No. 15-15460

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Manuela Villa,

Plaintiff/Appellant,

v.

Maricopa County, *et al.,*

Defendant/Appellee.

BRIEF FOR MANUELA VILLA AS APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
NO. 14-CV-01681-PHX-DJH

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INTRODUCTION

The Plaintiff/Appellant filed a complaint alleging that the Arizona wiretap statutes were both facially unconstitutional and unconstitutional as applied. The defendant/appellee filed a motion to dismiss pursuant to Rule 12(b)(6) FRCP. The district court granted the appellee's motion and dismissed the case.

Appellant alleges in her complaint that the Maricopa County Attorney utilizes wiretaps in criminal investigations by appointing deputy county attorneys to exercise his power and responsibility to both authorize and apply for the wiretaps with the Maricopa County Superior Court in violation of Title III. These investigations often involve dozens of wiretaps of targets and phones requiring numerous court orders for interception of oral, wire and electronic communications. The county attorney himself neither authorizes nor applies for wiretaps under A.R.S. §13-3010(A) or current procedures.

When an investigation is completed, the responsible deputy county attorney and/or investigating officers bundle all of the recordings together and submit them to the court for sealing pursuant to A.R.S. §13-3010(H). In many cases the wiretap orders that authorized the interception have been expired for days, weeks or even months while the recordings have remained unsealed.

Plaintiff's oral communications were intercepted over a wiretap authorized and applied for be a deputy county attorney. Long after the orders authorizing the

interception of communications over the phones she called were terminated or expired, her communications were sealed by the court. Thus, she has standing and that was not an issue in the court below.

The plaintiff submits that A.R.S. §13-3010(A), which allows the county attorney to appoint deputy county attorneys to make applications for wiretaps and extensions thereof on his behalf, is facially unconstitutional and unconstitutional as applied by the county attorney in violation of 18 U.S.C. 2516(2).

A.R.S. §13-3010(H), which allows the state to submit the recordings of the intercepted oral communications up to 10 days after the termination of the authorized interception and does not condition admissibility of the intercepted communications on timely sealing, is also facially unconstitutional and unconstitutional as applied by the county attorney in violation of 18 U.S.C. 2518(8)(a).

Maricopa County's position in this matter points out precisely why federal intervention is required on these issues. The county does not recognize Title III as a comprehensive federal legislative scheme governing the use and procedures for wiretaps that preempts the field and sets the minimum standards for the use of wiretaps by both federal and state authorities. Instead it claims that "there is no federal preemption" and therefore the states are free to enact "compliant approaches" that "substantially comply" with Title III. County Motion to Dismiss at page 4. (Excerpt of Record (Hereinafter "EOR") pp. 17-18, 1. 2-15)

The U.S. District Court in this matter followed Arizona law and the county's position that Title III is not the minimum standard for a Title III wiretap investigation and Arizona is free to go its own way so long as it "substantially complies" with Title III. Specifically, regarding the wiretap of this plaintiff, the U.S. District Court held that assistant prosecutors may authorize and apply for Title III interception orders and extensions and further, the failure to follow the requirements of 18 U.S.C. 2518(8)(a) does not preclude the use of wiretaps recordings in court. (EOR pp. 65-66, l. 22-17; pp. 68-69, l. 9-5; p.73, l. 16-21, p. 74, l.17-21)

On the authorization issue, the Supreme Court held in ***U.S. v. Giordano***, 416 U.S. 505 (1974) that Congress intended to centralize the authority and policy over wiretaps in a high ranking official responsive to the political process. By allowing for the delegation the power of the county attorney over wiretaps to subordinates, both A.R.S. §13-3010(A) and the policies of the county attorney are in conflict with the plain wording of 18 U.S.C. 2516(2), congressional intent and the overwhelming weight of authority nationwide. The Arizona statute and policy are also at odds with this court's decision on state authorization, ***U.S. v. Perez-Valencia***, 727 F.3d 852 (9th Cir. 2013), where the court held that compliance with 18 U.S.C. 2516(2) requires that the attorney responsible for authorizing and applying for a wiretap must be a principal prosecuting attorney both in name and function.

On the sealing issue, the courts below and county attorney simply refuse to

follow the Supreme Court's decision in ***U.S. v. Ojeda-Rios***, 495 U.S. 257 (1990). In that decision, the Court specifically rejected the procedure of waiting until the end of an investigation to submit all of the intercepted recordings to the court for sealing (the procedure utilized by the Maricopa County Attorney) because it violated both the plain wording and intent of 18 U.S.C. 2518(8)(a). It further held that compliance with 2518(8)(a) is a necessary precondition to the admissibility of intercepted communications. See ***U.S. v. Hermantek***, 289 F.3d 1076 (9th Cir. 2002). It remanded for a determination of whether the government's excuse for not timely sealing as each order expired, i.e. reliance on circuit precedent, was the real reason for the failure to seal in that case. The District Court and Arizona decisions hold that Arizona does not have to comply with 2518(8)(a).

The decision of the District Court in this case was that:

1) "…the Court finds that A.R.S. §13-3010(A), which authorizes the county attorney to designate in writing a deputy county attorney to submit a wiretap application complies with federal law and is therefore constitutional both on its face and as applied." (EOR p. 69, l. 2-5)

2) "The court therefore, declines to rely on ***Ojeda-Rios*** as a basis to find Arizona's ten day limit unconstitutional" and "instead relies on Massachusetts cases which are more directly on point" to find that Arizona's ten day limit for sealing is "not in conflict with 2518(8)(a)." (EOR pp. 71-72, l. 24-9)

3) "The Court finds that the absence of a provision in the Arizona statute making compliance with the sealing requirement [in 2518(8)(a)] a prerequisite for admission does not render the statute unconstitutional." (EOR p. 73, l. 16-21)

4) With respect to the policy of waiting to the end of an investigation to seal all of the wiretaps in a case the Court held that it "agrees that the alleged policy does not violate the Arizona statute"…"and is not preempted by federal statute." (EOR p. 74, l. 17-21)

STATEMENT OF JURISDICTION

A) Jurisdiction in the District Court

The District Court had jurisdiction pursuant to 28 U.S.C. 1331(federal question jurisdiction), 28 U.S.C. 1343(3) and (4) and 18 U.S.C. 2520 (damages, equitable and declaratory relief under Title III).

B) Appellate Jurisdiction

This court has jurisdiction pursuant to 28 U.S.C. 1291.

ISSUES PRESENTED

1. Is A.R.S. §13-3010(A) facially unconstitutional or unconstitutional as applied?

2. Is A.R.S. § 13-3010(H) facially unconstitutional or unconstitutional as applied?

PROCEDURAL HISTORY

On July 25, 2014 Plaintiff filed her complaint alleging that the Arizona wiretap statute was unconstitutional facially and as applied. Thereafter, the county filed its motion to dismiss pursuant to Rule 12(b)(6) FRCP. The trial court granted that motion on March 4, 2015. The plaintiff filed her notice of appeal on March 11, 2015.

STATEMENT OF FACTS

The operative facts concerning the wiretap in this case are contained at paragraphs 18-35 of the Complaint. These facts are considered to be true for purposes of a Rule 12(b)(6) motion.

The complaint alleges that the plaintiff/appellant is a taxpayer in Maricopa County whose telephone conversations with her daughter were intercepted over a wiretap in Case Number CWT-412 issued by the Maricopa County Superior Court. (EOR p.2, l.22-27) On eight occasions between December 12, 2011 and January 8, 2012 her calls were intercepted and recorded. She was not given notice of the interception by the government, but in March 2014 she discovered that her calls had been intercepted. She was not a defendant in any case involving the wiretap. (EOR p. 10, l. 1-8)

18 U.S.C. 2516(2) allows a principal prosecuting officer of a state or political subdivision to apply for a wiretap if there is a state statute that authorizes the officer to do so. The application must comply with the requirements of 18 U.S.C. 2518.

A.R.S. §13-3010(A) allows the attorney general, a county attorney or a "prosecuting attorney whom a county attorney or the attorney general designates in writing" to file an application for a wiretap. The application must comply with the requirements of A.R.S. §13-3010(B) including the facts and circumstances relied on by the applicant.

The complaint alleges that the procedures for obtaining a wiretap order in Maricopa County begin with the investigating officer requesting an initial wiretap thorough the criminal division in the Maricopa County Attorney's Office. A deputy county attorney is assigned and helps with the application, affidavit and orders. (EOR p. 7, l. 1-15)

Included in the paper work for the initial wiretap application is a form signed by the County Attorney usually called an "Authorization to Make Application for Ex Parte Order for Interception." This authorization names one or more deputy county attorneys to make application for an order of interception on behalf of the County Attorney. That document also authorizes one or more deputy county attorneys to make further applications for "modification, amendment or extension" of such ex parte orders as may be necessary in connection with the wiretap application. This document may include the name of the initial targets and the criminal charges being investigated.

The initial wiretap application, affidavit and orders are filed with a Maricopa County Superior Court judge and a CWT number is assigned. A CWT may have one or more applications for orders of interception and extensions of previously issued orders. Within a wiretap investigation, the county attorney's office calls new applications for additional interception orders on new phones and/or defendants "modifications or amendments." (EOR p. 6, l. 15-25)

However, no authorization documents signed by the principal prosecuting attorney are included in any further applications for new interception orders or extensions of expiring interception orders within an investigation. Pursuant to the language in the authorization document filed with the initial wiretap application, all further requests for new orders or extensions of existing orders in the investigation are both authorized and applied for by deputy county attorneys. (EOR p.7, l. 16-25)

The specific facts alleged in the complaint concerning the wiretap in the plaintiff's case are as follows (EOR pp. 9-10, l. 1-17):

> 29. On or about November 9, 2011 deputy county attorney Jennifer Brockel applied for an order of interception for communications from four cell phones in the Maricopa County Superior Court. That application was granted by a superior court judge and designated CWT-412. Attached to the original application was an authorization document that stated that William G. Montgomery authorized Jennifer Brockel, Vanessa Losicco, Jeffery Beaver and Tony Novitsky to "make application on my behalf for an Ex Parte Order for interception of telephonic communications…" Said document also authorized these deputy county attorneys "to make further application for modification, amendment and extension of such Ex Parte Order as may be necessary in connection with the above investigation."

30. On or about November 23, 2011 deputy county attorney Brockel applied for and was granted another order of interception in CWT-412. That application was entitled "Application for a Second Amended Ex Parte Order Authorizing the Interception of Wire, Oral, Stored Wire, and Electronic Communications, and for Extension of Use of Dialed Number Recorder and Trap and Trace Devices." Included in the application was a new request to intercept communication on target telephone #9, (602) 388-5736 used by Hugo Gabriel Armenta-Castro.

31. On or about December 21, 2011 DCA Brockel applied for an extension of the wiretap on Target Telephone #9 which was granted by a Maricopa County Superior Court judge.

32. On December 12, 2011 and again on January 8, 20112, Plaintiff's communications were intercepted on eight occasions over Target Telephone #9, (602) 388-5736, primarily while talking to her daughter while she was using said phone.

33. Plaintiff discovered her calls had been intercepted in March 2014.

34. Over the course of the wiretap investigation in CWT-412, there were 14 separate orders of interception for 32 telephones. The investigation was terminated on March 1, 2102.

35. On information and belief, all of the recordings of the intercepted communications for all 32 phones in CWT-412 were submitted en masse to the issuing judge for sealing on March 1, 2012 even though the interception orders had terminated at various dates throughout the investigation. However, they were not delivered to the court clerk and actually sealed until May 25, 2012. As a result, the recordings were not in the possession of the court and were unsealed for a minimum of 6-90 days after the specific orders for interception for each phone terminated.

SUMMARY OF ARGUMENT

1) 18 U.S.C. 2516(2) allows a principal prosecuting attorney to apply for a wiretap if state law authorizes him to do so. A.R.S. §13-3010(A) is the Arizona statute that allows the attorney general or a county attorney, who are principal

prosecuting attorneys, to apply for a wiretap. However, A.R.S. §13-3010(A) also allows these principal prosecuting attorneys to appoint assistant prosecutors to apply for wiretaps. Appellant submits that this delegation provision is in conflict with 18 U.S.C. 2516(2) and is facially unconstitutional under the preemption doctrine.

2) The practice and procedure to apply for a wiretap followed by the Maricopa County Attorney is that he appoints assistant attorneys to authorize, prepare and file the applications for all wiretap orders and extensions thereof. This practice is in conflict with 18 U.S.C. 2516(2) and is unconstitutional under the preemption doctrine.

3) 18 U.S.C. 2518(8) requires immediate sealing by the issuing court of all wiretap recordings upon termination of the authorized interception, or the government must provide a satisfactory explanation for any delay, as a prerequisite to admissibility. A.R.S. §13-3010(H) allows the Maricopa County Attorney 10 days after the termination of an authorized interception to submit the recordings to the issuing judge for sealing and has no requirements for admission of the recordings in court. The Arizona provision is in conflict with 18 U.S.C. 2518(8)(a) and is unconstitutional under the preemption doctrine.

4) The practice and procedure of the Maricopa County Attorney is to wait until the authorization for the last wiretap in an investigation has expired before collecting all of the recordings from the investigation and submitting them to the

issuing judge for sealing. This practice is in conflict with the requirements of 18 U.S.C. 2518(8)(a) and is unconstitutional under the preemption doctrine.

LEGAL ARGUMENT

1. Standard of Review.

The standard on review is whether Plaintiffs have pled sufficient *factual matter*, accepted as true, to 'state a claim to relief that is plausible on its face,' and a mere conjecture that conduct may have occurred …..does not meet that burden. *See* ***Ashcroft v. Iqbal***, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (emphasis added) (quoting ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The question in this case is whether the complaint states a cause of action because the questioned statutes are unconstitutional facially or as applied.

This court reviews the legal conclusions of the District Court de novo.

2. The Preemption Doctrine and Wiretap Law

The key holding of the District Court in dismissing the appellant's complaint is that the preemption does not apply to the authorization, application and sealing provisions at issue in this case. The court found, relying on the state decisions from Massachusetts and Arizona, that under Arizona law the Maricopa County Attorney could appoint deputy county attorneys to authorize and apply for wiretaps and was not required to comply with the Title III sealing requirements. The district court

found that the Arizona wiretap statute "substantially complies" with Title III and therefore the preemption doctrine does not apply. If, as appellant submits, Title III is the minimum standard for a wiretap that state statutes and procedures must comply with, then preemption applies and the statute and procedures are unconstitutional.

Since some Arizona wiretap decisions and the District Court discussed preemption and the Arizona wiretap statutes under a "substantial compliance" standard it is necessary to discuss the current status of the preemption doctrine as determined by the U.S. Supreme Court. It is unclear from what source the substantial compliance theory was derived, but it does not comply with the Court's current requirements of the preemption doctrine. See ***State v. Politte***, 136 Ariz. 117, 664 P.2d 661 (App. 1982); ***State v. Olea,*** 139 Ariz. 280, 678 P.2d 465 (App. 1983).

The preemption doctrine was most recently discussed by the Court in ***Arizona v. U.S***., 132 S. Ct. 2492 (2012) where the Court found that certain aspects of SB 1070 were unconstitutional because they did not comply with the requirements and purpose of U.S. immigration law. In that case the Court stated:

> Second, state laws are preempted when they conflict with federal law. *Crosby*, *supra*, at 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352. This includes cases where "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 142-143, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963), and those instances where the challenged state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines, 312 U.S., at 67, 61 S. Ct. 399, 85 L. Ed. 581; see also *Crosby*, *supra*, at 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352 ("What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and

identifying its purpose and intended effects.").

In determining that the state could not criminalize the conduct of aliens in obtaining employment the Court held that conflict preemption applied and stated:

> The ordinary principles of preemption include the well-settled proposition that a state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S., at 67, 61 S. Ct. 399, 85 L. Ed. 581. Under § 5(C) of S. B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law--the deterrence of unlawful employment--it involves a conflict in the method of enforcement. The Court has recognized that a "[c]onflict in technique can be fully as disruptive to the system Congress enacted as conflict in overt policy." *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 287, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971). The correct instruction to draw from the text, structure, and history of IRCA is that Congress decided it would be inappropriate to impose criminal penalties on aliens who seek or engage in unauthorized employment. It follows that a state law to the contrary is an obstacle to the regulatory system Congress chose.

The Court pointed out in ***U.S. v. Giordano***, 416 U.S. 505 (1974) that Title III is a comprehensive scheme and each part thereof has a Congressional purpose. The Congressional record says that the states are free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation. See ***State v. Salazar,*** 231 Ariz. 535, 298 P.3d 224 (App.2013) for the Arizona recognition of this principal.

As the ***Giordano*** court stated:

> The purpose of the legislation, which was passed in 1968, was effectively to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act, most notably those interceptions permitted to law enforcement officers when

> authorized by court order in connection with the investigation of the serious crimes listed in § 2516. Judicial wiretap orders must be preceded by applications containing prescribed information, § 2518 (1). The judge must make certain findings before authorizing interceptions, including the existence of probable cause, § 2518 (3). The orders themselves must particularize the extent and nature of the interceptions that they authorize, § 2518 (4), and they expire within a specified time unless expressly extended by a judge based on further application by enforcement officials, § 2518 (5). Judicial supervision of the progress of the interception is provided for, § 2518 (6), as is official control of the custody of any recordings or tapes produced by the interceptions carried out pursuant to the order, § 2518 (8). The Act also contains provisions specifying the circumstances and procedures under and by which aggrieved persons may seek and obtain orders for the suppression of intercepted wire or oral communications sought to be used in evidence by the Government. § 2518 (10)(a).

Title III was Congress's attempt to carefully balance the needs of law enforcement to use electronic surveillance and the constitutional right to privacy of American citizens. Title III was ten years in the making and many of the provisions in the final bill resulted in part from the Court's decision in ***Berger v. New York***, 388 U.S. 41 (1967) where the Court identified several constitutional requirements that a wiretap statute must meet. This comprehensive statute was specifically intended to set the minimum standards for the use of wiretaps in the United States. As with immigration, Arizona cannot simply go its own way on a national issue where Congress has already acted and set the standards.

The preemption standard recognized in most courts is set forth in the case often cited in Arizona, ***Commonwealth v. Vitello,*** 327 N.E.2d 819 (Mass. 1975):

> It is clear that Congress in enacting Title III intended to occupy the field of wiretapping and electronic surveillance, except as that statute specifically

> permits concurrent State regulation. In addition to express statements appearing in the congressional findings in Title III, that intent may be gleaned from the broad scope of particular provisions of Title III. Although the legislative history of Title III evinces a congressional concern for national legislation, Congress, having preempted the field, did in turn allow for concurrent State regulation subject, at the minimum, to the requirements of the Federal regulation. See § 2516 (2).

Appellant submits that the test to apply herein under conflict preemption is whether the Arizona statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in either technique or effect.

3. A.R.S. §13-3010(A), The Application And Delegation Provision Of The Arizona Wiretap Statute, Is Unconstitutional.

The allegations herein are that deputy county attorneys both authorize and apply for all wiretaps in Maricopa County. The County Attorney himself reviews nothing and simply signs a form letter of designation for his deputies that is affixed to the first wiretap application in an investigation. From that point on he has nothing to do with any further wiretap authorizations, applications, extensions or other procedures.

This statute and the procedures utilized by the Maricopa County Attorney fail to centralize responsibility for the use and policy regarding wiretaps in him as the principal prosecuting attorney as is required under Tile III.

A. The statutory basis for Arizona wiretap authorizations and applications.

18 U.S.C. 2516(2), which allows a state principal prosecuting attorney to apply for a wiretap order states, as follows:

> (2) The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire, oral, or electronic communications, may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter [18 USCS § 2518] and with the applicable State statute an order authorizing, or approving the interception of wire, oral or electronic communications by investigative or law enforcement officers….

The plain language of 18 U.S.C. 2516(2) states that the party applying for the wiretap 1) must be a "principal prosecuting attorney," 2) there must be a state statute authorizing the use of wiretaps in the state and 3) the judge may only grant the application for an order of interception if it complies with both the state statute and 18 U.S.C. 2518. As every case that has discussed the issue acknowledges, Title III invokes the Supremacy Clause and preemption doctrine.

A.R.S. §13-3010 is the state statute in question herein that allows for state wiretaps in Arizona:

> A. On application of a county attorney, the attorney general or a prosecuting attorney whom a county attorney or the attorney general designates in writing, any justice of the supreme court, judge of the court of appeals or superior court judge may issue an ex parte order for the interception of wire, electronic or oral communications if there is probable cause ….

The plain language of A.R.S. §13-3010(A) allows designated attorneys all of the powers and authority of a principal prosecutor with respect to wiretaps. There is

no requirement that the principal prosecutor authorize any application of the designated attorney, no limit on who a designee may apply to wiretap or how many extensions of a wiretap a designee may request. Under the statute the county attorney may designate any number of attorneys without limitation and, in practice, regularly designates several of the attorneys in the drug unit of his office for each wiretap investigation. There are no clear lines of responsibility to a politically responsible official and policy is made by line attorneys engaged in the investigations that are the focus of the wiretaps.

B. Case law on limited versus unlimited delegation of power to initiate a wiretap; the plain wording and intent of 18 U.S.C. 2516(2)

> The authorization requirements provided for in section 2516(1) are not mere technicalities; they are at the heart of the Congressional scheme. Moreover, as we have emphasized above, we are not concerned just with the rights of these defendants. The Act's procedures were designed to protect the general public from abuse of the awesome power of electronic surveillance.
>
> ***U.S. v. King***, 478 F.2d 494 (9th Cir. 1973)

In discussing the principal prosecuting attorney element, the court in ***U.S. v. Perez-Valencia***, *supra*, followed the plain language of 2516(2) and held that the term "principal prosecuting attorney" did not include assistant district attorneys. The court found that an absent district attorney could appoint a replacement but needed to delegate all, or at least the bulk, of his plenary powers so that the replacement under state law was the district attorney in fact, not simply in name. In so holding the court stated:

> Thus, we agree with the government that compliance with § 2516(2) necessarily requires an analysis of the applicable state wiretap statute, here California Penal Code § 629.50. That statute in turn plainly authorizes "*the* person designated to act as district attorney in the district attorney's absence" to apply for such an order.
>
> In this respect, we agree with our colleagues in the Second Circuit:
>
> Congress simply could not have intended that local wiretap activity would be completely suspended during the absence or disability of the official specifically named (in § 2516(2)). This conclusion is supported by the legislative history. The Senate Report states that "the issue of delegation (by the Attorney General or District Attorney) would be a question of state law." S. Rep. No. 1097, 90th Cong. 2d Sess. (1968)." *United States v. Fury*, 554 F.2d 522, 527 n.4 (2nd Cir. 1977)
>
> We hold also, however, that *the* "attorney designated to act in the district attorney's absence — as § 629.50 specifies — must be acting in the district attorney's absence not just as an assistant district attorney designated with the limited authority to apply for a wiretap order, but as an assistant district attorney duly designated to act for *all* purposes as the district attorney of the political subdivision in question".

U.S. v. Fury, *supra*, held that the Chief Assistant District Attorney, designated pursuant to a memorandum of the order of succession, could apply for a wiretap under New York law when the District Attorney was out of state. The ***Fury*** court found that the Senate Report on the bill supported limited delegation.

> This conclusion is supported by the legislative history. The Senate Report states that "the issue of delegation by [the Attorney General or District Attorney] would be a question of state law." S. Rep. No. 1097, 90th Cong. 2d Sess. (1968), 1968 U.S. Code Admin. News 2112, 2187. Fury responds that the statement, also in the Senate Report, that "the proposed provision does not envision a further breakdown" past the Attorney General or District Attorney precludes the delegation in the New York law. However, the delegation in New York is to an "acting" district attorney. This is not a "further breakdown" in the chain of command. There is still only one person who has the authority

and he is at the top.

> ….[W]e agree that the New York provision comports with the federal wiretap law. The delegation is only made to assure that someone can make the application and it does not change the fact that, like the federal law, the New York law "centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques," 1968 U.S. Code & Admin. News, *supra* at 2185. In this case the District Attorney is responsible for and names his replacement when he is absent. And "should abuses occur, the lines of authority lead to an identifiable person," *id*., the acting district attorney.
>
> ***U.S. v. Fury*** at FN 4.

Thus the 2nd and the 9th circuits have allowed a limited delegation of authority in order to promote the continuation of authority in the office of a principal prosecuting attorney. Other courts have allowed an associate attorney to physically file a wiretap application or extension properly authorized by a principal prosecuting attorney. ***Commonwealth v. Vitello***, 327 N.E.2d 819 (Mass. 1975); ***State v. Birs,*** 394 So.2d 1054 (Fla. App. 1981); ***O'Hara v. People***, 271 P.3d 503 (Colo 2012).

However, no court has approved of the general delegation of the power to authorize and apply for wiretaps to assistant attorneys in violation of the plain wording and congressional intent of Title III.

In those cases where the courts have discussed whether the state wiretap statute allows general delegation of authority to subordinate attorneys, the majority rule is that the state statute is, or would be, unconstitutional. ***State v. Farha***, 544 P.2d 341 (Kan.1975); ***State v. Bruce***, 287 P3d 919 (Kan. 2012); ***State v. Daniels***, 389 S02d 631 (Fla. 1980); ***State v. Birs***, 394 So2d 1054 (Fla. Ct. App. 1981); ***State***

v. Marine, 464 A2d 872 (Del. 1983); ***Poorer v. State***, 384 A2d 103 (Md. 1978); ***State v. Cocuzza*** 301 A2d 704 (N.J. 1973); ***State v. Frink***, 206 NW2d 664 (Minn. 1973); ***Price v. Goldman***, 525 P.2d 589 (Nev. 1974); ***People v***. ***Marlow***,350 N.E. 2d 215 (Ill. App. 1976); ***O'Hara v. People***, *supra*.

As set forth in ***State v. Bruce,*** *supra* (Kansas delegation provision found preempted and unconstitutional a second time) besides the plain wording of the statute, the centralization of authority and responsibility is the chief policy argument against delegation to subordinates:

> Both the United States Supreme Court and this court have identified the limited authorization provisions of the wiretap statutory scheme as "central." See *Giordano*, 416 U.S. at 528 (Supreme Court "confident" provision for preapplication approval intended to play central role); *Farha*, 218 Kan. at 402-03 (preapplication authorization "[c]rucial . . . safeguard[]"; "centralization ensures that wiretap applications not be approved routinely by lower echelon officials"; "centraliz[ation] in a publicly responsible official subject to the political process the formation of policy on electronic surveillance" express objective of federal law);….

The court in ***Poorer v. State***, *supra* compared the roles of state and federal officials to determine the intent of Congress:

> Section 2516(2) speaks of "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision. . . ." The language of that section does not confer upon the principal prosecuting attorney any power to delegate to an assistant the authority to apply for an electronic interception. The Congress would not have so carefully limited the power of the Attorney General of the United States to delegate to a specifically designated assistant the authority to seek orders to intercept oral or telephonic communications and at the same time bestowed upon the principal prosecutor of any State, city or county in the nation an unbridled license to clothe any or all of his or her assistants with permission to seek such orders. It is

> inconceivable that the country's highest legal officer would be so shackled while the principal prosecutor of the least populated county in the United States was free to permit any designee to apply for an interception order. We think the intent of the Congress to be that the authority devolved upon the principal prosecutor of the State or of the political subdivision, is personal to him, and may not be delegated. "[T]he authority to apply for court orders is to be narrowly confined . . . to those responsive to the political process, a category to which the . . . [Assistant State's Attorney] does not belong." *United States v. Giordano,* 416 U.S. at 520, 94 S. Ct. at 1829, 40 L.Ed.2d at 356.

In ***State v. Daniels***, *supra* the Florida Supreme Court held that an assistant prosecuting attorney could not authorize a wiretap. In suppressing the evidence obtained for a violation of the state statute the court stated:

> If the legislature were to include all assistant state attorneys in the class of officials who may authorize electronic surveillance applications, such inclusion would conflict with the federal standard and would be invalid. *See State v. Farha*, 218 Kan. 394, 544 P.2d 341 (1975) *cert. denied*, 426 U.S. 949, 96 S. Ct. 3170, 49 L. Ed. 2d 1186 (1976).
>
> This is not to say that the legislature may not authorize state attorneys to delegate their authority to an assistant state attorney so long as such provision for delegation is narrowly confined to ensure centralization and uniformity of policy. *Commonwealth v. Vitello*, 367 Mass. 224, 327 N.E.2d 819 (1975). But *see*, *Poore v. State*, 39 Md.App. 44, 384 A.2d 103 (Md.1978). Thus a provision for delegation of the authority cannot be unlimited in scope, *see*, *State v. Cocuzza*, 123 N.J.Super. 14, 301 A.2d 204 (N.J.Cty.Ct.1973), but can be designed to allow for continuity of administration when the state attorney is absent for an extended period of time.

The leading Arizona case on delegation is ***State v. Verdugo***, 180 Ariz. 180, 883 P.2d 417 (App. 1994). That court found both the state wiretap statute and county procedures constitutional under Title III. In ***Verdugo,*** the Maricopa county attorney claimed that he authorized a wiretap requested by a deputy county attorney simply

upon being informed of the factual basis for the request. The associate then wrote and filed the application. The court cited ***Commonwealth v. Vitello***, *supra* as persuasive authority but did not adopt its holding that the county attorney actually review and authorize the written application. The ***Verdugo*** court failed to discuss or find facial invalidity for lack of proof of authorization and then allowed the County Attorney to submit evidence of an oral authorization in the suppression proceeding. In the 9th Circuit this procedure would not be tolerated. See ***U.S. v. Staffeldt***, 451 F.3d 578 (9th Cir. 2006); ***U.S. v. Reyna***, 218 F.3d 1108 (9th Cir. 2000).

Verdugo does not discuss the authorization of subsequent "spin off" wiretap applications or extensions of existing orders. Plaintiff asserts that ***Verdugo*** was wrongly decided and is one of the chief reasons the county continues to use authorization procedures that violate Title III.

In ***Commonwealth v. Vitello,*** *supra* the court upheld the constitutionality of the Massachusetts wiretap statute against various challenges. With respect to authorization, the court required that the principal prosecuting attorney fully examine and authorize the application to be submitted to the court by his assistant, but allowed delegation to an assistant of the ministerial acts of signing and submitting the application to the court. Thus the Massachusetts provision, at least on its face, appears to follow the federal procedure outlined in 2516(1) and DOJ procedures. However, the court rejected the argument that the principal prosecuting

attorney must comply with the plain wording of 2516(2) and apply for the wiretap himself. The court stated that the better procedure would be for the principal prosecutor to sign the application but did not make this a requirement.

Massachusetts allows the state to prove the required review and authorization by the inference of delegating an associate to file the application. See ***Vitello***, *supra*. Authorization by inference can certainly lead to abuses. In addition, there are serious questions about the role of the assistant attorneys in the authorization of spin off and extension applications.

The authorization provision of the Massachusetts wiretap statute was found to violate the preemption doctrine by a panel in ***U.S. v. Smith***, No. 82-1678 (1st Cir. 1983) (reversed by ***U.S. v. Smith***, 726 F.2d 852 (1st Cir. 1984)). In finding for the defendant the panel held:

> More troubling than an Assistant District Attorney's lack of political accountability is that a District Attorney who delegates his/her warrant application authority is abdicating his/her congressionally imposed responsibility. As the Ninth Circuit has explained:
>
> Congress wanted each application passed upon by one of the highest law enforcement officials in the government, and it named them. The Congress expected them to exercise judgment, personal judgment, before approving any application. Routine processing by subordinates was not to be the approach. More responsibility than that which devolves upon any department head in any bureaucracy, that is, ultimate responsibility for what his subordinates do, was required." *United States v. King*, 478 F.2d 494, 503 (9th Cir.), cert. denied, 414 U.S. 846 (1973) and 417 U.S. 920 (1974).
>
> Congress could not have intended that a District Attorney's duty of safeguarding individual privacy would consist merely of affixing a signature

> to a special designation form letter. Moreover, the form letter here merely recites the fact of special designation, and the names and telephones for which a tap may be sought; unlike the actual application; it recites none of the facts necessary to establish probable cause or the necessity of electronic surveillance.

However, upon review, this position, and that of the 9th Circuit, were rejected by the en banc court which held:

> The panel's decision, we now conclude, did not sufficiently take into account the extent to which § 99 F(1) has been thus undergirded by *Vitello*. Unlike a situation where a state court interpretation "might impose requirements less stringent than" federal requirements, *United States v. Marion*, 535 F.2d 697, 702 (2d Cir. 1976), the procedure mandated by the Supreme Judicial Court calls for far more protection than a mere form letter of designation, which would amount to nothing more than a standing order frustrating the twin congressional objectives of policy uniformity and political accountability, and would constitute an abdication of responsibility. The detailed review by a district attorney of every application for a proposed use of electronic surveillance on a case by case basis, and his written special designation of an assistant to submit and prosecute the application before a justice, would seem to satisfy fully the congressional objectives.

U.S. v. Lyons, 740 F.3d 702 (1st Cir. 2014) is another Massachusetts case relied upon by the state. In ***Lyons*** the defendants ran an internet gambling business and were wiretapped pursuant to a number of state wiretaps. They were convicted in federal court and appealed, one issue being the authorization for the wiretaps. The court followed ***U.S. v. Smith***, *supra*, on authorization requirements under state law.

> *Lyons* is correct that a wiretap sought by state law enforcement must be authorized by the principal prosecuting attorney for the jurisdiction--either the state attorney general or the county district attorney, in this case the Essex County District Attorney. 18 U.S.C. § 2516(2). Under Massachusetts law, the principal prosecuting attorney need not himself appear in court in support of every wiretap application. Instead, he may specially designate a subordinate

> to exercise his authority on a case by case basis, but only in writing and after he has personally reviewed the wiretap application. Mass. Gen. Laws. ch. 272, § 99(F)(1); see also *United States v. Smith*, 726 F.2d 852, 857-58 (1st Cir. 1984) (citing *Commonwealth v. Vitello*, 367 Mass. 224, 327 N.E.2d 819 (1975)).
>
> . . . . . .
>
> Massachusetts requires that the district attorney personally review the application--a designee is insufficient. *Vitello*, 367 Mass. at 231-32.
>
> . . . . . .
>
> Because the district court was uncertain whether Massachusetts law required re- designation and personal review by the district attorney when new numbers were added to an existing wiretap, it ordered District Attorney Blodgett to file "an affidavit regarding his authorization of the particular amendments at issue . . . ." District Attorney Blodgett filed such an affidavit in which he made clear that he "personally reviewed each and every renewal application" prior to its submission and that he intended the specially designated assistant district attorneys to oversee the entire investigation, including both the original wiretaps and the "renewals." The affidavit also stated that, as the district court inferred in its initial ruling, District Attorney Blodgett did in fact personally authorize the October 12th wiretap application. The district court therefore denied the suppression motion as to the remaining wiretaps.

The allegations in this case is that the Maricopa County Attorney does not review every wiretap application, in fact he does not review any at all. He does not personally authorize any wiretap application nor does he supervise the deputy county attorneys who authorize, apply for and conduct the wiretapping. He signs "form letters of designation," not exactly the vision that Congress had when it designated "principal prosecuting attorneys" as the sole responsible parties who could apply for interception orders in 2516(2).

Thus Plaintiff asserts that A.R.S. §13-3010(A) is unconstitutional under the preemption doctrine for the following reasons: 1) the statute violates the plain wording of 18 U.S.C. 2516(2) by allowing the delegation of the wiretap authority of the principal prosecutor to subordinates without limitation; 2) this delegation violates the intent of Congress to limit the persons who can authorize and apply for a wiretap to high ranking public officials responsible to the political process; 3) the statute also violates the intent of Congress to centralize responsibility for policy and authority to protect the general public from abuse of the awesome power of electronic surveillance, and 4) the authorization and application procedures of the Maricopa County Attorney violate 2516(2).

4. A.R.S. §13-3010(H), The Sealing Provision For Arizona Wiretaps, Is Unconstitutional.

18 U.S.C. 2518(8)(a) provides that wiretap recordings must be sealed immediately upon termination of each order of interception or its extension during an investigation. It predicates admissibility on timely sealing or a satisfactory explanation for the failure to do so. The current Arizona wiretap provision for sealing allows ten days for sealing and has no provision for admissibility. No federal court considers ten days to be "immediate" under 2518(8)(a) in light of ***U.S. v. Ojeda-Rios,*** *supra*. See ***U.S. v. McGuire,*** 307 F.3d 1192 (9th cir. 2002); ***U.S. v. Pedroni***, 958 F.2d 262 (9th 1992). Even before ***Ojeda-Rios*** a delay of two days was considered sufficient to trigger a requirement that the government offer a satisfactory

explanation. ***U.S. v. Mora***, 821 F.2d 860 (1st Cir. 1987); ***U.S. v. Massino***, 784 F.2d 153 (2nd Cir. 1986). Arizona case law on sealing state wiretaps, all of which was decided prior to ***Ojeda-Rios***, *supra*, inexplicably and without any legal foundation, holds that compliance with the sealing provisions in 18 U.S.C. 2518(8)(a), a core requirement intended to protect both the integrity and confidentiality of the recordings, was not necessary for admissibility. See ***U.S. v. Ricco***, 421 F. Supp. 401 (SDNY 1976). The District Court finding that the Arizona statute and procedures do not have to comply with the minimum standards for admissibility under 18 U.S.C. 2518(8)(a) was incorrect as a matter of law. A.R.S. §13-3010(H) is unconstitutional under the preemption doctrine.

A. The federal sealing requirement and U.S. v. Ojeda-Rios

18 U.S.C. 2518(8)(a) provides as follows:

> The contents of any wire, oral, or electronic communication intercepted by any means authorized by this chapter [18 USCS §§ 2510 et seq.] shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire, oral, or electronic communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders…….. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517 [18 USCS § 2517].

In ***United States v. Ojeda-Rios***, *supra*, the court held that wiretaps must be

immediately sealed upon termination of the order of interception or there must be a satisfactory explanation for the failure to do so. In ***Ojeda-Rios***, the government did not seal the tapes until after all the wiretaps in the investigation had been terminated, one of the practices that is being challenged in this case. In this regard the court said:

> The section [2518(8)(a)] begins with the command that tapes shall be sealed "immediately" upon expiration of the underlying surveillance order and then, prior to the clause relied upon by the Government, provides that "the seal provided for by this subsection" (emphasis added) is a prerequisite to the admissibility of electronic surveillance tapes. The clear import of these provisions is that the seal required by § 2518(8)(a) is not just any seal but a seal that has been obtained immediately upon expiration of the underlying surveillance order. The "absence" the Government must satisfactorily explain encompasses not only the total absence of a seal but also the absence of a timely applied seal. Contrary to what is so plainly required by § 2518(8)(a), the Government would have us nullify the immediacy aspect of the sealing requirement.
>
> The primary thrust of § 2518(8)(a), …is to ensure the reliability and integrity of evidence obtained by means of electronic surveillance."…"the seal is a means of ensuring that subsequent to its placement on a tape, the Government has no opportunity to tamper with, alter, or edit the conversations that have been recorded. It is clear to us that Congress viewed the sealing requirement as important precisely because it limits the Government's opportunity to alter the recordings.
>
> . . . . . .
>
> It is true that offering to prove that tapes are authentic would be consistent with Congress' concern about tampering, but even if we were confident that tampering could always be easily detected, we would not be at liberty to agree with the Government, for it is obvious that Congress had another view when it imposed the sealing safeguard.

Ojeda-Rios also establishes that 18 U.S.C. 2518(8)(a) is a core provision of Title III. It held that Congress considered the integrity of the recordings so important

that it provided for the specific requirement of immediate sealing and conditioned admissibility of the recordings on compliance with 2518(8)(a). Nothing could stand as more of an obstacle to the will and intent of Congress than for Arizona to simply disregard this important and specific method for limiting the use of wiretapping in courts. ***U.S. v. Arizona***, *supra*.

In state court proceedings on the county sealing procedures the county attorney's representatives have claimed ignorance of long standing federal law as the "satisfactory explanation" for not following 2518(8). Superior court judges continue to allow untimely sealing and refuse to follow the 2518(8)(a) or ***U.S. v. Ojeda-Rios*** as did the District Court in this matter. Petitioners submit that, twenty three years after ***Ojeda-Rios,*** there is simply no satisfactory explanation that can be offered to establish an excusable lack of knowledge that a state wiretap must comply with both state and federal requirements, that 2518(8)(a) requires recordings be sealed immediately on termination of each order of interception, and/or that timely sealing is a prerequisite for the admissibility of the recordings under Title III.

B. Arizona Sealing Provisions and pre-Ojeda-Rios Arizona case law.

A.R.S §13-3010(H) provides as follows:

> If possible, the contents of any communication that is intercepted by any means authorized by this section shall be recorded on any tape, electronic, wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such a way as will protect the recording from editing or alterations. Within ten days after the termination of the authorized interception, the recordings shall be

> made available to the judge who issued the order and shall be sealed under the judge's directions. Custody of the recordings shall be maintained pursuant to court order.

The threshold issue is whether the Arizona wiretap statue is constitutional in light of ***Ojeda-Rios.*** There have been no reported decisions on the Arizona sealing procedures since ***Ojeda-Rios.*** The prior Arizona decisions held that immediate sealing was not required as a precondition of admissibility. In ***State v. Politte***, 136 Ariz. 117 (App. 1982), adopted by ***State v. Gortarez,*** 141 Ariz. 254 (1984), the court held:

> Likewise subparagraph (H) provides that all recordings shall be sealed under directions of the judge. It is obvious that the sealing and custody provisions have as their purpose the preservation of the materials in order to prevent alterations. This is not a requirement which "directly and substantially implement[s] the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *United States v. Giordano*, 416 U.S. 505, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974). We do not believe it is necessary that a state statute mirror the federal law by establishing an absolute evidentiary rule making the admission of authorized wiretap evidence depend on the sealing requirement.

In 1983, ***Politte*** was followed by ***State v. Olea***, *supra*, which cited and agreed with ***Politte*** in finding that wiretaps not sealed until after the investigation was completed were admissible. The court stated:

> It is clear that a seal need only be affixed after the authorization has expired or the tap has been terminated by the police. *United States v. Fury*, 554 F.2d 522, 533 (2nd Cir.1977), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2978, 53 L.Ed.2d 1095 (1977). In this case, the tapes from the Robles, Gonzales, and Urias taps should have been sealed on August 2, 1978. However, they were not sealed until approximately August 8, 1978. The tapes from the Estrada tap were not

> sealed until more than 50 days following the termination of the tap by the police. Under the facts of this case however, we find that the trial judge was correct in denying the request to suppress the tapes because of the late seal.
>
> . . . . . .
>
> We agree with those federal circuits which do not require the suppression of the tapes for late sealing where there is no showing of prejudice, tampering with the tapes, or that the integrity of the tapes has been affected by the failure to "immediately" seal the tapes.

It should be noted that while ***State v. Olea***, *supra* held that Arizona did not have to follow 18 U.S.C. 2518(8)(a), it did hold that Arizona law required that each wiretap needed to be sealed as the order of authorization ended rather than waiting to the end of the entire Title III investigation. This is another holding that the District Court, superior courts and the county attorney's office simply ignore.

C. The conflict between the state and federal sealing provisions.

Petitioners submit that A.R.S. §13-3010(H) is facially unconstitutional because 1) it does not condition admissibility on the timely sealing of the recordings and 2) does not require immediate sealing. In addition, the county policy that the superior court currently allows is to wait until the entire investigation is over and then submit the recordings for sealing rather than to seal as each order expires.

Clearly ***Politte*** and ***Olea*** are no longer good law in light of ***Ojeda-Rios***. The provision conditioning admissibility on timely sealing found in 18 U.S.C. 2518(8) is a core provision of Title III. The Supreme Court rejected the reasoning in ***Olea*** concerning the requirement of a showing of prejudice by the defense as necessary

for suppression or a showing by the state of authentication as sufficient for admission. The failure of the Arizona statute and cases to predicate admission upon timely sealing as determined by Congress makes the Arizona law far less restrictive than federal law, obstructs the policy and purposes of Title III and violates the plain language of 2518(8)(a) and ***Ojeda-Rios***. A.R.S. §13-3010(H) is therefore unconstitutional.

Turning to the other provision in direct conflict with Title III, the ten day sealing delay allowed under 3010(H), it is clear that this provision cannot be squared with the "immediate" sealing requirement of 2518(8)(a) and is unconstitutional under the preemption doctrine. The county argues that the ten day provision is constitutional because, 1) the ten day delay is actually more restrictive than the federal requirement of immediate sealing, and 2) pre-***Ojeda-Rios*** Massachusetts and Arizona case law hold that delayed sealing does not violate the preemption doctrine.

Neither of the arguments offered is sufficient to save the statute under the preemption doctrine. First, as ***Ojeda-Rios*** held, Congress set the minimum procedural requirements for admissibility under 2518(8). Nothing smacks more of an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" than to simply ignore the will of Congress and a Supreme Court decision directly on point.

Second, the county argues that "immediate" under 2518(8)(a) does not really

mean immediate because there are occasions where the federal courts have accepted excuses for untimely sealing. It theorizes that the 3010(H) ten day requirement is a hard and fast rule that allows no excuses but cites no authority for that proposition. The statutory history contradicts the county's position since the statute originally required immediate sealing that was extended to ten days after ***Olea*** and ***Politte*** were decided. The county also fails to acknowledge that there is no admissibility provision in the Arizona statute and the ***Olea*** conditions suppression on a showing of prejudice or tampering by a defendant. The county's interpretation of 3010(H) also allows terminated wiretaps to remain unsealed for days, weeks or months until the entire wiretap investigation is completed and it submits the recordings to the court, a practice that was rejected in ***Ojeda-Rios***. In summary, "ten days" is not more restrictive than "immediately," and there is no hard and fast rule on the time for submission for sealing because the Arizona rule requires that the defendant must show prejudice. The District Court, Arizona courts and county attorney have relegated Congress's carefully honed provision to ensure the integrity of the recordings to the scrap heap.

Lastly, 2518(8)(a) and 3010(H) are independent provisions that must both be complied with. The "more restrictive" supposition of the county only addresses the potential facial invalidity of the statute. The county's procedures fail to comply with 2518(8). The county deliberately withholds the recordings from the court until it

ends its investigation without a shred of authority to do so and exposes them to alteration and editing for extended periods. ***U.S. v. Ojeda-Rios***, *supra* at p. 263-264. The excuse that the county has offered in court for these practices: its attorneys are not knowledgeable about Title III, Title III doesn't apply to the county and this is what they have been doing for twenty years, i.e. since ***Ojeda-Rios*** was decided.

The county practices not only violate ***Ojeda-Rios*** but also this circuit's decisions. In ***U.S. v. Hermantek***, 289 F.3d 1076 (9th Cir. 2002) the court held that wiretap orders, other than roving wiretaps which are not at issue here, must be tied to one location or one facility. New orders on other cell phones used by a suspect in an investigation were not extensions and sealing must occur immediately after the termination of each interception order and its direct extensions. The court stated as follows regarding extensions and sealing:

> There is indeed a burden imposed on the government when a wiretap based on a specific cell phone number is no longer effective. The government must solicit the court for new authority to intercept the new phone number. This burden, however, is imposed by the Title III authorization requirements and exists independent of anything we have to say about the sealing requirement codified in § 2518(8)(a). The government has not explained why it would be burdensome to seal existing records contemporaneous with obtaining authority to wiretap a new facility or location.
>
> Applying the *Ojeda Rios/Vastola* rule here, we hold that the later orders were not extensions within the meaning of § 2518(8)(a). The recordings of the 8340 wiretap were sealed 39 days after the last authority to intercept that number expired. Under the law of this Circuit, a delay of that length does not constitute immediate sealing. *See United States v. Pedroni*, 958 F.2d 262, 265 (9th Cir. 1992) (holding that a 14-day delay in sealing tapes was not immediate); *see also Vastola*, 915 F.2d at 875 (holding that tapes should be

sealed either "as soon as was practical" after the actual surveillance ended "or as soon as practical" after the final extension order expires).

Based on the foregoing petitioners respectfully request that the court find that A.R.S. §13-3010(H) and the procedures of the county attorney's office based thereon are unconstitutional.

CONCLUSION

Appellant must show that she has a viable cause of action based on the facts presented in the complaint which are deemed to be true for this appeal. She submits that the Arizona wiretap statute is both facially unconstitutional and unconstitutional as applied on the issues of authorization and sealing of the intercepted recordings and her complaint was sufficient to allow her to proceed on her own causes of action and as a class representative. Based on the foregoing she requests that the court reverse the District Court and reinstate her complaint.

Respectfully submitted this 15th day of June, 2015.

/s/Cameron A. Morgan
Cameron A. Morgan
Attorney for Appellant Villa

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 I certify that:

X Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is:

X Proportionately spaced, has a typeface of 14 points or More and contains 9,729 words.

Dated: June 15, 2015

/s/ Cameron A. Morgan
Cameron A. Morgan
Attorney for Appellant Villa

CERTIFICATE OF SERVICE

I, Dawn-Marie Walker, certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 15, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellant CM/ECF system to Kenneth Mangum.

Dated: June 15, 2015.

/s/ Dawn-Marie Walker
Dawn-Marie Walker
Legal Assistant

STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6(a) of the United States Court of Appeals for the Ninth Circuit, counsel for Plaintiff-Appellant states there are no cases related to this appeal.

Dated: June 16, 2015.

/s/Cameron A. Morgan
Cameron A. Morgan
Attorney for Plaintiff-Appellant