraneanCoins v Ebay Inc. (2005, ND Cal) 2005 US Dist LEXIS 30876.

II.CONSTRUCTION AND APPLICATION OF PARTICULAR DEFINITIONS

12. Wire communication

Reading 18 USCS §§ 2510 and 2511 together, it is clear that Congress did not mean that every conversation aided in any part by any wire would be wire communication; when part of communication is carried to or from land-line telephone, by way of radio telephone, entire conversation is wire communication and search warrant is required. United States v Hall (1973, CA9 Ariz) 488 F2d 193.

To extent that computer "spy" system disclosed before they were sent out over telephone lines substance of replies generated by computer to defendant "intruder's" commands, information was not "wire communication" within meaning of 18 USCS § 2510 at time of its retrieval. United States v Seidlitz (1978, CA4 Md) 589 F2d 152, cert den (1979) 441 US 922, 60 L Ed 2d 396, 99 S Ct 2030.

Telephone conversation between defendants which was intercepted by motel switchboard operator was "wire communication" within meaning of 18 USCS § 2510. United States v Axselle (1979, CA10 Kan) 604 F2d 1330.

Conversations at private pretrial detention facility between defendant prisoner and defendant visitor were not wire communications protected under federal wiretap law because they communicated through internal communication device that resembles a handset, but is an entirely internal system that only connects two visiting rooms and is not connected to any facility capable of transmitting interstate or foreign communications pursuant to 18 USCS § 2510. United States v Peoples (2001, CA8 Mo) 250 F3d 630, 56 Fed Rules Evid Serv 331, subsequent app (2007, CA8 Mo) 483 F3d 876, cert den (2007, US) 128 S Ct 682, 169 L Ed 2d 534.

Despite apparent wireless nature of cellular phones, communications using cellular phones are considered wire communications under statute because cellular telephones use wire and cable connections when connecting calls. Company v United States (In re United States) (2003, CA9 Nev) 349 F3d 1132, 2003 CDOS 9891.

Good-faith exception to warrant requirement does not apply to warrants that are improperly issued under Title III of Omnibus Crime Control and Safe Streets Act, 18 USCS §§ 2510 et seq.; statute is clear on its face and does not provide for any exception to rule that district courts must suppress illegally obtained wire communications; further, Senate Report discussing Title III indicates no desire to press scope of suppression role beyond present law, and good faith exception is product of judicial balancing of social costs and benefits of exclusionary rule; judicial branch created exclusionary rule, and thus, modification falls to province of judiciary, while, in contrast, under Title III, Congress has already balanced social costs and benefits and has provided that suppression is sole remedy for violations, meaning that rationale behind judicial modification of exclusionary rule is absent with respect to Title III warrants. United States v Rice (2007, CA6 Ky) 478 F3d 704, 2007 FED App 88P, reh, en banc, den (2007, CA6) 2007 US App LEXIS 18746.

Legality of court-ordered "pen register" depends on legality of court-ordered wiretap since, when used in conjunction with court-ordered wiretap, it does intercept wire communications within meaning of 18 USCS § 2510(1), (4). In re Alperen (1973, DC Mass) 355 F Supp 372, affd (1973, CA1 Mass) 478 F2d 194.

Purely mechanical act of dialing particular number as revealed by pen register is not "communication" within contemplation of Title III of Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§ 2510-2520). Von Lusch v State (1978) 39 Md App 517, 387 A2d 306, cert den (1978) 283 Md 740.

Cable television systems are not common carriers pursuant to 47 USCS § 153(h) and as such, transmissions by cable operator are not "wire communications" under 18 USCS § 2510. Cox Cable Cleveland Area, Inc. v King (1983, ND Ohio) 582 F Supp 376.

Paid television supplier's microwave transmissions received by individual without authority from supplier and without payment of subscriber fee are not "wire communications" under 18 USCS § 2510(1), where transmissions were dispersed from top of bank building into and through air and at that point not carried along by means of, or subject to wire, cable, or other like connection to specific receiver. Hoosier Home Theater, Inc. v Adkins (1984, SD Ind) 595 F Supp 389.

Non-telephonic oral communications intercepted and recorded in good faith under wiretapping order must be suppressed, where non-call kitchen conversation picked up due to ineffective hang-up of phone receiver is without scope of 18 USCS § 2510(1) "wire communication" authorized to be intercepted under order, because Title III rule of exclusion contained in 18 USCS §§ 2515 and 2518 (10)(a)(iii) does not depend at all upon "good faith" of monitoring agent. United States v Borch (1988, ED Mich) 695 F Supp 898, revd on other grounds, remanded (1990, CA6 Mich) 903 F2d 1068.

Wire communication is defined to mean communication containing human voice, pursuant to 18 USCS § 2510(1), (18); cell site data is not wire communication under this definition because it does not involve transfer of human voice at any

point along path between cell phone and cell tower. In re Pen Register & Trap/Trace Device with Cell Site Location Auth. (2005, SD Tex) 396 F Supp 2d 747 (criticized in In re United States for Order for Disclosure of Telecommunications Records (2005, SD NY) 405 F Supp 2d 435) and (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 64) and (criticized in In re United States for an Order: Authorizing the Installation & Use of a Pen Register & Trap & Trace Device (2007, SD Tex) 2007 US Dist LEXIS 77635) and (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

In order for 18 USCS § 2703(c) to apply, information requested must pertain to "wire or electronic communications," and as defined in 18 USCS § 2510(15), that does not include location information. In re Application of United States (2007, DC Puerto Rico) 497 F Supp 2d 301.

Cell site data is not wire communication under definitions in 18 USCS § 2510(1), (18) because it does not involve transfer of human voice at any point along path between cell phone and cell tower. In re Application of United States (2007, DC Puerto Rico) 497 F Supp 2d 301.

Term "wire communication" is construed to apply only to that portion of radio-telephone communication which is actually transmitted by wire and not broadcast in manner available to public; portions of cordless telephone conversation intercepted by ordinary FM radio do not fall within category of "wire communications". State v Howard (1984) 235 Kan 236, 679 P2d 197.

13. Oral communication

Statements made by trader on floor of mercantile exchange, which were secretly recorded by undercover agent posing as trader, were not protected "oral communications" as defined by 18 USCS § 2510(2), since trader had no reasonable expectation that statements were private, even though exchange had membership requirement and rule prohibited tape recorders on trading floor. In re John Doe Trader Number One (1990, CA7 Ill) 894 F2d 240.

Tape recordings, made by or with consent of former corporate vice-president of antitrust defendant, are discoverable, where some of conversations were face-to-face and others were telephonic. In re High Fructose Corn Syrup Antitrust Litig. (2000, CA7 Ill) 216 F3d 621, 2000-1 CCH Trade Cases P 72945, cert den (2000) 531 US 993, 121 S Ct 483, 148 L Ed 2d 457.

Interceptions of private cordless telephone communications prior to 1994 did not violate Wiretap Act, notwithstanding defendant's claim that cordless phone conversations are protected by Act as an "oral communication" under 18 USCS § 2510; interception of cordless phone's radio transmission is not an interception of oral utterance itself, but of the radio signal produced by phone's handset and its base unit. Price v Turner (2001, CA9 Cal) 260 F3d 1144, 2001 CDOS 7031, 2001 Daily Journal DAR 8607.

Both wiretapping and bugging are regulated under Title III of Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351(1968); bugging includes interception of all oral communication in given location, which typically is accomplished by installation of small microphone in room to be bugged and transmission to some nearby receiver, and no reason appears why transmission through wire technology rather than in some other fashion does not fall under ambit of Title III. Company v United States (In re United States) (2003, CA9 Nev) 349 F3d 1132, 2003 CDOS 9891.

When telephone conversation is overheard and recorded at one end of line in absence of interception of communication passing through wires, it is not interception of "wire communication" but is interception of oral communication. United States v Carroll (1971, DC Dist Col) 332 F Supp 1299.

Definition of oral communication in 18 USCS § 2510(2) is devoid of any indication that oral communication must be interstate in character. United States v Burroughs (1974, DC SC) 379 F Supp 736, app dismd (1975, CA4 SC) 510 F2d 967, op withdrawn (1976, CA4 SC) 537 F2d 1156 and affd (1977, CA4 SC) 564 F2d 1111 (ovrld in part on other grounds by United States v Steed (1982, CA4 Va) 674 F2d 284, 10 Fed Rules Evid Serv 147).

Telex interceptions which did not involve aural acquisition of defendants communications are not within purview of 18 USCS §§ 2510 et seq., since term "aural" acquisition to § 2510 limits act to specifically to those interceptions that are overheard, involving sense of actually hearing conversation. United States v Gregg (1986, WD Mo) 629 F Supp 958, affd (1987, CA8 Mo) 829 F2d 1430, 23 Fed Rules Evid Serv 1170, cert den (1988) 486 US 1022, 100 L Ed 2d 226, 108 S Ct 1994.

42 USCS § 1983 claim based on interception of neighbors' telephone calls via police scanner is partially dismissed, where cordless telephone conversations are not "oral communications" as defined by 18 USCS § 2510(2), because cordless telephone communication was also expressly excluded from definitions of wire and electronic communications prior to October 25, 1994. Quigley v Rosenthal (1999, DC Colo) 43 F Supp 2d 1163, affd in part and revd in part on other grounds (2003, CA10 Colo) 327 F3d 1044, cert den, motion gr (2004) 540 US 1229, 158 L Ed 2d 172, 124 S Ct 1507.

Defendant, who was not overnight visitor and who engaged solely in business discussions, did not have reasonable expectation of privacy at premises where he was overheard and tape-recorded while participating in "La Cosa Nostra" induction ceremony, and, thus, his conversation did not constitute "oral communication" within meaning of 18 USCS § 2510, so that he was not "aggrieved person" with standing to suppress electronic surveillance. United States v Salemme

(1999, DC Mass) 91 F Supp 2d 141, revd on other grounds, remanded sub nom United States v Flemmi (2000, CA1 Mass) 225 F3d 78, cert den (2001) 531 US 1170, 148 L Ed 2d 1002, 121 S Ct 1137.

Portions of cordless telephone conversation intercepted by ordinary FM radio constitute oral communications, and rules pertaining to interception of oral communications are applicable. State v Howard (1984) 235 Kan 236, 679 P2d 197.

Where uncle of arrestee went to police station, told officer that he wanted to talk to nephew "by himself," held conversation with nephew in interrogation room in police station which conversation was surreptitiously monitored and recorded by police, interception was not violative of 18 USCS § 2510(2) and recordings were admissible into evidence. In re Joseph A. (1973, 2nd Dist) 30 Cal App 3d 880, 106 Cal Rptr 729.

Unpublished Opinions

Unpublished: Case was remanded where record contained insufficient evidence to demonstrate that government made requisite showing concerning 18 USCS §§ 2511(2)(d) and 2510(2) in camera hearing before district court or that its questions to witness in grand jury were not derived from allegedly illegal tape recording. Anderson v United States (In re Grand Jury Subpoena) (2006, CA9 Cal) 2006 US App LEXIS 25020.

14.--Expectation of privacy, generally

Legislative history behind 18 USCS § 2510(2) reflects Congress' intent that persons engaged in oral communications be protected where utterances occur under circumstances justifying expectation of privacy and court's inquiry is whether communications overheard were uttered by persons who have subjective expectation of privacy and whose expectations are objectively reasonable; evidence supported finding that police officer had reasonable expectation of privacy in his office; business office need not be sealed to offer occupant reasonable degree of privacy, and therefore conversation attempted to be overheard was "oral communication" within meaning of 18 USCS § 2510(2). United States v McIntyre (1978, CA9 Ariz) 582 F2d 1221.

In prosecution for unauthorized electronic eavesdropping on oral communications, justifiable expectation of privacy must be established; mere fact that one might suspect conversations are being intercepted does not preclude finding of such expectation; consent of owner of premises to interception did not preclude finding that there was justifiable expectation of privacy nor did fact that conversations could be overheard through open door of bank's office preclude such expectation. United States v Duncan (1979, CA4 NC) 598 F2d 839, 4 Fed Rules Evid Serv 848, cert den (1979) 444 US 871, 62 L Ed 2d 96, 100 S Ct 148.

Interception of face-to-face conversation adventitiously picked up by telephone recording system because inmate was in process of trying to make phone call at time of conversation was not prohibited. United States v Willoughby (1988, CA2 NY) 860 F2d 15, 26 Fed Rules Evid Serv 1129, cert den (1989) 488 US 1033, 109 S Ct 846, 102 L Ed 2d 978 and (criticized in United States v Lugo (2003, SD Tex) 289 F Supp 2d 790) and (criticized in People v Davis (2005) 36 Cal 4th 510, 31 Cal Rptr 3d 96, 115 P3d 417, 2005 CDOS 6393, 2005 Daily Journal DAR 8733).

Court did not commit plain error based on videotape surveillance of drug defendant which took place when number of persons were present and with consent of owner of premises. United States v Foster (1993, CA9 Cal) 985 F2d 466, 93 CDOS 820, 93 Daily Journal DAR 1586, amd on other grounds (1993, CA9 Cal) 1993 US App LEXIS 36776 and remanded on other grounds, on reh (1993, CA9 Cal) 995 F2d 882, 93 CDOS 4367, 93 Daily Journal DAR 7483 and amd on other grounds (1994, CA9 Cal) 17 F3d 1256, 94 CDOS 1679, 94 Daily Journal DAR 2957.

Government did not show that complaint which was filed more than two years after conversations between plaintiff, a former Acting Assistant Secretary of State for Legislative Affairs, and former Assistant Secretary of State for Consular Affairs was time-barred under 18 USCS § 2520(e), where plaintiff submitted sworn affidavit that he discovered calls had been intercepted by officers at State Department communications center within limitations period, and government did not rebut affidavit but claimed that defendant must have realized that he had been monitored once one of his calls was broadcast throughout communications center. Berry v Funk (1998, App DC) 331 US App DC 62, 146 F3d 1003 (criticized in Blake v Wright (1999, CA6 Ohio) 179 F3d 1003, 15 BNA IER Cas 297, 1999 FED App 218P) and (criticized in Tapley v Collins (2000, CA11 Ga) 211 F3d 1210, 16 BNA IER Cas 665).

Employees misusing private telephone system are not entitled to any reasonable expectation that communication is not subject to interception as required by 18 USCS § 2510(2). United States v Christman (1974, ND Cal) 375 F Supp 1354.

Congress did not intend 18 USCS § 2510 to apply to routine recording of emergency and investigative calls as integral component of police station telephone system. Jandak v Brookfield (1981, ND Ill) 520 F Supp 815.

Persons reasonable expectation of privacy is matter to be considered on case-by-case basis, taking into consideration its unique facts and circumstances; test applied is 2 part: (1) that person involved have subjective expectation of privacy; and (2) was that expectation objectively reasonably; no reasonable person entering private home to sell insurance would anticipate his conversation would be electronically monitored. Benford v American Broadcasting Cos. (1982, DC Md) 554 F Supp 145.

Defendants were entitled to summary judgment on plaintiffs' Omnibus Crime Control and Safe Streets Act, 18 USCS §§ 2510 et seq., claims because prior state court judgment had found that plaintiffs' lacked reasonable expectation of privacy; prior state court determination that plaintiffs did not have reasonable expectation of privacy precluded plaintiffs from

relitigating that issue. Bowens v Aftermath Entm't (2005, ED Mich) 364 F Supp 2d 641.

Defendants were entitled to summary judgment on plaintiffs' Omnibus Crime Control and Safe Streets Act, 18 USCS §§ 2510 et seq., claims because prior state court determination that plaintiffs did not have reasonable expectation of privacy precluded plaintiffs from relitigating that issue; all of parties before court were also parties to state court litigation, there was valid and final judgment issued by state court (even though that ruling was being appealed), issue of whether plaintiffs had objectively reasonable expectation of privacy was actually litigated in state proceeding, and plaintiffs' reasonable expectation of privacy was essential to addressing Michigan Eavesdropping statute, Mich. Comp. Laws § 750.539a et seq. Bowens v Aftermath Entm't (2005, ED Mich) 364 F Supp 2d 641.

Taped conversation in jail cell is not protected oral communication for which expectation of privacy would be justified. State v Williams (1985, Tenn) 690 SW2d 517, 63 **ALR4th** 447.

Use of convenience store surveillance tape by police to identify defendant and then to elicit confession from defendant did not violate federal wiretap statute, 18 USCS §§ 2510 et seq., because any expectation of privacy defendant claimed in defendant's statements was objectively unreasonable in circumstances: defendant shouted threats and obscenities at clerk in convenience store open to public; defendant could not reasonably have expected such remarks--whether overheard by customer, passerby, store employee, or surveillance camera recording defendant's words--to be confidential. Commonwealth v Rivera (2005) 445 Mass 119, 833 NE2d 1113.

15.----Miscellaneous

Intercepted conversation between defendants which occurred in house of complete strangers to which defendants had made several suspicious visits and into which they tried to gain entry by false representations, was not "oral communication" within meaning of 18 USCS § 2510(2), since conversation did not occur in factual setting which legally justified any subjective expectation of privacy defendants may have had. United States v Pui Kan Lam (1973, CA2 NY) 483 F2d 1202, cert den (1974) 415 US 984, 39 L Ed 2d 881, 94 S Ct 1577, 94 S Ct 1578.

Defendants, charged with intercepting telephone communications in violation of 18 USCS § 2511(1)(a), (2), had no expectation of privacy with respect to use of tape recorder and tape by private investigation agency allegedly hired by defendant to perform electronic surveillance. United States v Hunt (1974, CA5 Tex) 505 F2d 931, cert den (1975) 421 US 975, 44 L Ed 2d 466, 95 S Ct 1974.

Recordings taped from microphone installed in hotel room to record conversations between Drug Enforcement Administration agent and defendant would not be treated as if agent were carrying recording device on him, were obtained in violation of defendant's expectation of privacy and inadmissible at trial. United States v Padilla (1975, CA1 Puerto Rico) 520 F2d 526 (criticized in United States v Lee (2004, CA3 NJ) 359 F3d 194, 63 Fed Rules Evid Serv 781, 93 AFTR 2d 993).

In order to allege cause of action under 18 USCS §§ 2510 et seq., there was must be reasonable expectation that communication be private; where person knew he was being interviewed, knew that newsmen had recording equipment, yelled and swore at top of voice, slammed jail bars, produced loud and attention-getting noises, and made no effort to communicate confidentially to his attorney, there was no reasonable expectation of privacy. Holman v Central Arkansas Broadcasting Co. (1979, CA8 Ark) 610 F2d 542, 5 Media L R 2217.

Conversations between husband and wife during jail visit, which were taped by prisoner occupying cell next to husband, were not "oral communications" within meaning of 18 USCS § 2510, since husband and wife had no reasonable expectation of privacy in cell. United States v Harrelson (1985, CA5 Tex) 754 F2d 1153, 17 Fed Rules Evid Serv 738, reh den, en banc (1985, CA5 Tex) 766 F2d 186 and cert den (1985) 474 US 908, 88 L Ed 2d 241, 106 S Ct 277 and cert den (1985) 474 US 1034, 88 L Ed 2d 578, 106 S Ct 599.

Police officers had no expectation that communications between police officers and prisoner in public jail would not be intercepted and thus communications were not "oral communications" within meaning of 18 USCS § 2510. Angel v Williams (1993, CA8 Mo) 12 F3d 786, 27 FR Serv 3d 1402.

Denial of motion to suppress tapes from secret recording of defendant's pre-arrest conversations while he sat in back seat of police car was proper since defendant did not have reasonable expectation of privacy. United States v McKinnon (1993, CA11 Fla) 985 F2d 525, 7 FLW Fed C 90, cert den (1993) 510 US 843, 126 L Ed 2d 94, 114 S Ct 130.

Surreptitious tape recording of defendant's call from jail was not interception within meaning of 18 USCS § 2510 because police only recorded what defendant said in mouthpiece, not what was transmitted over wire, and admissibility of recording was not prohibited because defendant had no expectation of privacy, where defendant placed call while officer was standing three feet away and television camera was suspended eight feet from telephone and pointed toward phone, notwithstanding fact that defendant conducted conversation in Thai. Siripongs v Calderon (1994, CA9 Cal) 35 F3d 1308, 94 CDOS 5105, 94 Daily Journal DAR 9410, amd on other grounds, reh, en banc, den (1994, CA9 Cal) 35 F3d 1308, 94 CDOS 7830, 94 Daily Journal DAR 14461 and cert den (1995) 513 US 1183, 130 L Ed 2d 1127, 115 S Ct 1175 and (criticized in United States v Martinez-Salazar (1998, CA9 Ariz) 146 F3d 653, 98 CDOS 4099, 98 Daily Journal DAR 5626).

Although drug defendant spoke in Spanish, he had no reasonable expectation that conversations between himself and his codefendants at tire shop, where they allegedly unloaded drug shipments, would not be subject to interception pursuant to 18 USCS § 2510, and thus court properly dismissed motion to suppress audio and video taped conversations

surreptitiously recorded by informant under instructions from FBI. United States v Longoria (1999, CA10 Kan) 177 F3d 1179, 1999 Colo J C A R 2608, subsequent app (1999, CA10 Kan) 182 F3d 1156, 1999 Colo J C A R 4373 (criticized in United States v Keifer (1999, CA10 Kan) 198 F3d 798, 1999 Colo J C A R 6718) and subsequent app (2002, CA6 Tenn) 38 Fed Appx 237 and cert den (1999) 528 US 892, 145 L Ed 2d 182, 120 S Ct 217.

Employees at county rabies control center had reasonable expectation of privacy in their workplace under 18 USCS § 2510 and thus director who placed tape recorder in their common office violated statute, where entire office consisted of single room that could not be accessed without employees' knowledge, employees took great care to see that their conversations remained private, and frank nature of employees' conversations in which they criticized their boss makes it obvious that they had subjective expectation of privacy. Dorris v Absher (1999, CA6 Tenn) 179 F3d 420, 15 BNA IER Cas 193, 138 CCH LC P 58643, 1999 FED App 200P.

Recording of conversation between defendant and his passenger in patrol car while officer was searching their car did not violate Title III, since defendant did not have reasonable expectation of privacy pursuant to 18 USCS § 2510, notwithstanding fact that defendant was not in custody or being threatened with arrest, and defendant claimed that officer's statements that they should sit in police car for their safety created expectation of a safe haven. United States v Turner (2000, CA10 Wyo) 209 F3d 1198, 2000 Colo J C A R 2171, cert den (2000) 531 US 887, 148 L Ed 2d 146, 121 S Ct 208.

Conversations at private pretrial detention facility between defendant prisoner and defendant visitor were not protected because defendants had no reasonable expectation of privacy; under 18 USCS § 2510; facility's practice of monitoring and recording prisoner-visitor conversations was a reasonable means of achieving legitimate institutional goal of maintaining prison security and those conversing in a prison setting are deemed to be aware of necessity for and existence of such security measures. United States v Peoples (2001, CA8 Mo) 250 F3d 630, 56 Fed Rules Evid Serv 331, subsequent app (2007, CA8 Mo) 483 F3d 876, cert den (2007, US) 128 S Ct 682, 169 L Ed 2d 534.

Insurance agent making standard sales pitch in private home has reasonable expectation of privacy within meaning of 18 USCS § 2510(2). Benford v American Broadcasting Cos. (1980, DC Md) 502 F Supp 1159, 6 Media L R 2489, affd without op (1981, CA4 Md) 661 F2d 917, cert den (1981) 454 US 1060, 70 L Ed 2d 599, 102 S Ct 612.

Landowner's complaint about solicitor tape recording his statements at hearing held in connection with zoning citation must fail, where state rules of criminal procedure expressly provide for such recording, because federal wiretap statutes (18 USCS §§ 2510 et seq.) only prohibit recording of "such oral communications uttered by person exhibiting expectation that such communication is not subject to interception under circumstances justifying such expectation". Harman v Wetzel (1991, ED Pa) 766 F Supp 271.

In action brought by attorneys who alleged that warden violated 18 USCS § 2511(1)(a), part of Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS §§ 2510-2522, by secretly recording attorneys' conversations with detainees at federal detention center, warden's motion to dismiss complaint on ground that attorneys' conversations with detainees did not constitute oral communications within meaning of 18 USCS § 2510(2) was denied because attorneys' expectations that their conversations were not subject to interception were justified in light of (1) federal regulations prohibiting recording of meetings between attorneys and prison inmates except under narrow circumstances that were not present, and (2) representations by prison officers that attorneys' conversations with detainees were not being recorded. Lonegan v Hasty (2006, ED NY) 436 F Supp 2d 419.

Jury could have found that hospital's failure to aggressively respond to one incident of secret audio taping of its employees involving one of its managers made it liable under 18 USCS §§ 2510-2521 and 18 Pa. Cons. Stat. § 5725, when second incident was uncovered next year; hospital's Fed. R. Civ. P. 59(a) motion for new trial was denied. Care v Reading Hosp. & Med. Ctr. Inc. (2006, ED Pa) 448 F Supp 2d 657, 66 FR Serv 3d 122.

Recordings of defendant's conversations that took place in prison visiting room while defendant was incarcerated were not subject to sealing requirements of 18 USCS § 2518(8)(a), part of Title III of Omnibus Crime Control and Safe Streets Act of 1968; Title III does not apply to government's interception of prisoner's conversations while prisoner is incarcerated; pursuant to 18 USCS §§ 2510(2) and 2518(8)(a), statute only applies when participants in conversation had reasonable expectation of privacy, and prisoner has no reasonable expectation of privacy while incarcerated. United States v Calabrese (2007, ND Ill) 492 F Supp 2d 906.

In determining what is justified expectation of privacy for purposes of 18 USCS § 2510(2), one must look to traditional Fourth Amendment law; police officer could testify as participant in conversation with defendant, even though unknown to such officer and defendant, officer at front desk overheard such conversation via intercom because officer had already advised defendant of Miranda rights. Commonwealth v Look (1980) 379 Mass 893, 402 NE2d 470, cert den (1980) 449 US 827, 66 L Ed 2d 31, 101 S Ct 91.

With regard to oral conversations (18 USCS § 2510(2)), persons within jail or police facility have no reasonable expectation of privacy unless they are lulled into believing that conversation would be confidential by conduct of police or by privileged relationship between parties to conversation. In re Joseph A. (1973, 2nd Dist) 30 Cal App 3d 880, 106 Cal Rptr 729.

Tape recording of defendant's conversation following arrest and being placed in patrol car through activating of recording device for purpose of recording suspects' conversations during police officers' absence did not violate defendants constitutional right of privacy or 18 USCS § 2511 as defendant's expectation of privacy was not reasonable under circumstances. People v Newton (1974, 5th Dist) 42 Cal App 3d 292, 116 Cal Rptr 690, cert den (1975) 420 US 937, 43 L

Ed 2d 414, 95 S Ct 1147.

Unpublished Opinions

Unpublished: Defendant impliedly consented to monitoring by using prison phones when he had been informed of prison phone policies, each phone contained sign stating that calls were monitored and recorded, and he clearly acknowledged his awareness of surveillance. United States v Habben (2007, CA9 Ariz) 2007 US App LEXIS 28835, cert den (2008, US) 128 S Ct 1313, 170 L Ed 2d 128.

16. Intercept, generally

Interception of point-to-point transmissions by FCC do not violate 18 USCS §§ 2510 et seq. because transmissions under such circumstances do not contain genuine subjective expectation of privacy. United States v Rose (1982, CA1 Mass) 669 F2d 23, cert den (1982) 459 US 828, 74 L Ed 2d 65, 103 S Ct 63.

Term "intercept" as it relates to "aural acquisitions" refers to place where communication is initially obtained regardless of where communication is ultimately heard, therefore installation of wire tap device on telephone lines in county within judicial circuit in which order was issued which permitted them to transmit signals back to offices of law enforcement authorities in county not located in such district was proper. United States v Nelson (1988, CA11 Fla) 837 F2d 1519, reh den, en banc (1988, CA11 Fla) 845 F2d 1032 and cert den (1988) 488 US 829, 102 L Ed 2d 58, 109 S Ct 82.

Interception includes both location of tapped telephone and of original listening post, and judges in either jurisdiction have authority under Title III to issue wiretap orders. United States v Denman (1996, CA5 Tex) 100 F3d 399, cert den (1997) 520 US 1121, 137 L Ed 2d 336, 117 S Ct 1256.

District court properly granted summary judgment under Fed. R. Civ. P. 56 in favor of insurance company in independent agent's action alleging violation of his privacy rights under Electronic Communications Privacy Act (ECPA), 18 USCS §§ 2510 et seq., and under parallel state statute, 18 Pa. Cons. Stat. § 5702 et seq.; although company accessed agent's e-mail without authorization, there was no violation of privacy laws because there was no "intercept" of email within meaning of privacy laws and because 18 USCS § 2701(c) excepted searches by company, as service provider, from protection of ECPA. Fraser v Nationwide Mut. Ins. Co. (2003, CA3 Pa) 352 F3d 107, 20 BNA IER Cas 1207, 149 CCH LC P 59803.

District court erred in dismissing indictment, charging defendant with conspiring to engage in conduct prohibited by various provisions of Wiretap Act, 18 USCS §§ 2510-2522, because interception of an e-mail message in temporary, transient electronic storage states an offense under 18 USCS §§ 2510-2522, and term "electronic communication" includes transient electronic storage that is intrinsic to communication process, and thus interception of an e-mail message in such storage is an offense under Wiretap Act. United States v Councilman (2005, CA1 Mass) 418 F3d 67.

Definition of "interception" set forth in 18 USCS § 2510(4) does not state where interception occurs or whether more than one interception point may exist for jurisdictional purposes under 18 USCS § 2518(3); most reasonable interpretation of statutory definition of interception is that interception occurs where tapped phone is located and where law enforcement officers first overhear call, and Ninth Circuit joins at least three of its sister circuits in so holding. United States v Luong (2006, CA9 Cal) 471 F3d 1107, subsequent app, remanded (2006, CA9 Cal) 215 Fed Appx 639, cert den (2007, US) 128 S Ct 532, 169 L Ed 2d 371 and cert den (2007, US) 128 S Ct 531, 169 L Ed 2d 371 and cert den (2007, US) 128 S Ct 531, 169 L Ed 2d 371.

When FBI agent's affidavit explained that all intercepted calls from defendant's mobile phone, which had Eastern District of California area code, would first be heard within territorial jurisdiction of Northern District of California, calls were "intercepted" within jurisdiction of Northern District of California judge who authorized wiretap on phone, as required by 18 USCS § 2518(3), because "interception" under 18 USCS § 2510(4) included where law enforcement officers first overheard calls. United States v Luong (2006, CA9 Cal) 471 F3d 1107, subsequent app, remanded (2006, CA9 Cal) 215 Fed Appx 639, cert den (2007, US) 128 S Ct 532, 169 L Ed 2d 371 and cert den (2007, US) 128 S Ct 531, 169 L Ed 2d 371 and cert den (2007, US) 128 S Ct 531, 169 L Ed 2d 371.

Words "aural acquisition", literally translated, mean to come into possession through sense of hearing, as used in 18 USCS § 2510(4), and recording of private conversation by party to it is not intercept within meaning of 18 USCS § 2510(4). Smith v Wunker (1972, SD Ohio) 356 F Supp 44.

Definition of term "intercept" under 18 USCS § 2510(4) clearly equates "interception" with listening to, monitoring, or hearing of described communications, either at time such communications occur or at subsequent time through use of electronic means, such as playback tape recorder; recording communication which has not been heard by government agents and storing that recording so that it will not be heard, unless demanded by parties involved in conversation, does not constitute interception under terms of 18 USCS § 2510(4). United States v Bynum (1973, SD NY) 360 F Supp 400, affd (1973, CA2 NY) 485 F2d 490, vacated on other grounds (1974) 417 US 903, 41 L Ed 2d 209, 94 S Ct 2598.

Language of 18 USCS §§ 2510, 1511 and 2515 does not proscribe interception and use by unaided ear of noises and talking loud enough to be overheard beyond confines of room. United States v Agapito (1979, SD NY) 477 F Supp 706.

Electronic eavesdropping evidence will not be suppressed due to participation of government confidential informant in installation of bugs because even though Title III (18 USCS §§ 2510 et seq.) limitations on authority to intercept

communications are concerned with entire process of electronic surveillance, "interception" as defined in § 2510(4) and employed in §§ 2516(1) and 2518(5) does not include installation of listening devices. United States v Gambino (1990, SD NY) 734 F Supp 1084 (criticized in United States v Guzman (1998, SD NY) 1998 US Dist LEXIS 1538).

Satellite television programming provider was not entitled to summary judgment on its claim that subscriber violated 18 USCS § 2511(1)(a), part of Electronic Communications Privacy Act of 1986, 18 USCS §§ 2510-2522, when subscriber purchased and attempted to use pirate access device to decrypt, receive, and view provider's encrypted satellite transmissions; subscriber's admission that he purchased and attempted to use device was not sufficient to show that he actually "intercepted" signals within meaning of 18 USCS § 2510(4). DIRECTV, Inc. v Barnes (2004, WD Mich) 302 F Supp 2d 774.

Unlawful interception requires use of electronic, mechanical, or other device; thus, if confidential informant merely eavesdropped on defendant, but did not use some form of device, then no unlawful interception occurred. United States v Jones (2005, DC Utah) 364 F Supp 2d 1303.

"Beepers", electronic tracking devices, do not "intercept" contents of communications within meaning of 18 USCS § 2510. State v Hendricks (1979) 43 NC App 245, 258 SE2d 872, cert den (1980) 299 NC 123, 262 SE2d 6.

Where police officer's acquisition of contents of telephonic communications resulted from his answering telephone when it rang, no proscribed "interception" within meaning of 18 USCS § 2510(4) occurred even though conversations were simultaneously recorded. State v Vizzini (1971, App Div) 115 NJ Super 97, 278 A2d 235.

Use of recording device attached to telephone receiver is interception within meaning of 18 USCS § 2510(4). People v Boscia (1975) 83 Misc 2d 501, 373 NYS2d 309.

17.--Telephone conversations

"Intercept" under 18 USCS § 2510 does not pertain to acquisition of information through agent standing within 4 feet of defendant while she placed call; conversations carried on in tone of voice quite audible to persons standing outside are conversations knowingly exposed to public. United States v McLeod (1974, CA7 Ind) 493 F2d 1186.

There is no domestic exception to Title II, and thus unless District Court erred in granting defendants' motions for summary judgment in suit brought by ex-husband for violations of wiretap statute based on ex-wife's taping, during divorce proceedings, of telephone conversations between ex-husband and couple's minor children who were living with ex-wife. Thompson v Dulaney (1992, CA10 Utah) 970 F2d 744.

Surreptitious tape recording of defendant's call from jail was not interception within meaning of 18 USCS § 2510 because police only recorded what defendant said in mouthpiece, not what was transmitted over wire, and admissibility of recording was not prohibited because defendant had no expectation of privacy, where defendant placed call while officer was standing three feet away and television camera was suspended eight feet from telephone and pointed toward phone, notwithstanding fact that defendant conducted conversation in Thai. Siripongs v Calderon (1994, CA9 Cal) 35 F3d 1308, 94 CDOS 5105, 94 Daily Journal DAR 9410, amd on other grounds, reh, en banc, den (1994, CA9 Cal) 35 F3d 1308, 94 CDOS 7830, 94 Daily Journal DAR 14461 and cert den (1995) 513 US 1183, 130 L Ed 2d 1127, 115 S Ct 1175 and (criticized in United States v Martinez-Salazar (1998, CA9 Ariz) 146 F3d 653, 98 CDOS 4099, 98 Daily Journal DAR 5626).

Recording of telephone conversation alone constitutes "aural acquisition" of that conversation within meaning of 18 USCS § 2510(4). Sanders v Robert Bosch Corp. (1994, CA4 SC) 38 F3d 736, 10 BNA IER Cas 1, amd (1994, CA4) 10 BNA IER Cas 479 and reh, en banc, den (1995, CA4 SC) 10 BNA IER Cas 480 and (criticized in Dillon v Massachusetts Bay Transp. Auth. (2000) 49 Mass App 309, 729 NE2d 329, 16 BNA IER Cas 634).

Wife, who owned liquor store with husband, was properly held not liable for interceptions of telephone conversations at store, since defendant's listening to telephone conversations that her husband unlawfully recorded were not interceptions under 18 USCS § 2510(4), and defendant's acquiescence in husband's plans to tap his own telephone and her passive knowledge of interceptions were insufficient to impute liability to her for those interceptions in addition to husband's liability, and would result in potential double recovery for single interception. Reynolds v Spears (1996, CA8 Ark) 93 F3d 428.

Interceptions of private cordless telephone communications prior to 1994 did not violate Wiretap Act, notwithstanding defendant's claim that cordless phone conversations are protected by Act as an "oral communication" under 18 USCS § 2510; interception of cordless phone's radio transmission is not an interception of oral utterance itself, but of the radio signal produced by phone's handset and its base unit. Price v Turner (2001, CA9 Cal) 260 F3d 1144, 2001 CDOS 7031, 2001 Daily Journal DAR 8607.

In defendant's motion to suppress tapes of his telephone calls obtained while he was prisoner, law enforcement and consent exceptions in Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS § 2510(5)(a)(ii), excluded from definition of "interception" recordings made by any telephone or telegraph instrument, equipment or facility, or any component thereof being used by investigative or law enforcement officer in the ordinary course of his duties. United States v Hammond (2002, CA4 Md) 286 F3d 189, cert den (2002) 537 US 900, 154 L Ed 2d 172, 123 S Ct 215.

In defendant's motion to suppress tapes of his telephone calls obtained while he was prisoner, consent exceptions in Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS § 2510(5)(a)(ii), applied to prison inmates required to

permit monitoring as condition of using prison telephones. United States v Hammond (2002, CA4 Md) 286 F3d 189, cert den (2002) 537 US 900, 154 L Ed 2d 172, 123 S Ct 215.

Offending statements made by non-media defendant (director of defendant religious discrimination advocacy group) concerning private plaintiffs, which were made at press conference and on television show went well beyond merely reporting plaintiffs' neighbor's allegations against plaintiffs; plaintiffs' interest in privacy was sufficient to allow federal wiretap act to be applied to situations involving "use" of plaintiffs' intercepted telephone conversations concerning purely private matters; thus, application of federal wiretap act to advocacy group's actions did not violate First Amendment. Quigley v Rosenthal (2003, CA10 Colo) 327 F3d 1044, cert den, motion gr (2004) 540 US 1229, 158 L Ed 2d 172, 124 S Ct 1507.

Three-way telephone call, recorded by consent of one of parties to call, was found sufficiently trustworthy and did not violate Fourth Amendment or Federal Wiretap Statute, 18 USCS §§ 2510 et seq., where defendant knew that third party was online so was properly deemed to have consented to possibility that third person would record conversation; even though sound quality was poor, because defense expert was able to produce transcript of substantially all of conversation, to which government agreed to translation, tape was sufficiently trustworthy to withstand motion to suppress. United States v Moncivais (2005, CA6 Tenn) 401 F3d 751, 2005 FED App 145P.

Accomplice's call to defendant was recorded in accordance with regulations set forth by Massachusetts Department of Corrections and correctional facility's internal policy; therefore, recording fit squarely within case law applying 18 USCS § 2510(5)(a)(ii) law enforcement exception to recordings made by prison authorities who routinely monitored inmates' conversations and trial court properly found that correctional officer recorded calls in ordinary course of his duties, which was not violation of Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS §§ 2510-2522. United States v Lewis (2005, CA1 Mass) 406 F3d 11, cert den (2006, US) 126 S Ct 2951, 165 L Ed 2d 973.

Recording made pursuant to routine prison practice of monitoring all outgoing inmate calls under documented policy, of which inmates are informed, does not constitute interception for purposes of Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS §§ 2510-2522. United States v Lewis (2005, CA1 Mass) 406 F3d 11, cert den (2006, US) 126 S Ct 2951, 165 L Ed 2d 973.

Convicted defendants were entitled to new trial because government did not advance valid reason for admission of testimony relating to procedures used to obtain wiretap authorizations pursuant to Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS §§ 2510 et seq.; nothing in 18 USCS § 2515 required admission of such testimony, which had effect of unfairly prejudicing defendants, and testimony was not admissible relevant evidence under either Fed. R. Evid. 401 or 402, absent challenge by defendants to wiretap's validity. United States v Cunningham (2006, CA7 Ind) 462 F3d 708, reh den (2006, CA7 Ind) 2006 US App LEXIS 26930 and (criticized in United States v Thomas (2007, DC Dist Col) 525 F Supp 2d 17).

Accused cocaine distributors may not have wiretap evidence suppressed due to authorizing judge's alleged lack of jurisdiction, even though New York judge granted application for electronic surveillance of New Jersey telephones and 18 USCS § 2518(3) provides that judge may approve interception "within territorial jurisdiction" of his court, because § 2510(4) "intercept" of telephone conversations occurred not in New Jersey, where electronic impulses were diverted, but in New York, where impulses were converted into sound and acquired by government. United States v Rodriguez (1990, SD NY) 734 F Supp 116.

County employees' conversations were entitled to protection under 18 USCS § 2510(2), where office director placed tape recorder in office bathroom to tape employees' private and personal conversations, and although members of public visited office and used bathroom where tape recorder had been placed, recorded conversations took place only when no member of public had been present, and conversations had stopped when telephone was being used or when any car turned into road that was only entrance to office. Dorris v Absher (1997, MD Tenn) 959 F Supp 813 (criticized in Desilets v Wal-Mart Stores, Inc. (1999, CA1 NH) 171 F3d 711, 14 BNA IER Cas 1642, 137 CCH LC P 58598) and affd in part and revd in part on other grounds, summary judgment gr, remanded (1999, CA6 Tenn) 179 F3d 420, 15 BNA IER Cas 193, 138 CCH LC P 58643, 1999 FED App 200P.

Even assuming that newspaper and its editor knew that conversation had been illegally recorded by some unknown person, 18 USCS § 2510 could not be constitutionally applied to prohibit newspaper and its editor from publishing transcript of allegedly illegally wiretapped private conversation, where public school board trustee made numerous racial slurs and profane comments in conversation, written transcription of which was read into minutes of public school board meeting, and copy of minutes was obtained by newspaper through open records request. Peavy v New Times (1997, ND Tex) 976 F Supp 532, 26 Media L R 1435, summary judgment gr, in part, summary judgment den, in part, claim dismissed, request den (1998, ND Tex) 1998 US Dist LEXIS 13448.

18 USCS § 2510 did not apply to husband's interception of wife's telephone communication, but did not preclude claim against husband by other party to wife's communication. Kirkland v Franco (2000, ED La) 92 F Supp 2d 578.

Invoice/billing information and names, addresses, and phone numbers of parties called by subscriber were not "contents" of communication within meaning of 18 USCS § 2510(8). Hill v MCI WorldCom Communs., Inc. (2000, SD Iowa) 120 F Supp 2d 1194.

Because court could not conclude that minister's alleged counseling of caller rendered allegedly, homosexually explicit phone conversation business in nature, nor that it raised safety concerns for church personnel since conversation had been with adult, when listeners should have ceased listening was question of fact, precluding summary judgment on minister's

claim that church and its employees violated Electronic Communications Privacy Act, 18 USCS §§ 2510-2521. Fischer v Mt. Olive Lutheran Church, Inc. (2002, WD Wis) 207 F Supp 2d 914.

District court denied defendants' motions to suppress Title III interceptions of two telephones because interception of second telephone did not exceed 30-day maximum in 18 USCS § 2518(5); data gathered during first week after interception order was issued did not include actual contents of communications, and, thus, "interception" as defined by 18 USCS § 2510(4), did not begin until first recording was made. United States v Lazu-Rivera (2005, DC Puerto Rico) 363 F Supp 2d 30.

Defendants moved to dismiss plaintiff's Title III of Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act), 18 USCS §§ 2510-2520, claims on grounds that recordings of telephone conversations between plaintiff and her boyfriend could not be subject to suit because they were made by investigative or law enforcement officer in ordinary course of his duties, pursuant to 18 USCS § 2510(5)(a)(ii); however defendants' motion on this basis was denied as record was inadequate to rule in defendants' favor absent discovery on issue. Additionally, there was inadequate factual record with regards to how much notice was provided to plaintiff or her boyfriend. Colandrea v Town of Orangetown (2007, SD NY) 490 F Supp 2d 342.

Where city employees sued city and many officials after defendants installed call recording system at public safety complex, asserting, inter alia, claim under Title III of Omnibus Crime Control and Safe Street Act of 1968, 18 USCS §§ 2510 et seq., pursuant to 18 USCS § 2520, they asserted sufficient cause of action under 18 USCS § 2511 to survive summary judgment and defendants failed to show that either of two exceptions to Act applied; first, because there was genuine issue of material fact as to role that certain defendants played in procuring, installing, and using recording system, there existed genuine issue of material fact as to whether they intended to intercept plaintiffs' conversations pursuant to 18 USCS § 2510(a)(4). Further, argument that they did not intercept any calls through system because there was no evidence that they ever listened to calls, and thus they were never "actually acquired," was rejected. Walden v City of Providence (2007, DC RI) 495 F Supp 2d 245, 26 BNA IER Cas 580.

Admissibility of evidence linking accused to drug transaction, gathered from telephone conversation overheard by battery First Sergeant on extension phone in orderly room, is not precluded by 18 USCS §§ 2510 et seq., since brief monitoring of telephone conversation by First Sergeant was in ordinary course of business, so conversation was never "intercepted" within meaning of § 2510. United States v Sturdivant (1982, CMA) 13 MJ 323.

Recording by unindicted conspirator of telephone conversation with defendant by use of tape recorder and special adapter attached to telephone receiver did not meet statutory definition of "intercept" under New Jersey statute and 18 USCS §§ 2510(4) and 2511(1)(a). State v Gora (1977, App Div) 148 NJ Super 582, 372 A2d 1335.

Use of telephone to surreptitiously eavesdrop on employees when there was no purpose of trying to detect illicit contacts with competitors could never fall within exception from criminal or civil liability provided for use within ordinary course of business. Cady v IMC Mortg. Co. (2004, RI) 862 A2d 202, 22 BNA IER Cas 342.

18.--Use of pen register or other tracing device

For purposes of 18 USCS § 2510(4), pen register does not "intercept" because it does not acquire "contents" of communications or accomplish "aural acquisition" of anything. United States v New York Tel. Co. (1977) 434 US 159, 54 L Ed 2d 376, 98 S Ct 364.

Pen register is not interception of communication under 18 USCS § 2510(4). Korman v United States (1973, CA7 Ill) 486 F2d 926.

Pen register does not hear sound and therefore does not accomplish "interception" for 18 USCS § 2510(4) purposes; pen register acquires its information by interpreting and printing out electric pulses and is thus not "aural acquisition", which is only acquisition authorized by 18 USCS §§ 2510 et seq. United States v Illinois Bell Tel. Co. (1976, CA7 Ill) 531 F2d 809.

"Pen-register" is not interception of communication under 18 USCS § 2510(4). Application of United States for Order Authorizing Installation & Use of Pen Register (1976, CA8 Mo) 546 F2d 243, cert den (1978) 434 US 1008, 54 L Ed 2d 750, 98 S Ct 716.

Neither pen registers nor traces accomplished by "aural acquisition," are interception of wire communications as that term is defined by 18 USCS § 2510(4). Michigan Bell Tel. Co. v United States (1977, CA6 Mich) 565 F2d 385.

Since pen registers do not intercept contents of communications, they are not within scope of 18 USCS §§ 2510-2520. United States v Kail (1979, CA9 Cal) 612 F2d 443, cert den (1980) 445 US 966, 64 L Ed 2d 242, 100 S Ct 1657 and cert den (1980) 445 US 969, 64 L Ed 2d 247, 100 S Ct 1664 and cert den (1980) 446 US 912, 64 L Ed 2d 266, 100 S Ct 1842 and cert den (1980) 446 US 953, 64 L Ed 2d 810, 100 S Ct 2920.

Use of "pen register", device used in connection with telephone by which telephone numbers of outgoing calls are recorded and number of times telephone rings in respect to incoming calls, but does not record conversations, does not involve interception, acquisition, or use of aural impulses, is not instrument by which aural interception takes place within meaning of 18 USCS § 2510(4). United States v Focarile (1972, DC Md) 340 F Supp 1033, affd (1972, CA4 Md) 469 F2d 522, affd (1974) 416 US 505, 40 L Ed 2d 341, 94 S Ct 1820 and affd without op (1973, CA4 Md) 473 F2d 906, cert den (1973) 411 US 932, 36 L Ed 2d 400, 93 S Ct 1895.

"Pen register" is not "interception" under 18 USCS § 2510(4) and requirements of 18 USCS §§ 2510 et seq. do not apply. In re Korman (1972, ND Ill) 351 F Supp 325, affd (1973, CA7 Ill) 486 F2d 926.

"Pen register", when used in conjunction with court-ordered wiretap, does "intercept" wire communications within scope of 18 USCS § 2510(1), (4). In re Alperen (1973, DC Mass) 355 F Supp 372, affd (1973, CA1 Mass) 478 F2d 194.

Use of pen registers (devices which simply trace phone calls and do not record contents of such calls) does not constitute "interception" as that term is defined in 18 USCS § 2510(4) for purposes of 18 USCS §§ 2510 et seq. United States v Best (1973, SD Ga) 363 F Supp 11.

Installation of pen register is clearly not subject to restrictions of 18 USCS § 2511. Von Lusch v C & P Tel. Co. (1978, DC Md) 457 F Supp 814.

Since pen registers do not intercept "contents" of communications, fundamental part of definition of interception provided by 18 USCS § 2510(4), they are not controlled by Title III of Omnibus Crime Control and Safe Streets Act of 1968. Application of United States for An Order Authorizing Installation of Pen Register etc. (1978, WD Pa) 458 F Supp 1174.

Communications content information as defined under 18 USCS § 2510(8), obtained by post-cut-through dialed digits can not be intercepted by law enforcement under Pen/Trap Statute under 18 USCS §§ 3121(c), 3127 and can only be intercepted by law enforcement under 18 USCS § 2518, part of Title III of Omnibus Crime Control and Safe Streets Act of 1968, and Stored Communications Act, 18 USCS §§ 2701 et seq.; thus, government was denied authorization for access to such information through pen trap order because call contents would be obtained, which was proscribed by Pen/Trap Statute. In re the Application of United States (2006, SD Tex) 441 F Supp 2d 816 (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448).

Independent use of pen register is not subject to federal wiretapping statute since they are not intercepting devices as defined in statute, in that they do not intercept aural communications. People v Estrada (1978) 97 Misc 2d 127, 410 NYS2d 757.

Because they do not accomplish "aural acquisition" or acquire contents of communications, pen registers fall outside purview of 18 USCS § 2510(4). Davis v United States (1978, Dist Col App) 390 A2d 976.

Evidence obtained from tracing device which did not disclose content of call, but only existence of communication, time of call, and number dialed did not constitute aural interception of communications within meaning of 18 USCS § 2510(4) and was admissible in prosecution of defendant for aggravated kidnapping and intimidation, 18 USCS § 2515 not being applicable and no court order being necessary. People v Turner (1976, 1st Dist) 35 Ill App 3d 550, 342 NE2d 158.

Neither use of "pen register" alone, without accessory airphones, nor use of "trace" alone intercepts communication within meaning of 18 USCS § 2510(4) since such merely records numbers dialed from registered or traced telephone without showing that calls have been completed or answered. In re In-Progress Trace of Wire Communication etc. (1975, App Div) 138 NJ Super 404, 351 A2d 356, revd on other grounds (1978) 76 NJ 255, 386 A2d 1295.

19.--Miscellaneous

Printouts of Telex communications do not constitute "aural" acquisition of contents of communications; Telex communications, unlike telephonic communication, does not involve hearing sounds of voice but is more like pen register or television monitoring, sight rather than hearing being means of apprehending contents hence 18 USCS §§ 2510 et seq. do not apply to such printouts. United States v Gregg (1987, CA8 Mo) 829 F2d 1430, 23 Fed Rules Evid Serv 1170, cert den (1988) 486 US 1022, 100 L Ed 2d 226, 108 S Ct 1994.

Security officer employed by company that provided corporate defendant with security services could not recover damages for period of time after defendant turned off voice logger, even though due to design defect device continued to transmit ambient noise from guard's office to defendant's security control room, since conversations in guard's office were not intercepted in violation of Federal Wiretapping Act under 18 USCS § 2511; corporation never acquired "contents" of any conversations taking place in guard's office under 18 USCS § 2510(4), and there was no "intentional interception" under 18 USCS § 2511. Sanders v Robert Bosch Corp. (1994, CA4 SC) 38 F3d 736, 10 BNA IER Cas 1, amd (1994, CA4) 10 BNA IER Cas 479 and reh, en banc, den (1995, CA4 SC) 10 BNA IER Cas 480 and (criticized in Dillon v Massachusetts Bay Transp. Auth. (2000) 49 Mass App 309, 729 NE2d 329, 16 BNA IER Cas 634).

Subsequent listening to lawfully taped conversation by entity other than that which made original recording does not constitute interception which requires subsequent listening entity to obtain interception order. United States v Hammond (2002, CA4 Md) 286 F3d 189, cert den (2002) 537 US 900, 154 L Ed 2d 172, 123 S Ct 215.

In defendant's motion to suppress tapes of his telephone calls obtained while he was prisoner, under Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS § 2510(4), communication was only "intercepted" at time it was initially captured by non-party; "intercept" was defined as aural or other acquisition of wire communication through use of any electronic, mechanical or other device. United States v Hammond (2002, CA4 Md) 286 F3d 189, cert den (2002) 537 US 900, 154 L Ed 2d 172, 123 S Ct 215.

Airline pilot's unauthorized viewing of airline employee's secure website was not an "interception" in violation of

Wiretap Act,18 USCS §§ 2510-2520, since vice president acquired website's contents in their stored state, not during transmission. Konop v Hawaiian Airlines, Inc. (2002, CA9 Cal) 302 F3d 868, 2002 CDOS 7727, 2002 Daily Journal DAR 9709, 19 BNA IER Cas 166, 170 BNA LRRM 2906, 146 CCH LC P 10096, cert den (2003) 537 US 1193, 123 S Ct 1292, 154 L Ed 2d 1028, 19 BNA IER Cas 1088, 171 BNA LRRM 3152.

Internet service company intercepted communication between drug companies and their website users, under 18 USCS § 2510(4), because its acquisition was contemporaneous with transmission by users to drug companies; accordingly, district court erred by granting company summary judgment in Internet service company's favor. Blumofe v Pharmatrak, Inc. (In re Pharmatrak, Inc. Privacy Litig.) (2003, CA1 Mass) 329 F3d 9 (criticized in In re JetBlue Airways Corp. Privacy Litig. (2005, ED NY) 379 F Supp 2d 299).

District court's dismissal of officers' claim, for violation of Stored Communications Act, 18 USCS §§ 2701 et seq., on ground that messages that were accessed were not in "electronic storage," was reversed because there was no dispute that messages that remained on internet service provider's server after delivery were stored by electronic communication service within meaning of 18 USCS § 2510 (17)(B) and that messages were stored for purposes of backup protection within meaning of 18 USCS § 2510(17)(B). Theofel v Farey-Jones (2004, CA9 Cal) 359 F3d 1066, cert den (2004, US) 160 L Ed 2d 17, 125 S Ct 48.

Internet service provider's (ISP's) continued reception of former customer's e-mails did not constitute "interception" under Electronic Communications Privacy Act, 18 USCS §§ 2510 et seq., because it was conducted as part of ordinary course of ISP's business. Hall v EarthLink Network, Inc. (2005, CA2 NY) 396 F3d 500.

Act of using device to decrypt encrypted satellite television transmissions unquestionably falls under definition of "interception" as defined in 18 USCS § 2510(4); thus, under plain language of 18 USCS § 2511 and 18 USCS § 2520, using pirate access device to intercept encrypted satellite transmissions of satellite television provider constitutes violation of 18 USCS § 2511(1)(a). DIRECTV Inc. v Nicholas (2005, CA4 NC) 403 F3d 223.

In illegal interception of electronic communications case, e-mail messages obtained and copied from an online retailer by an Internet service provider (ISP) were "intercepted" within meaning of Wiretap Act. United States v Councilman (2005, CA1 Mass) 418 F3d 67.

Definition of "electronic storage" is extraordinarily and it covers any temporary, intermediate storage of wire or electronic communication incidental to electronic transmission thereof, as well as any storage of such communication by electronic communication service for purposes of backup protection of such communication. United States v Councilman (2005, CA1 Mass) 418 F3d 67.

If bugs were lawfully situated in living room, any conversation dealing with narcotics trafficking which they overheard, whether or not agents knew it was occurring in adjoining room, is lawfully intercepted and is therefore admissible. United States v Williams (1981, SD NY) 527 F Supp 859.

Individual who received paid television supplier's microwave transmissions without authority or payment of fee did not "intercept" transmissions within meaning of 18 USCS § 2510(4), since he did not orally acquire contents of any wire or oral communication (as latter term is defined at 18 USCS § 2510(1)), where signal had come as unconnected, omnidirectional frequency capable of receipt by anyone possessing required equipment, and supplier had no protectable privacy interest in signal prior to receipt. Hoosier Home Theater, Inc. v Adkins (1984, SD Ind) 595 F Supp 389.

Grand jury subpoena for foreign currency trader's records is valid under 18 USCS § 2510(4), where undercover agent tape-recorded conversation that he also could plainly hear, because there was no "interception" or prohibition against preserving conversation agent could lawfully overhear. In re John Doe Trader Number One (1989, ND Ill) 722 F Supp 419, affd (1990, CA7 Ill) 894 F2d 240.

Accused methamphetamine traffickers are not entitled to suppression of contents of 2 audio cassettes seized from answering machine during search of their residence, where deputies overheard incoming call over speaker while lawfully executing search warrant, then later replaced and transcribed contents of tapes, because deputies did not "intercept" any "wire, oral or electronic communication" within meaning of 18 USCS § 2510(4) when they overheard and replayed previously recorded conversations. United States v Upton (1991, SD Ohio) 763 F Supp 232.

Computer programmer could not be liable under Electronic Communications Privacy Act (18 USCS §§ 2510 et seq.), to extent he inadvertently glimpsed e-mail on computer screen while helping someone, because § 2510(4) defines "intercept" as "acquisition of contents of any wire, electronic, or oral communication through use of any electronic, mechanical, or other device." Wesley College v Pitts (1997, DC Del) 974 F Supp 375, 13 BNA IER Cas 355, affd without op (1998, CA3 Del) 172 F3d 861.

Disgruntled insurance agent has no viable claim against insurer under Federal Wiretap Act (18 USCS §§ 2510 et seq.), where it is undisputed that insurer acquired e-mail agent sent to another agent from its electronic storage facility after other agent had received and read it, because insurer's retrieval of e-mail message from post-transmission storage, after transmission was complete, was no "interception." Fraser v Nationwide Mut. Ins. Co. (2001, ED Pa) 135 F Supp 2d 623, 17 BNA IER Cas 662 (criticized in Theofel v Farey-Jones (2003, CA9 Cal) 341 F3d 978, 2003 CDOS 7848, 2003 Daily Journal DAR 9849) and affd in part and remanded in part (2003, CA3 Pa) 352 F3d 107, 20 BNA IER Cas 1207, 149 CCH LC P 59803 and (criticized in Theofel v Farey-Jones (2004, CA9 Cal) 359 F3d 1066).

Satellite television provider's claims against all but one unrelated individual alleging that they intercepted its television

programming by means of "Pirate Access Devices" in violation of 47 USCS § 605 and 18 USCS §§ 2510-2521 were dismissed pursuant to Fed. R. Civ. P. 21 because claims involved distinct and unrelated acts by unrelated individuals, and there was neither "common transaction or occurrence" nor "common question of law" as required by Fed. R. Civ. P. 20. DIRECTV, Inc. v Armellino (2003, ED NY) 216 FRD 240 (criticized in DIRECTV, Inc. v Barrett (2004, DC Kan) 220 FRD 630).

Individual's motion to dismiss under Fed. R. Civ. P. 12(b)(6) was granted because amendments to 18 USCS § 2520 did not undermine previous rule issued by Court of Appeals for Fourth Circuit which found that no private cause of action was permitted under former version of § 2520 for violations of 18 USCS § 2512; furthermore, company had to allege unlawful possession and use of eavesdropping equipment in order to maintain cause of action under 18 USCS § 2511, but mere possession of that equipment, alone, afforded no civil recovery under either § 2511 or § 2512. DIRECTV, Inc. v Amato (2003, ED Va) 269 F Supp 2d 688 (criticized in Directv, Inc. v Perez (2003, ND Ill) 279 F Supp 2d 962) and (criticized in DIRECTV, Inc. v Gatsiolis (2003, ND Ill) 2003 US Dist LEXIS 15801) and (criticized in Directv, Inc. v Pence (2003, ED Tex) 2003 US Dist LEXIS 25895) and (criticized in DirecTV, Inc. v Dougherty (2003, DC NJ) 2003 US Dist LEXIS 23654) and (criticized in DIRECTV, Inc. v Legans (2004, WD Tenn) 2004 US Dist LEXIS 972) and (criticized in DirecTV, Inc. v Dyrhaug (2004, ND Ill) 2004 US Dist LEXIS 5008) and (criticized in DirecTV, Inc. v Figueroa (2004, DC NJ) 2004 US Dist LEXIS 28000) and (criticized in DirecTV, Inc. v Dillon (2004, ND Ill) 2004 US Dist LEXIS 7229).

Defendant's text messages, supplied by electronic communication providers in response to search warrants were not "interceptions" under 18 USCS § 2510(4), but instead were governed by 18 USCS § 2703(a), and were admissible due to probable cause for warrants; unlike Wiretap Act, Stored Communications Act contained no express requirement that government demonstrate necessity. United States v Jones (2006, DC Dist Col) 451 F Supp 2d 71.

Where city employees sued city and many officials after defendants installed call recording system at public safety complex, asserting, inter alia, claim under Title III of Omnibus Crime Control and Safe Street Act of 1968, 18 USCS §§ 2510 et seq., pursuant to 18 USCS § 2520, they asserted sufficient cause of action under 18 USCS § 2511 to survive summary judgment and defendants failed to show that either of two exceptions to Act applied; inter alia, defendants failed to show that their conduct fell within ordinary course of business exception pursuant to 18 USCS § 2510(5)(a)(ii); while defendants suggested that recording was utilized for private purposes, long distance, or "900" calls, and to preserve and accurately recall messages relating to emergencies or official police business, such proffered justification did not square with number of defendants' statements; thus, whether purpose of system was routine and noninvestigative was called into question, and system did not unequivocally fall within exception. Walden v City of Providence (2007, DC RI) 495 F Supp 2d 245, 26 BNA IER Cas 580.

Where city employees sued city and many officials after defendants installed call recording system at public safety complex, asserting, inter alia, claim under Title III of Omnibus Crime Control and Safe Street Act of 1968, 18 USCS §§ 2510 et seq., pursuant to 18 USCS § 2520, they asserted sufficient cause of action under 18 USCS § 2511 to survive summary judgment and defendants failed to show that either of two exceptions to Act applied; inter alia, defendants failed to show that their conduct fell within consent exception as there was no evidence suggesting that plaintiffs were aware that their conversations were being recorded; while it was true that e-mail was circulated to at least number of employees, there was no indication that e-mail was sent to plaintiffs; additionally, there was no "beep" or similar warning emitted from telephone lines, no official memorandum circulated advising employees that lines were being recorded, and no effort to seek consent from employees. Walden v City of Providence (2007, DC RI) 495 F Supp 2d 245, 26 BNA IER Cas 580.

Where motel clerk answered switchboard call from motel room, received no reply upon answering, but heard commotion over telephone and recorded commotion without mechanically interfering with telephone line, resulting tape recording was not result of "intercept" as defined in 18 USCS § 2510(4), since motel clerk merely recorded that which he, as proper party to telephone line, could hear and he did so without violation of physical integrity of telephone line. Williams v State (1973, Okla Crim) 507 P2d 1339.

Unpublished Opinions

Unpublished: District court's remarks at defendant's suppression hearing regarding government's establishment of "super probable cause" satisfied probable cause assessment required by 18 USCS §§ 2510-2520 because district court demonstrated full awareness of relevant statutory standards for judicial authorization of wire and electronic surveillance. United States v Brewer (2006, CA4 Md) 204 Fed Appx 205 (criticized in United States v Rice (2007, CA6 Ky) 478 F3d 704, 2007 FED App 88P).

20. Electronic, mechanical, or other device, generally

It is not violation of 18 USCS § 2510 for father to listen in on conversations between his wife and his eight year old daughter, from his own phone, in his own home, and fact that he taped conversations which he permissibly overheard does not violate statute since such construction would create distinction without difference. Anonymous v Anonymous (1977, CA2 NY) 558 F2d 677 (criticized in United States v Murdock (1995, CA6 Mich) 63 F3d 1391, 1995 FED App 258P) and (criticized in Pollock v Pollock (1998, CA6 Ky) 154 F3d 601, 1998 FED App 271P) and (criticized in Milke v Milke (2004, DC Minn) 2004 US Dist LEXIS 11199).

Where telephone company installed telephone monitoring devices on phones in its departments dealing with general public, in order to allow supervisory personnel to monitor business calls to give employees more training and also to serve as protection for employees from abusive calls, exception to definition of "electronic, mechanical, or other device" found in 18 USCS § 2510(5)(a)(i) [sic] [illegible] Agency Corp. (1979, CA10 Utah) 591 F2d 579, 18 BNA FEP Cas 1547, 18

CCH EPD P 8914 (criticized in Schmerling v Injured Workers' Ins. Fund (2002) 368 Md 434, 795 A2d 715, 18 BNA IER Cas 873).

Beepers are governed by laws concerning electronic surveillance. United States v Sweeney (1982, CA7 Ill) 688 F2d 1131, 11 Fed Rules Evid Serv 665 (criticized in State v Rothlisberger (2004, Utah App) 2004 UT App 226, 95 P3d 1193, 203 Utah Adv Rep 19) and (superseded by statute on other grounds as stated in Ragland v State (2005) 385 Md 706, 870 A2d 609) and (criticized in State v Rothlisberger (2006) 2006 UT 49, 147 P3d 1176, 560 Utah Adv Rep 4).

Overhearing conversation by listening on same earpiece as participant to conversation is not interception of communication within meaning of 18 USCS § 2510. United States v Chiavola (1984, CA7 Ill) 744 F2d 1271, 16 Fed Rules Evid Serv 685 (criticized in State v Samuel (2000, App) 2001 WI App 25, 240 Wis 2d 756, 623 NW2d 565).

Federal judge is authorized to enter order permitting agents of government to visually monitor, and through video electronic equipment record, all activities in organizations safe houses dedicated exclusively to illicit business. United States v Torres (1984, CA7 Ill) 751 F2d 875, cert den (1985) 470 US 1087, 85 L Ed 2d 150, 105 S Ct 1853.

Seizure of electronic transfer funds for forfeiture purposes was not prohibited interception under 18 USCS § 2511(1), since government did not use "device" within meaning of 18 USCS § 2510(4) to obtain electronic transfer funds or information. United States v Daccarett (1993, CA2 NY) 6 F3d 37, 72 AFTR 2d 6248, 93 TNT 212-11, cert den (1994) 510 US 1191, 510 US 1192, 127 L Ed 2d 648, 114 S Ct 1294 and cert den (1994) 511 US 1030, 128 L Ed 2d 190, 114 S Ct 1538 and (criticized in United States v $ 87,118.00 in United States Currency (1996, CA7 Ill) 95 F3d 511) and (superseded by statute on other grounds as stated in United States v Mondragon (2002, CA4 Md) 313 F3d 862).

Corporation's use of voice logger, which recorded all telephone conversations on some telephone lines with extensions in security office, did not fall within business-use exception of 18 USCS § 2510(5)(a)(i), since voice logger is not telegraph instrument, equipment or facility, or component thereof, and was not used in ordinary course of its business, even though corporation claimed that it feared bomb threats. Sanders v Robert Bosch Corp. (1994, CA4 SC) 38 F3d 736, 10 BNA IER Cas 1, amd (1994, CA4) 10 BNA IER Cas 479 and reh, en banc, den (1995, CA4 SC) 10 BNA IER Cas 480 and (criticized in Dillon v Massachusetts Bay Transp. Auth. (2000) 49 Mass App 309, 729 NE2d 329, 16 BNA IER Cas 634).

Recording of all incoming and outgoing calls, including employee plaintiffs' conversations, by Dictaphone machine attached to telephone system of company providing central alarm services was in ordinary course of business under 18 USCS § 2510, and alleged lack of notice was justified; recording is standard practice within central station alarm industry and is intended at least in part to deter criminal activity, was recommended by company's underwriters and relevant trade association, and may be required by authorities in certain instances. Arias v Mutual Cent. Alarm Serv. (2000, CA2 NY) 202 F3d 553, 15 BNA IER Cas 1683, 140 CCH LC P 58873.

Anonymous source's hacking into defendant's computer to gain evidence of child pornography implicated neither Fourth Amendment nor Electronic Communications Privacy Act of 1986, 18 USCS §§ 2510 et seq., and thus evidence did not have to be suppressed. United States v Steiger (2003, CA11 Ala) 318 F3d 1039, 16 FLW Fed C 197, cert den (2003) 538 US 1051, 155 L Ed 2d 1095, 123 S Ct 2120.

Proposed distinction between "in transit" and "in storage" was rejected; term "electronic communication," 18 USCS § 2510(12), includes transient electronic storage intrinsic to communication process for such communications. United States v Councilman (2005, CA1 Mass) 418 F3d 67.

Because e-mail messages did not cease to be "electronic communication," pursuant to 18 USCS § 2510(12), during momentary intervals, intrinsic to communication process, at which message resided in transient electronic storage, e-mail provider who had been copying his customer's e-mails could be prosecuted under 18 USCS § 2511, part of Wiretap Act. United States v Councilman (2005, CA1 Mass) 418 F3d 67.

Covert monitoring of conversations between plaintiff, a former Acting Assistant Secretary of State for Legislative Affairs, and former Assistant Secretary of State for Consular Affairs concerning presidential candidate's passport by officers at State Department communications center was not shown to be within ordinary course of business under 18 USCS § 2510 so as to warrant dismissal of complaint; there was no reason presented as to need for secret monitoring nor was it shown to be routine and guidelines for center provided that calls should not be monitored unless parties so request. Berry v Funk (1998, App DC) 331 US App DC 62, 146 F3d 1003 (criticized in Blake v Wright (1999, CA6 Ohio) 179 F3d 1003, 15 BNA IER Cas 297, 1999 FED App 218P) and (criticized in Tapley v Collins (2000, CA11 Ga) 211 F3d 1210, 16 BNA IER Cas 665).

Prison intercepts of telephone conversations between inmate and his sister need not be suppressed, where interception and recording of calls occurred in conformity with pre-established institutional plan not specifically aimed at siblings, because prison officials are "investigative or law enforcement officers" and routine monitoring pursuant to established policy is "in ordinary course of their duties" within meaning of 18 USCS § 2510(5)(a)(ii) exemption from § 2511 blanket prohibition of interception of wire communications. United States v Cheely (1992, DC Alaska) 814 F Supp 1430 (criticized in United States v Rivera (2003, ED Va) 292 F Supp 2d 838) and (criticized in United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111).

Employer is denied summary dismissal of employees' claims that it violated 18 USCS § 2511 by monitoring and recording their telephone calls at work, even though employer contends its monitoring was exempt under § 2510(4) and (5) or § 2511(2)(d), because (1) it is not at all clear that employees were aware of and consented to monitoring, and (2) employer does not offer legitimate business reason that, as matter of law, justifies indiscriminate recording of all business and

personal telephone calls received or made during particular shift. Ali v Douglas Cable Communs. (1996, DC Kan) 929 F Supp 1362.

Company's claims under Federal Communications Act of 1934, 47 USCS § 605, and Electronic Communications Privacy Act, 18 USCS §§ 2510-2521, that named six defendants that allegedly pirated satellite television services, could be consolidated pursuant to Fed. R. Civ. P. 42(a) based upon common questions of fact and law and in interest of judicial economy and efficiency, and one named defendant's motion to drop claims against him or to sever claims were not warranted. Monon Tel. Co. v Bristol (2003, ND Ind) 218 FRD 614, 57 FR Serv 3d 933.

Customers' claim that airline violated 18 USCS § 2702(a)(3), part of Electronic Communications Privacy Act, when it provided National Aeronautical and Space Administration with addresses, credit card numbers, and travel itineraries of customers without their knowledge was dismissed for failure to state claim under Fed. R. Civ. P. 12(b)(6) because "electronic communication services," as term was defined by 18 USCS § 2510(15), encompassed internet service providers and telecommunications companies whose lines carried internet traffic; however, term did not encompass businesses that were selling traditional products or services online; because airline sold its services over internet but did not sell access to internet itself, airline fell outside scope of 18 USCS § 2702. Dyer v Northwest Airlines Corps. (2004, DC ND) 334 F Supp 2d 1196.

Electronic Communications Privacy Act definition of "electronic communications service" of 18 USCS § 2510(15) clearly includes internet service providers as well as telecommunications companies whose cables and phone lines carry internet traffic; however, businesses offering their traditional products and services online through website are not providing "electronic communication service." Dyer v Northwest Airlines Corps. (2004, DC ND) 334 F Supp 2d 1196.

Electronic communications in interstate commerce as defined in 18 USCS § 2511(1)(a) were held not to have been illegally intercepted by defendant, who used "KeyKatcher" device to obtain keystrokes transmitted from victim's keyboard to her computer, because those keystrokes were not yet electronic transmissions in interstate commerce at time they were intercepted. United States v Ropp (2004, CD Cal) 347 F Supp 2d 831.

Defendant's text messages, supplied by electronic communication providers in response to search warrants were not "interceptions" under 18 USCS § 2510(4), and were admissible due to probable cause for warrants; as used in Stored Communications Act, which, in 18 USCS § 2711(1), expressly adopted definitions provided in Wiretap Act, "electronic storage" meant any temporary, intermediate storage of wire or electronic communication incidental to electronic transmission thereof and any storage of such communication by electronic communication service for purposes of backup protection of such communication as provided in 18 USCS § 2510(17). United States v Jones (2006, DC Dist Col) 451 F Supp 2d 71.

Defendant's text messages, supplied by electronic communication providers in response to search warrants were not "interceptions" under 18 USCS § 2510(4), but instead were governed by 18 USCS § 2703(a), and were admissible due to probable cause for warrants; as used in Stored Communications Act, which, in 18 USCS § 2711(1), expressly adopted definitions provided in Wiretap Act, "electronic communication service" was defined as any service which provides to users thereof ability to send or receive wire or electronic communications as provided in 18 USCS § 2510(15). United States v Jones (2006, DC Dist Col) 451 F Supp 2d 71.

21.--Extension telephone exemption

There is no interception if acquisition of contents of communication is accomplished through telephone equipment used in ordinary course of business; to establish interception under 18 USCS § 2510(4), Government must establish beyond reasonable doubt that contents of wire or oral communication were acquired through electronic, mechanical, or other device other than telephone employed by subscriber or user in ordinary course of its business; however, telephone extension used without authorization or consent to surreptitiously record private telephone conversation is not used in ordinary course of business. United States v Harpel (1974, CA10 Colo) 493 F2d 346 (criticized in United States v Murdock (1995, CA6 Mich) 63 F3d 1391, 1995 FED App 258P).

Use of extension telephone by police officer to intercept telephone conversations between inmates in state correctional institution was not within exemption from statutory prohibition against secret monitoring of wire communications found within 18 USCS § 2510(5). Campiti v Walonis (1979, CA1 Mass) 611 F2d 387, 58 **ALR Fed** 579.

Extension business telephone may be "device" as defined by 18 USCS § 2510(5) where circumstances surrounding employer's interception of employee's telephone conversation indicate that employee's supervisor had particular suspicions about confidential information being disclosed to business competitor, had warned employee not to disclose such information, had reason to believe that employee was continuing to disclose such information, and knew that particular phone call was with agent of competitor. Briggs v American Air Filter Co. (1980, CA5 Ga) 630 F2d 414.

Business extension exception did not apply to employer's interceptions of employees' phone calls because monitoring system used, which consisted of "alligator chips attached to a microphone cable" and "interface connecting microphone cable to a VCR and a video camera" was not "telephone or telegraph instrument, equipment or facility or component within meaning of 18 USCS § 2510(5). Williams v Poulos (1993, CA1 Me) 11 F3d 271 (criticized in Blumofe v Pharmatrak, Inc. (In re Pharmatrak, Inc. Privacy Litig.) (2003, CA1 Mass) 329 F3d 9).

To meet business use exception of 18 USCS § 2510(5)(a)(i), both of that section's prongs must be met. Sanders v Robert Bosch Corp. (1994, CA4 SC) 38 F3d 736, 10 BNA IER Cas 1, amd (1994, CA4) 10 BNA IER Cas 479 and reh, en banc, den

(1995, CA4 SC) 10 BNA IER Cas 480 and (criticized in Dillon v Massachusetts Bay Transp. Auth. (2000) 49 Mass App 309, 729 NE2d 329, 16 BNA IER Cas 634).

Tape recorder connected to extension phones in wife's home, which wife used to check on defendant husband's business dealings related to their funeral business and his possible marital infidelities, did not all fall within telephone or business extension exemption under 18 USCS § 2510(5), since recording mechanism does not qualify for exemption, and indiscriminate recording of both incoming and outgoing calls did not constitute conduct within ordinary course of funeral home business. United States v Murdock (1995, CA6 Mich) 63 F3d 1391, 1995 FED App 258P, reh, en banc, den (1995, CA6) 1995 US App LEXIS 28950 and cert den (1996) 517 US 1187, 116 S Ct 1672, 134 L Ed 2d 776 and (criticized in In re Grand Jury (1997, CA3 Del) 111 F3d 1066) and (criticized in Chandler v United States Army (1997, CA9 Idaho) 125 F3d 1296, 97 CDOS 7546, 97 Daily Journal DAR 12161) and (criticized in Berry v Funk (1998, App DC) 331 US App DC 62, 146 F3d 1003) and (criticized in Miles v State (2001) 365 Md 488, 781 A2d 787) and (criticized in Smith v Mike Devers & Mike Devers Ins. Agency, Inc. (2002, MD Ala) 2002 US Dist LEXIS 1125) and (criticized in United States v Lam (2003, ND Cal) 271 F Supp 2d 1182) and (criticized in Henson v State (2003, Ind App) 790 NE2d 524) and (criticized in Babb v Eagleton (2007, ND Okla) 2007 US Dist LEXIS 82246).

Extension telephone is not intercepting device within meaning of 18 USCS § 2510(5)(a). United States v Christman (1974, ND Cal) 375 F Supp 1354.

In action brought by attorney and his hospitalized client against physician, hospital, and nurse, seeking monetary relief for alleged violations of wire and oral communication interception laws, unauthorized or non-consented to use of extension telephone to overhear conversation between attorney and client qualified as exception to definition of interception under 18 USCS § 2510(5)(a). Gerrard v Blackman (1975, ND Ill) 401 F Supp 1189.

Operative factual test to determine applicability of extension phone exemption is whether extension phone is being used by subscriber "in ordinary course of business". Briggs v American Air Filter Co. (1978, ND Ga) 455 F Supp 179, affd (1980, CA5 Ga) 630 F2d 414.

Supervisor who uses tape recorder on office telephone extension to intercept personal calls of employee without employee's consent or knowledge commits illegal wiretapping unless recording of telephone calls is in ordinary course of business. Abel v Bonfanti (1985, SD NY) 625 F Supp 263, 42 BNA FEP Cas 132, 39 CCH EPD P 35893.

Wife cannot proceed with claim for relief from husband who wiretapped phone in marital home under 18 USCS § 2520, even though wife had filed for legal separation at time of wiretapping, where both parties resided in marital home and could have listened in on phone conversations by use of extension phones, because (1) 18 USCS § 2510(5)(a)(i) "extension phone" exception is expression of congressional intent to leave matters of interspousal domestic conflict to realm of state courts, and (2) there is no evidence that wiretap ever intercepted conversation in which wife participated. Perfit v Perfit (1988, CD Cal) 693 F Supp 851 (criticized in Milke v Milke (2004, DC Minn) 2004 US Dist LEXIS 11199).

Husband's attorneys and guardian ad litem are entitled to summary dismissal of ex-wife's civil action under federal and state eavesdropping statutes, where husband had recorded, by means of extension phone answering machine, and attorneys and guardian had disclosed, son's conversations with his mother, because, unlike typical circumstances of interspousal wiretapping, interception of minor child's telephone conversations by use of extension phone in family home is permitted by broad reading of exemption in 18 USCS § 2510(5)(a)(i). Scheib v Grant (1993, ND Ill) 814 F Supp 736, affd (1994, CA7 Ill) 22 F3d 149, reh, en banc, den (1994, CA7 Ill) 1994 US App LEXIS 13371 and cert den (1994) 513 US 929, 130 L Ed 2d 280, 115 S Ct 320 and (criticized in Pollock v Pollock (1998, CA6 Ky) 154 F3d 601, 1998 FED App 271P) and (criticized in Milke v Milke (2004, DC Minn) 2004 US Dist LEXIS 11199).

Claim of former employees against former employer under 18 USCS §§ 2510-2521, arising out of employer's recording of employees' personal telephone conversations through voice-activated tape recorders attached to employer's telephones, is granted summarily, where recorders were attached to busboard installed by telephone company by means of wire installed by employer, because (1) wire, not busboard, was intercepting device so interception did not occur via instrument furnished by telephone company, and (2) recorders were not telephone instruments or equipment, so (3) business extension exception of 18 USCS § 2510(5) does not apply. Pascale v Carolina Freight Carriers Corp. (1995, DC NJ) 898 F Supp 276, 10 BNA IER Cas 1804.

Where city employee was allegedly unaware that system for recording telephone calls to city continued to record statements through employee's headset after calls were terminated, exemption under 18 USCS § 2510(5)(a)(i) for interception using business device in ordinary course of business did not apply to interception of employee's private conversation with co-workers which was unrelated to city business. Anderson v City of Columbus (2005, MD Ga) 374 F Supp 2d 1240.

First Sergeant's listening on extension to orderly room phone to conversation between members of his organization was in ordinary course of business and therefore within exception under 18 USCS § 2510(4) and (5). United States v Sturdivant (1980, ACMR) 9 MJ 923, petition for review filed (1980, CMA) 9 MJ 427 and revd on other grounds (1982, CMA) 13 MJ 323.

On appeal from order in action instituted by plaintiff wife against defendant husband for alimony and child support, which order suppressed all evidence of plaintiff's adulterous conduct resulting from interception of her telephone communications, notwithstanding defendant's argument, relying on language in 18 USCS § 2510(5)(a), that 18 USCS §§ 2510 et seq. did not apply to facts of this case because communications were intercepted by use of extension telephone furnished by communications common carrier which was being used in ordinary course of business, such interceptions were

illegal under federal law; notwithstanding defendant's testimony that he used telephone to obtain information as to possible business calls, where parties were living in state of separation, where defendant had telephone company install extension telephone, which was connected to telephone in plaintiff's residence, in supply closet in defendant's office without plaintiff's knowledge or consent, where sound-activated recorder was installed by defendant and not by communications common carrier in ordinary course of business, and where neither defendant nor his employees placed calls or directly received incoming calls on telephone, trial judge's finding that defendant was not using extension telephone in ordinary course of business was supported by ample evidence. Rickenbaker v Rickenbaker (1976) 290 NC 373, 226 SE2d 347.

22. Person

Dismissal of city as defendant was proper because Title III, 18 USCS § 2510(6), does not allow for suits against municipalities. Amati v City of Woodstock (1999, CA7 Ill) 176 F3d 952, 15 BNA IER Cas 1, 43 FR Serv 3d 351, cert den (1999) 528 US 985, 145 L Ed 2d 362, 120 S Ct 445, 16 BNA IER Cas 736 and (criticized in Adams v City of Battle Creek (2001, CA6 Mich) 250 F3d 980, 2001 FED App 157P).

Federal Wiretap Act is inapplicable to municipalities; 18 USCS § 2510 does not include municipality within definition of "person" who can be held liable for interception under 18 USCS § 2511, even though 18 USCS § 2520 provides for recovery of civil damages against any "person or entity" who violates Act. Abbott v Village of Winthrop Harbor (2000, CA7 Ill) 205 F3d 976, 16 BNA IER Cas 32, 140 CCH LC P 58863, reh den (2000, CA7 Ill) 2000 US App LEXIS 6359 and (criticized in Conner v Tate (2001, ND Ga) 130 F Supp 2d 1370) and (criticized in Williams v City of Tulsa (2005, ND Okla) 393 F Supp 2d 1124) and (criticized in Walden v City of Providence (2007, DC RI) 495 F Supp 2d 245, 26 BNA IER Cas 580).

Word "person" within meaning of 18 USCS § 2510 includes estranged individual living in same house. Kratz v Kratz (1979, ED Pa) 477 F Supp 463 (criticized in Kirkland v Franco (2000, ED La) 92 F Supp 2d 578).

23. Investigative officers

Agents of Intelligence Division, Internal Revenue Service, and agents of audit branch of same service working with Intelligence Division Agents are investigative or law enforcement officers within meaning of words as used in 18 USCS § 2510(7). United States v Iannelli (1973, CA3 Pa) 477 F2d 999, affd (1975) 420 US 770, 43 L Ed 2d 616, 95 S Ct 1284.

On appeal from defendant's conviction for possession of heroin in violation of 21 USCS § 844(a), which appeal presented question of admissibility in federal court of evidence seized pursuant to arrest by California officers when that arrest was based on state agents' use of information gathered by wiretaps authorized under federal law but illegal under California law, California agents were "investigative or law enforcement officers" as that term is defined by 18 USCS § 2510(7). United States v Hall (1976, CA9 Cal) 543 F2d 1229, cert den (1977) 429 US 1075, 50 L Ed 2d 793, 97 S Ct 814.

Pursuant to 18 USCS § 2517, federal investigative officer may turn over wiretaps from federal investigation to state attorney grievance commission that is investigating potential misconduct by attorney, since commission was empowered to investigate attorney's commission of federal crimes, including, but not limited to, those listed in § 2516, and thus its personnel were "investigative officers" within meaning of 18 USCS § 2510(7) to whom disclosure could be made. Berg v Michigan Attorney Grievance Comm'n (In re Electronic Surveillance) (1995, CA6 Mich) 49 F3d 1188, 1995 FED App 105P.

Correctional officer, as employee who was authorized to use inmate telephone system under Mass. Gen. Laws ch. 124, § 1(b) and (g), and correctional facility's phone monitoring policy, was empowered to assist with investigations into events occurring at correctional facility; he was, therefore, investigative or law enforcement officer pursuant to 18 USCS § 2510(7), part of Title III of Omnibus Crime Control and Safe Streets Act of 1968, 18 USCS §§ 2510-2522. United States v Lewis (2005, CA1 Mass) 406 F3d 11, cert den (2006, US) 126 S Ct 2951, 165 L Ed 2d 973.

Prison intercepts of telephone conversations between inmate and his sister need not be suppressed, where interception and recording of calls occurred in conformity with pre-established institutional plan not specifically aimed at siblings, because prison officials are "investigative or law enforcement officers" and routine monitoring pursuant to established policy is "in ordinary course of their duties" within meaning of 18 USCS § 2510(5)(a)(ii) exemption from § 2511 blanket prohibition of interception of wire communications. United States v Cheely (1992, DC Alaska) 814 F Supp 1430 (criticized in United States v Rivera (2003, ED Va) 292 F Supp 2d 838) and (criticized in United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111).

For purposes of 18 USCS § 2510(7), prison officials must be deemed, at least, to have authority to investigate potential criminal violations in interest of prison security. United States v Correa (2002, DC Mass) 220 F Supp 2d 61, subsequent app, remanded (2005, CA1 Mass) 406 F3d 11, cert den (2006, US) 126 S Ct 2951, 165 L Ed 2d 973.

Defendants' motion to suppress phone conversation between them recorded pursuant to prison policy was denied; prison telephone system administrator's disclosure of recording to police was permitted under law enforcement exception at 18 USCS § 2510(5)(a)(ii). United States v Correa (2002, DC Mass) 220 F Supp 2d 61, subsequent app, remanded (2005, CA1 Mass) 406 F3d 11, cert den (2006, US) 126 S Ct 2951, 165 L Ed 2d 973.

24. Law enforcement officers

BRIEF IN SUPPORT OF STATE'S MOTION FOR RECONSIDERATION

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Monitoring of conversation between prison inmate and outsider fell within "investigative or law enforcement officer" exception under 18 USCS § 2510 since monitoring took place within ordinary course of officer's duties, monitoring took place in prison, and prison inmates had reasonable notice that monitoring of conversations might occur. United States v Paul (1980, CA6 Ky) 614 F2d 115, 61 **ALR Fed** 816, cert den (1980) 446 US 941, 64 L Ed 2d 796, 100 S Ct 2165.

Monitoring by correction officials of telephone conversations between 2 defendants and between woman and another inmate is excepted under 18 USCS § 2510(5)(a) since jail officials are free to intercept conversations between prisoner and visitor and since monitoring took place within ordinary course of officers' duties and is thus permissible under § 2510. United States v Paul (1980, CA6 Ky) 614 F2d 115, 61 **ALR Fed** 816, cert den (1980) 446 US 941, 64 L Ed 2d 796, 100 S Ct 2165.

Tape recordings of phone calls made from prison by federal prisoner to son outside prison, which were authorized by Bureau of Prison regulations, came within "investigative or law enforcement officer" exception of 18 USCS § 2510(5)(ii). United States v Feekes (1989, CA7 Wis) 879 F2d 1562, reh den (1989, CA7) 1989 US App LEXIS 12613 and (criticized in United States v Rivera (2003, ED Va) 292 F Supp 2d 838) and (criticized in United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111) and (criticized in United States v Faulkner (2006, CA10 Kan) 439 F3d 1221, 69 Fed Rules Evid Serv 679).

Where monitoring of inmate's telephone conversations by correctional officers was authorized by prior regulations, prisoners are notified about monitoring policy in 4 different ways, and Code of Federal Regulations provides public notice of possibility of monitoring, tapes were admissible under exception for evidence intercepted by law enforcement officer. United States v Sababu (1989, CA7 Ill) 891 F2d 1308, 29 Fed Rules Evid Serv 332.

Metropolitan Detention Center's routine taping of defendant's telephone conversations did not violate Title III, since center was law enforcement agency and interceptions were made in ordinary course of business and thus came within "law enforcement" exception, 18 USCS § 2510(5)(a). United States v Van Poyck (1996, CA9 Cal) 77 F3d 285, 96 CDOS 1091, 96 Daily Journal DAR 1850, subsequent app (1996, CA9 Cal) 77 F3d 491, reported in full (1996, CA9 Cal) 1996 US App LEXIS 4668 and cert den (1996) 519 US 912, 136 L Ed 2d 199, 117 S Ct 276.

Taping of confession to Catholic priest was in ordinary course of jailers' duties and did not violate Wiretap Act, since under 18 USCS § 2510(5)(a) statute does not apply to interceptions by law enforcement officers in ordinary course of his duties. Mockaitis v Harcleroad (1997, CA9 Or) 104 F3d 1522, 97 CDOS 602, 97 Daily Journal DAR 957.

Taping of police department's line, which had initially been left untapped to allow for person calls, came within statutory exclusion under 18 USCS § 2510(5)(a)(ii) for eavesdropping by investigative or law enforcement officer in ordinary course of his duties, notwithstanding claim by employees of police department that express notice was required; decision to tap was precipitated by an official use of line which showed that it had been a mistake to leave it untapped. Amati v City of Woodstock (1999, CA7 Ill) 176 F3d 952, 15 BNA IER Cas 1, 43 FR Serv 3d 351, cert den (1999) 528 US 985, 145 L Ed 2d 362, 120 S Ct 445, 16 BNA IER Cas 736 and (criticized in Adams v City of Battle Creek (2001, CA6 Mich) 250 F3d 980, 2001 FED App 157P).

County's recording of telephone calls made by state judges from their offices in county's detention center was not excused by law enforcement exception, 18 USCS § 2510(5)(a)(ii), since county did not record judges' conversations in ordinary course of its law enforcement duties, and Title III provides no basis for a good faith addition to exception; county did not have policy of monitoring judges' calls, and contended it recorded judges only by mistake, individuals responsible for installation and maintenance of recording system testified that they knew it was wrong to record judges, and county has not suggested any valid, law-enforcement related reason to record judges. Abraham v County of Greenville (2001, CA4 SC) 237 F3d 386.

Police department's use of duplicate or "clone" pager to tap police officer's pager without a warrant or notice because department erroneously thought that officer was assisting drug dealers was not in ordinary course of police department's business under 18 USCS § 2510(5). Adams v City of Battle Creek (2001, CA6 Mich) 250 F3d 980, 2001 FED App 157P, reh den (2001, CA6) 2001 US App LEXIS 16099 and (criticized in Anderson v City of Columbus (2005, MD Ga) 374 F Supp 2d 1240).

Title III did not proscribe disclosure to prisoner of recordings of prisoner's telephone calls to his attorney, which prisoner knew were monitored and recorded pursuant to a policy of Bureau of Prisons, since these recordings were not product of an interception because they were obtained by prison authorities in ordinary course of their duties pursuant to 18 USCS § 2510(5)(a)(ii). Smith v DOJ (2001, App DC) 346 US App DC 232, 251 F3d 1047.

Telephone monitoring of prisoners' personal calls is permissible under 18 USCS § 2510(5)(a)(ii) when undertaken in ordinary course of prison officials' duties. Crooker v U. S. Dep't of Justice (1980, DC Conn) 497 F Supp 500 (criticized in United States v Rivera (2003, ED Va) 292 F Supp 2d 838) and (criticized in United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111).

Routine and random monitoring of inmate's personal telephone calls by prison officials is in ordinary course of prison officials' duties and thus is permissible under 18 USCS § 2510(5)(a)(ii) which excludes from proscriptions of § 2510 interception of communications over equipment used by investigative or law enforcement officer in ordinary course of his duties. Crooker v U. S. Dep't of Justice (1980, DC Conn) 497 F Supp 500 (criticized in United States v Rivera (2003, ED Va) 292 F Supp 2d 838) and (criticized in United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111).

Equipment used to record conversation falls within 18 USCS § 2510(5)(a) where reasons for installation and general use of equipment was to improve police emergency and investigative services and routine recording of all calls made on investigative line was thus for reasons well within proper scope of law enforcement; police chief's decision to listen to particular tape, based on reasonable suspicions that police regulations, particularly those concerning private use of phones in conduct unbecoming officer, were being violated is justified by proper law enforcement purpose. Jandak v Brookfield (1981, ND Ill) 520 F Supp 815.

Tape recordings of inmates prison telephone conversations are not suppressible as illegally obtained where inmates, charged with aiding and abetting drug kingpin, had telephone conversations monitored and recorded by correctional officers as part of standard prison procedure because prison officers are investigative or law enforcement officers acting pursuant to thoroughly institutionalized ongoing policy at prison of randomly monitoring and comprehensively recording calls for purpose of maintaining prison security and thus are under 18 USCS § 2510 (5)(a)(ii). United States v Vasta (1986, SD NY) 649 F Supp 974.

Tape recordings of telephone conversations between prison inmates and others by prison employees are exempt under 18 USCS § 2510(5)(a)(ii) from prohibitions on electronic eavesdropping under 18 USCS § 2511, in motion to suppress use of recordings in criminal trial for introduction of marijuana into federal penitentiary, where (1) Bureau of Prisons regulations empower employees to conduct investigations relating to prison security and allow monitoring of inmates' telephone conversations and (2) sign was posted by each prison telephone notifying inmates that conversations might be monitored, because employees are "investigative officers" under § 2510(7) and recordings were made in ordinary course of employees' duties. United States v Clark (1986, MD Pa) 651 F Supp 76, affd without op (1988, CA3 Pa) 857 F2d 1464 and affd without op (1988, CA3 Pa) 857 F2d 1464 and affd without op (1988, CA3 Pa) 857 F2d 1466 and affd without op (1988, CA3 Pa) 857 F2d 1466 and affd without op (1988, CA3 Pa) 857 F2d 1466 and affd without op (1988, CA3 Pa) 857 F2d 1466 and affd without op (1988, CA3 Pa) 857 F2d 1466 and affd without op (1988, CA3 Pa) 857 F2d 1466 and affd without op (1989, CA3 Pa) 869 F2d 592, cert den (1989) 490 US 1073, 104 L Ed 2d 646, 109 S Ct 2082 and affd without op (1989, CA3 Pa) 872 F2d 414 and affd without op (1989, CA3 Pa) 872 F2d 412.

Detained criminal defendant's Title III (18 USCS §§ 2510 et seq.) claim must fail, even though prison officials intercepted and disclosed virtually all of defendant's telephone conversations in prison, because interception was proper either (1) under § 2510(5)(a)(ii) exception for investigative or law enforcement officer in ordinary course of his duties, or (2) under § 2511(2)(c) exception where inmate used prison telephone after being advised it was subject to monitoring. United States v Noriega (1991, SD Fla) 764 F Supp 1480.

Prison intercepts of telephone conversations between inmate and his sister need not be suppressed, where interception and recording of calls occurred in conformity with pre-established institutional plan not specifically aimed at siblings, because prison officials are "investigative or law enforcement officers" and routine monitoring pursuant to established policy is "in ordinary course of their duties" within meaning of 18 USCS § 2510(5)(a)(ii) exemption from § 2511 blanket prohibition of interception of wire communications. United States v Cheely (1992, DC Alaska) 814 F Supp 1430 (criticized in United States v Rivera (2003, ED Va) 292 F Supp 2d 838) and (criticized in United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111).

Inmates' challenge to interception of calls originating from inmate telephone system at privately run detention facility will not be denied summarily, where nothing in state or federal law or contracts under which facility operates empowers private security guards to conduct investigations of or make arrests for offenses enumerated in 18 USCS § 2516, because employees intercepting inmate calls are not "investigative or law enforcement officers" for purposes of § 2510(5)(a)(ii). Huguenin v Ponte (1998, DC RI) 29 F Supp 2d 57.

Defendant's motion for suppression of his recorded telephone calls from prison is denied, where calls fall under both law enforcement and consent exceptions to Title III (18 USCS §§ 2510 et seq.), because his counsel's argument that exceptions do not permit FBI's use of such recordings lacks any support from statutes or case law. United States v Hammond (2001, DC Md) 148 F Supp 2d 589, affd (2002, CA4 Md) 286 F3d 189, cert den (2002) 537 US 900, 154 L Ed 2d 172, 123 S Ct 215.

Telephone companies that contracted with prison and were supervised by county were considered "law enforcement" under law enforcement exception to wiretap statute, specifically 18 USCS § 2510(a)(ii); thus, recordings of defendant prisoner's telephone conversations were not suppressed. United States v Rivera (2003, ED Va) 292 F Supp 2d 838 (criticized in United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111) and subsequent app (2005, CA4 Va) 412 F3d 562, 67 Fed Rules Evid Serv 683, cert den (2005) 546 US 1023, 126 S Ct 670, 163 L Ed 2d 540 and post-conviction relief den (2007, ED Va) 494 F Supp 2d 383, app dismd, Certificate of appealability denied (2008, CA4 Va) 2008 US App LEXIS 3804.

Despite broad prohibition of Title III of Omnibus Crime Control and Safe Streets Act of 1968's, 18 USCS §§ 2510-2520, government may intercept telephone communications without prior judicial authorization in two contexts: (1) when conversation is intercepted by investigative law enforcement officer in ordinary course of his duties, 18 USCS § 2510(5)(a)(ii); and (2) when one of parties to communication has given prior consent to such interception, 18 USCS § 2511(2)(c). United States v Rivera (2003, ED Va) 292 F Supp 2d 838 (criticized in United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111) and subsequent app (2005, CA4 Va) 412 F3d 562, 67 Fed Rules Evid Serv 683, cert den (2005) 546 US 1023, 126 S Ct 670, 163 L Ed 2d 540 and post-conviction relief den (2007, ED Va) 494 F Supp 2d 383, app dismd, Certificate of appealability denied (2008, CA4 Va) 2008 US App LEXIS 3804.

Where at least some of parties to conversations recorded by prison officials impliedly consented to monitoring and recording, defendant's motion to suppress was denied because Federal Wiretapping Act, specifically 18 USCS § 2511(c) and (d) permitted such recording; also, prison officials who worked for privately owned facility did not qualify for law

enforcement exception in 18 USCS § 2510(7). United States v Faulkner (2004, DC Kan) 323 F Supp 2d 1111, affd (2006, CA10 Kan) 439 F3d 1221, 69 Fed Rules Evid Serv 679.

Village comptroller's claims that village mayor and police chief violated 18 USCS § 2511(1)(a) by recording telephone calls on finance department's lines survived summary judgment in part; law enforcement exception, 18 USCS § 2510(5)(a)(ii), did not apply because recording, which was allegedly initiated to check on asserted employee misbehavior or to investigate threats against employees, was either unrelated to law enforcement or targeted in nature; however, consent exception under 18 USCS § 2511(2)(c) applied to calls recorded after comptroller became aware of recording. Narducci v Vill. of Bellwood (2006, ND Ill) 444 F Supp 2d 924.

Unpublished Opinions

Unpublished: In state prisoner's action under 42 USCS § 1983 and 18 USCS §§ 2510 et seq. in which prisoner alleged that defendants monitored outgoing calls made from his prison phone account to home of another inmate suspected of smuggling drugs, district court did not abuse its discretion in denying prisoner's motion for additional discovery under Fed. R. Civ. P. 56(f) because prisoner did not indicate how continuance would have allowed him to produce evidence showing that defendants were not law enforcement officers using monitoring equipment in ordinary course of their duties; law enforcement exception of 18 USCS § 2510(5)(a) applies to prison's policy of routine taping of outgoing inmate calls. Rhodes v Alameda County Sheriff Dep't (2006, CA9 Cal) 207 Fed Appx 781.

25. Aggrieved person

Defendant in whose residence was located telephone which was object of intercept, was "aggrieved person" as defined in 18 USCS § 2510(11); defendant who was principal figure in narcotics conspiracy and who used as headquarters residence which was occupied by paramour was "aggrieved person" as defined in 18 USCS § 2510(11) and had leave to raise question of legitimacy of surveillance of headquarters under 18 USCS § 2518(10). United States v Bynum (1973, CA2 NY) 475 F2d 832.

"Aggrieved person" under 18 USCS § 2510(11) does not include one who is not implicated and against whom no one has made proffer of information derived from defectively authorized tap. United States v Gibson (1974, CA4 Va) 500 F2d 854, cert den (1975) 419 US 1106, 42 L Ed 2d 802, 95 S Ct 777.

Defendants who moved to suppress evidence seized as result of second wiretap based on first illegal wiretaps were not "aggrieved persons" within meaning of 18 USCS § 2510(11) where issue was moot as to named party in second tap whose conversations had been overheard because he died prior to suppression hearing, and as to remaining defendants, there were no allusions to their identity or conduct in conversations intercepted on first tap. United States v Scasino (1975, CA5 Fla) 513 F2d 47.

Defendants who did not participate in conversations overheard upon extension of initial wiretap authorization and having no interest in premises where phone was tapped, were not aggrieved persons within meaning of 18 USCS §§ 2510(11), 2518(10)(a) and had no standing to contest admission of evidence at trial. United States v Bynum (1975, CA2) 513 F2d 533, cert den (1975) 423 US 952, 46 L Ed 2d 277, 96 S Ct 357.

Witness who does not show he was party to intercepted wire or oral communication or person against whom interception was directed is not aggrieved person under 18 USCS § 2510(11) and has no standing to raise claim of illegal surveillance under 18 USCS § 2518. In re Berry (1975, CA10 NM) 521 F2d 179, cert den (1975) 423 US 928, 46 L Ed 2d 256, 96 S Ct 276, reh den (1975) 423 US 1039, 46 L Ed 2d 414, 96 S Ct 577.

Aggrieved person under 18 USCS § 2510(11) is one who has had his conversations intercepted during wiretap, or is person against whom wiretap is directed. United States v Fury (1977, CA2 NY) 554 F2d 522, cert den (1977) 433 US 910, 53 L Ed 2d 1095, 97 S Ct 2978 and cert den (1978) 436 US 931, 56 L Ed 2d 776, 98 S Ct 2831.

Under 18 USCS § 2510(11), "aggrieved person" relates to standing to object to unauthorized electronic surveillance, but it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge bugs; only one present at seizure or with recognized interest, either possessory or proprietary, in premises, can claim required expectation of privacy needed to object to such illegal entries. United States v Scafidi (1977, CA2 NY) 564 F2d 633, cert den (1978) 436 US 903, 56 L Ed 2d 400, 98 S Ct 2231 and cert den (1978) 436 US 903, 56 L Ed 2d 401, 98 S Ct 2231 and cert den (1978) 436 US 903, 56 L Ed 2d 401, 98 S Ct 2231 and cert den (1978) 436 US 912, 56 L Ed 2d 413, 98 S Ct 2252, reh den (1978) 439 US 960, 58 L Ed 2d 353, 99 S Ct 366.

Defendant had no standing to obtain information received as result of wiretaps since he was not "aggrieved person" within meaning of 18 USCS § 2510(11). United States v Cruz (1979, CA1 Mass) 594 F2d 268, cert den (1979) 444 US 898, 62 L Ed 2d 133, 100 S Ct 205, reh den (1979) 444 US 946, 62 L Ed 2d 315, 100 S Ct 308.

Person may not object to agent's answering telephone at house in violation of 18 USCS §§ 2510 et seq. where person does not have such ownership or control over house as to give him standing for such objection. United States v Vadino (1982, CA11 Fla) 680 F2d 1329, 11 Fed Rules Evid Serv 221, reh den (1982, CA11 Fla) 691 F2d 977 and cert den (1983) 460 US 1082, 76 L Ed 2d 344, 103 S Ct 1771.

Witness in criminal prosecution, even one who has been granted immunity, whose identity was first discovered by government by means of unlawful wiretap is "aggrieved person" with standing under 18 USCS § 2518(10)(a), in effect, to

suppress his own testimony by objecting to questions posed to him by government, which questions are based directly or indirectly on unlawful wiretap. United States v Cohen (1973, SD NY) 358 F Supp 112.

Term "aggrieved party" is to be construed in accordance with existing standing rules in order to invoke Fourth Amendment for suppression motion. Haina v State (1976) 30 Md App 295, 352 A2d 874, cert den (1977) 430 US 906, 51 L Ed 2d 582, 97 S Ct 1175.

Term "aggrieved person" should be interpreted identically under both 18 USCS § 2510 and under 50 USCS § 1801; therefore, if person lacks standing under § 2510, he also lacks standing under § 1801; only persons with standing to suppress fruits of illegal wiretap are parties at whom wiretaps were directed, parties to call that was intercepted, or parties owning premises where conversations were intercepted. In re Flanagan (1982, ED NY) 533 F Supp 957, 10 Fed Rules Evid Serv 764, revd on other grounds (1982, CA2 NY) 691 F2d 116, 11 Fed Rules Evid Serv 1215.

"Aggrieved person" must be party to communications which government seeks to use at trial or be able to assert that conversations took place on his premises; only defendants overheard in earlier interception are "aggrieved persons" entitled to assert that later interception was tainted by earlier one. United States v Torres (1984, ND Ill) 583 F Supp 86, revd on other grounds, remanded (1984, CA7 Ill) 751 F2d 875, cert den (1985) 470 US 1087, 85 L Ed 2d 150, 105 S Ct 1853.

Only person who has standing to challenge admissibility of wiretap is person aggrieved by interception. United States v Cresta (1984, DC Me) 592 F Supp 889.

Minimization claim, whether based upon 18 USCS § 2518 or intercept order itself, may be raised only by one with privacy interest in place of surveillance, and being aggrieved person does not confer standing, by itself, to raise challenge based on minimization. United States v Massino (1985, SD NY) 605 F Supp 1565, revd on other grounds (1986, CA2 NY) 784 F2d 153.

Minimization challenge to electronic surveillance evidence fails for lack of standing, even though suppression movants are "aggrieved persons" within meaning of 18 USCS § 2510(11), because movants whose conversations were intercepted during surveillance of another person's home and telephones had no privacy interest that was invaded. United States v Squittieri (1988, DC NJ) 688 F Supp 163, affd without op (1989, CA3 NJ) 879 F2d 859 and affd without op (1989, CA3 NJ) 879 F2d 859 and affd without op (1989, CA3 NJ) 879 F2d 861, cert den (1989) 493 US 954, 107 L Ed 2d 352, 110 S Ct 366 and affd without op (1989, CA3 NJ) 879 F2d 861 and affd without op (1992, CA3 NJ) 961 F2d 210.

Claims by those defendants who were not captured on recordings of intercepted telephone calls, of being "implicated" by evidence, did not give rise to standing, and thus, those defendants' motion to suppress recordings under 18 USCS § 2518(10)(a) was denied. United States v Eiland (2005, DC Dist Col) 398 F Supp 2d 160.

Unpublished Opinions

Unpublished: Defendant lacked standing under 18 USCS § 2510(11) to challenge admission of wiretapping evidence where defendant was not party to any intercepted communication and was not person against whom any interception was directed; evidence was directed only against defendant's alleged co-conspirators. United States v Weaver (2007, CA3 Pa) 220 Fed Appx 88, cert den (2007, US) 128 S Ct 408, 169 L Ed 2d 286.

26. Judge of competent jurisdiction

District court may not delegate review of Title III orders to magistrate judges; magistrate judge is not "judge of competent jurisdiction" under 18 USCS § 2510(9) authorized to issue wiretapping order. In re United States (1993, CA2 NY) 10 F3d 931, cert den (1994) 513 US 812, 130 L Ed 2d 21, 115 S Ct 64.

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18 USCS § 2703

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 121. STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

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18 USCS § 2703

NITA Commentary:

Review expert commentary from The National Institute for Trial Advocacy preceding 18 USCS § 2701 (relating to computer records).

§ 2703. Required disclosure of customer communications or records

(a) Contents of wire or electronic communications in electronic storage. A governmental entity may require the disclosure by a provider of electronic communication service of the contents of a wire or electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of a wire or electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

(b) Contents of wire or electronic communications in a remote computing service.
(1) A governmental entity may require a provider of remote computing service to disclose the contents of any wire or electronic communication to which this paragraph is made applicable by paragraph (2) of this subsection--
(A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant; or
(B) with prior notice from the governmental entity to the subscriber or customer if the governmental entity--
(i) uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena; or
(ii) obtains a court order for such disclosure under subsection (d) of this section;
except that delayed notice may be given pursuant to section 2705 of this title [18 USCS § 2705].
(2) Paragraph (1) is applicable with respect to any wire or electronic communication that is held or maintained on that service--
(A) on behalf of, and received by means of electronic transmission from (or created by means of computer processing of communications received by means of electronic transmission from), a subscriber or customer of such remote computing service; and
(B) solely for the purpose of providing storage or computer processing services to such subscriber or customer, if the provider is not authorized to access the contents of any such communications for purposes of providing any services other than storage or computer processing.

(c) Records concerning electronic communication service or remote computing service.

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(1) A governmental entity may require a provider of electronic communication service or remote computing service to disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications) only when the governmental entity--

(A) obtains a warrant issued using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation or equivalent State warrant;

(B) obtains a court order for such disclosure under subsection (d) of this section;

(C) has the consent of the subscriber or customer to such disclosure;

(D) submits a formal written request relevant to a law enforcement investigation concerning telemarketing fraud for the name, address, and place of business of a subscriber or customer of such provider, which subscriber or customer is engaged in telemarketing (as such term is defined in section 2325 of this title [18 USCS § 2325]); or

(E) seeks information under paragraph (2).

(2) A provider of electronic communication service or remote computing service shall disclose to a governmental entity the--

(A) name;

(B) address;

(C) local and long distance telephone connection records, or records of session times and durations;

(D) length of service (including start date) and types of service utilized;

(E) telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address; and

(F) means and source of payment for such service (including any credit card or bank account number),

of a subscriber to or customer of such service when the governmental entity uses an administrative subpoena authorized by a Federal or State statute or a Federal or State grand jury or trial subpoena or any means available under paragraph (1).

(3) A governmental entity receiving records or information under this subsection is not required to provide notice to a subscriber or customer.

(d) Requirements for court order. A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation. In the case of a State governmental authority, such a court order shall not issue if prohibited by the law of such State. A court issuing an order pursuant to this section, on a motion made promptly by the service provider, may quash or modify such order, if the information or records requested are unusually voluminous in nature or compliance with such order otherwise would cause an undue burden on such provider.

(e) No cause of action against a provider disclosing information under this chapter. No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter [18 USCS §§ 2701 et seq.].

(f) Requirement to preserve evidence.

(1) In general. A provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process.

(2) Period of retention. Records referred to in paragraph (1) shall be retained for a period of 90 days, which shall be extended for an additional 90-day period upon a renewed request by the governmental entity.

(g) Presence of officer not required. Notwithstanding section 3105 of this title [18 USCS § 3105], the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter [18 USCS §§ 2701 et seq.] requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service.

History:

(Added Oct. 21, 1986, P.L. 99-508, Title II, § 201(a), 100 Stat. 1861; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, §§ 7038, 7039, 102 Stat. 4399; Sept. 13, 1994, P.L. 103-322, Title XXXIII, § 330003(b), 108 Stat. 2140; Oct. 25, 1994, P.L. 103-414, Title II, § 207(a), 108 Stat. 4292; April 24, 1996, P.L. 104-132, Title VIII, Subtitle A, § 804, 110 Stat. 1305; Oct. 11, 1996, P.L. 104-293, Title VI, § 601(b), 110 Stat. 3469; Oct. 11, 1996, P.L. 104-294, Title VI, § 605(f), 110 Stat. 3510; June 23, 1998, P.L. 105-184, § 8, 112 Stat. 522; Oct. 26, 2001, P.L. 107-56, Title II, §§ 209(2), 210, 212(b)(1), 220(a)(1), 220(b), 115 Stat. 283, 285, 291, 292; Nov. 2, 2002, P.L. 107-273, Div B, Title IV, § 4005(a)(2), Div C, Title I, Subtitle A, § 11010, 116 Stat. 1812, 1822; Nov. 25, 2002, P.L. 107-296, Title II, Subtitle C, § 225(h)(1), 116 Stat. 2158; Jan. 5, 2006, P.L. 109-162, Title XI, Subtitle C, § 1171(a)(1), 119 Stat. 3123.)

History; Ancillary Laws and Directives:

1. Effective date of section
2. Amendments
3. Other provisions

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1. Effective date of section:
This section became effective 90 days after enactment, pursuant to § 202 of Act Oct. 21, 1986, P.L. 99-508, which appears as 18 USCS § 2701 note.

2. Amendments:

1988. Act Nov. 18, 1988, in subsecs. (b)(1)(B)(i) and (c)(1)(B)(i), inserted "or trial"; and in subsec. (d), inserted "may be issued by any court that is a court of competent jurisdiction set forth in section 3126(2)(A) of this title and".

1994. Act Sept. 13, 1994, in subsec. (d), substituted "section 3127(2)(A)" for "section 3126(2)(A)".
Act Oct. 25, 1994, in subsec. (c)(1), in subpara. (B), deleted cl. (i), which read: "uses an administrative subpoena authorized by a Federal or State statute, or a Federal or State grand jury or trial subpoena;", and redesignated cls. (ii)-(iv) as cls. (i)-(iii), respectively, and added subpara. (C); and, in subsec. (d), substituted "A court order for disclosure under subsection (b) or (c) may be issued by any court that is a court of competent jurisdiction described in section 3126(2)(A) and shall issue only if the governmental entity offers specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." for "A court order for disclosure under subsection (b) or (c) of this section may be issued by any court that is a court of competent jurisdiction set forth in section 3127(2)(A) of this title and shall issue only if the governmental entity shows that there is reason to believe the contents of a wire or electronic communication, or the records or other information sought, are relevant to a legitimate law enforcement inquiry.".

1996. Act April 24, 1996 added subsec. (f).
Act Oct. 11, 1996, P.L. 104-293, in subsec. (c)(1)(C), inserted "local and long distance".
Act Oct. 11, 1996, P.L. 104-294, in subsec. (d), substituted "3127(2)(A)" for "3126(2)(A)".

1998. Act June 23, 1998, in subsec. (c)(1)(B), in cl. (ii), deleted "or" after the concluding semicolon, in cl. (iii), substituted "; or" for a concluding period, and added cl. (iv).

2001. Act Oct. 26, 2001, substituted the section heading for one which read "§ 2703. Requirements for governmental access"; in subsec. (a), in the heading, substituted "Contents of wire or electronic" for "Contents of electronic" and, in the text, substituted "contents of a wire or electronic" for "contents of an electronic" in two places, substituted "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure"; in subsec. (b), in the heading, substituted "Contents of wire or electronic" for "Contents of electronic", in para. (1), in the introductory matter, substituted "any wire or electronic" for "any electronic", in subpara. (A), substituted "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure" and, in para. (2), in the introductory matter, substituted "any wire or electronic" for "any electronic"; in subsec. (c), in para. (1), substituted "A governmental entity may require a provider of electronic communication service or remote computing service to" for "(A) Except as provided in subparagraph (B), a provider of electronic communication service or remote computing service may", and deleted "covered by subsection (a) or (b) of this section) to any person other than a governmental entity.
"(B) A provider of electronic communication service or remote computing service shall disclose a record or other information pertaining to a subscriber to or customer of such service (not including the contents of communications covered by subsection (a) or (b) of this section) to a governmental entity"
following "communications", redesignated subpara. (C) as para. (2), redesignated former para. (2) as para. (3), and, in para. (2) as redesignated, redesignated cls. (i)-(iv) as subparas. (A)-(D), respectively, in subpara. (A) as redesignated, substituted "using the procedures described in the Federal Rules of Criminal Procedure by a court with jurisdiction over the offense under investigation" for "under the Federal Rules of Criminal Procedure", in subpara. (D) as redesignated, substituted "; or" for a concluding period, and added subpara. (E), and, in the concluding matter, substituted "paragraph (1)" for "subparagraph (B)"; and, in subsec. (d), deleted "described in section 3127(2)(A)" following "jurisdiction".
Such Act further, in subsec. (c)(2) as redesignated, substituted "entity the--", subparas. (A)-(F), and "of a subscriber" for "entity the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity, and length of service of a subscriber", and, in the concluding matter, deleted "and the types of services the subscriber or customer utilized," following "service".

2002. Act Nov. 2, 2002, in subsec. (c)(1)(E), made a technical correction which did not affect the text; and added subsec. (g).
Act Nov. 25, 2002 (effective 60 days after enactment, as provided by § 4 of such Act, which appears as 6 USCS § 101 note), in subsec. (e), inserted ", statutory authorization".

2006. Act Jan. 5, 2006, in subsec. (c)(1)(C), deleted "or" following the concluding semicolon.

3. Other provisions:
Application of section. For application of this section, see Act Oct. 21, 1986, P.L. 99-508, Title II, § 202, 100 Stat. 1868, which appears as 18 USCS § 2701 note.

Notes:

Related Statutes & Rules:

This section is referred to in 18 USCS §§ 2701, 2702, 2704, 2705, 2706, 2707.

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27 Moore's Federal Practice (Matthew Bender 3d ed.), ch 641, Search and Seizure § 641.121.
8A Fed Proc L Ed, Criminal Procedure §§ 22:322-326, 328, 331.
31 Fed Proc L Ed, Telecommunications § 72:990.

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1 Criminal Defense Techniques (Matthew Bender), ch 5, Electronic Surveillance Under Federal Law §§ 5.11, 5.13.
4 Criminal Defense Techniques (Matthew Bender), ch 84, Computer Crime §§ 84.02, 84.06.

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3 The Law of Advertising (Matthew Bender), ch 53, Cable Television Advertising § 53.04.

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Interpretive Notes and Decisions:

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I.IN GENERAL

1. Generally

While warrants for electronic data are often served like subpoenas (via fax), Congress called them warrants and Congress intended them to be treated as warrants, under 18 USCS § 2703(b)(1)(A). United States v Bach (2002, CA8 Minn) 310 F3d 1063, reh den, reh, en banc, den (2003, CA8) 2003 US App LEXIS 141 and cert den (2003) 538 US 993, 123 S Ct 1817, 155 L Ed 2d 513 and subsequent app (2005, CA8 Minn) 400 F3d 622, reh den (2005, CA8) 2005 US App LEXIS

7041 and cert den (2005) 546 US 901, 126 S Ct 243, 163 L Ed 2d 223.

Under Electronic Communications Privacy Act of 1986, 18 USCS §§ 2701 et seq., even if Internet service provider (ISP) acts without lawful authority in disclosing information, this does not absolve government from unlawfully requesting or soliciting ISP's disclosure; violation by one does not excuse other. Freedman v Am. Online, Inc. (2004, DC Conn) 303 F Supp 2d 121.

With respect to telecommunications provider that provided records to government without court order when government was investigating kidnapping, 18 USCS § 2703(d) did not authorize court to issue order sought by U.S. Attorney that would somehow validate retroactively disclosure of records to government. In re United States (2005, DC Mass) 352 F Supp 2d 45.

18 USCS § 2703 does not authorize court to enter prospective order to turn over data as it is captured instead, statute establishes mechanism for compelling disclosure of information existing at time order is issued and for compelling preservation of such information in period before such order is obtained. In re United States for an Order Authorizing the Use of a Pen Register (2005, ED NY) 396 F Supp 2d 294, 15 ALR Fed 2d 803 (criticized in In re United States for Order for Disclosure of Telecommunications Records (2005, SD NY) 405 F Supp 2d 435) and (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 64) and (criticized in In re United States for an Order: Authorizing the Installation & Use of a Pen Register & Trap & Trace Device (2007, SD Tex) 2007 US Dist LEXIS 77635).

Order under 18 USCS § 2703 can only authorize provider's disclosure of information, not interception by law enforcement. In re United States for an Order Authorizing the Use of a Pen Register (2005, ED NY) 396 F Supp 2d 294, 15 ALR Fed 2d 803 (criticized in In re United States for Order for Disclosure of Telecommunications Records (2005, SD NY) 405 F Supp 2d 435) and (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 64) and (criticized in In re United States for an Order: Authorizing the Installation & Use of a Pen Register & Trap & Trace Device (2007, SD Tex) 2007 US Dist LEXIS 77635).

Nothing in 18 USCS § 3117(b) definition of mobile tracking device places limitation on "records or other information" obtainable pursuant to 18 USCS § 2703(d) order. In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 76 (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Stored Communications Act, 18 USCS §§ 2701 et seq., did not require federal prosecutors and law enforcement agents to provide plaintiff with notice of search warrants; 18 USCS § 2703(b)(1)(A) required notice only if government elected to obtain information via subpoena. Bansal v Russ (2007, ED Pa) 513 F Supp 2d 264.

Servicemember could not have reasonable expectation of privacy in registration information he gave to Internet service provider when 18 USCS § 2703(c)(1)(A) did not preclude Internet service provider from disclosing information to non-government third parties. United States v Ohnesorge (2005, NMCCA) 60 MJ 946, 2005 CCA LEXIS 51.

2. Applicability

18 USCS § 2703(c), which states that provider of electronic communication service may only give subscriber information if government has warrant, applies to service provider and not government. Guest v Leis (2001, CA6 Ohio) 255 F3d 325, 2001 FED App 206P.

3. Relationship with other laws

When governmental entity invokes Wis. Stat. § 968.135 or any equivalent route to compel telephone company to produce terminating automated message accounting report, it has obtained information under 18 USCS § 2703. Ameritech Corp. v McCann (2005, CA7 Wis) 403 F3d 908, reh den, reh, en banc, den (2005, CA7 Wis) 2005 US App LEXIS 8563.

Government application is granted for disclosure of narrowly specified information about certain customers of Internet services provider, which is also cable operator, but ultimate reconciliation of statutory conflict between required disclosures under 18 USCS § 2703(d) and privacy protections of 47 USCS § 551 is left for another day, because issue of statutory conflict is not presented in ripe, sharpened manner since customer information has not yet been disclosed and no claims have been made against company pursuant to § 551(f). In re United States for an Order Pursuant to 18 U.S.C. 2703(d) (1999, DC Mass) 36 F Supp 2d 430.

Challenge to order, requiring cable internet service provider to provide government with subscriber's name, home address, telephone number, e-mail address, and other identifying information without disclosing investigation to subscriber, must fail, where latest definition of "other service" specifically makes 47 USCS § 551(h)(2) requirement of disclosure to cable subscribers inapplicable to recipients of cable internet service, because only statute applicable here is 18 USCS § 2703(d), requiring release of subscriber records for ongoing criminal investigation. In re United States (2001, SD NY) 157 F Supp 2d 286.

Plain language of 18 USCS §§ 2703 and 2711 expressed legislative intent to limit out-of-district authority to cases

involving terrorism, and words actually chosen by Congress and codified in Fed. R. Crim. P. 41(b) and 18 USCS §§ 2703, 2711 did not support government's argument that Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub. L. No. 107-56, 2001 H.R. 3162, 115 Stat. 272, 291 (October 26, 2001) expanded district court authority to issue out-of-district warrants for every conceivable non-terrorism crime in prosecutors' arsenal where statutory language of §§ 219 and 220 of Patriot Act was clear and unambiguous in limiting district court authority to issue out-of-district warrants to investigations of terrorism; therefore, Florida district court had no authority to issue and declined to issue search warrant to seize electronic data maintained by "dot-com" in Northern District of California in child pornography investigation. In re Search Warrant (2003, MD Fla) 362 F Supp 2d 1298 (criticized in In re Yahoo, Inc., 701 First Ave., Sunnyvale, Cal. 94089 (2007, DC Ariz) 2007 US Dist LEXIS 37601).

Judges accepting ex parte applications for order authorizing installation and use of pen register and trap-and-trace device and authorizing release of subscriber and other information, including cell-site information have focused on explicit text of statutes, which states that cell-site information may not be obtained solely pursuant to Pen Register Statute, 47 USCS § 1002(a)(2); those courts permit government to obtain cell-site information after meeting requirements of both Pen Register Statute and 18 USCS § 2703(c)(1), which allows government to obtain customer records from electronic communication providers; those courts point out that 18 USCS § 2703 meets purpose of 47 USCS § 1002 exception, to require more than minimal authorization imposed under Pen Register Statute, but does not require probable-cause showing. In re United States (2006, SD Tex) 433 F Supp 2d 804 (criticized in In re the Application of United States (2006, SD Tex) 441 F Supp 2d 816) and (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Pursuant to Pen Register Statute, 18 USCS § 3123, and Stored Communications Act, 18 USCS § 2703, government was authorized to use pen register with trap device to obtain prospective cell site location information regarding certain cellular telephone without warrant or showing of probable cause. In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448 (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

In order for 18 USCS § 2703(c) to apply, information requested must pertain to "wire or electronic communications," and as defined in 18 USCS § 2510(15), that does not include location information. In re Application of United States (2007, DC Puerto Rico) 497 F Supp 2d 301.

4. Construction

Communications company loses argument that it is lawfully required only to produce long-distance cellular telephone billing records since local cellular telephone billing records are not "telephone toll billing records" under 18 USCS § 2703(c)(1)(C), even if some local customers choose to prepay for specified amount of air time and are not assessed separate charge for each call, because common-sense plain meaning of phrase includes all billing records that contain information which was used or could be used to charge for telephone calls or services. In re Grand Jury Subpoenas (1995, WD Mo) 894 F Supp 355.

Where U.S. sought order to require cell phone company to provide cell site information for criminal suspect, application was denied because information could not be obtained pursuant to combination of Pen Register statute, 18 USCS § 3123, and Stored Communications Act, 18 USCS § 2703(c), absent warrant issued pursuant to Fed. R. Crim. P. 41, supported by probable cause to believe that information sought was itself evidence of crime, not merely relevant to investigation. In re Order Authorizing the Release of Prospective Cell Site Info. (2006, DC Dist Col) 407 F Supp 2d 134 (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448).

Stored Communications Act (SCA), 18 USCS § 2703, either alone or in tandem with Pen Registry Statute, 18 USCS § 3121, or pursuant to Communications Assistance for Law Enforcement Act of 1994, 47 USCS §§ 1001 et seq., does not authorize access to individual's cell-phone-derived location information, either past or prospective, on simple showing of articulable relevance to ongoing investigation (a reasonable relevance standard); SCA expressly sets movement/location information, such as that obtained from cellular phones, outside its scope by defining "electronic communications" to exclude any communication from tracking device as defined in 18 USCS § 3117. In re United States for Order Directing Provider of Elec. Commun. Serv. to Disclose Records to Gov't (2008, WD Pa) 534 F Supp 2d 585.

5. Constitutionality

District court's issuance of court order for cell site information under 18 USCS § 2703 and Pen Register Statute was not unconstitutional in violation of Fourth Amendment's prohibition against unreasonable searches and seizures because Government did not seek to install "tracking device," as individual had chosen to carry device (cell phone) and to permit transmission of its information to third party, carrier and provision of such information to third party carrier did not implicate Fourth Amendment; for purposes of Fourth Amendment, cell site information sought did not provide "virtual map" of user's location and did not pinpoint user's location within building, but only identified nearby cell tower. In re United States for Order for Disclosure of Telecommunications Records (2005, SD NY) 405 F Supp 2d 435 (criticized in In re Application of the United States for an Order for Prospective Cell Site Location Info. on a Certain Cellular Telephone (2006, SD NY) 2006 US Dist LEXIS 11747) and (criticized in In re the Application of United States (2006, SD Tex) 441 F Supp 2d 816) and (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Government's reliance on Stored Communications Act (SCA) was objectively reasonable because there was no indication in 2003, when applications for SCA orders were filed in case, that statute was unconstitutional, and neutral magistrate judge approved government's applications. United States v Ferguson (2007, DC Dist Col) 508 F Supp 2d 7.

II.ENFORCEMENT

6. Grand jury subpoena

Annunzio-Wylie Act provided bank with immunity for disclosing bank records pursuant to grand jury subpoenas, notwithstanding defendant's claim that bank's disclosure violated 18 USCS § 2703, part of the ECPA, since even if ECPA technically deprived grand jury of authority to demand account records, bank, as a witness, was not in a position to test limits of grand jury's authority. Coronado v BankAtlantic Bancorp, Inc. (2000, CA11 Fla) 222 F3d 1315, 13 FLW Fed C 998, cert den (2000) 531 US 1052, 148 L Ed 2d 559, 121 S Ct 656.

7. Probable cause standard

Where government refused to provide sworn affidavit attesting to facts demonstrating probable cause so as to permit court to issue warrant under Fed. R. Crim. P. 41, court denied government's application for pen register to capture and report prospective cell site information in connection with investigation of fugitive; Pen/Trap Statute, 18 USCS §§ 3121 et seq., and 18 USCS § 2703(d), part of Stored Communications Act, did not allow order for capture of prospective cell site information to be issued upon less than probable cause. In re Order Authorizing Installation and Use of Pen Register (2006, DC Md) 439 F Supp 2d 456 (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448).

Defendant's text messages, supplied by electronic communication providers in response to search warrants were not "interceptions" under 18 USCS § 2510(4), but instead were governed by 18 USCS § 2703(a), and were admissible due to probable cause for warrants; unlike Wiretap Act, Stored Communications Act contained no express requirement that government demonstrate necessity. United States v Jones (2006, DC Dist Col) 451 F Supp 2d 71.

Government was not entitled to court order under Stored Communications Act, 18 USCS § 2703, giving government access to individual's cell-phone-derived location information, either past of prospective, on simple showing of articulable relevance to ongoing investigation; such information could only be obtained upon showing of probable cause under Fed. R. Civ. P. 41 in accordance with settled Fourth Amendment standards. In re United States for Order Directing Provider of Elec. Commun. Serv. to Disclose Records to Gov't (2008, WD Pa) 534 F Supp 2d 585.

8. Specific and articulable facts standard

One of three ways in which government can obtain cell site information is that government may obtain court order pursuant to 18 USCS § 2703(c) and (d), part of Stored Communications Act, 18 USCS §§ 2701 to 2712, upon showing of specific and articulable facts that information sought is relevant to and material to ongoing criminal investigation. In re Application of United States (2007, DC Puerto Rico) 497 F Supp 2d 301.

For court to issue order compelling telecommunication service provider to disclose historical cell site information under 18 USCS § 2703(d) to federal law enforcement agents, government did not have to establish probable cause, but instead lesser specific and articulable facts standard applied. In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 76 (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Government's application for order directing certain cellular telephone companies to disclose historical cell site information under Stored Communications Act, 18 USCS §§ 2701 et seq., was granted because 18 USCS § 2703(d) order requiring disclosure of historical cell site information could issue on showing of "specific and articulable facts" and no more. In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 76 (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Because historical cell site information clearly satisfies each of three definitional requirements of 18 USCS § 2703(c), 18 USCS § 2703(d) order requiring disclosure of historical cell site information may issue on showing of "specific and articulable facts" and no more. In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 76 (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

9. Prima facie claim

Bank customer stated prima facie claim under 18 USCS § 2703, which provides that if electronic communication service has held contents of electronic communications in electronic storage for one hundred eighty days or less, it may disclose that communication to government only pursuant to federal or state warrant, where customer alleged that on same day funds were electronically transferred to her account, bank disclosed contents pursuant to verbal instructions. Lopez v First Union Nat'l Bank (1997, CA11 Fla) 129 F3d 1186, 11 FLW Fed C 760, reh, en banc, den (1998, CA11 Fla) 141 F3d 1191 and (criticized in Lee v Bankers Trust Co. (1999, CA2 NY) 166 F3d 540, 14 BNA IER Cas 1389) and (criticized in Stoutt v

Banco Popular de P.R. (2001, DC Puerto Rico) 158 F Supp 2d 167) and (criticized in Stoutt v Banco Popular de P.R. (2003, CA1 Puerto Rico) 320 F3d 26) and (criticized in In re JetBlue Airways Corp. Privacy Litig. (2005, ED NY) 379 F Supp 2d 299).

10. Subpoena

Suppression of information about suspected child molester is not required, even though government obtained information via invalid subpoena served on his Internet service provider, because, for Fourth Amendment purposes, court does not find that Electronic Communications Privacy Act of 1986 (18 USCS §§ 2510 et seq.) has legislatively determined that individual has reasonable expectation of privacy in his name, address, social security number, credit card number, and proof of Internet connection. United States v Hambrick (1999, WD Va) 55 F Supp 2d 504, affd (2000, CA4 Va) 225 F3d 656, reported in full (2000, CA4 Va) 2000 US App LEXIS 18665 and cert den (2001) 531 US 1099, 148 L Ed 2d 714, 121 S Ct 832 and (criticized in United States v Bach (2001, DC Minn) 2001 US Dist LEXIS 22109).

Federal agency's subpoena, issued pursuant to FRCP 45 during pretrial discovery phase of underlying civil action, does not constitute "trial subpoena" as contemplated by 18 USCS § 2703(c)(1)(C), which provides that provider of electronic communication service must disclose private customer information to government entity only in response to, inter alia, trial subpoena served by government entity. FTC v Netscape Communs. Corp. (2000, ND Cal) 196 FRD 559, 28 Media L R 1821, 2000-1 CCH Trade Cases P 72900, 46 FR Serv 3d 920.

11. Cell phone tracking requests

Denial of cell phone tracking request under 18 USCS § 2703(d) was upheld because government's showing of specific and articulable facts was insufficient to permit real-time acquisition of prospective cell site "tracking" information and required showing of probable cause. In re United States for an Order Authorizing the Use of a Pen Register (2005, ED NY) 396 F Supp 2d 294, 15 ALR Fed 2d 803 (criticized in In re United States for Order for Disclosure of Telecommunications Records (2005, SD NY) 405 F Supp 2d 435) and (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 64) and (criticized in In re United States for an Order: Authorizing the Installation & Use of a Pen Register & Trap & Trace Device (2007, SD Tex) 2007 US Dist LEXIS 77635).

Permitting surreptitious conversion of cell phone into tracking device without probable cause raised serious Fourth Amendment concerns, especially when phone was monitored in home or other places where privacy was reasonably expected; therefore, court denied U.S.'s request for motion to compel access to subscriber records maintained by phone company pursuant to 18 USCS § 2703(c), including location of cell site/sector at call origination, call termination, and, if reasonably available, during progress of call. In re Pen Register & Trap/Trace Device with Cell Site Location Auth. (2005, SD Tex) 396 F Supp 2d 747 (criticized in In re United States for Order for Disclosure of Telecommunications Records (2005, SD NY) 405 F Supp 2d 435) and (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 64) and (criticized in In re United States for an Order: Authorizing the Installation & Use of a Pen Register & Trap & Trace Device (2007, SD Tex) 2007 US Dist LEXIS 77635) and (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Cell site information is not record concerning electronic communication service or remote computing service and therefore is not covered by 18 USCS § 2703(c). In re Application of the United States of America for an Order Authorizing the Installation and Use of a Pen Register (2005, DC Md) 402 F Supp 2d 597 (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448).

Cell site or tracking information constituted "information" pertaining to customers or users of electronic communications services under 18 USCS § 2703(c) and consequently was sort of "information" that Government was entitled to seek pursuant to order under § 2703(d). In re United States for Order for Disclosure of Telecommunications Records (2005, SD NY) 405 F Supp 2d 435 (criticized in In re Application of the United States for an Order for Prospective Cell Site Location Info. on a Certain Cellular Telephone (2006, SD NY) 2006 US Dist LEXIS 11747) and (criticized in In re the Application of United States (2006, SD Tex) 441 F Supp 2d 816) and (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Government was entitled to order that would allow for pen register and trap and trace device on phone number assigned to cellular telephone and was further entitled, pursuant to Pen Register Statute, 18 USCS §§ 3121 et seq., and Stored Communications Act, 18 USCS § 2703, to record cell site information, but only when cell phone was being used for calls and only if location information was used only to give approximate location of phone, based upon cell sites, and was not used to pinpoint exact location of cell phone. In re United States (2006, WD La) 411 F Supp 2d 678 (criticized in In re Application of the United States for an Order for Prospective Cell Site Location Info. on a Certain Cellular Telephone (2006, SD NY) 2006 US Dist LEXIS 11747) and (criticized in In re the Application of United States (2006, SD Tex) 441 F Supp 2d 816) and (criticized in In re United States for an Order Directing Provider of Elec. Commun. Serv. to Disclose Records to the Gov't (2008, WD Pa) 534 F Supp 2d 585).

Government could not use combined authority of 18 USCS § 3122, part of Pen/Trap Statute, 18 USCS §§ 3121 et seq., and 18 USCS § 2703, part of Stored Communications Act (SCA), 18 USCS §§ 2701 et seq., to obtain disclosure of prospective information concerning originating and terminating cellular towers for calls to and from particular cellular

telephone; although cell site information constituted signaling information under 18 USCS § 3127(3), such information could not be obtained solely under Pen/Trap Statute pursuant to 47 USCS § 1002(a)(2), part of Communications Assistance for Law Enforcement Act of 1994, 47 USCS §§ 1001 et seq., because it could disclose cellular subscriber's physical location, and legislative history indicated that Congress did not intend for Pen/Trap Statute to be used in conjunction with SCA to obtain information. In re United States (2006, ED Wis) 412 F Supp 2d 947 (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States for an Order: Authorizing the Installation & Use of a Pen Register & Trap & Trace Device (2007, SD Tex) 2007 US Dist LEXIS 77635).

Government's application for order authorizing telecommunication service provider to disclose cell site tower location information made and received by identified cellular telephone was denied because court did not agree with government that it should impute to Congress intent to "converge" provisions of Pen Register and Trap and Trace Statute, Stored Communications Act, and Communications Assistance for Law Enforcement Act of 1994 to create vehicle for disclosure of prospective cell location information on real time basis on less than probable cause. In re Application of the United States for an Order Authorizing the Installation and Use of a Pen Register (2006, WD NY) 415 F Supp 2d 211 (criticized in In re United States for Order for Prospective Cell Site Location Info. (2006, SD NY) 460 F Supp 2d 448) and (criticized in In re United States Orders pursuant to 18 U.S.C. 2703(d) (2007, DC Mass) 509 F Supp 2d 64) and (criticized in In re United States for an Order: Authorizing the Installation & Use of a Pen Register & Trap & Trace Device (2007, SD Tex) 2007 US Dist LEXIS 77635).

12. Violation established

Internet service provider (ISP) subscriber was awarded summary judgment finding that two police officers violated 18 USCS § 2703(c), part of Electronic Communications Privacy Act of 1986 (ECPA), 18 USCS §§ 2701 et seq., by using invalid search warrant application to solicit information about subscriber from ISP; under 2001 amendments to ECPA, governmental entities could be held liable for soliciting information from ISP without complying with processes specified in ECPA, and officers' argument--that they merely requested and did not require ISP to disclose information--was disingenuous and did not absolve them from liability. Freedman v Am. Online, Inc. (2004, DC Conn) 303 F Supp 2d 121.

13. Violation not established

Task force investigating on-line obscenity, which seized computer bulletin boards, did not violate 18 USCS § 2703(a), (b), or (c) by searching plaintiffs' electronic communications and subscriber information, since access was pursuant to a valid warrant. Guest v Leis (2001, CA6 Ohio) 255 F3d 325, 2001 FED App 206P.

Defendant's Internet information was properly disclosed to police authorities under 18 USCS § 2703(d), and was not violation of any privacy right, where defendant had shared child pornography with other parties and was charged with violations of 18 USCS §§ 2252(a)(2), 2252(a)(4)(B), 922(g)(1), and 924(a)(2). United States v Perrine (2008, CA10 Kan) 518 F3d 1196.

Governmental defendants including city, its police department, and certain government officials, could not be held liable under 18 USCS § 2703(a), part of Stored Communications Act (SCA), for divulging text messages because application of § 2703(a) is limited to governmental actions during criminal investigations; it has no application to employer, who happens to be governmental agency, in its effort to manage its own workforce by auditing electronic equipment provided to its employees to determine whether they have engaged in workplace malfeasance. Quon v Arch Wireless Operating Co. (2006, CD Cal) 445 F Supp 2d 1116, 25 ALR6th 649.

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TOC: United States Code Service; Code, Const, Rules, Conventions & Public Laws > TITLE 18. CRIMES AND CRIMINAL PROCEDURE > PART I. CRIMES > CHAPTER 121. STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS > **§ 2703. Required disclosure of customer communications or records**
Citation: **18 U.S.C. 2703**
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OVERVIEW OF CHAPTER 121. STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

COMMENTARY

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 121. STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

OVERVIEW OF CHAPTER 121. STORED WIRE AND ELECTRONIC COMMUNICATIONS AND TRANSACTIONAL RECORDS ACCESS

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Computer Records Generally

The computer and its many facets of communication and preservation of information provide increasingly complex issues of maintaining individual privacy while providing legitimate Government access to relevant information concerning criminal activity. The Government obtains access to computer related information in multiple ways, including standard search warrants, subpoenas, and congressional statutory authorization (see, e.g., 18 USCS §§ 3121-3127 and 50 USCS §§ 1841-1842 (pen register and trap and trace devices)). In addition to attempting to breach the shield of computer privacy by a search for stored electronic information on individual computers or through Internet Service Providers, the Government is now using computers as a sword to obtain, compare and store information about individuals. For instance, computer programs are now part of surveillance devices such as face recognition systems where crowds or neighborhoods are scanned and the computer program attempts to match faces to persons suspected of criminal activity. Scanned faces based on digitized information, although not matched to criminal activity, may remain stored in the program and may document an individual's location. Government data mining programs collect information to search for predictive or anomalous patterns that might be associated with either terrorist or criminal conduct. The National Crime Center maintains data files on approximately 200,000 suspected terrorists and violent criminals. Fingerprint databases are being used to check passengers on airlines, watch lists are being used to track identified individuals, and programs identify ticket purchasing and travel on all airlines to look for suspicious travel plans.

In-Home Computer Records

Fourth Amendment protection remains strongest in the home. Consequently, to be entitled to enter the home to seize a computer, hard drive, storage disks and other related hardware and software, the Government must obtain a search warrant meeting Fourth Amendment guidelines. The warrant issues most commonly associated with in-home seizure of computers and computer records relate to specificity of the items to be seized and the scope and duration of the Government's seizure needed to achieve its goals. *United States v. Davis*, 226 F.3d 346 (5th Cir. 2000); *United States v. Lacy*, 119 F.3d 742 (9th Cir. 1997). Once computers and related hardware and software are seized based on a probable cause warrant, the Government is free to use any system that will provide the officers with access to the sought-after stored information. Frequently, government agents must remove the physical equipment from the search location to a government laboratory to conduct an efficient and not overly intrusive forensic analysis for the desired stored digital information. A complete computer forensic analysis may deny the owner use of the computer system for an extensive time. Further, when the computer system contains both seizable and non-seizable data, denying the owner access to the non-seizable data may result in financial or other harm and exposure of the non-criminal data may invade the owner's personal privacy.

Encrypted Records

The Government has long sought legislation limiting citizen access to sophisticated encryption codes that prevent the Government from gaining access to properly seized computer records. On the other hand, citizen privacy, both from the Government and from other individuals who may hack into computer records, has supported creation of strong encryption programs. A 2001 Federal District Court decision opened the way for a combination of warrant and electronic access to passwords for encrypted files. *United States v. Scarfo*, 180 F. Supp. 2d 572 (D.N.J. 2001). The Government obtained a warrant to enter defendant's business to install a "Key Logger System" (KLS) on defendant's personal computer keyboard. The Government was not required to give notice of the entry or installation to defendant. The Government also presented sufficient evidence to the trial court that the Classified Information Procedures Act (18 USCS Appendix 3) protected the KLS from discovery by defense counsel. Although defendant was provided with a summary of the KLS, the court was not

specific about precisely how the Government acquired the keystroke information or entered the encrypted files. The court, however, stated that the Government configured the KLS so that it did not violate the wiretap statute, 18 USCS § 2510. In other words, the KLS did not record any keystrokes of any e-mail or wire communications made over a telephone or cable line while the modem operated. If any communication port on the modem was open, the KLS did not record keystrokes. While offering some protection of other communications, not all e-mail communications are typed while the individual is on-line or has a communication port open. For example, a person may type and store an e-mail communication on a laptop or home computer while not on-line preferring to hold the e-mail for future transmission. Although the Government response configured the KLS not to search for or record any fixed data stored in the computer, presumably the government would record the keystrokes of an e-mail composed while the computer was not on-line. Nevertheless, based on the Government's representations about the KLS, the court denied suppression of evidence and denied discovery about details of the KLS. Instead the court ambiguously stated that KLS "obtained the pass phrase to the [suspect] file and retrieved information."

In pressing the suppression motion, the defendant had to rely on the judge's review of information provided by the Government under the Classified Information Procedures Act. The defendant was unable to discover or examine witnesses about precisely what information the Government obtained, was unable to research the system, and was unable to provide expert testimony concerning the system.

Access to Content of Stored Wire or Electronic Communications

The Electronic Communications Privacy Act ("ECPA")(18 USCS §§ 2701 et seq.), governs Government access to *stored wire and electronic communications* in a "facility" through which an electronic communication service is provided. "Electronic storage" is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; [and] (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication; . . ." 18 USCS § 2510(17). The ECPA provides guidelines for Government access primarily to e-mail or voice communications included within e-mail. The communications typically are stored either within a local network server or on the server for an Internet Service Provider (ISP) using either of the two main e-mail protocols, IMAP or POP3. When POP3 is used the e-mail is stored on the ISP server until opened by the recipient at which time the e-mail is downloaded to the individual computer. Once downloaded the communication may be deleted from the ISP server, although some systems retain the communication on the server at the request of the subscriber or through backup procedures. E-mail providers also use other protocols such as HTTP that also may involve storage of communications.

By definition, stored wire and electronic communications mean temporary or intermediate storage incidental to the transmission of the communication. Once delivered to the subscriber or customer, the communication is no longer in temporary storage and it becomes the same as any other stored information. The service provider, however, may store a backup for protection of the communication in case of a power failure. Backups may also be preserved on parallel hard drives in different locations. The backup appears to be included within the definition of stored communication to which the Government has access.

Originally, the ECPA in 18 USCS § 2703 dealt only with stored electronic communications. The USA PATRIOT Act (Public Law 107-56) amended § 2703 to include stored wire communications as well as electronic communications because some e-mails may have voice components. Previously, the Federal Wiretap Statute governed wire communications involving voice components. 18 USCS § 2510. The USA PATRIOT Act also amended § 2510 to remove stored wire communications from the Federal Wiretap Statute and include such communications in the ECPA. Direct interception of wire communications en route to the recipient or to electronic storage is still governed by the statutory requirements set out in 18 USCS §§ 2510 et seq. Nevertheless, the broader protection afforded by the Federal Wiretap Statute, at least from direct interception of wire communications, may prove illusory in situations where the communication is stored prior to access by its recipient. The concept of "interception" does not apply to electronic or wire communications while in storage because Government acquisition is not simultaneous with transmission. *Steve Jackson Games, Inc. v. U.S. Secret Service, 36 F.3d 457 (5th Cir. 1994).* If Government officials become aware of a stored electronic or wire communication but not its contents, the officials may immediately apply for a search warrant or a court order in some circumstances to obtain the contents of the communication while in storage. A warrant to seize must only satisfy Fourth Amendment requirements, which are considered less onerous than a wiretap request meeting statutory guidelines. Thus, by minimal delay after transmission, the Government may get access to the communication while in storage using the less burdensome search warrant process.

Authorization for obtaining the *contents* of the stored communications depends on two variables--the type of facility controlling the storage and the duration of the storage. To gain access to content of materials stored in an "electronic communications system" (defined in 18 USCS § 2510(14)) that have been stored for 180 days or less, the Government can require disclosure only by resorting to a Fourth Amendment search warrant. The search warrant issuance process was amended to permit issuance by any judge having jurisdiction over the offense regardless of the locus of the electronic storage system. Thus, such warrants are valid nationwide regardless of where they were issued.

If the communications have been stored in excess of 180 days, or if the communications are stored in a "remote computing service," the Government may obtain access from any "electronic communication service" (defined in 18 USCS § 2510(15)) in three ways: (1) a Fourth Amendment search warrant *without notice* to the subscriber or customer; (2) a Federal or State administrative subpoena or a Federal or State grand jury or trial subpoena *with notice* to the subscriber or customer; or (3) a court order for disclosure. The court order for disclosure requires only that the Governmental entity provide specific and articulable facts demonstrating reasonable grounds to believe the communications are relevant to an ongoing criminal investigation. 18 USCS § 2703(d).

Further, 18 USCS § 2704 permits the Government, when proceeding by subpoena or court order under 18 USCS § 2703(b), to require the service provider to create a backup copy of the contents of the communication. The backup is made without notice to the subscriber or customer to avoid potential Governmental loss of such information. The subscriber is required to be notified of the creation of the backup copy three days after the Government is notified that the backup has been made. In some circumstances, notice may be further delayed if the court believes there is danger to persons or danger of flight, destruction of evidence, intimidation of witnesses or serious jeopardy to the investigation. 18 USCS § 2705.

Access to Non-Content Information

The USA PATRIOT Act dramatically expanded the *non-content* information available to the Government under the Electronic Communications Privacy Act. Under the statute prior to amendment, most of the accessible information related to telephone communications. Now the Act authorizes information access beyond telephone records to records of all providers of electronic communication services and remote computer services concerning a specific subscriber or customer. The Government is authorized to request the records in several ways: a Fourth Amendment search warrant issued in accord with Federal Rule of Criminal Procedure 41 or a comparable state process; consent of the customer or subscriber; a formal written request concerning a subscriber or customer suspected of telemarketing fraud; an administrative, grand jury or trial subpoena; or a court order complying with § 2703(d). Under § 2703(d), to obtain a court order the Government need only list specific facts providing reasonable grounds that the information requested is relevant and material to a criminal investigation.

In addition, the USA PATRIOT Act expanded the type of records that must be disclosed to the Government by the electronic communication service or remote computer service. The Act now specifies permissible Government access to the following information about a subscriber to or customer of such services: name; address; local and long distance telephone connection records; records of session times and durations; length of service and types of service; telephone numbers, instrument numbers or other subscriber numbers or identities, presumably including Internet Protocol numbers; and means of payment, including credit card and bank account numbers. The expanded list of available information, particularly credit cards and bank accounts, is designed to provide the Government with more options for quickly and accurately identifying computer users and tracking their Internet contacts and communications. These records are available through any of the means described in the previous paragraph. 18 USCS § 2703.

Access to Content and Non-Content Electronic and Wireless Communications Transmitted or Stored by Cable Companies

When first created, cable companies primarily supplied television viewers with access to packages of television programs. The Cable Act (47 USCS § 551) placed substantial restrictions on Government access to identifying information about cable company subscribers and about the selection of video services by specific subscribers. The government entity seeking the information has to present in a court proceeding clear and convincing evidence that the subscriber is reasonably suspected of criminal activity and that the desired information would be material evidence in the case. More recently, cable companies are offering telephone services and Internet access. In recognition of the multiple electronic services cable companies provide, the USA PATRIOT Act added a provision that the Electronic Communications Privacy Act, the wiretap statute and the pen register and trap and trace provisions shall determine Government access to electronic and wireless communications that are part of the cable company's communication services. Consequently, substantial subscriber information and content information is accessible to the Government, which is consistent with the Government's access to comparable information held by Internet Service Providers.

Voluntary Disclosure to the Government

The USA PATRIOT Act amended 18 USCS § 2702 to expand the situations in which an electronic service provider or a remote computing service provider may voluntarily disclose content and non-content information. The provider may disclose information whenever it reasonably believes an emergency exists involving immediate danger of death or serious physical harm to any person. Further, the provider may disclose information incident to provision of services to customers or for the protection of the provider's rights or property. The requirements of "immediate danger" and "serious physical injury" may provide a civil plaintiff with some room to litigate the provider's exercise in judgment in deciding to disclose information. In criminal cases, suppression is highly unlikely because the disclosure is likely to be treated as a private search. The amended Act does not require vigilance and disclosure by the provider; it merely protects the provider if the provider chooses to disclose in certain situations. Less clear are the situations in which a provider can disclose subscriber information to protect the provider's rights and property. For example, assume a provider becomes aware of computer fraud, hacking or other illegal acts involving use of the provider's services. It is unclear when the provider would or should determine that the activity sufficiently affects the provider's rights and property justifying disclosure of the relevant information to the Government without incurring civil liability for the disclosure.

Remedies

When the Government violates statutory provisions governing access to stored wire and electronic communications and non-content information, remedies are unclear. The ECPA provides that one method of Government access to information is a search warrant issued in accord with Federal Rule of Criminal Procedure 41 or a similar state procedure. In most situations, a violation of the search warrant process required by Rule 41 permits suppression of the evidence. The Government, however, has alternative methods of requesting the information and the ECPS limits a subscriber or customer to civil remedies for non-constitutional violations of 18 USCS §§ 2701 et seq. 18 USCS § 2708. For intentional violations of the Act, a subscriber or customer may be given declaratory or equitable relief that would presumably include a cessation of the surveillance. Exclusion of the evidence already obtained does not appear to be a remedy for non-constitutional violations.

Related Commentaries

For additional commentaries dealing with electronic surveillance and related subjects, see--

NITA Commentary, Title 18, preceding § 2510 (relating to video surveillance).

NITA Commentary, Title 18, § 2516 (relating to wire and electronic communications).

NITA Commentary, Title 18, § 3117 (relating to electronic tracking and thermal imaging devices).

NITA Commentary, Title 18, preceding § 3121 (relating to pen registers and trap and trace devices).

NITA Commentary, Title 49, § 44901 (relating to airport security).

NITA Commentary, Title 50, preceding § 1801 (relating to foreign intelligence surveillance).

NITA Commentary, Title 50, preceding § 1841 (relating to use of pen registers and trap and trace devices in foreign intelligence surveillance).

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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO, Plaintiff, vs. LEOTIS B. BRANIGH III, Defendant.	CASE NO. CR-07-8107 AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT OF MOTION TO DETERMINE COMPETENCY

STATE OF IDAHO)
:ss.
County of Latah)

Charles E. Kovis, being first duly sworn on oath, deposes and says:

1. I am the Court-appointed attorney for Mr. Leotis Branigh.

2. Attached to this affidavit at Exhibit "A" are true and accurate copies of police reports received by Mr. Branigh and me. These reports were received from the State of

Idaho after discovery requests in the above-entitled action.

3. All documents attached to this affidavit at Exhibit "A" are incorporated herein as though fully set forth.

DATED this 28TH day of November 2008.

Charles E. Kovis

SUBSCRIBED and SWORN to before me this 28 day of November 2008.

ALICIA M. FOTH NOTARY PUBLIC STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at Moscow therein.

My commission expires: 5-5-2014

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of ~~November,~~ December 2008, a true and correct copy of this *Affidavit of Charles E. Kovis in Support of Motion To Determine Competency* was hand-delivered to:

DANIEL SPICKLER
PROSECUTING ATTORNEY
P.O. BOX 1267
LEWISTON, IDAHO 83501

Charles E. Kovis

Law Supplemental Narrative:

Supplemental Narratives

Seq Name	Date	Narrative
19 Arneson Jeff	20:10:39 10/04/2007	
Arneson 10-04-07	Lewiston Police Supplemental Narrative	

Case 07-L17915
October 04, 2007
Sgt. Arneson, 216
352

On 10-03-07 at approximately 1330 hours I was contacted at the Lewiston Police Department by Desiree Anderson. Anderson is the ex wife of the victim, Michael Johnston and a former girlfriend/fiance' of the suspect, Leotis Branigh III. I conducted an interview with Anderson in interview room two of the Lewiston Police Department, Investigative section, Also present was Lt. Tom Greene.

Anderson told me that she had received a divorce from Johnston on 08-03-06. She stated that they were married in 1999 and had been married for approximately seven years. She further stated that they had two children in common, Eliah age 12, and John age 8. At the time of their divorce, she went to live with her aunt for a while. During spring break of 2007, Johnston asked her to house sit while he went on a Spring vacation with Eliah and John to Vermont. From that time forth, she lived at 1029 Cedar Avenue #23.

Even though she was living with her ex husband and children, she had met Leotis Branigh through Lacey Jackson who is Anderson's sister. Branigh and Anderson went to Sandpoint to visit Lacey and went to her sentencing in March of 2007. Lacey had met Branigh, via letters, while they were in prison. Lacey's husband, Daniel Jackson, had known Branigh for quite a period of time. Anderson began a dating relationship with Branigh during the week of her children's school spring break. Upon returning from spring break vacation Mike Johnston asked Anderson to renew their relationship. At this point in time Anderson was unsure about her relationships with Branigh and Johnston. Anderson said that she was on again off again with both of them quite frequently. Anderson stated that during the end of May, she went to Seattle with Leotis Branigh for the weekend. During this time Mike was extremely depressed and upset and said he was going to kill himself. She decided to stop seeing Branigh who had begun to change and seemed to be a different type of person which, Anderson attributed to "meth" and drug use.

During the months of June, July, and August, Branigh began mailing numerous mailings to Desiree as she had changed her phone number so that he could no longer call her.

In September of 2007, Leotis obtained her phone number from an unknown location or source and started calling again. Anderson began seeing Branigh in her neighborhood and receiving numerous calls and text messages from Branigh. Anderson again began having a dating relationship with Branigh near the end of August first part of September. She stated that it lasted a couple of weeks or less. Anderson said there was discussion about her and Branigh moving in together. Later Anderson determined that Branigh had changed and was not the same person as during the beginning of their relationship. Upon breaking it off with Branigh at this time she described Branigh as "terroristic". Branigh would not let Anderson leave his trailer for approximately one (1) hour, even after numerous requests by Anderson for Branigh to let her leave. Anderson told Branigh she was not going to have a relationship with him. Anderson and

Johnston both told Branigh not to have contact with them.

On September 6th, 2007 Leotis Branigh, III confronted Anderson at H & R Block where she was taking classes. He threatened to "snap her neck" and refused to leave until confronted by Officer Krakalia who had been summoned to the scene by a concerned classmate.

She stated she saw Leotis Branigh two times after September 6th. Branigh had shown up at the Anderson/Johnston residence and Johnston and Branigh exchanged words. Branigh began to taunt Johnston about Branigh's past relationship with Anderson. It was approximately one week later, on a Thursday and Friday, she stopped by Leotis's trailer in Clarkston, Washington and they, Anderson and Branigh decided they would meet somewhere and talk about the future on Sunday. That Sunday Leotis arrived at their trailer at 1029 Cedar Avenue #23. This caused friction between Branigh and Anderson, Branigh and Johnston, and Anderson and Johnston.

On September 6th Anderson told Leotis that she would no longer consider living together with him. This was due to the fact that Johnston had issued an ultimatum that his children would never see her at that residence as long as Branigh was living there, due to his drug use and his past criminal record.

Anderson told me that she has had three Unicel phone numbers, the first one was canceled in May of 2007, it was 791-0123, originally an Inland Cellular number but was changed to Unicel. Approximately June 2007 she again changed her number, it was 553-1576. Just a short time later in June, 2007 she changed it again to 553-2015, that one also being a Unicel number. She stated this was due to numerous text messages and phone calls from Leotis Branigh. She stated she began receiving angry text messages from Branigh in May and June of 2007. She said the last time she actually spoke with Branigh on the phone was September 10th or 11th, until Monday. The only time she would respond to him during these times was to tell Branigh to leave her and her family alone. She advised that on June 19th she went to SJRM where she found out she had miscarried and believed it was Branigh's baby that she miscarried. She was also adamant that Johnston was never suicidal. Anderson later signed a Medical Release which I took to St. Joseph's Regional Medical Center and retrieved the medical records pertaining to the miscarriage. Those records were placed in the original case file.

Anderson described one incident where Branigh was "brainwashing" her. What he told her and the manner in which he talked to her at the time "just creeped me out", no one she ever knew or talked to talked to her like that. This was another factor in Anderson terminating the relationship with Branigh.

Leotis told Anderson that Anderson hurt him so much that he was contemplating hurting his own mother.

Anderson stated that on 10/01/07 she received, as did Johnston, numerous text messages from Branigh. For further details on these see Officer Hopple's supplemental and the search warrant and subpoena of telephone text messages between these three individuals.

Anderson stated that the messages became threatening and it angered Johnston. He went out to smoke and took his cell phone and continued to receive text messages from Branigh. She stated Johnston was not armed and all he had with him was his cell phone and cigarettes. She stated at one point he even gave her his cell phone as the battery became weak and she took it into the trailer where it was charging. After it charged she was going to take it back out to him, and changed her mind. Johnston continued to pace at the end of the driveway at 1029 Cedar Avenue from one edge of the gravel driveway to the other edge and back. She stated he was very upset at Branigh for the text messages received that day. At one point she looked out the window and did not see Johnston. A short while later she heard five sounds that she wanted to believe were fireworks or some other source but said that she knew at that time they were gunshots. She waited a brief period of time and since Johnston did not return she finally called police dispatch. Awhile later an officer was dispatched to her location and she later spoke with Officer Mundell.

Anderson stated that to the best of her knowledge, Branigh did not have a firearm, but he always carried a knife on his person and or his vehicle. She did not know where he may access a firearm. She does believe that Branigh's father has some firearms as does his mother, and his father and mother do not reside together any longer.

I asked Anderson to explain a letter to me that she had written to Branigh in which it states "why did you send that ring to me? You said you'd keep it. Does this mean you've moved on? You know I cant leave where I'm at. The only way I'll ever be free is if he dies or decides he don't want me and you know that will never happen."

Anderson stated previous to my pointing this letter out to her that she could never be free of Johnston due to the fact that he is family and he is the father of their common children. She stated in the letter that what she was trying to tell Branigh. It was quite apparent that Anderson was extremely distraught over the fact that this may have planted a seed in Branigh's thoughts.

Investigation Continuing.

Sgt J. Arneson #216

Narrative:

Lewiston Police Department

Domestic Battery
98-L19915
Ofc. Doug Boyle #320
11-16-98
Typed by: 292

On 11-17-98 at about 0000 hours, I was dispatched to 3625 17th Street in reference to a battery. I arrived and contacted Michael Johnston. Johnston stated that approximately 2345 hours on 11-16-98 his ex girlfriend, Desiree Anderson came to his travel trailer to pick up their son. Johnston stated that he and Anderson began arguing at the door way to the trailer, with Anderson standing outside and him in the door way. He stated that the arguing was about another trailer they had just lived in together four days prior at 1029 Cedar Ave. #23, which he was informing her that he was going to move back into and that she needed to move out. He stated that while he was explaining this to Anderson, she jumped up into his trailer and began hitting and scratching his face. Johnston stated that he grabbed her to hold her arms down so she could not hit him anymore and she then bit him on the left side of his cheek and neck area just below his ear. Johnston stated he pushed her out of the trailer to get her away from him and she then took their son, Elijah Johnston with her and left the area.

I looked at Michael Johnston's face and could see three dig marks in his forehead which appeared to be caused from fingernails. These three marks were now starting to scab but blood was noticable on the wounds. Johnston then showed me his neck and cheek area on the left side of his face just in the front and below his left ear. There I could see a swollen area which was oval in shape and was where he was bitten by Anderson. I asked Johnston if anything else happened that he did not tell me in regards to their argument and fight at that location. Johnston stated that was all that went on and that he did not hit her or do anything more than hold her and then push her away from him after being bitten.

I next talked to Lora Bay. I asked Bay if she saw anything that had occurred. She stated that she did not see it, but when the arguing was getting more intense she had her son, Nathanial Bay and also the son of Johnston and Anderson, Elijah Johnston come back with her to the back of the trailer to watch the TV while they were arguing. She stated she did this so that both the small boys did not have to witness the argument between Johnston and Anderson. Bay did state that her and the children could hear the arguing and the fighting from their location because of the fight being so loud.

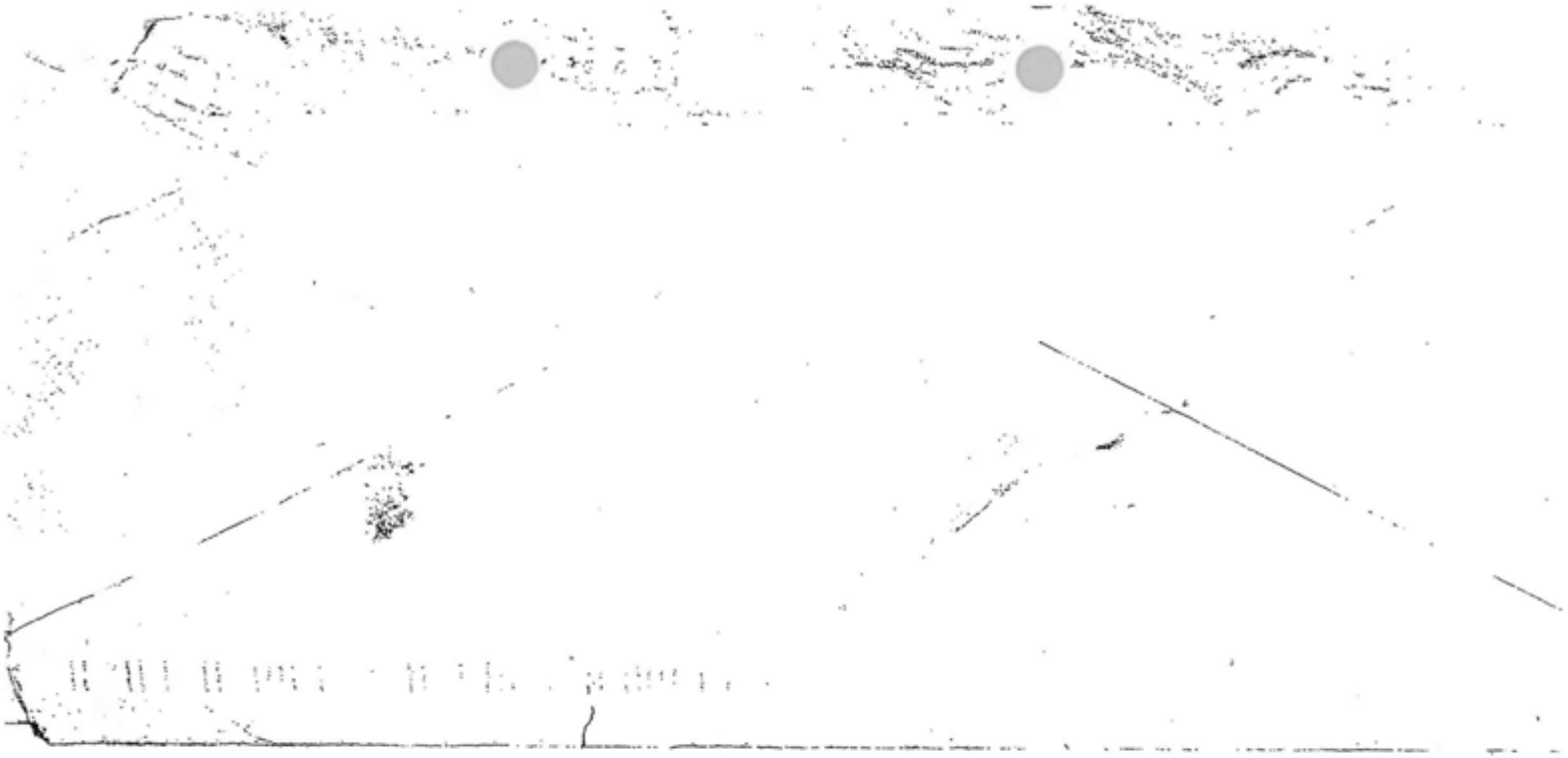
I next took photographs with the patrol camera of Johnston's forehead and left cheek neck area for evidence in this case.

I checked out at 1029 Cedar Ave. #23 and contacted Desiree Anderson at that location. I informed Anderson why I was there and asked her to tell me what had occurred earlier at 3625 17th Street. Anderson immediately stated that it was her fault and that she had lost her temper, that she had hit, scratched and bitten Johnston. I asked her if at any time Johnston had hit her or anything to that effect. She stated that he did not, that the only thing that he did was push her away from him. She then again stated that it was her that lost her temper and that she was the only one that acted violently in the situation. Given the situation, with Anderson having her son, Elijah Johnston already asleep at that location, and it being an hour since the incident occurred, Anderson was issued a C&S for Domestic Battery for hitting, scratching and biting Michael Johnston. No other charges are filed in this case.

End of Report

Ofc. Doug Boyle #320

Reviewed by:



Leotis Braniff III
PO Box 1584
Lewiston ID 83501

83501+1461

It's not right, you accusing me of killing my child. Because that's what it was. It was mine and I loved it and wanted it more than life. I had names chosen, I knew my due date, I was excited damnit. I didn't do anything to hurt it, nothing I could control anyway. I was under too much stress, but I was eating right and not drinking or smoking. I knew I was pregnant at only 2½ weeks and I lost it at 4½ weeks, 2 days before I had my official pregnancy test scheduled. There wasn't much time for telling — I had planned to tell you after the test, but well, that didn't happen. I've had to listen to people tell me that "these things happen" and "it was probably for the best" blah blah blah. It's been one of the worst things to ever happen to me and I've been dealing with it by myself. Yeah, I know you had to hear it, and I heard it. But I wasn't

going to hide it from you. I'm sorry. There was a good chance I lost it because of my blood type. I have a Rh negative blood type. By chance, is yours a positive? If so, that would help explain it a little better. my - type rejects a positive type baby - if you were positive, that made it 50/50 that I would miscarry just because of blood types alone. A positive person carries possibilities for neg. & possitive babies, thats why I said 50/50. But, in the end, I just don't know why. It wasn't my fault though, and I hope someday you believe that. Why did you send that ring to me? You said you'd keep it. Does this mean you've moved on? You know I can't leave where I'm at. The only way I'll ever be free is if he dies or [illegible] want me —

And you know that will never happen. I'm sorry I hurt you. If I could go back and change things, I would. I miss you so much. It hurts all the time, knowing what I grew up, just knowing you're hurting and its my fault. I live with that pain and guilt everyday, so don't think I got away blame free or unscathed. Never think I don't care still. I made my choice and I will spend the rest of my life here in my hell on earth. This is just the way it is. I'm sorry. You still mean the world to me, believe it or not.

Love,

Denise

Did you get the package I sent you?

There are still days when I think of jumping. Maybe in another few weeks the time will be right. I just

07-L1915

LEWISTON POLICE DEPARTMENT

Medical Release

On JUNE 19, 2007, at 1100 hours, DESIREE DAWNE ANDERSON
(DATE) (TIME) NAME (FIRST, MIDDLE, LAST)
received medical attention from St. Joseph Regional Medical Center personnel.

It was determined that He/She:

- ☐ Could be safely released into police custody and incarcerated if necessary.
- ☐ Should not be incarcerated due to the injury/illness for which he/she was examined.
- ☐ Should be hospitalized due to the injury/illness examined for.
- ☐ Refused the medical attention which was offered.

The subject was treated for (complete after release signed): MISCARRIAGE.

Special instructions and/or medication prescribed:

Attending Physician:

Ambulance Attendant:

Officer(s): J. ARNESON #216.

Related Case No.: 07-L17915

RELEASE OF INFORMATION

I authorize St. Joseph Regional Medical Center, its employees and members of its medical-dental staff, to release the information contained on this form, together with any other information it has about the condition or conditions for which I was examined or treated on this date (including information concerning mental health or drug and alcohol abuse, if any), to the Lewiston Police Department, to the Nez Perce County Sheriff's Office, to any representative of either of these organizations, and to any physician who provides follow-up care to me while I am in the custody of either of those organizations. I further authorize St. Joseph Regional Medical Center to furnish photocopies of information extracted from patient-related medical and billing records (including information concerning mental health or drug and alcohol abuse, if any, in accordance with federal law) to any person or entity who is or may be responsible to pay, authorize, review or otherwise act on claims for payment of any part of the care received by me at the hospital, including any insurer, employer, governmental agency or individual. This consent is subject to revocation at any time. If not previously revoked, this consent will terminate 90 days from the date hereof, but revocation will not affect information furnished while it is in force.

Signature of Patient: X Desiree Anderson

WHITE COPY - Lewiston Police Department YELLOW COPY - St. Joseph Regional Medical Center PINK COPY - Nez Perce County Sheriff's Office

HISTORY OF PRESENT ILLNESS:
This is a 30 year-old female. Cramping abdominal discomfort, pelvic discomfort and vaginal bleeding. She thinks she is about 4 or 5 weeks pregnant. Her last period was May 13th but she has been having some cramping this morning and bleeding this morning about 8. She has had a couple other deliveries. She cannot take Tylenol, Ibuprofen or Aspirin.

PAST MEDICAL HISTORY:
Includes depression and some suicidal ideations in the past and deliveries and thoracic outlet syndrome.

SOCIAL HISTORY:
She is divorced. She does not work. Her doctor is Dr. Black.

REVIEW OF SYSTEMS:
Crampy pelvic discomfort, some vaginal bleeding, spotting. No right or left quadrant adnexal tenderness, no upper abdominal pain, no flank pain, no fever, no chills, no coughing. She has not been plagued by headaches or vomiting with this.

PHYSICAL EXAMINATION:
VITAL SIGNS: Temperature 98.3, blood pressure 107/70, pulse of 84. she is in room B. She was quite upset because she had to wait a while. She has no facial asymmetry, no scleral icterus, conjunctiva pallor. LUNGS: are clear, no flank tenderness.

Note she has slight suprapubic tenderness. No guarding, no rebound, no abdominal distention, no upper abdominal tenderness. No leg swelling, calf tenderness or redness. Speculum exam - there is mild, small amount of blood in the vaginal vault. The uterus is not particularly large or tender.

LABORATORY, X-RAYS & OTHER STUDIES:
CT was done to look for ectopic and basically no pregnancy is seen. She does have a small cyst. Her blood type is A-. White count 11,100, hemoglobin 14.5.

IMPRESSION:
Probable missed overt abortion.

PLAN:
RhoGAM was ordered. Oxycodone for pain. She states she can take that. I will discharge her home. The patient was never happy the whole time she was here. Always upset.

EMERGENCY DEPARTMENT REPORT

ST JOSEPH REGIONAL
MEDICAL CENTER
Lewiston, Idaho

Patient Name: ANDERSON,DESIREE D
Acct/Unit Number: J8649253 J083899
Physician: HOCUM,BRIAN
Admit Date:
Location/Room # ER
Discharge Date: 06/19/07

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT OF MOTION TO DETERMINE COMPETENCY

NOTE: I did offer her Demer[redacted]IM and she refused this cause [redacted] drove.

BRIAN R. HOCUM, M.D.

MR.LXG
D: 06/19/2007 20:02:27
T: 06/23/2007 14:30:01
481436

EMERGENCY DEPARTMENT REPORT

ST JOSEPH REGIONAL
MEDICAL CENTER
Lewiston, Idaho

Patient Name: ANDERSON,DESIREE D
Acct/Unit Number: J8649253 J083899
Physician: HOCUM,BRIAN
Admit Date:
Location/Room # ER
Discharge Date: 06/19/07

PATIENT: ANDERSON,DESIREE D	ACCT #: J8649253	LOC: ER	U #: J083899
	AGE/SX: 30/F	ROOM:	REG: 06/19/07
	DOB: [redacted]	BED:	DIS:
REG DR: HOCUM,BRIAN	STATUS: DEP ER	TLOC:	DOC.PT.ID:

SPEC #: 0619:ST00043S	COLL: 06/19/07-UNK	STATUS: COMP	REQ #: 01143836
	RECD: 06/19/07-1526	SUBM DR: HOCUM,BRIAN	
ENTERED: 06/19/07-1521		OTHR DR:	
ORDERED: CT/NG DNA SDA			

Test	Result	Flag	Reference	
CT/NG DNA SDA				
> CHLAMYDIA TRACHOMATIS DNA, SDA	NOT DETECTED		NOT DETECTED	QU
> NEISSERIA GONORRHOEAE DNA, SDA	NOT DETECTED		NOT DETECTED	QU

Test performed at QUEST DIAGNOSTICS-PORTLAND
6600 SW HAMPTON STREET
PORTLAND, OR 97223-8348
Director: JOEL M. SHILLING, MD

QU - QUEST DIAGNOSTICS

PATIENT: ANDERSON,DESIREE D	ACCT #: J8649253	LOC: ER	U #: J083899
	AGE/SX: 30/F	ROOM:	REG: 06/19/07
	DOB: [redacted]	BED:	DIS:
REG DR: HOCUM,BRIAN	STATUS: DEP ER	TLOC:	DOC.PT.ID:

ABO/RH TYPE				
> BLOOD TYPE	A NEG			ML

ML - PATHOLOGISTS' REGIONAL LABORATORY
415 6TH ST. LEWISTON, ID 83501

PATIENT: ANDERSON,DESIREE D	ACCT #: J8649253	LOC: ER	U #: J083899
	AGE/SX: 30/F	ROOM:	REG: 06/19/07
	DOB: [redacted]	BED:	DIS:
REG DR: HOCUM,BRIAN	STATUS: DEP ER	TLOC:	DOC.PT.ID:

SPEC #: 0619:H00167S	COLL: 06/19/07-1505	STATUS: COMP	REQ #: 01143818
	RECD: 06/19/07-1508	SUBM DR: HOCUM,BRIAN	
ENTERED: 06/19/07-1450		OTHR DR:	
ORDERED: CBC/ADIFF/PLT			

	Test	Result	Flag	Reference	
	CBC/AUTO DIFF/PLT				
>	WBC	11.1	*H	4.5-11.0 K/mcL	ML
>	RBC	4.53		4.00-5.20 M/mcL	ML
>	HGB	14.5		12.0-15.0 g/dL	ML
>	HCT	41.5		36.0-48.0 %	ML
>	MCV	91.4		80.0-100.0 fL	ML
>	MCH	32.0		26.0-34.0 pg	ML
>	MCHC	35.0		31.0-36.0 g/dL	ML
>	RDW	12.7		11.5-14.5 %	ML
>	PLT CT	262		140-440 K/mcL	ML
>	MPV	8.1		7.4-10.4 fL	ML
>	GRAN%	72.1		38.0-78.0 %	ML
>	LYMPH%	22.8		15.5-49.0 %	ML
>	MONO%	3.7		1.0-9.0 %	ML
>	EOSIN%	0.9		0.0-7.0 %	ML
>	BASO%	0.5		0.0-2.0 %	ML
>	GRAN #	8.0		1.8-8.0 K/mcL	ML
>	LYMPH #	2.5		1.5-4.8 K/mnL	ML
	MONO #	0.4		0.1-0.9 K/mcL	ML
>	EOSIN #	0.1		0.0-0.7 K/mcL	ML
>	BASO #	0.1		0.0-0.3 K/mcL	ML

ML - PATHOLOGISTS' REGIONAL LABORATORY
415 6TH ST. LEWISTON, ID 83501

PATIENT: ANDERSON,DESIREE D	ACCT #: J8649253	LOC: ER	U #: J083899
	AGE/SX: 30/F	ROOM:	REG: 06/19/07
	DOB: [redacted]	BED:	DIS:
REG DR: HOCUM,BRIAN	STATUS: DEP ER	TLOC:	DOC.PT.ID:

SPEC #: 0619:U00036S COLL: 06/19/07-1235 STATUS: COMP REQ #: 01143713
RECD: 06/19/07-1235 SUBM DR: HOCUM,BRIAN

ENTERED: 06/19/07-1229 OTHR DR:
ORDERED: UA AUTO, UA MICROSCOPIC
COMMENTS: Added Tests: Micro & C&S, if indicated
QUERIES: Urine Source: Clean Void Midstream

	Test	Result	Flag	Reference	
	URINE MACROSCOPIC				
>	COLOR	P.YELLOW			ML
>	APPEARANCE	HAZY			ML
>	SPEC. GRAVITY UA	1.016		1.003-1.030	ML
>	PH	5.0		5.0-9.0	ML
>	PROTEIN	NEG		<30 mg/dL	ML
>	GLUCOSE	NORM		NORM mg/dL	ML
>	KETONE	NEG		NEG mg/dL	ML
>	UROBILINOGEN	NORM		NORM mg/dL	ML
>	BILIRUBIN	NEG		NEG mg/dL	ML
>	BLOOD	250(4+)	*H*	<5 ery/mcL	ML
>	NITRITE	NEG		NEG	ML
>	LEUKOCYTE ESTERASE	NEG		NEG /mcL	ML
	URINE MICROSCOPIC				
>	RBC	>100	*H*	0-2 /hpf	ML
	WBC	0-2		0-4 /hpf	ML
	EPITHELIAL CELLS	FEW		FEW /hpf	ML
>	BACTERIA	0		0 /hpf	ML
>	C&S INDICATED?	NO			ML

ML - PATHOLOGISTS' REGIONAL LABORATORY
415 6TH ST. LEWISTON, ID 83501

HISTORY OF PRESENT ILLNESS:
Desiree is a 30 year-old who was seen yesterday by Dr. Hocum for spontaneous abortion. She returns for administration of RhoGAM. She states she is still having some pain but is doing reasonably well on the codone.

I spent some time talking to her about miscarriage and the rational behind giving the RhoGAM. The patient will follow up with Dr. Black.

_____
JAY A. HUNTER, M.D.

MR.LXG
D: 06/20/2007 07:24:01
T: 06/23/2007 20:05:41
481490

MINOR CARE DEPARTMENT REPORT

ST JOSEPH REGIONAL
MEDICAL CENTER
Lewiston, Idaho

Patient Name: ANDERSON,DESIREE D
Acct/Unit Number: J8650244 J083899
Physician: HUNTER,JAY
Admit Date:
Location/Room # MC
Discharge Date: 06/20/07

St. Joseph Regional Medical Center P.O. BOX 816 * LEWISTON, IDAHO 83501 (208) 743-2511

PATIENT NAME/ADDRESS
ANDERSON, DESIREE D
1029 CEDAR AVE TRLR 17
LEWISTON, ID 83501
PHONE (208)553-1576
SOC.SEC.NO. 538-90-9318
EMPLOYER UNEMPLOYED

GUARANTOR NAME/ADDRESS
ANDERSON, DESIREE D
1029 CEDAR AVE TRLR 17
LEWISTON, ID 83501
PHONE (208)553-1576
RELATIONSHIP SAME AS PATIENT
EMPLOYER UNEMPLOYED
FINANCIAL CLASS SELF

ACCOUNT NO.	ROOM/BED	TYPE	LOCATION/SERVICE	MEDICAL RECORD NO.
J8649253		ER	ER	J083899

DATE OF BIRTH	AGE	SEX	M.S.	RELIGION	RACE	ARRIVAL MODE
12/15/76	30	F	D	NO PREFEREN	W	WALK

PERSON TO NOTIFY/ADDRESS — RELATIONSHIP
ANDERSON, NADINE — MOTHER
1029 CEDAR AVE #17
LEWISTON, ID 83501
HOME PHONE (208)746-5741 WORK PHONE

NEXT OF KIN/ADDRESS — RELATIONSHIP
JOHNSTON, MICHAEL — EXH
1029 CEDAR AVE #23
LEWISTON, ID 83501

HOME PHONE (208)790-2740 WORK PHONE SCHWABS SCREW

INSURANCE NAME	POLICY NUMBER	COVERAGE NUMBER	SUBSCRIBER INSURED NAME
SELF PAY			ANDERSON, DESIREE D

ACCIDENT INFORMATION	REASON FOR VISIT	MAIDEN/OTHER NAME
	C/O ABD CRAMPING/VAG BLEEDING	JOHNSTON, DESIREE
ACCIDENT DATE/TIME	COMMENTS URGENT Fam Dr: BLACK, ELIZABETH	ADVANCED DIRECTIVES UNK

ADMISSION DATE/TIME	ADMITTING PHYSICIAN	ATTENDING PHYSICIAN	REGISTRAR
06/19/07 12:15		HOCUM, BRIAN	AD.SJH
DISCHARGE DATE/TIME	DISCHARGED TO:	HOSPITAL DAYS	SERVICE

PRINCIPAL DIAGNOSIS (CONDITION AFTER STUDY RESPONSIBLE FOR ADMISSION)

SECONDARY DIAGNOSIS

OPERATION PROCEDURE

CONSULTANTS

CONDITION ON DISCHARGE: RECOVERED ___ IMPROVED ___ NOT IMPROVED ___ DIED: UNDER 48 Hrs. ___ OVER 48 Hrs. ___

I certify that the narrative descriptions of the principal and secondary diagnosis and the major procedures performed are accurate and complete to the best of my knowledge.

X
SIGNATURE OF ATTENDING PHYSICIAN | DATE

A#: [redacted]
U#: [redacted]
L#: [redacted]

FORM ID: FS (Face Sheet) [redacted] ANESTHESIA PHYSICIAN CHART Inpt/Opt Admission Record

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT
OF MOTION TO DETERMINE COMPETENCY

(B)

Time: 1212 | Patient Name: Anderson, Desiree | Injury ☐ Yes ☐ No

TRIAGE / CHIEF COMPLAINT: 4o ABD cramping & Vaginal bleeding. Cramping started last night & bleeding this AM. Denies other problems. Nausea but denies diarrhea or vomiting.

Current Medications: (Including OTC & herbal) Multi Vit

Allergies / Reactions: ☐ NKA ASA Ibuprofen Tylenol Sulfa/ PCN | Latex Allergy Risk: ☐ N ☒ Y If Yes: (Contact Dermatitis) / Delayed Hypersensitivity / Immediate Hypersensitivity

PMH: ☒ None ☐ COPD/Asthma ☐ Cardiac ☐ Diabetes ☐ Seizures ☐ Hypertension

Other:

Patient's Primary Care Physician	Time Notified	Time Respond	Nurse Init.	Authorized	Denied
Black					

E.D. Doctor to see ☐

Tobacco Use ☒ Yes ☐ No | ETOH/Substance ☐ Yes ☒ No | Caffeine ☐ Yes ☒ No

Arrival Mode: ☒ Walk ☐ Wheelchair ☐ Ambulance ☐ Police ☐ Carried ☐ Stretcher ☐ Air ☐ Transfer

BP 107/70 | Temp 98.3 ☐ O R T | Weight # kg | Height

P 94 ☐ Irreg ☐ Reg | R 12

Pulse Oximeter ☐ Room Air ☐ O2 ___ L %

Date of last Tetanus

LNMP 4-5 wks ago pregnant (neg 13)

PRE-HOSPITAL CARE: ☒ N/A ☐ Refer to EMS Report/Radio Communication Form

CARE AT HOME: ☒ Yes ☐ No

Airway:	☐ Patent	☐ Partially Obstructed	☐ Obstructed			
Breathing:	☐ Normal	☐ Labored	☐ Shallow			
Circulation:	☐ Pink	☐ Pale	☐ Cyanotic			
Skin:	☐ Warm	☐ Hot	☐ Cool	☐ Dry	☐ Diaphoretic	
Mental Status:	☐ Alert	☐ Cooperative	☐ Anxious	☐ Lethargic		
	☐ Oriented x ___		☐ Confused	☐ Combative	☐ Unconscious	

VISUAL ACUITY

OS: 20/___ OD: 20/___ ☐ With Glasses ☐ Without Glasses ☐ With Contacts

R.N. Signature: ▶ [signature] Time: 1215

PAIN
0 = No Pain
1 = Mild Pain
2 = Moderate Pain
3 = Quite a Lot of Pain
4 = Very Bad Pain
5 = Unbearable
(Describe Duration, Location & Quality in Chief Complaint)
8/10

☒ Acceptable level of pain control to the pt. / family. LEVEL 0-5 0-4

☐ Pain Management Education 10

Pain Scale: Importance of effective Pain Management, Interventions if admitted.

(0-1) (2-16) NEONATAL / PEDIATRIC
Age Appropriate:
☐ Growth ☐ Development
☐ OFC ___ ≤ 2 yrs. PRN
☐ Immunizations Current
☐ Information Given/PCP referral for follow-up

TRIAGE ACUITY:
Non-Urgent
Urgent
Emergent
ED / MC

TRIAGE INTERVENTION: ☐ NA
Isolation Precautions: ☐ Yes ☐ No
☐ Ice ☐ Splint ☐ Dressing
☐ Special Spiritual Religious Needs
☐ Other

Additional Record Supplements
☐ Focus of Care / Treatment (pg 4)
☐ Code 4 Sheet
☐ Burn Flow Sheet
☐ Cardiac Flow Sheet
☐ Neuro Flow Sheet

X-RAY		LABORATORY
	Pelvis	CBC
	Hip	BMP
Chest (one)	Femur	CMP
Chest (two)	Knee (comp)	LFT
ABD (one)	Tibia/Fibula	Cardiac Panel
ABD (two)	Ankle (comp)	CK C MB Stat If
	Foot (comp)	Troponin I
Hand	Toes	Beta HCG
Fingers		ABG
Wrist	Ribs L R	Dig Level
Forearm	IVP	WSR
Elbow	Mandible	Amylase
Shoulder (comp)	Skull	Lipase
Clavicle	Facial Bones	Glucose
Humerus	Nasal Bones	Monospot
	Pelvic US	Alcohol
Cervical Spine	ABD US	Protime
Thoracic Spine	Venus Duplex	APTT
Lumbar Spine		Urine Cult
Sacral Spine	CT HEAD S	Blood Cult
X-table lat ___	CT Head C&S	T&C ___ Units
	CT ABD	Type & Screen
	CT CHEST	Urine Drug Screen
		GC / Chlamydia
		KOH / Wet Mount
		Quick Strep
		12 Lead ECG

Physician Orders: ☐ Upgrade to ED ☐ PL notified of upgrade ___ Initials

HCG Q neg (1300)

Refused blood 1st IM

HCG TITER

ABO typing

Rhogam

☒ CHARGES COMPLETE

ADDRESSOGRAPH

ANDERSON, DESIREE D 30Y
HOGUE, BRIAN J003099
ER F 12/15/76
05/15/07
NO PREFERENCE J0649253

ST. JOSEPH REGIONAL MEDICAL CENTER
Lewiston, Idaho

EMERGENCY DEPARTMENT PATIENT RECORD

Page 1

003782 (4/02)

AFFIDAVIT OF CHARLES E. KOVIS IN SUPPORT OF MOTION TO DETERMINE COMPETENCY

Time	BP	Pulse	Resp	Temp	Monitor	SaO2	Blood Sugar	Output/Source	Time	IV Fluid	Site / Cath Size	Rate/Amt. Infused	Initials
	/												
	/												
	/												
	/												
	/												
	/												

Time	Medication / Treatment	Site	Initial	Time	Pain Scale 0-5

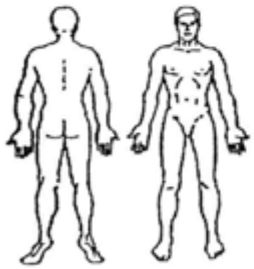
Time	Medication / Treatment	Site	Initial	Time	Pain Scale 0-5

Time	Focus of Care / Treatment	Initial
1220	Amb to Room B -	D
1240	Pt. resting at this time —	NE
1340	Pt. resting quietly. No complaints at this time. Pelvic set up done. Pt. awaiting exam.	NE
1440	Pt. c/o minimal lower abdominal pain. Pt. still awaiting pelvic exam. No specific requests. Repositioned self for comfort	NE
1500	Brief pelvic exam by Dr Hotum, states she continues to have discomfort —	D
1520	Refuses pain med 2° inability to drive herself	D

Time	Focus of Care / Treatment	Initial
	home. Abruptio speech, Pt would not wait explained to	D
1535	Pt to ultrasound per stretcher —	D
1600	Returned to ED —	D
1630	cont to complain about wait	D
1635	Recheck by Dr Hotum —	D
1700	Discussed f/u follow up care. Pt's fearful asked whether she caused a miscarriage 2) the importance of discussed at length. She opts to return tomorrow for rhogam. —	D

☐ SEE ADDITIONAL PATIENT RECORD SUPPLEMENTS

NURSING DIAGNOSIS (see key back of page 1)	INTERVENTION	GOAL	INITIALS / TIME
1. ☒ risk for alteration in fluid balance	Diagnostics ordered, Fluid balance	Fluid balance	NE 1220
2. ☐			



CONDITION AT DISCHARGE

DISCHARGE INSTRUCTIONS ☐ Yes ☐ No

FOLLOW-UP PHYSICIAN

Total Disability _____ Days

Partial Disability _____ Days

X _____ M.D.
PHYSICIAN'S SIGNATURE

Discharge Diagnosis:

1. _____
2. _____
3. _____

☐ Emergency Physician
☐ Attending Physician
☐ Dictated, But Not Read
☐ Not Dictated

ADDRESSOGRAPH

ANDERSON, DESIREE D 33Y
HOCUM, BRIAN J083899
ER F 12/15/76
06/15/07

ST. JOSEPH REGIONAL MEDICAL CENTER Lewiston, Idaho

EMERGENCY DEPARTMENT PATIENT RECORD

J3549253

000782 (4/02)

NEURO

☐ N/A ☒ WNL | 15 GCS

EYE OPENING
4 - Spontaneous
3 - To Voice
- To Pain
- None

VERBAL RESPONSES
5 - Oriented
4 - Confused
3 - Inapprop. Words
2 - Incomp. Sounds
1 - None

MOTOR RESPONSES
6 - Follows Command
5 - Localizes Pain
4 - Withdraws to Pain
3 - Flexes to Pain
2 - Extends to Pain
1 - None

HAND GRASP / LEG MOVEMENT

	Left	Right
	☒	☐ Strong
	☐	☐ Weak
	☐	☐ Absent

PUPILS Right Left Both

☒ Equal ☐ Fixed ☐ Sluggish
☐ Brisk ☐ Dilated ☐ Cataract
☐ Pinpoint ☐ Non-Reactive

RESPIRATORY

☐ N/A ☒ WNL

CHEST MOVEMENT
☒ Symmetrical
☐ Labored
☐ Asymmetrical
☐ Unlabored

BREATH SOUNDS

Left		Right
☒	Clear	☒
☐	Rales	☐
☐	Rhonchi	☐
☐	Wheezes	☐
☐	Decreased	☐
☐	Absent	☐

Cough: ☐ Yes ☒ No
Sputum: ☐ Yes ☒ No
Color: _____

CARDIOVASCULAR

☐ N/A ☒ WNL
MONITOR
RHYTHM _____

PULSES	Left	Right
Normal	☐	☐
Bounding	☐	☐
Weak	☐	☐
Absent	☐	☐

EDEMA - Absent + Present
JVD - Absent + Present
CAP REFILL ☐ Normal ☐ Delayed
SKIN ☐ Warm ☐ Hot ☐ Cool/Cold
MOISTURE ☐ Dry ☐ Diaphoretic

PREGNANCY
☐ N/A
☐ Denies
☐ Yes
Gravida 2
Para 2
AB 0
EDC _____
Fetal Heart Rate Unknown

ELIMINATION / ENDOCRINE

GI ☐ N/A ☒ WNL
Bowel Sounds: ☐ Present ☐ Absent
Last BM _____
Abdomen: ☒ Soft ☐ Nontender ☐ Firm
☐ Distended ☒ Tender ☐ Guarding
RLQ knee guard

Fluids / Electrolytes / Nutrition
Nutritional Status ☒ WNL
☐ Problem Identified _____ (Reference Nutrition Problem List)
☐ Dietary Referral
☐ Nausea ☐ Vomiting ☐ Diarrhea
Duration _____
Mucous Membranes ☐ Moist ☐ Dry

GU ☐ N/A ☐ WNL
☐ No Complaint ☐ Flank Pain L R
☐ Hematuria ☐ Frequency ☐ Dysuria
☐ Retention ☐ Incontinence
Urine: Multistix for Urinalysis vaginal bleeding
☐ Negative ☐ Positive
Color _____ Character _____

ACTIVITY / REST / INTEGUMENTARY

ORTHO INJURY ☒ N/A ☐ WNL
☐ CMS Intact
Location _____

Sleep Patterns Intact
☐ Yes ☒ No

BURNS ☒ N/A ☐ WNL
☐ Thermal ☐ Chemical
☐ Electrical
Describe: _____
☐ See Burn Sheet

INTEGUMENTARY ☐ N/A ☐ WNL
Intact: ☐ Yes ☐ No
☐ Abrasions Describe: _____
☐ Avulsion _____
☐ Ecchymosis _____
☐ Hematoma _____
☐ Lacerations _____
☐ Deformity _____
☐ Amputation _____

NCTIONAL STATUS
Appearance: ☐ Groomed ☐ Unkept
Self Care: ☐ Able ☐ Needs Help

BLEEDING
☐ Controlled with pressure
☐ No excessive bleeding

SAFETY MEASURES
☐ Side Rails Up
☐ x1 ☐ x2 ☐ N/A
☒ Call Bell
☐ Family Present
☐ Nurse In Attend.
☐ Papoose Board
☐ History of Falls
☐ Restraints
(See Narrative)

PSYCHOSOCIAL

ROLE FUNCTION
☐ Student
☐ Occupation _____
☐ Plan to Return to Work ☐ Y ☐ N
☐ Retired ☐ Disabled ☐ Unemployed

LITERACY / LEARNING
☐ Language (Inability to read, write or speak English)
Sensory ☐ Deaf ☐ Blind
☒ No Barriers Identified
Learning Preference _____

INTERDEPENDENCE
☒ Adequate Support / Systems Intact
☐ Homeless

ABUSE / NEGLECT ASSESSMENT
☒ Negative Assessment
☐ Social Service Referral _____

SELF-CONCEPT / CULTURAL / SPECIAL SPIRITUAL RELIGIOUS NEEDS
☒ No Needs Identified
☐ Needs Identified _____
☐ Pastoral Care Notified

MISCELLANEOUS

☒ PT Education RE: Equipment Use

Nurse's Signature: ▶ N. Enfleden RN **Time** ▶ 1345

PATIENT OUTCOMES AND DISCHARGE INSTRUCTIONS

Referral Made To:
☐ Social Service
☐ MHC
☐ Dietician
☐ Pt. Education
☐ Rehab
☐ CPS
☐ Law Enforcement
☐ Public Health

Patient Outcomes
☐ Same
☒ Improved
☐ Pain Scale 0 1 2 3 4 5
☐ Deceased
☐ Coroner Notified _____
☐ Organ donation addressed
☐ LWBS
☐ AMA

Discharged Via:
☒ Ambulatory
☐ W/C
☐ Stretcher
☐ Ambulance
Reason _____
☐ Crutches
☐ Release with Responsible Adult
☐ Carried

Disposition:
☒ Home
☐ Admission
☐ Nursing Home
☐ Other: _____
☐ Morgue

☐ Report To: _____ Time: _____
☐ Transferred To: _____ Time: _____
☒ Discharged with instructions for: miscarriage, return tomorrow for ultrasound
☐ Med Sheet Information
☒ Voiced understanding of instructions
☐ Discharged with Rx for _____
☐ Starter-PAK given for _____
☐ Discharged with Work Release x _____ days

Follow-up Care:
☒ PCP Black
☐ Specialist _____
☒ Return to ED/MC for recheck tomorrow
☐ Physician/walk-in facilities list for elective follow-up care

DISCHARGE TIME 1700

PLAN FOR UNRESOLVED NURSING DX.:

NURSE'S SIGNATURE	Initials
Brownell	B
Enfleden	E

ADDRESSOGRAPH

ANDERSON, DESIREE D JOY
BROWN, BRIAN JO: 3859
F 12/15/76
06/19/07
NO PREFERENCE J3649253

ST. JOSEPH REGIONAL MEDICAL CENTER Lewiston, Idaho
EMERGENCY DEPARTMENT PATIENT RECORD

007862 (4/02)

St. Joseph Regional Medical Center
415 6TH STREET • P.O. BOX 816 • [redacted]TON, IDAHO 83501
(208) 799-5[redacted]

DIAGNOSTIC IMAGING REPORT

Name: ANDERSON,DESIREE D
Phys: HOCUM,BRIAN
DOB: [redacted] Age: 30 Sex: F
Acct: [redacted] Loc: ER
Exam Date: 06/19/2007 Status: REG ER
Radiology No: 071804
Unit No: J083899

EXAM#	TYPE/EXAM
000538298	US/PELVIC US

History: Abdominal and pelvic pain and cramping with vaginal bleeding.

Findings:

The pelvis was imaged both transabdominally and endovaginally. The uterus is 4.8 x 5.4 x 8.4 cm. In the myometrium anteriorly in the upper body there is a submucosal hypoechoic mass which measures 1.8 x 1.9 x 2.0 cm. The endometrium is 5 mm in thickness. Within the endometrial canal there are small focal areas of echogenic material which could be blood clots. No gestational sac is seen in the uterus or in the adnexa. The right ovary is 2.7 x 3.0 x 3.4 cm. Within it there is a simple cyst which measures 2.0 x 2.0 cm. The left ovary is normal and measures 2.3 x 2.7 cm. There is no other evidence of a pelvic mass, cyst, free fluid or ectopic pregnancy.

Impression:

1. 1.8 x 1.9 x 2 cm submucosal mass in the fundus of the uterus. This is probably a submucosal fibroid.

2. Echogenic material within the endometrial canal consistent with acute blood products.

mp

Mark W. Peterson, M.D.

CC: ELIZABETH BLACK, M.D.; BRIAN HOCUM, M.D.

Transcribed Date/Time: 06/19/2007 (1658)
Transcriptionist: RD.KJF
Printed Date/Time: 06/19/2007 (1703)

Prosecuting Attorney
Nez Perce County, Idaho
Post Office Box 1267
Lewiston, Idaho 83501
Telephone: (208) 799-3073

FILED

2008 DEC 2 PM 4 47

PATTY O. WEEKS
CLERK OF THE DIST. COURT

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

THE STATE OF IDAHO,	)	CASE NO. CR2007-0008107
Plaintiff,	)	STATE'S REQUESTED INSTRUCTIONS
vs.	)	
LEOTIS B. BRANIGH III,	)	
Defendant.	)	

Herewith submitted are STATE'S REQUESTED INSTRUCTIONS numbered consecutively ONE through FOURTEEN.

DATED this 2ND day of December 2008.

Daniel L Spickler

DANIEL L. SPICKLER
Prosecuting Attorney

JURY INSTRUCTION NO. 1

The Defendant, LEOTIS B. BRANIGH III, is charged by Amended Information with the crime of MURDER IN THE FIRST DEGREE, I.C. § 18-4001, 18-4002 and 18-4003, a felony, alleged to have been committed in Nez Perce County, State of Idaho, on or about the 1st day of October 2007, the charging part of the Information being:

> That the Defendant, LEOTIS B. BRANIGH III, on or about the 1st day of October 2007, in the County of Nez Perce, State of Idaho, did willfully, unlawfully, deliberately, with premeditation, and with malice aforethought and/or by lying in wait, kill and murder MICHAEL S. JOHNSTON, a human being, by shooting him in the back with a gun from which he died.

To this Information, the Defendant pled "not guilty."

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 2

It is not necessary that every that every fact and circumstance put in evidence on behalf of the State be established beyond a reasonable doubt, but it is necessary to sustain a conviction that all facts and circumstances in evidence, when taken together, establish beyond a reasonable doubt the material elements of the offense charged.

State v. Strickland, 136 Idaho 264, 32 P.3d 158 (Ct.App. 01)

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 3

It is alleged that the crime charged was committed "on or about" a certain date. If you find the crime was committed, the proof need not show that it was committed on that precise date.

ICJI 208;
I.C. § 19-1414; *State v. Mundell*, 66 Idaho 297, 158 P.2d 818 (1945).

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 4

Under our law and system of justice, the Defendant is presumed to be innocent. The presumption of innocence means two things.

First, the State has the burden of proving the Defendant guilty. The state has that burden throughout the trial. The Defendant is never required to prove his innocence, nor does the Defendant ever have to produce any evidence at all.

Second, the State must prove the alleged crime beyond a reasonable doubt. A reasonable doubt is not a mere possible or imaginary doubt. It is a doubt based on reason and common sense. It is the kind of doubt which would make an ordinary person hesitant to act in the most important affairs of his or her own life. If after considering all the evidence you have a reasonable doubt about the Defendant's guilt, you must find the Defendant not guilty.

ICJI 103A

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 5

In order for the Defendant to be guilty of Murder, the State must prove each of the following:

1. On or about the 1st day of October 2007,

2. in the State of Idaho

3. the Defendant, LEOTIS B. BRANIGH III, engaged in conduct which caused the death of MICHAEL S. JOHNSTON,

4. the Defendant acted without justification or excuse, and

5. with malice aforethought.

If you find that the State has failed to prove any of the above beyond a reasonable doubt, you must find the Defendant not guilty of First Degree Murder. If you find that all of the above have been proven beyond a reasonable doubt, then you must decide if the Defendant is guilty of first degree murder.

ICJI 704;
I.C. § 18-4001.

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 6

In order for the Defendant to be guilty of First Degree Murder, the State must prove that the murder:

> was a willful, deliberate, and premeditated killing. Premeditation means to consider beforehand whether to kill or not to kill, and then to decide to kill. There does not have to be any appreciable period of time during which the decision to kill was considered, as long as it was reflected upon before the decision was made. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not premeditation.

If you unanimously agree that the State has proven the above special circumstance beyond a reasonable doubt, you must find the Defendant guilty of first degree murder. If you unanimously agree that the special circumstance has not been proven beyond a reasonable doubt, then you must find the Defendant guilty of second degree murder.

All other murder is murder of the second degree.

ICJI 705

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 7

You heard testimony that the Defendant, Leotis B. Branigh III, made a statement to the police concerning the crime charged in this case. You must decide what, if any, statements were made and give them the weight you believe is appropriate, just as you would any other evidence or statements in the case.

ICJI 323

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 8

"Malice" and "maliciously" mean the desire to annoy or injure another or the intent to do a wrongful act.

ICJI 343

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 9

Malice may be express or implied.

Malice is express when there is manifested a deliberate intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act,

2. The natural consequences of the act are dangerous to human life, and

3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word "aforethought" does not imply deliberation or the lapse of time. It only means that the malice must precede rather than follow the act.

ICJI 703;
I.C. § 18-4002.

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 10

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

ICJI 345

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 11

The death penalty is not a sentencing option for the court or the jury in this case.

ICJI 1701;
I.C. § 18-4004A(2).

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 12

A "deadly weapon or instrument" is one likely to produce death or great bodily injury. It also includes any other object that is capable of being used in a deadly or dangerous manner if the person intends to use it as a weapon.

ICJI 1206;
State v. Missenberger, 86 Idaho 321, 386 P.2d 559 (1963);
State v. Lenz, 103 Idaho 632, 651 P.2d 566 (Ct. App. 1982). I.C. § 18-905(d).

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 13

In this case you will return a verdict, consisting of a series of questions. Although the explanations on the verdict form are self-explanatory, they are part of my instructions to you. I will now read the verdict form to you. It states:

"We, the Jury, for our verdict, unanimously answer the question(s) submitted to us as follows:

QUESTION NO. 1: Is LEOTIS B. BRANIGH III, guilty or not guilty of MURDER IN THE FIRST DEGREE?

Not Guilty ____ **Guilty** _____

If you unanimously answered Question No. 1 **"Guilty"**, then proceed to answer Question No. 2. If you unanimously answered Question No. 1 **"Not Guilty"**, then you should simply sign the verdict form and advise the bailiff.

QUESTION NO. 2: Did LEOTIS B. BRANIGH III, personally use a deadly weapon in the commission of the crime of which you have found him guilty?

YES: ____ **NO:** _____

The verdict form then has a place for it to be dated and signed. You should sign the verdict form as explained in another instruction.

ICJI 223

STATE'S REQUESTED INSTRUCTION NO. _____

_____ GIVEN

_____ REFUSED

_____ COVERED

DATED this _____ day of December 2008.

_____
JUDGE

JURY INSTRUCTION NO. 14

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO, Plaintiff, vs. LEOTIS B. BRANIGH III, D.O.B.: [redacted], S.S.N.: [redacted], Defendant.	CASE NO. CR2007-0008107 VERDICT FORM

We, the Jury, duly impaneled and sworn to try the above-entitled action, for our verdict, unanimously answer the question(s) submitted to us as follows:

QUESTION NO. 1: Is LEOTIS B. BRANIGH III, guilty or not guilty of MURDER IN THE FIRST DEGREE?

Not Guilty ____ **Guilty** _____

If you unanimously answered Question No. 1 **"Guilty"**, then proceed to answer Question No. 2. If you unanimously answered Question No. 1 **"Not Guilty"**, then you should simply sign the verdict form and advise the bailiff.

QUESTION NO. 2: Did LEOTIS B. BRANIGH III, personally use a deadly weapon in the commission of the crime of which you have found him guilty?

YES: ____ **NO:** _____

DATED this ____ day of December 2008.

_____

Presiding Officer

Charles E. Kovis
Attorney at Law
312 S. Washington
Post Office Box 9292
Moscow, Idaho 83843
Telephone: (208) 882-3939
Fax: (208) 882-5379
Idaho State Bar # 4700

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO, Plaintiff, vs. LEOTIS B. BRANIGH III, Defendant.	CASE NO. CR-07-8107 **MOTION FOR PSYCHOLOGIST FEES AND COSTS** **UNDER SEAL**

COMES NOW, CHARLES E. KOVIS, attorney for Leotis B. Branigh III and moves this court for an allowance of psychologist fees and costs in this matter. This *Motion for Psychologist Fees and Costs* is supported by the affidavit of the undersigned submitted with this motion.

DATED this 24th day of November, 2008.

Charles E. Kovis

Charles E. Kovis
Attorney for Leotis B. Branigh III

Charles E. Kovis
312 S. Washington
Post Office Box 9292
Moscow, Idaho 83843
Telephone: (208) 882-3939
Fax: (208) 882-5379
Idaho State Bar # 4700

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO, Plaintiff, vs. LEOTIS B. BRANIGH III, Defendant.	CASE NO. CR-07-8107 **AFFIDAVIT OF CHARLES E. KOVIS** **UNDER SEAL**

STATE OF IDAHO)
:ss.
County of Nez Perce)

Charles E. Kovis, being first duly sworn on oath, deposes and says:

1. My name is Charles E. Kovis. I am the attorney appointed to represent Mr. Leotis B. Branigh III.

2. On June 21, 2008, I employed a licensed psychologist, Dr. Craig W. Beaver, to assist me in the defense of Mr. Branigh. The employment of Dr. Beaver was previously approved by Judge Brudie.

3. Attached to this affidavit is Dr. Beaver's billing invoice which accurately

869

depicts all of the time he has expended up to November 13, 2008. The amount requested for Dr. Beaver's fees at $300.00 per hour is $7,441.75.

Dated: November 28th, 2008

Charles E. Kovis
CHARLES E. KOVIS

SUBSCRIBED and SWORN to before me this 28 day of November, 2008.

ALICIA M. FOTH
NOTARY
PUBLIC
STATE OF IDAHO

Notary Public in and for the State of Idaho
Residing at Moscow therein.
My commission expires:
5-5-2014

870

Craig W. Beaver, Ph.D., ABPP - CN
Licensed Psychologist

250 Bobwhite Court, Suite 220 Boise, Idaho 83706 (208) 336-2972 Fax (208) 336-4408
Mailing Address: P.O. Box 5445, Boise, Idaho 83705

SSN/TAX ID: [redacted]

Charles Kovis
Attorney at Law
P.O. Box 9292
Moscow, Idaho 83843

INVOICE
RE: Leotis B. Branigh, III
Case # CR-07-8107

06.21.2008	1 hour	Review of Records @ $300.00/hr
06.21.2008	4 hours	travel time @ $150.00/hr
06.11.2008	2½ hours	Diagnostic Interview @ $300.00/hr

Total Due: **$1650.00**

Craig W. Beaver, Ph.D., ABPP - CN

Licensed Psychologist

250 Bobwhite Court, Suite 220 Boise, Idaho 83706 (208) 336-2972 Fax (208) 336-4408
Mailing Address: P.O. Box 5445, Boise, Idaho 83705

SSN/TAX ID: [redacted]

Charles Kovis
Attorney at Law
P.O. Box 9292
Moscow, Idaho 83843

INVOICE
RE: Leotis B. Branigh, III
Case # CR-07-8107

07.15.2008		prior invoice – balance due $1650.00
07.24.2008	½ hour	Consultation w/ attorney @ $300.00/hr
08.19.2008	2 hours	travel time @ $150.00/hr
08.19.2008		airfare @ $277.01
08.19.2008		rental car @ $52.75
08.19.2008		lodging @ $101.99
08.20.2008	9 hours	Neuropsychological testing @ $250.00/hr
08.20.2008	2 hours	travel time @ 150.00/hr

Total Due: $5081.75

RED LION HOTEL
LEWISTON

621 21st Street Lewiston, Idaho 83501 (208) 799-1000 or 800-232-6730
Reservations 800-Red Lion (800-733-5466) or redlion.com

DENISON, MR JAMES
DR CRAIG W. BEAVER
250 BOB WHITE CT STE 220
BOISE, ID 83706 USA

ROOM NUMBER: 701
DAILY RATE: Muti
ROOM TYPE: QQN
ACCOUNT: 93600261750
CLERK:

DATE	DESCRIPTION	REFERENCE	AMOUNT
8/19/2008	ROOM TAX (2%)	ROOM TAX (2%)	$1.88
8/19/2008	SALES TAX (6.5%)	SALES TAX (6.5%)	$6.11
8/19/2008	ROOM CHARGE	#701 DENISON, MR JAMES	$94.00
		BALANCE DUE:	**$101.99**

)Return((RA Document 324644180
RESERVATION # 25761948-US-2B
CAR# 0 1 2 1 5 3 2 5 Car Group C
BLK CHEV COBA 4DR WA 419XRZ

DENISON,JAMES

Out LEWISTON, ID APT 19AUG08/1841
In LEWISTON, ID APT 20AUG08/1530
Miles-Out 5551 Miles-In 5564
Miles Driven 13 Fuel In 0/8
Method of pay = CLUB
AMEX XXXXXXXXXXX1005

Rate AQ/C 0 DY 20 HR		
0 MI @ .00	=	
20 HR @ 22.50	=	
0 DY @ 44.99	=	
0 WK @ 314.93	=	
MIN 1DY/AQ/C 13FM	=	44.99
TIME & MILEAGE	=	44.99
##$ 0.47/DY ERF	+ =	0.47
*4.30/DAY FEE	+ =	4.30
Subtotal	=	49.76
Tax 6.000%	+ =	2.99
Total Charges	=	52.75
AMOUNT DUE CV USD	=	52.75

*$3.00/DY CONCESSION FEE &
$.50/DY VEH LIC FEE RECOUP
##ENERGY RECOVERY FEE

The amount that appears in "Amount Due" has been billed to your AMEX Card.
All charges are subject to audit and change if any errors are found.
For local inquiries call 208-746-0488. Thank you for renting from Budget.

7D5B/1CD5/00233/10:31/F

Anne Knittle

From: Peggy Doyle [peggydoyle@comcast.net]
Sent: Wednesday, August 13, 2008 12:35 PM
To: 'Anne Knittle'
Subject: Ticketless confirmation

ATTN ANNE DENISON/JAMES*PD
CC
MAIL TICKETLESS

DR CRAIG BEAVER
PO BOX 5445
BOISE ID 83705-0445

AUG 13 2008 INVOICE:ITIN LOCATOR:ZLGZNG
6BQPD
19 AUG 08 - TUESDAY
ALASKA 2218 COACH CLASS OPERATED BY-HORIZON AIR
LV: BOISE 650P NONSTOP MILES- 198
AR: LEWISTON/CLKS 645P
SEAT-18B
FREQ FLYER AS 41864104

20 AUG 08 - WEDNESDAY
ALASKA 2217 COACH CLASS OPERATED BY-HORIZON AIR
LV: LEWISTON/CLKS 440P NONSTOP MILES- 198
AR: BOISE 635P
SEAT-18B
FREQ FLYER AS 41864104

CONFIRMATION FOR TKTLESS TRAVEL IS CF-NAUCYD

AIR TRANSPORTATION 221.40 TAX 30.61 TTL 252.01
PROCESSING FEE 25.00
SUB TOTAL 277.01
CREDIT CARD PAYMENT 277.01-
AMOUNT DUE 0.00

PAGE:01

Craig [redacted]. Beaver, Ph.D., AB[redacted] - CN
Licensed Psychologist

250 Bobwhite Court, Suite 220 Boise, Idaho 83706 (208) 336-2972 Fax (208) 336-4408
Mailing Address: P.O. Box 5445, Boise, Idaho 83705

SSN/TAX ID: [redacted]

Charles Kovis
Attorney at Law
P.O. Box 9292
Moscow, Idaho 83843

INVOICE
RE: Leotis B. Branigh, III
Case # CR-07-8107

08.22.2008		prior invoice – balance due $5081.75
08.25.2008		Psychological testing @ $150.00
08.25.2008		Psychological testing @ $110.00
08.25.2008		Psychological testing @ $150.00
08.25.2008	2 hours	Diagnostic Interview @ $300.00/hr
08.25.2008	2 hours	travel time @ 150.00/hr

Total Due: $6391.75

Craig W. Beaver, Ph.D., ABPP - CN

Licensed Psychologist

250 Bobwhite Court, Suite 220 Boise, Idaho 83706 (208) 336-2972 Fax (208) 336-4408
Mailing Address: P.O. Box 5445, Boise, Idaho 83705

SSN/TAX ID: [redacted]

Charles Kovis
Attorney at Law
P.O. Box 9292
Moscow, Idaho 83843

INVOICE
RE: Leotis B. Branigh, III
Case # CR-07-8107

09.19.2008		prior invoice – BALANCE PAST DUE $6391.75
10.13.2008	½ hour	Consultation w/ attorney @ $300.00/hr
10.13.2008	½ hour	Collateral Interview @ $300.00/hr
10.16.2008	½ hour	Review of Records @ $300.00/hr
10.16.2008	1 ½ hours	Diagnostic Interview @ $300.00/hr

Total Due: $72.91.75

Craig [illegible]. Beaver, Ph.D., A[illegible] - CN
Licensed Psychologist

250 Bobwhite Court, Suite 220 Boise, Idaho 83706 (208) 336-2972 Fax (208) 336-4408
Mailing Address: P.O. Box 5445, Boise, Idaho 83705

SSN/TAX ID: [redacted]

Charles Kovis
Attorney at Law
P.O. Box 9292
Moscow, Idaho 83843

INVOICE
RE: Leotis B. Branigh, III
Case # CR-07-8107

10.22.2008		prior invoice – BALANCE PAST DUE $7291.75
11.13.2008	½ hour	Consultation w/ attorney @ $300.00/hr

Total Due: $7441.75

Second Judicial District Court - Nez Perce County

Minutes Report

Case: CR-2007-0008107

Defendant: Branigh, Leotis Brannon III

Selected Items

Hearing type:	Hearing	Minutes date:	12/03/2008
Assigned judge:	Jeff M. Brudie	Start time:	01:40 PM
Court reporter:	carlton	End time:	02:12 PM
Minutes clerk:	JANET	Audio tape number:	C1
Prosecutor:	Daniel L Spickler		
Defense attorney:	Charles Kovis		

Tape Counter: 14044	Crt addresses potential jurors.
Tape Counter: 14411	Crt q counsel. Counsel are ready to proceed.
Tape Counter: 14422	Clerk call roll.
Tape Counter: 14816	Crt q State. State has no challenges to panel.
Tape Counter: 14832	Crt q Mr. Kovis. Mr. Kovis has no challenges to panel.
Tape Counter: 14848	Crt explains process.
Tape Counter: 14959	Clerk swears in potential panel.
Tape Counter: 14927	Crt explains process re random drawing for seating.
Tape Counter: 15150	Crt introduces self and staff. Crt introduces Mr. Spickler from the State. Crt introduces Def Mr. Branigh and Mr. Kovis his attorney.
Tape Counter: 15420	Crt reads Information.
Tape Counter: 15606	Crt reads preliminary instructions. Crt explains general questions.
Tape Counter: 15854	Crt begins general questions.
Tape Counter: 20816	Crt admonishes potential jurors.
Tape Counter: 21243	Crt explains questionnaire. Potential jurors may leave after they have filled out the questionnaire. Crt in recess.

JMB

FILED

2008 DEC 4 AM 8 40

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Nez Perce

CLERK OF THE DIST. COURT

State of Idaho
Plaintiff(s),

v.

Leotis Branigh
Defendant(s).

REQUEST TO OBTAIN APPROVAL TO BROADCAST AND/OR PHOTOGRAPH A COURT PROCEEDING

I hereby request approval to broadcast and/or photograph the following court proceedings:

Case No. CR 07-8107
Date: Dec 8 2008
Time: 9am
Location: 2nd District Court
Presiding Judge: Jeff Brudie

I have read the attached rule permitting cameras in the courtroom and will comply in all respects with the Rule and Order of the Court.

Signature: Barry Kough Kyle Mills Steve Hanks
Representing: Lewiston Tribune
Address: 505 Capital St
Telephone Number: 743-9411 x 210

ORDER

The Court, having considered the request under the rule permitting cameras in the trial courtrooms, hereby orders that permission to broadcast and/or photograph the above hearing is:

[X] Granted under the following restrictions:
Compliance with MSOIA Guide

[ ] Denied.

Dated this 4 day of Dec, 2008.

District/Magistrate Judge

AND ORDER

Charles E. Kovis
Attorney at Law
312 South Washington Street
Post Office Box 9292
Moscow, Idaho 83843
Telephone: (208) 882-3939
Fax: (208) 882-5379
I.S.B. # 4700
ckovis@turbonet.com

Attorney for Defendant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE

STATE OF IDAHO, Plaintiff, vs. LEOTIS B. BRANIGH III, Defendant.	CASE NO. CR-07-8107 MOTION TO STAY PROCEEDINGS

COMES NOW the Defendant, Leotis B. Branigh III, by and through his Attorney of Record, Charles E. Kovis, and at the request of Mr. Branigh, moves this Court for an order staying any further proceedings in this matter until Mr. Branigh's appeal of this Court's order dated November 28, 2008 denying his motion to dismiss on double jeopardy grounds is heard by the Idaho Supreme Court.

This motion is based upon the case of *Abney v. United States, 431 U.S. 651* (1977). The

United States Supreme Court has ruled that an order denying a petitioner's motion to dismiss on double jeopardy grounds is a "final decision" within the meaning of 28 U.S.C. § 1291 and thus immediately appealable. The U.S. Supreme Court states in Abney, "(a) Although lacking the finality traditionally considered indispensable to appellate review, such an order falls within the "collateral order" exception to the final judgment rule announced in *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541,* since it constitutes a complete, formal, and, in the trial court, final rejection of an accused's double jeopardy claim, the very nature of which is such that it is collateral to, and separable from, the principle issue of whether or not the accused is guilty of the offense charged." A defendant, in arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, is contesting the very authority of the Government to hale him into court to face trial on the charge against him. *423 U. S. 30 (1974); Robinson v. Neil, 409 U.S. 505, 409 U.S. 509 (1923).* The U.S. Supreme Court also states in Abney, "Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments." (Emphasis added)

Also, Hawkins, in his pleas to the Crown, says that both the pleas of autrefois acquit and autrefois convict are grounded on the maxim that, 'a man shall . . . not be brought into danger of his life for one and the same offence more than once,' cited in *Ex Parte Lange, 85 U.S. 163 (1873)* Also in *Ex Parte Lange, 85 U.S. 163 (1873*), the U.S.Supreme court states, "There is no more sacred duty

of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and, in such cases, no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

DATED this 4th day of December 2008.

Charles E. Kovis
Attorney for Defendant Leotis B. Branigh III

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of December, 2008, a true and correct copy of this *Motion to Stay Proceedings* was hand-delivered to:

DANIEL SPICKLER
PROSECUTING ATTORNEY
P.O. BOX 1267
LEWISTON, IDAHO 83501

Charles E. Kovis

Leotis Branigh III
Nez Perce County Jail
P.O. Box 896
Lewiston, Idaho 83501

Pro Se Appellant

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR NEZ PERCE COUNTY

STATE OF IDAHO, Plaintiff- Respondent vs. LEOTIS B. BRANIGH III, Defendant-Appellant	CASE NO. CR-07-8107 NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENT AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, Leotis B. Branigh III, appeals against the above-named respondent to the Idaho Supreme Court from the *Opinion and Order on Defendant's Motion to Dismiss and Motion in Limine*, entered in the above entitled action on the 28th day November 2008, Honorable Jeff M. Brudie presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to I.A.R. 11 (c)(3) and the case of *Abney v. United States, 431 U.S. 651* (1977). The United States Supreme Court has

ruled that an order denying a petitioner's motion to dismiss on double jeopardy grounds is a "final decision" within the meaning of 28 U.S.C. § 1291 and thus immediately appealable. The U.S. Supreme Court states in Abney, "(a) Although lacking the finality traditionally considered indispensable to appellate review, such an order falls within the "collateral order" exception to the final judgment rule announced in *Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541,* since it constitutes a complete, formal, and, in the trial court, final rejection of an accused's double jeopardy claim, the very nature of which is such that it is collateral to, and separable from, the principle issue of whether or not the accused is guilty of the offense charged." A defendant, in arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, is contesting the very authority of the Government to hale him into court to face trial on the charge against him. *423 U. S. 30 (1974); Robinson v. Neil, 409 U.S. 505, 409 U.S. 509 (1923).* The U.S. Supreme Court also states in Abney, "Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments." (Emphasis added)

Also, Hawkins, in his pleas to the Crown, says that both the pleas of autrefois acquit and autrefois convict are grounded on the maxim that, 'a man shall . . . not be brought into danger of his life for one and the same offence more than once,' cited in *Ex Parte Lange, 85 U.S. 163 (1873)* Also in *Ex Parte Lange, 85 U.S. 163 (1873*), the U.S.Supreme court states, "There is no more sacred duty

of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and, in such cases, no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

3. The appellant intends to raise the following issues on appeal, provided that this list of issues is not exhaustive, and shall not prevent the appellant from asserting other issues on appeal.

a. Did the District Court err in denying defendant's Motion to Dismiss on Grounds of Double Jeopardy?

b. Did the District Court err in finding that the defendant was not "put in jeopardy of life or limb" in violation of the Fifth Amendment to the U.S. Constitution, when a deputy sheriff, who later admitted to consuming alcohol, prior to the incident, opened fire on defendant/defendant's vehicle with a military style assault rifle which he was not POST certified to use, and continued to fire at the defendant an unknown amount of times estimated to be in excess of a dozen, through approximately three miles of residential neighborhoods, though the defendant's vehicle slowed significantly and was disabled while the majority of the shots were fired and continuing to slow as the deputy who later said he "doesn't remember" firing the AR-15 after the tire was deflated, continued to fire at an unarmed defendant who had made no threatening or provocative acts toward law enforcement?

c. Did the District Court err in finding that the language of the Fifth Amendment which states: "nor shall any person . . for the same offense . . .

be twice put in jeopardy of life or limb," cannot be interpreted literally in cases where a defendant is unnecessarily, unlawfully, and/or recklessly "put in jeopardy of life or limb" by law enforcement officers who act with wanton neglect, recklessness, or criminal intent, and that a defendant has the right to contest the very authority of the Government to then hale him into court to fact trial on the charge against him after being subject to such acts?

4. There is a portion of the record that is sealed but that portion sealed has no bearing on this appeal. That portion sealed deals with financial matters.

5. a. A reporter's transcript is requested.

b. The appellant requests the preparation of the Pretrial Motions Hearing held on November 25, 2008.

6. The appellant requests the standard clerk's record pursuant to I.A.R. 28(b)(2).

7. I certify:

a. That a copy of this notice of appeal is being served on each reporter of whom a transcript has been requested as named below at the address set out below:

Name and Address:

Linda Carlton, Court Reporter
Nez Perce County Courthouse
P.O. Box 896
Lewiston, Idaho 83501

b. That the appellant is exempt from paying the estimated transcript fee because he is indigent. (Idaho Code § 31-3220, 31-3220A, IAR 27(e))

c. That the Appellant is exempt from paying for the preparation of the record

because the appellant is indigent. (Idaho Code § 31-3220, 31-3220A, IAR 27(e))

d. That the appellant is exempt from paying the appellant filing fee because this is a criminal appeal. (I.A.R. 23 (a) (8))

e. That service has been made upon all parties required to be served pursuant to Rule 20 and the attorney general of Idaho pursuant to Section 67-1401(1), Idaho Code.

DATED this 4th day of December, 2008.

Leotis B. Branigh III
LEOTIS B. BRANIGH III, Pro Se

STATE OF IDAHO)
:ss.
County of Nez Perce)

Leotis B. Branigh, being sworn, deposes and says:

That the party is the appellant in the above-entitled appeal and that all statements in this notice of appeal are true and correct to the best of his knowledge and belief.

Leotis B. Branigh III
LEOTIS B. BRANIGH III, Appellant

SUBSCRIBED and SWORN to before me this 4th day of December 2008.

CHARLES E. KOVIS NOTARY PUBLIC STATE OF IDAHO

Charles Kovis
Notary Public in and for the State of Idaho
Residing at Moscow therein.
My commission expires: 12-6-2012

888

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 4th day of December, 2008, caused a true and correct copy of the attached NOTICE OF APPEAL to be hand delivered to:

DANIEL SPICKLER
PROSECUTING ATTORNEY
P.O. BOX 1267
LEWISTON, IDAHO 83501

LINDA CARLTON, COURT REPORTER
NEZ PERCE COUNTY COURTHOUSE
P.O. BOX 896
LEWISTON, IDAHO 83501

and mailed, postage pre-paid, first class, to:

LAMONT ANDERSON
DEPUTY ATTORNEY GENERAL
ATTORNEY GENERAL'S OFFICE
P.O. BOX 83720-0010
BOISE, IDAHO 83720

Leotis B. Branigh III

Leotis B. Branigh III, Pro Se Appellant

Second Judicial District Court - Nez Perce County

Minutes Report

Case: CR-2007-0008107

Defendant: Branigh, Leotis Brannon III

Selected Items

Hearing type:	Hearing on Motions	Minutes date:	12/05/2008
Assigned judge:	Jeff M. Brudie	Start time:	08:34 AM
Court reporter:	carlton	End time:	09:02 AM
Minutes clerk:	JANET	Audio tape number:	C2
Prosecutor:	Daniel L Spickler		
Defense attorney:	Charles Kovis		

Tape Counter: 83424	Crt outside presence of jury in ct rm 2. Crt reviews previously ruling on mtns. Def's mtn to dismiss re double jeopardy issue and mtn in limine re cell phone records.
Tape Counter: 83526	Crt address mtn to reconsider re cell phone records.
Tape Counter: 83621	State reviews federal statute and presents statement.
Tape Counter: 83852	Mr. Kovis presents statement.
Tape Counter: 84206	State responds.
Tape Counter: 84408	Crt presents comments. Crt addresses issue of standing and presents comments and reviews case law. Def does have standing to challenge the search warrant validity. Crt finds a governmental entity can include a state court and presents comments.
Tape Counter: 94833	Crt finds the federal statute does provide for a state service and presents comments. Crt does reconsider and reverses its previously ruling.
Tape Counter: 85023	Crt addresses mtn in limine re cell phone records is denied. State will still have to lay foundation for records.
Tape Counter: 85010	Crt addresses Def's mtn to dismiss re double jeopardy issue. Crt addresses Def's mtn to stay proceedings and appeal filed. Crt has reviewed.
Tape Counter: 85206	Mr. Kovis presents statement.
Tape Counter: 85410	State presents statement.
Tape Counter: 85626	Mr. Kovis responds.
Tape Counter: 85659	Crt reviews case law and presents comments. Crt reviews appellate law. Crt finds no right to automatic appeal. Crt reviews 12A permissive appeal. Crt finds no substantial grounds have been laid and that is not appropriate.
Tape Counter: 90135	Crt denies Def'smtn to stay proceedings. Crt will return to ct rm 1 for jury selection.

Second Judicial District Court - Nez Perce County

Minutes Report

Case: CR-2007-0008107

Defendant: Branigh, Leotis Brannon III

Selected Items

Hearing type:	Jury Trial	Minutes date:	12/05/2008
Assigned judge:	Jeff M. Brudie	Start time:	09:02 AM
Court reporter:	carlton	End time:	12:00 AM
Minutes clerk:	JANET	Audio tape number:	C1
Prosecutor:	Daniel L Spickler		
Defense attorney:	Charles Kovis		

Tape Counter: 90809	Crt on record in Ct Rm 1 with potential jurors. Crt and attorneys have reviewed the jury questionnaire and the Crt has excused some of the potential jurors.
Tape Counter: 91129	Crt q State. State is ready to proceed. Crt q Mr. Kovis. Mr. Kovis is ready to proceed.
Tape Counter: 91149	Crt reviews trial process. Crt begins general questions.
Tape Counter: 91449	State q potential juror.
Tape Counter: 91507	Mr. Kovis objects to last question. Crt sustains objection. State continues q. Mr. Kovis has nothing further.
Tape Counter: 91610	Crt presents comments. Crt excuses #26 Walter McIntosh. Crt replaces Chair #26 with Tiffany McFetridge (#44). Crt q Ms. McFetridge.
Tape Counter: 91933	Crt cont general qustions.
Tape Counter: 92222	State has no questions. Mr. Kovis challenges juror for cause. Crt grants request and excuses #23 Vance Aram for cause.
Tape Counter: 92430	State has no questions. Mr. Kovis challenges juror for cause. Crt grants request and excused #35 Karen Colpitts for cause. Crt moves Darlene Chase #45 to Chair #23. Crt moves Raymond Faling #46 to Chair #35.
Tape Counter: 92659	Crt cont general questions.
Tape Counter: 93428	State begins general questions.
Tape Counter: 94546	Crt explains individual voir dire.
Tape Counter: 94627	Mr. Kovis begins general questions.
Tape Counter: 100227	Crt will take recess at 10:30. Crt admonishes jury panel.

Tape Counter: 105012 Back on record. All parties present and ready to proceed.
Crt addresses individual voir dire questioning. Crt releases audience. #47- #70 are to return at 1:15 p.m. #71 -#100 are to return at 3:00 p.m. Crt admonishes audience.

Tape Counter: 105400 Back on record outside presence of jury in jury room for individual voir dire.
Crt will question
#8 George Poleson
#9 Janet Kaufman
#12 Dale Frost
#13 Shelly Wiemer
#14 Aaron Clark
#25 Daniel Quinlan
#30 William Wicks.

State request to question:
#15 Mary Hudon
#17 Scott Solom
#22 Jolene Hopper
#26 Tiffany McFetridge
#28 Melvin Wilkinson

Mr. Kovis request to question:
#11 Kelly Harwick. (was previously released until 3:00 p.m. and will be questioned then)

Crt released jurors #1 - #7 to come back at 3:00 p.m.
Robert Simons, Richard Mitchell, Dana Fowler, Rian VanLeuven, Edwin Buettner, Sandra Brandolino, and Steve Luoma.

Crt begins questions of #8 George Poleson.
State questions Mr. Poleson.
Mr. Kovis questions Mr. Poleson.
Crt releases Mr. Poleson until 3:00 p.m.

Crt begins questions of #9 Janet Kaufman.
State questions Ms. Kaufman.
Mr. Kovis questiohs Ms. Kaufman. Mr. Kovis challenges for cause.
Crt agrees. Crt excuses Ms. Kaufman for cause.
Crt moves Phil Heitstuman #47 to Chair #9.

Crt releases #11 Kelly Harwick and #10 Rocky Goffinett until 3:00 p.m.

Crt begins questions of #12 Dale Frost.
State questions Mr. Frost.
Mr. Kovis has no questions.
Crt releases Mr. Frost until 3:00 p.m.

Tape Counter: 0

Crt begins questions of #13 Shelly Wiemer.
State questions Ms. Wiemer.
Mr. Kovis questions Ms. Wiemer.
Sate has no objections to Ms. Wiemer being released for hardship.
Mr. Kovis has no objections.
Crt excuses Ms. Wiemer for hardship.
Crt moves Dennis Munden #49 to Chair #13.
Crt begins questions of #14 Aaron Clark.
State questions Mr. Clark.
Mr. Kovis has no questions and challenges for cause.
Crt excused Mr. Clark for cause.
Crt moves Shawna Clark #50 to Chair #14.
Crt releases remaining panel until 3:00 p.m. except 7 individuals.

Crt begins questions of #15 Mary Hudon.
State questions Ms. Hudon.
Mr. Kovis has no questions.
Crt releases Ms. Hudon until 3:00 p.m.
Crt begins questiolns of #17 Scott Solom.
State questions Mr. Solom.
Mr. Kovis has no questions.
Crt questions Mr. Solom. Crt releases Mr. Solom until 3:00 p.m.
Crt begins questions of #22 Jolene Hopper.
State questions Ms. Hopper.
Mr. Kovis questions Ms. Hopper. Mr. Kovis requests Ms. Hopper be released based on his personal knowledge of her.
State has no objection.
Crt excused Mr. Hopper.
Crt moves Drew Piper #53 to Chair #22.
Crt begins questions of #25 Daniel Quinlan.
State indicates he knows Mr. Quinlan personally.
Mr. Kovis has no questions and challenges for cause.
Crt excuses Mr. Quinlan for cause.
Crt moves Jerry Mallory #55 to Chair #25.
Crt begins questions of #26 Tiffany McFetridge.
State questions Ms. McFetridge.
Mr. Kovis questions Ms. McFetridge.
Crt releases Ms. McFetridge until 3:00 p.m.

Tape Counter: 0

Crt begins questions of #28 Melvin Wilkinson.
State questions Mr. Wilkinson.
Mr. Kovis has no questions.
Crt releases Mr. Wilkinson until 3:00 p.m.

Tape Counter: 0	Crt begins questions of #30 William Wicks. State questions Mr. Wicks. Crt questions Mr. Wicks. Mr. Kovis questions Mr. Wicks. Mr. Kovis requests to release. State agrees. Crt excuses Mr. Wicks. Crt moves Marjorie Tate #56 to Chair #30. Crt goes over replacements. Crt reviews process.
Tape Counter: 13000	Back on record at 1:30 p.m. All parties present and ready to proceed.
Tape Counter: 13125	Crt begins general questions.
Tape Counter: 13513	State begins general questions.
Tape Counter: 13546	Mr. Kovis has no general questions.
Tape Counter: 13646	Crt will start individual voir dire outside the presence of the panel. Individual voir dire begins in CrtRm 1 Jury Room. Crt begins questions of #9 Phil Heitstuman. State has no questions. Mr. Kovis has no questions and requests to excuse but not for cause. State will leave to the Crt's discretion. Crt will leave Mr. Heitstuman on panel for now. Crt questions counsel re individual voir dire of #13 Denis Munden. Mr. Kovis requests. Crt begins questions of #13 Denis Munden. State has no questions. Mr. Kovis questions Mr. Munden. Crt does not release at this time. Crt begins questions of #14 Shawna Parker. State questions Ms. Parker. Mr. Kovis questions Ms. Parker and challenges for cause. State will leave to the Crt's discretion. Crt excuses for cause. Crt moves Betty Shows #59 to Chair #14. Crt questions counsel re individual voir dire of Drew Piper #22. Mr. Kovis requests.

Crt begins questions of Drew Piper #22.
State questions Mr. Piper.
Mr. Kovis questions Mr. Piper.
Crt qustions counsel re passing for cause.
State requests Mr. Piper be excused.
Crt excuses Mr. Piper for the month.
Crt moves Linda Scott #60 to Chair #22.
Crt begins questions of Jerry Mallory #25.
State has no questions.
Mr. Kovis challenges for cause.
Crt excuses for cause.
Crt moves Gerald Jenkins #61 to Chair #25.

Tape Counter: 0

Crt questions counsel re individual voir dire of Marjorie Tate #30.
State requests.

Crt begins questions of Marjorie Tate #30.
State questions Ms. Tate. State challenges for cause.
Mr. Kovis agrees.
Crt excuses for cause.
Crt moves Kari Johnson-Decicio #62 to Chair #30.
Crt goes over excusals and replacements.
Counsel req individual for #14 Betty Shows.
Crt begins questions of Betty Shows #14.
State questions Ms. Shows and challenges for cause.
Mr. Kovis has no objection.
Crt excuses for cause.

Crt moves Ronda Knight #63 to Chair #14.
Crt begins questions of Ronda Knight #14.
State questions Ms. Knight.
Mr. Kovis has no questions.
Crt questions counsel re passing juror for cause.
State passes.
Mr. Kovis passes.
Crt returns jury to courtroom.
Crt questions Linda Scott #22.
State questions Ms. Scott.
Mr. Kovis questions Ms. Scott.
Crt questions counsel re passes juror for cause.
Counsel passes juror for cause.
Crt returns juror to courtroom.

Crt begins questions of Gerald Jenkins #25.
State has no questions.
Mr. Kovis questions Mr. Jenkins.
Crt questions counsel re passing juror for cause.
Counsel pass juror for cause.
Crt returns juror to courtroom.

Crt questions Kari Johnson-Decicio #30.
State questions Ms. Johnson-Decicio.
Mr. Kovis questions Ms. Johnson-Decicio and challenges for cause.
State has no objections.
Crt excuses juror for cause.
Crt moves Nancy Sattler #64 to Chair #30.

Crt begins questions of Nancy Sattler #30.
State questions Ms. Sattler.
Mr. Kovis questions Ms. Sattler.
Crt questions counsel re passing juror for cause.
Counsel pass juror for cause.
Crt returns juror to courtroom.

Tape Counter: 0

Crt reviews 36 jurors being passed for cause.
State agrees.
Mr. Kovis agrees.

Crt reviews panel seating.
Mr. Kovis requests to individually voir dire Kelly Harwick #11.

Crt begins questions of Kelly Harwick #11.
State has no questions.
Mr. Kovis questions Ms. Harwick.
Crt questions Ms. Harwick.
Crt questions counsel re passing juror for cause.
Counsel pass juror for cause.
Crt returns juror to courtroom.

Tape Counter: 0

Crt continues review of panel seating.
Counsel agree.

Crt indicates 36 jurors have been passed for cause.
Crt questions State.
State passes panel for cause.
Mr. Kovis passes panel for cause.

Crt questions counsel re peremptory challenges.
Mr. Kovis requests to do in courtroom.
Crt will return to courtroom. Crt intends to release all other potential jurors.
Crt explains peremptory challenge process to Mr. Branigh.

Mr. Kovis questions Crt re moving chairs.
Crt explains process.

COURT MINUTES

Tape Counter: 30418

Back in session. All parties present and ready to proceed. Crt addresses panel. Crt will release audience. Crt explains alternate process.

Tape Counter: 30740 Crt in recess for attorneys to review their peremptory challenges.

Peremptory Challenges:
State:
1. Sandra Brandolino #6
2. Dale Frost #12
3. Scott Solom #17
4. George Poleson #8
5.Justin Godwin #27
6. Linda Scott #22
7. Robert Simons #1
8. Barbara Davis #24
9. Tiffany McFetridge #26
10. Rocky Goffinett #10
11. Raymond Faling #35

Peremptory Challenges:
Mr. Kovis
1. Bradley Whitcomb #16
2. Karen Schmidt #19
3. Denise Connolly #20
4. Darlene Chase #23
5. Phil Heitstuman #9
6. Edwin Buettner #5
7. Kelly Harwick #11
8. Dana Fowler #3
9. Jonathan Phipps #21
10. Kathy Martin #34
11. Colleen Hartshorn #32

Tape Counter: 35715 Crt seats jury panel.
1. Richard Mitchell
2. Rian Vanleuven
3. Steve Luoma
4. Denis Munden
5. Ronda Knight
6. Mary Hudon
7. Roy Busch
8. Gerald Jenkins
9. Melvin Wilkinson
10. Mary Assadi
11. Nancy Sattler
12. Nicole Holmes
13. James White
14. Mark Condrey

Tape Counter: 40050 Crt removes other potential jurors from Well.

Tape Counter: 4019	Crt addresses panel.
Tape Counter: 40125	Clerk swears in panel.
Tape Counter: 402	Crt q State re panel State accepts panel. Crt q Mr. Kovis. Mr. Kovis accepts panel.
Tape Counter: 40214	Crt explains alternate juror process. Crt reviews schedule.
Tape Counter: 40326	Crt admonishes jury.
Tape Counter: 40539	Crt retires jury to jury room for instructions. Crt addresses audience panel and presents comments re jury duty.
Tape Counter: 40703	Crt q counsel. Counsel have nothing further.
Tape Counter: 40710	Crt in recess until Monday, Dec 8, 2008, at 9:00 a.m.

JMB

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF Nez Perce

FILED
2008 DEC 8 AM 8 45
PATTY O. WEEKS
CLERK OF THE DISTRICT COURT
DEPUTY

State of Idaho,
Plaintiff(s),

v

Leotis Branigh III,
Defendant(s).

REQUEST TO OBTAIN APPROVAL TO BROADCAST AND/OR PHOTOGRAPH A COURT PROCEEDING

I hereby request approval to broadcast and/or photograph the following court proceedings:

Case No. CR07-8107
Date: 9:00 a.m.
Time: 12/8/08 - 12/12/08
Location: Courtroom #1
Presiding Judge: Brudie

I have read the attached rule permitting cameras in the courtroom and will comply in all respects with the Rule and Order of the Court.

Signature: Matt Loveless
Representing: KLEW TV
Address: 2626 M St., Lewiston
Telephone Number: (208) 746-2636 FAX (208) 746-4819

ORDER

The Court, having considered the request under the rule permitting cameras in the trial courtrooms, hereby orders that permission to broadcast and/or photograph the above hearing is:

[X] Granted under the following restrictions:
Compliance w/ Media Guide re: Photographing of Jury

[ ] Denied.

Dated this 8 day of Dec, 2008.

District/Magistrate Judge