Challenging Federal Wiretaps

by Jonathan M. Abramson

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This article focuses on federal wiretap applications, challenges to wiretap interceptions, and changes in the procedure for reviewing orders authorizing wiretaps following the *Ramirez-Encarnacion* decision.

Wiretaps are an extremely powerful investigative tool for federal prosecutors. A plethora of statutory requirements must be satisfied when applying for an order authorizing the interception of wire communications.[1] Despite these statutory prerequisites for wiretap authorization, the official 2004 Federal Wiretap Report indicates that every one of the 1,710 interception applications requested in 2004 was authorized.[2] This high approval rate means, as a practical matter, that the only effective check on federal wiretaps is by way of *post-hoc* challenges to the admissibility of evidence obtained by wiretaps brought by targets or other aggrieved parties.

This article discusses federal wiretaps[3] issued pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.[4] It also provides an overview of wiretap challenges and recent developments in Tenth Circuit case law relating to the standard of review applied by the federal district court when ruling on motions challenging orders authorizing wiretaps.

The Application Process

Before an assistant U.S. attorney makes application for a wiretap to a "judge of competent jurisdiction,"[5] the application must be authorized by the Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General or Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General.[6] Once a wiretap application is authorized by the Office of the Attorney General, the application must be submitted for judicial approval. A judge may authorize interceptions within the territorial jurisdiction of the court in which the judge is sitting.[7]

Strict adherence to the procedural steps set forth by 18 U.S.C. §§ 2510 *et seq.* is required when seeking judicial authorization to intercept wire or oral communications.[8] The applicant[9] must state:

1) the phone number to be intercepted;
2) the phone number's subscriber;
3) the names of the interceptees;
4) that there is probable cause to believe that the named interceptees are committing, have committed, or are about to commit an offense listed in 18 U.S.C. § 2516;[10] and
5) which qualifying federal law is possibly being violated.[11]

The applicant also must submit an affidavit in support of the application. The affidavit is typically quite long and detailed and must explain why a wiretap is necessary. These statements of necessity may not be general or boilerplate, and "must specifically relate to the individuals targeted by the wiretap."[12]

Specifically, the affidavit must describe, among other things, what "normal investigative" techniques have been attempted; the government must fully explain what techniques were used to investigate the target(s) of the wiretap.[13] The wiretap application must indicate that the government attempted normal investigative techniques and failed, or that normal investigative techniques reasonably appear unlikely to succeed or too dangerous.[14] "Normal investigative" techniques are:

1) standard visual and aural surveillance;
2) questioning and interrogation of witnesses and participants, including the use of grand juries and grants of immunity, if necessary;
3) search warrants; and
4) infiltration of conspiratorial groups by undercover agents or informants.[15]

Pen registers and trap and trace devices also are considered traditional investigative techniques.[16] If any of these investigative techniques has not been tried, the government must explain, with particularity, why each such unattempted technique would be either unsuccessful or too dangerous.[17]

Additionally, in Colorado, some district court judges hold an *in camera* hearing where the applicant and affiant answer questions or address concerns the court may have regarding the application. If the judge finds that the application and affidavit have satisfied the statutory prerequisites, an order authorizing the interception of communications will issue and will be effective for a period not to exceed thirty days,[18] although that thirty-day period may be extended for cause.[19]

Challenging Wiretaps

To have standing to contest the legality of an order authorizing the wiretap, an individual must be an "aggrieved person"—that is, a person who was a party to any intercepted communication or against whom the interception was directed.[20] Any aggrieved person may move to suppress the contents of any intercepted communication or evidence derived therefrom, on the grounds that:

1) the communication was unlawfully intercepted;
2) the order authorizing or approving the interception was insufficient on its face; or
3) the interception was not made in conformity with the order authorizing or approving it.[21]

Defendants often allege in motions to suppress that the overheard conversations were not properly "minimized," in violation of the wiretap authorization order, or that there was an insufficient showing of "necessity" to justify the wiretap.[22]

Minimization Challenges

Wiretaps must be conducted in a manner that minimizes the interception of communications that are not subject to interception.[23] Thus, the interception should be suspended if the conversation heard is not related to criminal activity. This minimization requirement "does not create an 'inflexible rule of law,' but rather demands an evaluation of the 'facts and circumstances of each case.'"[24]

Whether minimization is proper is determined using a "reasonable" standard.[25]

Standard of Review for Determinations of Necessity by Circuit

Circuit	Standard of Review	Case Law
First	"minimally adequate" facts to support district court's determination of necessity	*U.S. v. Scibelli*, 549 F.2d 222, 226 (1st Cir.), *cert. denied*, 431 U.S. 960 (1977)
Second	"minimally adequate" facts to support district court's determination of necessity	*U.S. v. Miller*, 116 F.3d 641, 663 (2d Cir. 1997), *cert. denied*, 524 U.S. 905 (1998)
Third	*de novo* review to evaluate whether a full and complete statement was made; abuse of discretion to review the determination of necessity for an abuse of discretion	*U.S. v. Phillips*, 959 F.2d 1187, 1189 (3rd Cir.), *cert. denied*, 506 U.S. 987 (1992)
Fourth	no consistent standard of review; government's burden of showing "necessity" is not great	*U.S. v. Smith*, 31 F.3d 1294, 1298 (4th Cir. 1994), *cert. denied*, 513 U.S. 1181 (1995)
Fifth	no consistent standard of review; conflict of authority over which standard should be used	*Compare U.S. v. Kelley*, 140 F.3d 596, 604 (5th Cir.) (reviewing for clear error), *cert. denied*, 525 U.S. 880 (1998), *with U.S. v. Bennett*, 219 F.3d 1117, 1121 (5th Cir.) (reviewing for abuse of discretion), *cert. denied*, 531 U.S. 1056 (2000)
Sixth	abuse of discretion standard	*U.S. v. Corrado*, 227 F.3d 528, 539 (6th Cir. 2000)
Seventh	necessity determination affirmed if there is a "factual predicate" to support it	*U.S. v. Zambrana*, 841 F.2d 1320, 1330 (7th Cir. 1988)
Eighth	clear error	*U.S. v. Davis*, 882 F.2d 1334, 1343 (8th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990)
Ninth	*de novo* review to evaluate whether a full and complete statement was made; abuse of discretion to review the determination of necessity for an abuse of discretion	*U.S. v. Brown*, 761 F.2d 1272, 1276 (9th Cir. 1985)
Tenth	abuse of discretion standard	*U.S. v. Ramirez-Encarnacion*, 291 F.3d 1219 (10th Cir. 2002)
Eleventh	clear error	*U.S. v. Green*, 40 F.3d 1167, 1172-73 (11th Cir. 1994), *cert. denied*, 514 U.S. 1089 (1995)
D.C.	abuse of discretion standard	*U.S. v. Sobamowo*, 892 F.2d 90, 93 (D.C. Cir. 1989), *cert. denied*, 498 U.S. 825 (1990)

Generally, the burden is on the government to demonstrate proper minimization.[26] If the government makes a *prima facie* showing of reasonable minimization, the burden shifts to the opposing party to show that more effective minimization could have taken place.[27]

When addressing minimization challenges, the district courts focus on "the reasonableness of the agents' efforts to refrain from monitoring conversations deemed non-pertinent to the investigation."[28] In practice, minimization challenges are rarely successful.

Necessity Challenges

The most common approach to a motion to suppress intercepted communications is a "necessity" challenge. The necessity requirement is intended "to ensure that the relatively intrusive device of wiretapping 'is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.'"[29]

As mentioned above, the application requesting a wiretap order must include an affidavit indicating the reasons normal investigative techniques are inadequate and that, as a result, a wiretap is necessary. Specifically, the affidavit must contain a "full and complete statement as to whether or not other investigative techniques have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."[30] Wiretaps should not issue unless the government has sufficiently shown that other investigative techniques and/or procedures have been tried and failed, or that it would be useless to attempt them.[31] Therefore, a district court must reject a wiretap application if the government, through its law enforcement agents, has not first attempted, without success, traditional investigative methods.[32]

In *United States v. Arrington*,[33] the defendants alleged that there was an insufficient showing by the government that wiretaps were necessary. The defendants argued that standard investigative techniques would have succeeded, obviating the need for the wiretap.[34] The trial court agreed and granted the defendants' motions to suppress the wiretap. In its decision, the trial court emphasized the brevity of the investigation before the wiretap was requested, as well as the government's failure to undertake several avenues of normal investigative techniques.[35] The government appealed, and in an unpublished decision, the Tenth Circuit Court of Appeals affirmed the trial court's order granting the defendants' motions to suppress the wiretap orders.[36]

The Tenth Circuit Standard of Review after *Ramirez-Encarnacion*

Conflict as to the standard used to review the validity of orders authorizing wiretaps exists among the federal appellate courts (*see* sidebar entitled "Standard of Review for Determinations of Necessity by Circuit"). Before 2002, the U.S. District Court for the District of Colorado reviewed orders authorizing the interception of communications *de novo*. In complex, multi-defendant cases, this often resulted in week-long evidentiary hearings involving what the government did or failed to do to satisfy the necessity requirement before requesting a wiretap.[37] Defendants sometimes were successful in suppressing the evidence obtained via wiretaps, most often when the judge reviewing the wiretap order interpreted the necessity requirement more strictly than the issuing judge.[38]

Also, before 2002, there was a conflict of authority in the Tenth Circuit as to whether wiretap orders should be reviewed *de novo* or on an abuse of discretion basis.[39] In *United States v. Armendariz*,[40] the Tenth Circuit Court of Appeals held that necessity was to be reviewed for abuse of discretion. However, in the 1997 case of *United States v. Castillo-Garcia*,[41] the Tenth Circuit stated that necessity was a question of law that should be reviewed *de novo*.

The Tenth Circuit resolved this conflict in 2002. In a footnote in the case *United States v. Ramirez-Encarnacion*,[42] the court stated that "abuse of discretion" is the proper standard of review for determining whether a wiretap was necessary.[43] Although *Ramirez-Encarnacion* was not an *en banc* decision, the "footnote was circulated to the *en banc* court, which has unanimously agreed that to the extent any of our earlier cases can be viewed as inconsistent with our holding here, they are overruled."[44]

Soon after *Ramirez-Encarnacion* was decided, many Colorado defendants argued that although the abuse of discretion standard should apply on appeal, the district court still should review necessity challenges *de novo*. This argument has been universally rejected.[45]

Since the *Ramirez-Encarnacion* decision, district judges also have suggested that the reviewing judge may consider only the information that was before the issuing judge.[46] This information includes applications, affidavits, and orders authorizing the wiretaps, as well as any testimonial and documentary evidence introduced during *in camera* proceedings before the issuing judge.[47]

Franks Challenges

After *Ramirez-Encarnation*, a defendant's most viable option for challenging

a wiretap authorization is probably a so-called *Franks* challenge, named after the US Supreme Court's decision in *Franks v. Delaware*.[48] In that case, the Court held that searches conducted pursuant to an affidavit containing recklessly or intentionally false material statements violated the Fourth Amendment.

A defendant is entitled to a *Franks* hearing after making a substantial preliminary showing that a "false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause."[49] If the defendant meets this threshold and a hearing is conducted, he or she must establish, by a preponderance of the evidence, that the misstatements or omissions in question were made intentionally or with reckless disregard for the truth and that, with the false statements omitted, probable cause was lacking.[50]

Because the necessity requirement is material to the issuance of wiretap orders, such orders are subject to a *Franks* analysis as to whether the application and affidavit contained material misstatements or omissions regarding the necessity of the wiretap.[51] If a wiretap application contained inaccuracies about the need for the wiretap, the reviewing court, at the suppression hearing, must determine whether, under the true facts, "a reasonable district court judge would have denied the application because the necessity for the wiretap had not been shown."[52]

A great deal of investigation and careful inspection of the discovery is generally required to make a preliminary showing to warrant a *Franks* hearing. If events are referenced in the wiretap affidavit that are not substantiated by the discovery provided by the government, defense counsel may consider filing very specific discovery requests in order to assess the validity of a *Franks* challenge.

In *United States v. Small*,[53] the defendants submitted a *Franks* challenge, alleging that the affiant made several inaccurate and misleading statements, as well as omissions, in the wiretap affidavit. The defendants alleged that intentional misrepresentations were made to the issuing judge regarding the profits and drug volumes of the drug conspiracy. The court found that the defendants did not demonstrate, by a preponderance of the evidence, that the affiant made an intentional misrepresentation. Furthermore, the court stated that "[e]ven assuming that the misstatement concerning profits and drug volumes was knowingly or recklessly made, I do not find that it is any way material, as Defendants contend, or would have any effect upon a probable cause or necessity finding if removed from the First Affidavit."[54] Recently, the Tenth Circuit affirmed the trial court's denial of the defendants' *Franks* challenge.[55]

Conclusion

Ramirez-Encarnacion has greatly changed the process for reviewing orders authorizing wiretaps in Colorado. To successfully challenge a wiretap order, a defendant must show that the issuing judge abused his or her discretion, based on the information presented to that judge.

This change creates significant challenges for counsel representing defendants or other aggrieved persons in wiretap cases by greatly limiting challenges to wiretap orders based on necessity. In light of this difficulty, counsel should consider whether to file more fact-intensive *Franks*

motions challenging the truth of the underlying allegations that the wiretap is "necessary."

NOTES

1. 18 U.S.C. § 2510(4) defines "intercept" as "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."

2. *See* Table of Authorized Intercepts Granted Pursuant to 18 U.S.C. § 2519, available at http://www.uscourts.gov/wiretap04/Table7-04.pdf (of the 1,710 authorizations, 730 were federal authorizations and 980 were state authorizations).

3. Wiretaps appear to be rarely requested or authorized by Colorado state courts. *See* Table of Intercept Orders Issued by Judges During Calendar Year 2003, available at http://www.uscourts.gov/wiretap03/Table2-03.pdf (reflecting that two state wiretaps were authorized in 2003, one in Denver County and another in Weld County); Table of Jurisdictions With Statutes Authorizing the Interception of Wire, Oral, or Electronic Communications, available at http://www.uscourts.gov/wiretap04/Table1.pdf (reflecting no state wiretaps authorized in 2004).

4. 18 U.S.C. §§ 2510 *et seq.* It should be noted that the USA PATRIOT Act, H.R. 3162, 107th Cong. (2001), altered only minor aspects of U.S.C. §§ 2510 *et seq.*; *e.g.*, the PATRIOT Act added the definition of a "computer trespasser" where it had not previously existed.

5. 18 U.S.C. § 2510(9) defines "judge of competent jurisdiction" as "a judge of a United States district court or a United States court of appeals" and " 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." As a practical matter, wiretap orders in the District of Colorado are issued by U.S. District Court Judges. *See* http://www.uscourts.gov/wiretap04/A1-04.pdf.

6. 18 U.S.C. § 2516(1).

7. 18 U.S.C. § 2518(3).

8. *U.S. v. Giordano*, 416 U.S. 505 (1974); *U.S. v. Small*, 229 F.Supp.2d 1166 (D.Colo. 2002).

9. "Applicant" is defined by 18 U.S.C. § 2510(7) as:

> 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 the offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses.

10. 18 U.S.C. § 2518.

11. 18 U.S.C. § 2516(1)(a).

12. *Small, supra*, note 8 at 1188.

13. *U.S. v. Castillo-Garcia*, 117 F.3d 1179, 1187 (10th Cir. 1997).

14. 18 U.S.C. § 2518(3)(c).

15. *Castillo-Garcia, supra*, note 13.

16. *Id.* A pen register device records the date and time of incoming and outgoing calls from a particular telephone number, and records the telephone numbers called from that number. A trap and trace device records the origin of a telephone call made to a certain telephone number.

17. *U.S. v. Ramirez-Encarnacion*, 291 F.3d 1219, 1221 (10th Cir. 2002).

18. 18 U.S.C. § 2518 (5).

19. 18 U.S.C. § 2518(5) (extension may be granted if applicant can demonstrate that, despite evidence obtained as result of initial wiretap(s), continued interception is still necessary).

20. 18 U.S.C. § 2510 (11).

21. 18 U.S.C. § 2518(10)(a).

22. *See* 18 U.S.C. §§ 2518(1)(c) and 2518(3)(c).

23. 18 U.S.C. § 2518 (5).

24. *Scott v. U.S.*, 436 U.S. 128, 139-40 (1978).

25. *U.S. v. Earls*, 42 F.3d 1321, 1325 (10th Cir. 1994).

26. *U.S. v. Torres*, 908 F.2d 1417, 1423 (9th Cir. 1990); *U.S. v. Rizzo*, 491 F.2d 215, n. 7 (2d Cir.), *cert. denied*, 416 U.S. 990 (1974).

27. *U.S. v. Willis*, 890 F.2d 1099, 1101 (10th Cir.1989).

28. *Id.*

29. *U.S. v. Edwards*, 69 F.3d 419, 429 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 2497 (1996), *quoting U.S. v. Kahn*, 415 U.S. 143, 153, n. 12 (1974).

30. 18 U.S.C. § 2518 (1)(c).

31. 18 U.S.C., § 2518 (3)(c); *Castillo-Garcia, supra*, note 13; *U.S. v. Killingsworth*, 117 F.3d 1159 (10th Cir. 1997).

32. *United States v. Ippolito*, 774 F.2d 1482, 1486 (9th Cir. 1985).

33. *U.S. v. Arrington*, No. 99-1565, 2000 WL 775576, 2000 U.S. App. LEXIS 5762 (10th Cir. 2000).

34. *Id.*

35. *Id.*

36. *Id.*

37. *See Small, supra*, note 8 at 1174 (evidentiary hearing on motions to suppress wiretaps lasted five days).

38. *See U.S. v. Arrington, supra*, note 33.

39. This conflict was recognized in *Ramirez-Encarnacion, supra*, note 17 at 1222, n. 1.

40. *U.S. v. Armendariz*, 922 F.2d 602, 608 (10th Cir. 1990).

41. *Castillo-Garcia, supra*, note 16 at 1186.

42. *Ramirez-Encarnacion, supra*, note 17.

43. *Id.* at 1222; *see also U.S. v. Cline*, 349 F.3d 1276, 1280 (10th Cir. 2003), *quoting Ramirez-Encarnacion*.

44. *Ramirez-Encarnacion, supra*, note 17 at *en banc* n. 1.

45. *See U.S. v. Oregon-Cortez*, 244 F.Supp.2d 1167, 1172 (D.Colo. 2003) ("it defies logic . . . to review the issuing judge's conclusion that the wiretaps were necessary under a de novo standard and conduct an evidentiary hearing to develop information that was not before the issuing judge when the Court of Appeals reviews the same issuing judge's conclusion under an abuse of discretion standard"); *U.S. v. Mack*, 272 F.Supp.2d 1174, 1177 (D.Colo. 2003) (endorsing the *Oregon-Cortez* decision and welcoming the change in procedure as long overdue).

46. *Oregon-Cortez, supra*, note 45 at 1172.

47. *Id.*

48. *Franks v. Delaware*, 438 U.S. 154 (1978).

49. *Small, supra*, note 8 at 1189, *quoting Franks, supra*, note 48 at 155-56.

50. *Franks, supra*, note 48 at 156.

51. *Ippolito, supra*, note 32 at 1485-86; *U.S. v. Carneiro*, 861 F.2d 1171, 1176 (9th Cir. 1988).

52. *Ippolito, supra*, note 32 at 1486-87; *Carneiro, supra*, note 51 at 1176.

53. *Small, supra*, note 8.

54. *Id.* at 1192.

55. *U.S. v. Small*, 423 F.3d 1164 (10th Cir. 2005) ■

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