

AGENDA

PROSECUTORS' GUIDE TO WIRETAPS

October 9, 2017

2:30 p.m. – 4:00 p.m.

Lower Plaza Assembly Room

Instructors: Senior Deputy District Attorney David Russell
and Deputy District Attorney John Poore

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|-------------|--|-----------|
| I. | Introduction | 2:30 p.m. |
| II. | Getting a Wiretap | 2:35 p.m. |
| | Wiretap Statutes | 2:40 p.m. |
| | Wiretap Requirements | 2:50 p.m. |
| III. | Running a Wiretap | 3:00 p.m. |
| | Types of Wiretaps | 3:10 p.m. |
| | Amendments | 3:15 p.m. |
| | 10 Day Reports | 3:20 p.m. |
| | Building Prosecutable Wiretap Cases | 3:25 p.m. |
| IV. | Prosecuting Cases After the Wiretap is Over | 3:30 p.m. |
| | Sealing Order | 3:35 p.m. |
| | Notice and Inventory | 3:40 p.m. |
| | Discovery Obligations | 3:45 p.m. |
| | Defending the Wiretap | 3:50 p.m. |
| V. | Conclusion | 4:00 p.m. |

Wiretaps



Senior Deputy District Attorney David Russell
Deputy District Attorney John Poore

Topics to Cover

- Getting a Wiretap
- Running a Wiretap
- Prosecuting Cases After the Wiretap is Over

GETTING A WIRETAP

WIRETAP STATUTES PC 629.50-98

Crimes Justifying a Wiretap

- **PC 629.52** - Probable cause to believe an individual is committing, has committed, or is about to commit:
 - Heroin, cocaine, PCP, and meth sales-related crimes **when weight exceeds 3lbs**;
 - Murder/solicitation to commit murder;
 - Kidnapping in violation of **PC 209**;
 - Any felony violation of **PC 186.22**;
 - Bombings or use of **WMDs**;
 - Human trafficking; AND
 - **Attempts or conspiracies** of the above.

Additional Probable Cause Required

- **Nexus to This County** – **PC 629.52**.
- **Communications Will Occur** – **PC 629.52(b)**.
- **Lines or Places Monitored Will Be Used for Communications** – **PC 629.52(c)**.
- **Exhaustion** - **PC 629.52(d)**:
 - Normal investigative procedures have been tried and have failed or reasonably appear either to be unlikely to succeed if tried or to be too dangerous.

Nexus

- Hardline is located in this county.
- Cell phone is being used in this county.
- Calls are initiated from this county.
- The target subject or target crimes are connected to this county.

Communications

- Identify Target Subjects.
- Identify Target Communications.
- Connect Phones to Target Subjects.

Duration of Interception

- Order may be for up to 30 days.
- 30 day clock begins at initial interception or 10 days after the signing of the order by the judge.
- Interception may be amended or extended.

Wiretap Documents

- **Affidavit:** Affiant must be POST-certified in wiretaps pursuant to PC 629.94.
- **CEO Review:** Signed by the Chief of the affiant's agency or designee.
- **Application:** Signed by the DA or designee.
- **Wireroom Instructions:** Identifying the targets, target offenses, and communications subject to monitoring.
- **Order:** Signed by the Presiding Judge or ordered designee.

Steps in Wiretap Preparation


- Affiant writes affidavit and submits it to the assigned DDA.
- Assigned DDA approves affidavit and obtains wiretap number prior to CEO review.
- CEO approves affidavit.
- Assigned DDA prepares the Order, Application, and Wireroom Instructions before submitting all documents to the DA for review.
- DA approved documents delivered to the secretary for the Presiding Judge.

Tips for a Well-Written Wire

- **Continuity:**
 - Dates (June 21, 2015; 6/21/15; 6-21-15)
 - Abbreviations
 - 805-415-1529 (hereinafter referred to as "Target Telephone #2")
 - Federal Bureau of Investigation ("FBI")
- **Capitalization.**
- **Clear and Concise Language:**
 - He (John) said that she (Sally) sold dope.
 - John said Sally sold dope.

RUNNING A WIRETAP

Streamlining Wiretap Documents

1. Search Warrant vs Wiretap
2. DA Greg Totten's Application 
3. Exhaustion/Necessity
4. Boilerplate vs Specific Examples
5. Personal Liaison with Judge
6. Upload Documents to Shared Drive

Up and Running: Overview

1. Types of Wiretaps
2. Amendments
3. 10 Day Reports
4. Final (10 Day) Report
5. Wiretap Operations
6. Winding Down Wiretap Operations

Types of Wiretaps

Basis of Wiretap (Target Crimes) are:

1. Cold Case/Cool Case
-Example: Homicide
2. Currently Planning/Committing Crimes
-Example: Narcotics
3. Hybrid – Involves Both
-Example: Gang

Amendments

Every Affidavit Must Demonstrate Probable Cause that:

1. Target Subject
2. Is or Will be Using the Phone # or Device
3. To Commit or Discuss Target Crimes

Amendments

Every Affidavit Must Demonstrate Exhaustion and Necessity:

2 Scenarios:

1. Target Subject already addressed in previous affidavits/amendments
2. New Target Subject not addressed in previous affidavits/amendments

Amendments

1. Target Subject Already Addressed in Previous Affidavits/Amendments

VI.
NECESSITY
32. I believe that interception of wire communications of Target Telephones will be the only reasonable, viable means to gather evidence against the Target Subjects because normal investigative techniques have failed, appear reasonably likely to fail if tried, or are too dangerous to attempt as explained in Attachment A.

Amendments

2. New Target Subject not addressed in previous affidavits/amendments

NECESSITY
31. I believe that interception of wire communications of Target Telephones will be the only reasonable, viable means to gather evidence against the Target Subjects because normal investigative techniques have failed, appear reasonably likely to fail if tried, or are too dangerous to attempt as explained in Attachment A.
32. Since the interception and monitoring of communications of the Target Telephones began on June 2, 2014, investigators have attempted and continued to employ traditional investigative techniques (including) promotion searches, traffic stops, confidential contacts, physical surveillance, analysis of phone records and data and analysis of GPS records and data. The following are a few specific examples of the techniques employed or attempted and a discussion of why these techniques have failed to achieve the objectives and goals of this investigation.

Amendments

3. Monitoring of New Target Telephone expires 30 days from signing of original order

35. For these reasons, I ask that Ventura County Court Order 2014-12 be amended to include the interception of wire and electronic telephone communications to and from Target Telephone #3 to commence as part of Ventura County Court Order 2014-12. The monitoring of Ventura County Court Order 2014-12 began at 8:29 p.m. on June 2, 2014 and will terminate at 8:29 p.m. on July 2, 2014. The monitoring of Target Telephones #1, #1a, and #2 will terminate on the same date and time.

10 Day Reports

Day 1 is the Date Original Order is Signed by Judge.

Judge's Signature Must be on the 10 Day Report on or before Day 10.

10 Day Reports

Contains:

1. Number of Communications Intercepted
2. What Progress Has Been Made Toward Achieving Authorized Objective
3. "Satisfactory" Explanation for Lack of Progress AND Necessity for Continued Interception.

10 Day Reports

If the Judge finds that progress has not been made or that the explanation for the lack of progress is "Not Satisfactory", or that no need exists for continued interception...the judge shall order that the interception terminate immediately.

Final (10 day) Report

Contains:

1. Number of Communications Intercepted
2. Short Summary of Intercepted Dirty Calls During the Period??? - Depends
3. Short Summary of Intentions for Future Investigation/Wiretaps??? - Depends

Wiretap Operations

1. Building Prosecutable Cases
2. Identity

NAME	TRANSCRIPTION	TRANSLATION
	[Comienzo de llamada]	[Beginning of call]
MUNIZ	Hey, is this Alex?	Hey, is this Alex?
ORNELAS	¿Si... eh?	Yes... huh?
MUNIZ	¡Ey, cuidado!	Hey, brother in law!
ORNELAS	¿Qué hubole?	What's up?
MUNIZ	Ey, ¿no, no tienes el pedazo que tenías? ¿Ove tantas un pedacito por ahí?	Hey, don't, don't you still have that piece? That piece you had around there?
ORNELAS	¿Ah... creo que, ah?	Uh... I think that, uh?
MUNIZ	¿Te acuerdas que me dijiste que tenías un pedacito por ahí?	Remember you had told me that you had a little piece around?
ORNELAS	Namás uh... yeah, nomás tantito.	Just that uh... yeah, just a little bit.
MUNIZ	¿Cómo cuánto?	How much?
ORNELAS	Cómo... eight (8).	Like... eight (8).

MUNIZ	Que si se puede armar aqui cerquitas. ¿Sabes dónde está la, la Río Mesa?	That if you can come nearby here. Do you know where uh, uh, Río Mesa is at?
ORNELAS	SI.	Yes.
MUNIZ	Por allí nos, por allí nos en sí, en sí se llama la Red, ah Red Wing, donde venden botas.	Right there we can, right there we can in the, in the, it is called Red, Red Wing, where they sell boots.
ORNELAS	SI.	Yes.
MUNIZ	Allí nos vemos. Yo aquí me voy en chinga de volada porque me habías y yo le pido permiso a este tipo.	We will see each other there. I will leave here as fast as I can just give me a call and I will ask this Guy for permission.
ORNELAS	Dices que se llama Red Wings. ¿Verdad?	You said it was called Red Wings, right?
MUNIZ	Simón.	Yes.
ORNELAS	Okay.	Okay.
MUNIZ	Yo voy y lo encuentro allí.	I will go and meet you there.
ORNELAS	Okay, ahorita en un ratito.	Okay, I will be there in a little bit.





Wiretap Operations

1. Arrest of Target Subjects During Wiretap
2. Disclosure / Discovery Obligations

Winding Down Wiretap Operations

Options:

1. Extension for Current Wiretap
2. New Wiretap
3. No Further Interception





PROSECUTING CASES AFTER A WIRETAP IS OVER

- ### What comes next...
- Sealing Order
 - Notice and Inventory obligations
 - Discovery obligations
 - Use of evidence regarding non-target crimes
 - End of year reports
 - Defending the wiretap in court

Sealing Order

- **PC 629.64** – “Immediately upon the expiration of the order...”
- Typically it takes a day or two
- Our templates have a provision saying we can disclose copies (redacted) once we have filed a case

Notice and Inventory

- A “reasonable” time or no more than 90 days from termination
- Includes 3 things:
 - The fact of the entry of the order
 - The dates/period of interception
 - Whether they were intercepted or not

Example

Dear Sir or Madam:

Enclosed is a copy of a notice regarding Ventura County Wiretap No. 13-05. This notice is required to be sent to you pursuant to Penal Code section 629.68.

You are not required to take any action as a result of this notice.

Beginning on April 7, 2013, a Ventura County Superior Court Judge issued Wiretap No. 13-05, authorizing a thirty-day interception of wire communications. The wiretap terminated on April 18, 2013, and resulted in the arrest of persons for drug trafficking. The parties arrested are currently facing drug trafficking charges in Ventura, California.

This notice is being sent to you, as required by law, because during the duration of the wiretap one or more communications were intercepted during monitoring. This notice does not mean that your telephone was being intercepted; rather, it only indicates that you may have had a conversation with - or received a call from - an individual who was the subject of the above wiretap. [Or you were identified as a result of this investigation.] The law requires us to notify each person who was intercepted during the existence of the wiretap. Again, you do not have to take any action as a result of this notice.

Delaying the Inventory

- On an ex parte showing of good cause
- Only as long as necessary to achieve the purpose for which it was granted...
- Typically, it's 90 day postponements

Discovery Obligations

- Extra obligations...
- "...a copy of **ALL** recorded interceptions from which evidence against the defendant was derived..."
- No hiding the wire behind a SW, and no wall stops / hand-offs
 - (unless through a truly independent source)

Discovery obligations

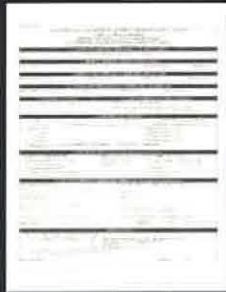
- 10 days before use:
 - Recordings
 - Court order
 - Application
 - Monitoring logs / line sheets
 - (+) PLUS (+)
- Transcripts
 - Unless a judge finds it wasn't possible to furnish them AND no prejudice by delay

Non-Target Crimes

- Can't be used unless:
 - The crime is a wire qualifying crime, OR
 - Violent felony
- Must ask for permission from the judge
- Make application "as soon as practicable"

End of Year Reporting to the AG

- \$ Cost
- Total #s
- Charges filed
- Convictions



Defending the Wire in Court

- 1538.5 procedures
- 4th Amendment vs. statutory violation
- Central purpose standard
 - Small technical defects vs. failure to meet the purpose behind the requirement
- Quash and Traverse
 - Lacks PC or material misstatement

Defending the Wire in Court

- **Exhaustion and Necessity**
 - *People v. Leon* (2007) 40 Cal.4th 376
 - CI/UC, pen register, search warrants, wit interview / grand jury / immunity, trash searches, consensual recording
- **Should not be the 1st step, nor**
- **Should it be used when traditional investigation would work**

Defending the Wire in Court

- **Local issues:**
 - We can aggregate to reach 3 lbs.
 - It must start with PJ, and then go in order from a list of formal designees
- **Affidavits can be redacted**
 - *People v. Acevedo* (2012) 209 Cal. App. 4th 1040 - Follow normal *Hobbs* procedure

Be very careful...

- Mistakes could result in the suppression of ALL the wire evidence
- Violations can be costly

Other useful cases

- *People v. Jackson* (2005) 129 Cal. App. 4th 129 – standard of review
- *People v. Westbrook* (1993) 15 Cal. App. 4th 41 – sealing of the recordings
- *People v. Roberts* (2010) 184 Cal. App. 4th 1149 – good overview, and 10 day reports
- *Scott v. U.S.* (1978) 436 U.S. 128 and *People v. Reyes* (2009) 172 Cal. App. 4th 671 – minimization requirements



Sr. DDA David Russell: 805-654-2516
DDA John Poore: 805-654-2012
