STATE OF LOUISIANA	*	**NO. 2001-K-2271**
VERSUS	*	**COURT OF APPEAL**
TERRELL V. STERLING ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 421-270, SECTION "K"
HONORABLE ARTHUR HUNTER, JUDGE

* * * * * *

Chief Judge William H. Byrnes, III

* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Dennis R. Bagneris, Sr., and Judge Terri F. Love)

LOVE, J., DISSENTS WITH WRITTEN REASONS

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MOTION TO DISMISS DENIED;
WRIT GRANTED;
REVERSED & REMANDED

In this case involving evidence based on wiretapping, this Court denies the motion to dismiss the State's writ application that was raised by counsel for defendants Terrell Sterling and Romander Minor. This Court exercises its supervisory jurisdiction to review the trial court's ruling that granted the defendants' motion to suppress the evidence. We reverse and remand.

Statement of the Case

On April 26, 2001 seventeen defendants were charged by indictment with crimes ranging from attempted possession of cocaine and heroin to being part of a street gang. On July 30, 2001, the trial court held a motion hearing. After the November 6, 2001 preliminary hearing, the trial court suppressed the wiretap evidence, and the State's writ application followed. This Court granted the State Attorney General's office's motion for leave to file an *amicus curiae* brief. On March 15, 2002 defense counsel for Terrell Sterling and Romander Minor filed a motion to dismiss the State's writ

application.

Motion to Dismiss

In the motion to dismiss, attorneys for Terrell Sterling and Romander Minor contend that under the relevant Louisiana statute relating to evidence obtained by means of court ordered wiretaps, the State was limited to review by appeal rather than by a writ application. Additionally, the defense claims that the district attorney failed to make the express certification mandated by the statute.

At issue is whether the State has a remedy by writ application as well as by appeal.

Under the Electronic Surveillance Act, La. R.S. 15:1310(H)(3), provides:

> In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion to suppress made under this Subsection, or the denial of any application for an order of approval, if the attorney general or district attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

The Louisiana statute tracks the federal statute, 18 U.S.C. § 2518(10)(b).

Although previously, federal criminal procedure did not provide for appeal of pretrial motions to suppress, 18 U.S.C. § 2518(10)(b) gives the United States the right to take an interlocutory appeal from an order granting a motion to suppress intercepted wire communications and from orders denying an application for an order of approval. *United States v. Kahn*, 415 U.S. 143, 149, 94 S.Ct. 977, 891, 39 L.Ed.2d 225, fn. 6 (1974).

The provisions of the Louisiana Criminal Code "shall be given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." La. R.S. 14:3; *State v. Williams*, 2000-1725 (La. 11/28/01), 800 So.2d 790, 800. Under La. R.S. 15:1310(H)(3), the State has the right to appeal the decision to grant the motion to suppress the evidence garnered through wiretaps. The statute does not mandate that review *must be* by appeal or that the State may not obtain a review by applying for a supervisory writ. The language authorizes that the State may appeal the ruling if it certifies to the judge denying such application that the appeal is not taken for purposes of delay.

Previously, this Court has reviewed the suppression of evidence obtained by electronic surveillance pursuant to La. R.S. 15:1301-1312 by way of the State's writ application. In *State v. Neisler*, 93-2401 (La. 4 Cir.

3/29/94), 635 So.2d 433, this Court reversed the trial court's decision to suppress the evidence, and the Louisiana Supreme Court affirmed this Court's decision, *State v. Neisler*, 94-1384 (La. 1/16/96), 666 So.2d 1064 (on rehearing). See also *State v. Cain*, 95-0054 (La. 4 Cir. 2/27/96), 670 So.2d 515, *writ denied*, 96-0771 (5/3/96), 672 So.2d 687.

Routinely, Louisiana appellate courts review the suppression of evidence by supervisory writ application. In the present case, the State did not file a motion for an appeal and did not file its certification; however, the State timely applied for a supervisory writ. The Louisiana statute, La. R.S. 15:1310(H)(3), allows, but does not require review of the evidence obtained by wiretapping only by means of an appeal. The State implemented a legally proper procedure in obtaining a review of the suppression of the wiretapping evidence by means of a supervisory writ application.

Accordingly, the defense's motion to dismiss is denied.

State's Writ Application

In the present case, the defense based its motion to suppress on the following grounds: (1) None of the wiretap applications was properly authorized; (2) None of the persons who intercepted the oral communications was qualified under the statute to intercept them; (3) The confidential informant whose information established the probable cause

was not properly presented to the issuing judges and sworn so that the judges could inquire as to the truthfulness of the statements in the application; (4) None of the wiretap recordings was properly sealed; (5) None of the wiretaps or extensions therefore were necessary (as required by the statute). At the hearing the parties focused on the first two issues.

In its writ application, the State argues that the trial court erred in suppressing the evidence based on the first two grounds.

Standard of Review of a Motion to Suppress

The appellate court reviews the district court's findings of fact on a motion to suppress under a clearly erroneous standard, and will review the district court's ultimate determination of Fourth Amendment reasonableness *de novo*. *U.S. v. Seals*, 987 F.2d 1102 (5 Cir. 1993), *cert. denied*, 510 U.S. 853, 114 S.Ct. 155, 126 L.Ed.2d 116 (1993). On mixed questions of law and fact, the appellate court reviews the underlying facts on an abuse of discretion standard, but reviews conclusions to be drawn from those facts *de novo*. *United States v. O'Keefe*, 128 F.3d 885 (5 Cir. 1997), *cert. denied*, 523 U.S. 1078, 118 S.Ct. 1525, 140 L.Ed.2d 676 (1998). An appellate court reviews the district court's determinations of reasonable suspicion and probable cause *de novo. U.S. v. Green*, 111 F.3d 515 (7 Cir. 1997), *cert. denied sub nom. Green v. U.S.*, 522 U.S. 973, 118 S.Ct. 427, 139 L.Ed.2d

328 (1997). Where the facts are not in dispute, the reviewing court must consider whether the trial court came to the proper legal determination under the undisputed facts. *Maryland Cas. Co. v. Dixie Ins. Co.*, 622 So.2d 698 (La. App. 1 Cir. 1993), *writ denied* 629 So.2d 1138 (La. 1993).

Hearing on the Motion to Suppress

The defense provided copies of the approval pages of the applications for wire intercepts and a copy of a representative wiretap application and order. The application asked that the district court authorize Louisiana State troopers, Drug Enforcement Agency ("DEA") agents and intelligence analysts, Jefferson Parish Sheriff's deputies, New Orleans Police Officers ("NOPD") officers, and contracted monitors of the Lafayette Group to intercept and to listen to wire and oral communications to and from the target telephone.

Trooper David Nunez signed as the affiant in each application. Harry Connick, Orleans Parish District Attorney ("DA"), signed to approve the applications for telephone numbers in Orleans Parish. Paul Connick, Jefferson Parish District Attorney, signed to approve the application for a wiretap on a Jefferson Parish phone number. Trey Phillips, Assistant District Attorney ("ADA"), for Madison Parish, signed on the line for District Attorney James Caldwell to show approval of the application for the

telephone number in Madison Parish. Julie Cullen, the Assistant Attorney General ("AAG"), who heads the Criminal Division, signed on the line for Richard Ieyoub, the Louisiana State Attorney General ("AG"), to show that he approved all of the applications. An Orleans Criminal District Judge issued the orders for the wiretaps for (504) 319-3878 and (504) 913-8913. The application relating to telephone number (504) 433-0063 in Jefferson Parish was granted by a Twenty-Fourth Judicial District Court Judge. The order for the wiretap for telephone number (318) 574-0392 was issued by a Sixth Judicial District Court Judge.

At the November 6, 2001 hearing, the parties agreed to limit the hearing to the first two of the five specific grounds, whether the wiretap applications were properly authorized and whether the persons, who intercepted the oral communications and executed the wiretap orders, were those properly qualified under the statute. The parties acknowledged that resolution of the first two grounds might end the case.

The parties made the following stipulations: (1) Assistant Attorney Julie Cullen, in charge of the Attorney General's Office Criminal Division, to whom Attorney General Ieyoub delegated general responsibility for all wiretap investigations in Louisiana, signed each wiretap application in this case without Attorney General Ieyoub's prior knowledge or authorization;

(2) Madison Parish District Attorney James Caldwell was aware that the Louisiana State Police were requesting a wiretap for a telephone in his parish. District Attorney Caldwell authorized Assistant District Attorney Trey Phillips to handle the request. Trooper David Nunez, who applied for the wiretap application for phone number (318) 574-0392, presented the application to ADA Phillips, who signed it. District Attorney James Caldwell did not review or authorize the application before it was signed in Madison Parish.

The State clarified that the District Attorneys for Jefferson and Orleans Parish signed the applications; therefore, the defense arguments focused only on the fact that Julie Cullen of the Attorney General's Office signed the applications for wiretaps in those two parishes. The trial court clarified that the Attorney General did not sign the applications for any of the wiretaps of (504) 913-8913, (504) 433-0063, (318) 574-0392, or (504) 319-3878. All were signed by Julie Cullen of the Attorney General's Office.

Trooper David Nunez testified that in January 2001 he was assigned to the High Intensity Drug Trafficking Area Task Force ("HIDTA"), which was composed of federal, state, and local agents. He was the affiant on the applications for wiretaps. He was responsible for all the signatures and the chain of command. Trooper Nunez said that he was the State Police case

agent. He produced the confidential informant and obtained the signatures.

The Lafayette Group, a civilian company under contract to monitor the wiretaps and transcribe the information, was mentioned in the affidavit. The Lafayette Group was only to monitor and transcribe; the group had nothing to do with probable cause or the investigation, and the group did no proactive law enforcement work.

Trooper Nunez stated that prior to setting up the wiretap, all the Lafayette monitors were "minimized" by a Jefferson Parish ADA, and the trooper was present during minimization. Minimization referred to deletions due to privileges such as attorney/client, clergy, and husband/wife. The Lafayette Group monitors were to take calls as they were made, write down what was said, and transcribe when the wiretap was over. The monitors were supervised by law enforcement agents like Trooper Nunez, who observed them every few hours.

On cross-examination, the trooper stated that he was assisted by a Jefferson Parish ADA and a State Police attorney in Baton Rouge. Any type of affidavit to be filed in Orleans Parish was proofread by attorney Tim McElroy. The trooper sought the approval of the DA and a determination by an attorney that the application was legally sufficient. ADA approved all the affidavits. Trooper Nunez appeared to be convinced that Louisiana had a

provision similar to the federal provision that allowed actual interception by a contracted private group. He said that HIDTA hired the Lafayette Group, but then clarified that Lafayette contracted with the State Police. He did not have a copy of the contract. None of the Lafayette Group monitors was a commissioned police officer. Trooper Nunez agreed that the monitors were private citizens, mostly retired federal agents. The trooper stated that all the interceptions were made by the Lafayette Group, not police officers.

Trooper Nunez said that the Lafayette Group physically was in a special office in Metairie used by HIDTA when the interceptions occurred. He was in the office every day during the two and one-half months that conversations were intercepted. He reviewed the synopses of intercepted calls and also he read "live" information. There was no set time period for him to stay in the office. The case agents from Orleans Parish (Sergeant Toy), Jefferson Parish (Robert Gerdes and Bruce Harrison), and the DEA (Robert Norton and Jefferson Justice) also supervised the monitors. He agreed that NOPD Sergeant Toy, Jefferson Parish Sheriff's Office Deputies Gerdes and Harrison, and DEA Agents Norton and Justice were not commissioned state police officers of the Department of Public Safety and Corrections. There were ten to fifteen employees of the Lafayette Group monitoring calls. A Jefferson Parish ADA gave the lecture on minimization

before the monitoring began, and he returned later for those who missed the first lecture. Trooper Nunez stated that none of the monitors was scheduled until he had received that instruction. The trooper checked the synopses for information and to insure that they were being written in a manner to correctly provide the necessary information.

On redirect examination, Trooper Nunez stated that the Lafayette Group was housed in an office on the same floor as his office; his office was about fifty feet from the HIDTA work station where the wiretap was being conducted. On recross-examination, the trooper said that he prepared ten-day reports during the investigation, which summarized what the monitors did. He did not prepare a report relating to his time spent supervising the monitors. The trooper agreed that the Lafayette Group was a private company made of mostly retired federal agents and State troopers. "Senior management" at all the agencies, not just the State police, made the decision to select the Lafayette Group. He subsequently agreed that the Lafayette Group had contracted with HIDTA. The trooper stated that he had worked with the Lafayette Group before in past investigations. The monitors worked eight-hour shifts; two to four Lafayette Groups employees were working on each shift.

Trooper Nunez testified that the Lafayette personnel were not present

when the judges visited the facility where the Lafayette Group monitored the phones. He did not recall whether he gave the names of any of the Lafayette personnel to the judges. He did not show the judges the contract with the Lafayette Group. The trooper said that he told the two judges that the group regularly performed these duties for the DEA and that the employees were not law enforcement officers (but retired agents). Trooper Nunez did not recall if he had such a discussion with the judge in Madison Parish.

Authorization

Initially, the State maintains that the trial court erred in suppressing the evidence because the signatures and approval could be linked and identified with the authority of the District Attorney and the State Attorney General.

The defense argues that under La. R.S. 15:1308 (relying on legislative history relating to the original version of its federal counterpart, 18 U.S.C. 2516), both the signature of the Parish District Attorney and the Attorney General on the wiretap applications are required. The defense maintains that the Louisiana statute does not allow any assistant attorney general or assistant district attorney to authorize the application for a wiretap.

Federal Statutes and Jurisprudence

Considering that the issue is *res nova* in Louisiana, federal law and

jurisprudence are reviewed. The federal statute, 18 U.S.C. 2516(1), has been amended over the years to broaden the list of federal officials who may authorize an application for a wiretap.

In *United States v. Giordano*, 416 U.S. 505, 507-508, 94 S.Ct. 1820, 1823, 40 L.Ed.2d 341 (1974), the United States Supreme Court concluded that 18 U.S.C. § 2516(1) did not permit the Attorney General's Executive Assistant to validly authorize a wiretap application. Only the Attorney General or an Assistant Attorney General specially designated by him had the power to authorize a wiretap application.

In *United States v. Chavez*, 416 U.S. 562, 94 S.Ct. 1849, 40 L.Ed.2d 380 (1974), the United States Supreme Court stated that "misidentifying the Assistant Attorney General as the official authorizing the wiretap application to be made does not require suppression of wiretap evidence when the Attorney General himself has actually given the approval…." *Id.* 416 U.S. at 569, 94 S.Ct. at 1853. The Supreme Court stated:

> . . . Hence, failure to secure approval of one of these specified individuals prior to making application for judicial authority to wiretap renders the court authority invalid and the interception of communications pursuant to that authority "unlawful" within the meaning of 18 U.S.C. s 2518(10)(a)(i). Failure to correctly report the identity of the person authorizing the application, however, when in fact that Attorney General has given the required preliminary approval to submit the application, does not represent a similar failure to follow Title III's precautions against the unwarranted use of wiretapping or electronic surveillance and does not warrant the suppression of evidence

> gathered pursuant to a court order resting upon the application. *Id.* at 571-2, 94 S.Ct. at 1854.

In *United States v. Robertson*, 504 F.2d 289 (5 Cir. 1974), *cert. denied sub nom. Robertson v. U.S.*, 421 U.S. 913, 95 S.Ct. 1568, 43 L.Ed.2d 778 (1975), the Fifth Circuit noted that the United Supreme Court held in *Giordano, supra,* that the suppression of wiretap evidence was not required for certain non-constitutional procedural defects. The Fifth Circuit found that the congressional intent was satisfied when the head of the Justice Department personally reviewed and approved the proposed application.

In *United States v. Joseph*, 519 F.2d 1068 (5 Cir. 1975), *cert. denied sub nom. Joseph v. U.S.*, 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 312 (1976), *and sub nom. Ganem v. U.S.*, 430 U.S. 905, 97 S.Ct. 1173, 51 L.2d.2d 581 (1977), the United States Fifth Circuit held that the wiretap order naming an acting Assistant Attorney General (whose authority had lapsed) as the official authorizing the application was valid (and not facially insufficient) because the Attorney General had in fact authorized the application. See also *State v. Ladd*, 527 F.2d 1341 (5 Cir. 1976).

In *United States v. Acon*, 513 F.2d 513 (3 Cir. 1975), the wiretap authorizations were signed by an acting assistant attorney general, not specifically qualified to approve electronic surveillance under 18 U.S.C. § 2516(1). The Third Circuit stated that under 18 U.S.C. § 2518(10)(a)(ii),

suppression of the evidence was not required for facial insufficiency relating to less critical requirements and noted that in *Giordano, supra,* and *Chavez, supra,* the Supreme Court examined affidavits, which might have varied identification information. The Third Circuit found that the fact that the government could use affidavits to vary who authorized the application made that requirement less critical and reversed the district court's order of suppression.

In *United States v. Anderson,* 39 F.3d 331, 339 (D.C.Cir.1994), *rev'd in part on other grounds on reh'g en banc,* 59 F.3d 1323 (D.C.Cir.1995), *cert. denied sub nom.U.S. v. Anderson,* 516 U.S. 999, 116 S.Ct. 542, 133 L.Ed.2d 445 (1995), in denying the defense's motion to suppress, the D.C. Circuit stated that **those individuals who signed the applications were identifiable**. The D.C. Circuit declared:

> The wiretap statute in effect at the time *Giordano* was decided provided that even assistant attorneys general could not authorize applications unless they had been specially designated to do so by the Attorney General and did not provide for authorizations by deputy assistants. Because the only persons permitted to authorize wiretap applications under the old act were political appointees requiring the confirmation of the Senate it made sense for the Supreme Court, as well as for this court in *United States v. Robinson,* 698 F.2d 448, 452 (D.C.Cir.1983), to state that the purpose of the Wiretap Act was to limit authorizations to politically accountable officials. See infra Part I(A)(2). With the amendment of the statute to permit certain nonpolitically accountable deputy assistants in the criminal division to authorize applications, that purpose can no longer be ascribed to Congress. It would perhaps be more

> accurate, then, to attribute to Congress the purpose of limiting such authority to identifiable officials in positions of trust. *Id.* at 340, fn. 6.

In *States v. Nanfro*, 64 F.3d 98 (2nd Cir. 1995), *cert. denied sub nom. Ingrao v. U.S.*, 516 U.S. 1060, 116 S.Ct. 738, 133 So.2d 688 (1996), the Second Circuit upheld the conviction based on wiretapping evidence where a Deputy Assistant Attorney General, designated by the Attorney General, approved the application for the wiretap. The Second Circuit stated:

> Section 2516(1) does not state that the Attorney General must designate officials by name. Identification by position is entirely consistent with the legislative history, which indicates that the purpose of the statute was to ensure that intrusive electronic eavesdropping be authorized only by a limited group of responsible federal officials. **The statute requires that each of the officials be able to trace his or her explicit authority, by designation, to the Attorney General**, an official who, by virtue of presidential appointment and Senate confirmation, is publicly responsible and subject to the political process. The statutory limitations allow the responsible persons to be identified and encourage consistency in the policy with which the electronic surveillance power is used. [Emphasis added.]
> Id. at 100.

In *United States v. Duran*, 189 F.3d 1071, 1085-86 (9 Cir. 1999), *cert. denied sub nom Duran v. U.S.*, 529 U.S. 1081, 120 S.Ct. 1706, 146 L.Ed.2d 509 (2000), the Ninth Circuit upheld the admissibility of information obtained by means of a wiretap when all the individuals targeted were not identified.

The federal statute, 18 U.S.C. 2516(1) currently provides:

> The Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense ….

Louisiana Law

La. R.S. 15:1308 (added by La. Acts 1985, No. 859, § (1) provides in pertinent part:

> (A) The attorney general, with the approval of the district attorney in whose district the interception of wire or oral communications shall take place, and the district attorney, with the approval of the attorney general, may authorize an application to a judge in whose district the interception of wire or oral communications shall take place, and such judge may grant in conformity with R.S. 15:1310 an order authorizing or approving the interception of wire or oral communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of:
>
> (1) Any violation of the Uniform Controlled Dangerous Substance Act ….

The Louisiana Electronic Surveillance Act, La. R.S. 15:1301 *et seq.*, does not explicitly provide for delegation by the Attorney General or the

District Attorney. La. C.Cr.P. art. 8 provides that "official titles, such as clerk of court, coroner, district attorney, and sheriff, include assistants and deputies." The Official Revision Comment to art. 8 declares: "In some instances it is the clear intent to restrict the official title to the actual holder of the office, and this limitation is expressly recognized by the introductory clause of this article," which provides that titles include assistants "[u]nless the context clearly indicates the contrary…." According to the comment, Art. 8 codified the well-established general principle that assistants may perform the duties of officials under whom they serve.

La. C.Cr.P. art. 8 is part of the general criminal law, and La. R.S. 15:1308 is part of the specific statute on electronic surveillance. Where two laws conflict, the law more specifically directed to the matter at issue generally prevails over the general law. *State v. One 1990 Sierra Classic Truck*, 94-0639 (La. App. 4 Cir. 11/30/94), 646 So.2d 492, *writ denied*, 94-3171 (La. 2/17/95), 650 So.2d 254. However, where the specific statute, La. R.S. 15:1308(A), is silent on the issue, it does not forbid delegation, and the context does not conflict with La. C.Cr.P. art. 8.

La. C.Cr.P. art. 8, which provides that "official titles, such as clerk of court, coroner, district attorney, and sheriff, include assistants and deputies" is illustrative, not exclusive. The fact that the article contains a list of

examples, which does not include the attorney general, does not mean that the article does not apply to the Attorney General, an "official title." La. R.S. 15:1308 should be read in *pari materia* with La. C.Cr.P. art. 8 and arts. 62 and 63.

In *State v. Refuge*, 300 So.2d 489 (La. 1974), the Louisiana Supreme Court noted that with respect to La. C.Cr.P. art. 8, La. C.Cr.P. art. 934(5) provided that "'District Attorney' includes an assistant district attorney…." and held that the requirement of Code of Criminal Procedure that a bill of information be made by the district attorney was satisfied when an assistant district attorney signed the bill.

State v. Neyrey, 341 So.2d 319, 324 (La. 1976), involved the construction of Art. 4, § 8(2) of the 1974 Constitution (limiting the plenary power of the Attorney General under the 1921 Constitution) that authorized that he could "assist in the prosecution of any criminal case" upon a district attorney's written request. The Louisiana Supreme Court held that the District Attorney's prior written request that the Attorney General's Office handle the charges was sufficient. The Supreme Court upheld the trial court's denial of the motion to quash.

In Re Matter of Morris Thrift Pharmacy, 397 So.2d 1301 (La. 1981), the Louisiana Supreme Court considered La. C.Cr.P. art. 66, relating to the

Attorney General or District Attorney's power to issue subpoenas for purposes of investigation. The Supreme Court viewed the term "Attorney General" as meaning the office, which included his assistants.

Federal jurisprudence expanded the reading of the federal statute, and the statute was amended to expand the list of those entitled to authorize the wiretap applications under 18 U.S.C. 2516(1). Federal legislative history focuses on the responsibility in the hands of an identifiable person.

The federal and Louisiana statutes, 18 U.S.C. § 2515 and La. R.S. 15:1307, both provide exclusionary rules if the disclosure of the information obtained would be a violation of the federal and state electronic surveillance law as follows: "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding…." Under the federal jurisprudence interpreting the federal wiretap statute, suppression of the evidence is not always necessary because of only a facial insufficiency.

Louisiana has no clear article, statute or revision comment that resolves this issue. La. R.S. 15:1310(A)(1) provides that each application for a wiretap order shall include the "identity of the investigative or law enforcement officer making the application and the person authorizing the

application." Like 18 U.S.C. 2518(10)(a), La. R.S. 15:1310(H)(1) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the state, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that:
>
> (a) The communication was unlawfully intercepted;
>
> (b) The order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (c) The interception was not made in conformity with the order of authorization or approval.

In the present case, the defense argues that each of the applications was insufficient on its face under La. R.S. 15:1310(H)(1)(b) [as the federal cases argued under 18 U.S.C. 2518(10)(a)(i)] because Attorney General Ieyoub did not sign or authorize the applications. The defense asserts that the Madison Parish application was also facially insufficient because District Attorney James Caldwell did not authorize the application, and ADA Trey Phillips signed on the line for the DA's signature and printed his name and ADA underneath the line. The defense complains that the fact that the Attorney General did not authorize the wiretap applications makes the wiretap orders illegal; therefore, the communications were unlawfully intercepted under La. R.S. 15:1310(H)(1)(a).

In *State v. Neisler*, *supra,* at pp. 7-8, 666 So.2d at 1068, the Louisiana

Supreme Court was faced with the issue of whether evidence must be suppressed under La. R.S. 15:1307 in the case of a failure to follow a statutory requirement of La. R.S. 15:1310 in obtaining a wiretap order. La. R.S. 15:1310(B)(1) provides that if the application relies on the information provided by a confidential informant, then the informant "shall be presented to the judge and be sworn …." The Supreme Court noted that in a case where there was a clear violation of the statutory requirements of La. R.S. 15:1310B(1), the necessity for suppressing evidence under the exclusionary rule of La. R.S. 15:1307 was an entirely separate question. *Id.* The Court noted that the informant's information was not crucial to the determination of probable cause. The Louisiana Supreme Court held:

> . . . We conclude that suppression of the evidence because of the officers' failure to present the informant, when that informant's information was unnecessary to the obtaining of the wiretap order that led to the search warrant, is simply too high a price to pay to assure technical compliance with a statute whose purpose was otherwise served by the commendable police work in the present case. The deterrent purpose of the exclusionary rule in La.Rev.Stat. 15:1307 would not be served by suppressing otherwise valid criminal evidence because of the type of police behavior involved in this case, namely, the inclusion of superfluous information in the affidavit used to obtain the wiretap order.
> *Id*. at p. 10, 666 So.2d at 1069.

In the present case Attorney General Ieyoub authorized Assistant Attorney General Julie Cullen to approve and sign the applications. The

Madison Parish application was not signed by DA James Caldwell. In *Chavez, supra,* and the subsequent federal appellate opinions, there are other considerations. Under *Chavez*, the misidentification alone did not render interceptions unlawful, and violations of that procedural requirement did not substantially and directly affect the congressional intent behind Title III and the Louisiana Electronic Surveillance Act.

Under *Neisler, supra,* the technical statutory violation should not warrant suppression in the present case. Ultimately, the Director of the Criminal Division, Assistant Attorney General Julie Cullen, who is a clearly identifiable official with authority from an elected official, Attorney General Ieyoub, signed and authorized the applications. The aims of centralization and consistency have been upheld. The Madison Parish application is also legally valid because it is traceable to the authority of the identifiable official, the Attorney General.

The non-constitutional procedural defects in the applications and orders do not fall under La. R.S. 15:1310(H)(1) ("unlawfully intercepted") and do not substantially and directly affect the congressional intent behind Title III and the Louisiana Electronic Surveillance Act, La. R.S. 15:1301 *et seq*. Suppression of the evidence obtained by means of the wiretaps is not warranted because the applications were approved by identifiable persons

having the authority to approve the applications. The authorizations of the applications are valid.

Monitoring by Employees of a Private Company

The State also contends that the trial court erred in suppressing the evidence based on the fact that the monitoring duties were subcontracted to the Lafayette Group, which is comprised mostly of retired DEA agents and state troopers.

The defense contends that the Louisiana statute, La. R.S. 15:1302(12) is clear that only a state police officer and a district attorney can intercept wire or oral communications. The defense argues that the Louisiana statute was never expanded to allow individuals under contract to the State or HIDTA to intercept communications. The State distinguishes between interception and monitoring.

The absence of the language (found in the federal statute to authorize individuals under contract with the government to conduct an interception) does not mean that the use of civil personnel under contract is prohibited. The statute does not restrict the monitoring to law enforcement officers and the district attorney where the statute is silent.

The federal statute, 18 U.S.C. 2518(5), allows civilians under contract to the government to intercept wire or oral communications. Louisiana R.S.

15:1310(E) contains the language of its federal counterpart except for the last sentence, which allows for interception by an individual contracting with the government.

Louisiana R.S. 15:1302(12), provides:

> "Investigative or law enforcement officer" means any commissioned state police officer of the Department of Public Safety and Corrections who, in the normal course of his law enforcement duties, is investigating an offense enumerated in this Chapter, and the district attorney authorized by law to prosecute or participate in the prosecution of such offense.

Louisiana R.S. 15:1308(A), provides that a "judge may grant in conformity with R.S. 15:1310 an order authorizing or approving the interception of wire or oral communications by an investigative or law enforcement officer having responsibility for the investigation of the offense as to which the application is made…," In the present case, the defense maintains that a wiretap order in Louisiana cannot authorize an interception by anyone who is not an investigative or law enforcement officer. The language of La. R.S. 15:1308(A) contemplates that all applications will originate with an officer, but it is silent as to monitoring.

The federal statute provides in pertinent part in 18 U.S.C. 2518(5): "An interception under this chapter may be conducted in whole or in part by

Government personnel, or by an individual operating under a contract with the Government, acting under the supervision of an investigative or law enforcement officer authorized to conduct the interception." The language to allow government personnel or individuals operating under a government contract (acting under supervision of investigative or law enforcement officer authorized to conduct interception) to conduct the interception was added in 1986 by Pub.L. 99-508, § 106(c). From 1968 to 1986 the statute had no provision to allow civilian personnel to conduct an interception.

However, 18 U.S.C. 2516(1) (like La. R.S. 15:1308(A)), which applies to federal applications for wiretaps, still provides that after a valid application, a "judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made…." even though 18 U.S.C. 2518(5) was amended to provide that civilians under contract may conduct the interception. La. R.S. 15:1308(A) tracks the 18 U.S.C. § 2516(1)'s language.

Although the Louisiana statute has no provision for interception by civilian personnel, the statute does not prohibit civilian monitors, as distinguished from those who intercept the telephone calls. The Lafayette

Group, a private company used often by the DEA, according to the state trooper's testimony at the hearing, conducts interceptions under its contract with the federal government. Trooper Nunez stated that the Lafayette employees monitored the wiretaps, listened, minimized, and transcribed the pertinent parts of the intercepted conversations. He and the other law enforcement officers supervised, but there was no set schedule. He supervised when he was at the office and had time.

Louisiana La. R.S. 15:1302(11), provides that: "'Intercept'" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."

In *State v. Esteen*, 2001-0879 (La. App. 5 Cir. 5/15/02), __ So.2d __, 2002 WL 991568, the case arose from an investigation of drug trafficking in Jefferson Parish conducted in 1998 by the Federal Bureau of Investigations, the Drug Enforcement Agency, the Louisiana State Police, and the Jefferson Parish Sheriff's Office. Law enforcement agencies obtained pen registers and wiretapping evidence that led to the arrests of various suspects. One defendant argued that the trial court's denial of his motion to suppress was in error because the tapes were not individually sealed. Although the issue of the use of civilian monitors was not raised, the Fifth Circuit noted that several witnesses for the Lafayette Group, a private company that performed

the monitoring services for the wiretaps, testified at the motion to suppress hearing about the sealing of the tapes. *Id*. at p. 42. Without addressing the issue of the employment of the Lafayette Group, two convictions obtained as a result of the wiretaps were affirmed by the Fifth Circuit in *State v. Richardson*, 00-1551 (La. App. 5 Cir. 8/28/01), 795 So.2d 477 and *State v. Decay*, 01-192 (La. App. 5 Cir. 9/13/01), 798 So.2d 1057.

In *United States v. Lopez*, 106 F.Supp.2d 92 (D. Me. 2000), the federal district court found that the government failed to disclose its intention to use civilian monitors. In the present case, the government did disclose that it intended to use civilian translators. The federal statute allowed civilian monitors supervised by law enforcement personnel. However, the federal court found that civilian monitors may intercept communications if the order authorizing interception expressly provides for the use of such monitors. After finding the two violations, the federal district court considered whether suppression was warranted under 18 U.S.C. S 2518(10)(a). Quoting *United States v. Donovan*, 429 U.S. at 433-34, 97 S.Ct. 658, the federal court concluded:

> . . . [T]he failure of the Government to disclose in the Application its intent to use civilian monitors does not mean that communications were "unlawfully intercepted" under § 2518(10)(a)(i). Although the Court has determined that Title III implicitly requires the Government to reveal to the issuing judge its intent to use civilian monitors, the Court cannot say that such an implied requirement "directly and substantially"

> implements "the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Donovan*, 429 U.S. at 433-34, 97 S.Ct. 658. Indeed, that the Court has inferred this requirement from the general scheme of Title III essentially dictates a finding that suppression is not warranted under the test set forth in *Donovan*. Accordingly, although the Court finds that the Application was deficient, such deficiency did not result in unlawful interceptions, and therefore suppression is not appropriate per § 2518(10)(a). [Footnote omitted].
> *Id*. at 98.

In considering the violation in that civilian monitors intercepted the telephone calls despite the order's requirement that law enforcement officers conduct the intercepts, the federal court noted that it was more than a minor or technical violation. The federal court noted that the violation was inadvertent, the minimization efforts of the civilian monitors and the law enforcement officers were sufficient, and the defendant suffered no prejudice. The court concluded that the violation was not sufficiently serious "that justice requires suppression of the entire wiretap." *Id.* at 100. The court concluded that the supervision of the civilian monitors in the case was more than adequate to meet the requirements of § 2518(5). *Id.* at 102.

In the present case the applications clearly noted that the Lafayette Group monitors had been contracted to intercept the communications. In *Lopez, supra*, the federal court noted the legislative history: "The legislative

history specifically reflects, however, that the purpose of the amendment is to 'free' field agents from their monitoring duties 'so that they can engage in other law enforcement activities.'" *Id.* at 102, quoting House Report No. 99-647, 99th Cong., 2d Sess., 1986 U.S.C.C.A.N. 3555. The court went on to state:

> . . . The language of the House Report plainly indicates that Congress intended that supervision of civilian monitors need not be continuous, nor active, contrary to this Court's previous holding. Obviously Congress intended that civilian monitors could be left alone-- presumably for extensive periods--so that the law enforcement officers, who would otherwise be conducting the interceptions themselves, may "engage in other law enforcement activities." . . . .
> *Id.* at 101.

The Louisiana statute, La. R.S. 15:1310(E), does not include the amendment to 18 U.S.C. § 2518(5) except for its last two sentences relating to translators and civilian monitors. There is no Louisiana mandate that civilian personnel, even if the Lafayette employees are mostly retired federal agents and state troopers, can be authorized to conduct an interception. There is no Louisiana mandate that civilian personnel cannot be authorized to conduct an interception.

Pursuant to Title III (as interpreted by the federal courts) and the Louisiana Electronic Surveillance Act, we find no restriction on the wiretapping or monitoring by the contracted civilian employees that would

prohibit their performance or employment. La. R.S. 15:1308(A) addresses the process of securing authorization for a wiretap application. It does not say anything regarding the acceptability of the subcontracted monitors.

Considering that subcontracted monitoring is not expressly prohibited, this Court finds that it is legally valid. The Lafayette Group had been utilized in previous wiretapping and monitoring cases. The Lafayette Group's employees did not participate in proactive law enforcement activities. The monitors were required to attend a minimization lecture to train them. The defendants' privacy rights were protected under the minimization procedures. The state police officer, State Trooper David Nunez, and other law enforcement officers supervised the activities, and the Lafayette Group and worked at Trooper Nunez's direction. The applications included the fact that the Lafayette Company employees would be monitors. The district judges who approved the applications were aware of the Lafayette Group's participation and did not restrict the Group's monitoring. The monitoring by the Lafayette Group did not infringe on any provision or underlying policy.

The supervision of the Lafayette Group employees or other civilian personnel adequately met the requirements of the State statute. The Lafayette Group was set up, approved, and supervised by identified law

enforcement personnel, including law enforcement officer, State Trooper Nunez. Under the totality of circumstances, the Lafayette Group had the legal capacity to intercept and monitor telephone calls pursuant to a wiretap order. The employment of the Lafayette Group does not merit suppression of the evidence obtained through the wiretaps.

Accordingly, the motion to dismiss the writ application is denied. The ruling of the trial court is reversed, and the motion to suppress is denied with respect to the above issues. The case is remanded for further proceedings.

MOTION TO DISMISS DENIED;
WRIT GRANTED;
REVERSED & REMANDED