

CHIEF DEPUTIES

Diane F. Boyer-Vine
Jeffrey A. DeLand

PRINCIPAL DEPUTIES

C. David Dickerson
John T. Studebaker
Daniel A. Weitzman
Christopher Zickel
Lara K. Bierman
Edward Neal Cohen
Alvin D. Gress
Michael R. Kelly
Michael J. Kerzen
Kirk S. Louie
James A. Marzala
Robert C. Miller
Michael S. Salerno
William K. Seark
Jeff Thom
Michael H. Upson
Richard B. Weisberg

OFFICE OF LEGISLATIVE COUNSEL

State Capitol, Suite 7021
Sacramento, California 95834-3702

TELEPHONE (916) 341-8000
FACSIMILE (916) 341-3020
INTERNET www.legislativecounsel.ca.gov
EMAIL administration@legislativecounsel.ca.gov



January 14, 2002

DEPUTIES

Paul Anzillo
Joe J. Ayala
Scott A. Baxter
Robert F. Bony
Ann M. Burnham
Eileen J. Buxton
Cindy M. Cardullo
Sergio E. Carpio
Emilia Carrer
Ben S. Date
Byron D. Damiani, Jr.
J. Christopher Dawson
Clinton J. deWiz
Linda Dozier
Krista M. Ferns
Sharon R. Fisher
Debra Zidich Gibbons
Saira K. Gilbey
Lisa C. Goldkuhl
Kristen A. Goodwin-Alexander
Kathleen E. Hall
Mara Hilikos Marita
Jana T. Harrington
Baldev S. Heir
Thomas R. Heuer
Russell Holder
Debra R. Huston
Valeria R. Jones
Pat Hart-Jorgensen
Lori Ann Joseph
Thomas J. Kerba
Jacqueline R. Kinney
Eve B. Krottinger
L. Erik Lange
Felicia A. Lee
Diana G. Lim
Romulo I. Lopez
Mariana Marin
Anthony P. Marquet
Francisco A. Martin
Daniel M. Maruccia
JudyAnne McGinley
Abel Munoz
Donna L. Neville
Robert A. Peatz
Stephanie Ramirez-Ridgeway
Patriicia Gates Rhodes
Beth A. Salaman
Jessica L. Steele
Ellen Sward
Mark Franklin Terry
Bradley N. Webb
Leslie A. Wells
Jack G. Zorman

Honorable Carl Washington
2136 State Capitol

INTERCEPTION OF COMMUNICATIONS - #24812

Dear Mr. Washington:

QUESTION

Would a state statute authorizing "roving wiretaps" be valid?

OPINION

A state statute authorizing "roving wiretaps" would be invalid as beyond the limited wiretapping authority provided to the states by federal law.

ANALYSIS

Federal law prohibits the unauthorized interception of wire and other private communications¹ and the use of illegally intercepted communications (18 U.S.C. Sec. 2511). This prohibition applies to all persons, including employees and agents of the United States, or states, or political subdivisions (18 U.S.C. Sec. 2510(6)). However, federal law provides a procedure for the legal interception by specified government agents of wire, oral, or electronic communications (18 U.S.C. Sec. 2510 and following). In general, that law permits interception only pursuant to a court order, or in an emergency with prompt application for a court order (18 U.S.C. Secs. 2516, 2518).

The federal law permits a state to issue court orders "in conformity with section 2518 of this chapter" for wiretaps relating to certain crimes, including any "crime dangerous

¹ The federal law includes interception of oral communications, not in issue here.

to life, limb, or property, and punishable by imprisonment for more than one year" if the crime is designated in an applicable state statute (18 U.S.C. Sec. 2516(2)). Any state-authorized wire interception not in conformity with Section 2518 of the United States Code (hereafter Section 2518) is barred by this federal law (*U.S. v. Tortorello* (2d Cir. 1973) 480 F.2d 764, 772; *U.S. v. Van Horn* (N.D. Neb. 1984) 579 F.Supp. 804, 810).

California law currently authorizes law enforcement to intercept electronic communications pursuant to a court order (Ch. 1.4 (commencing with Sec. 629.50), Pt. 1, Title 15, Pen. C.). California law does not now authorize "roving wiretaps" (see subd. (d), Sec. 629.50, and subd. (c), Sec. 629.52, Pen. C.).

As used here, "roving wiretaps" are orders to intercept communications from one or more persons without specifying any communications equipment to be intercepted (see Goldsmith, "Eavesdropping Reform: The Legality of Roving Surveillance" (1987) Ill. L.R. 401). These are authorized under federal law, but are treated differently from other wiretaps. The authority to apply for them is limited in subsection (11) of Section 2518.²

Section 2518 authorizes wiretaps in various circumstances, as follows:

"§2518. Procedure for interception of wire, oral, or electronic communications.

"(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter⁽³⁾ shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

"(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

"(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the

² The U.S.A. P.A.T.R.I.O.T. Act (P.L. 107-56), signed into law October 26, 2001, added certain terrorist crimes to the list of federal crimes for which interceptions of communications could be ordered, but did not affect the aspect of the wiretapping law at issue here.

³ 18 U.S.C. Sec. 2510 and following.

Honorable Carl Washington — Request #24812 — Page 3

person, if known, committing the offense and whose communications are to be intercepted;

"(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

"(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

"(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

"(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that—

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) except as provided in subsection (1), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

Honorable Carl Washington — Request #24812 — Page 4

"(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted;

"(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

"(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

"(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

"(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

* * *

"(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that—

"(a) an emergency situation exists that involves—

"(i) immediate danger of death or serious physical injury to any person,

"(ii) conspiratorial activities threatening the national security interest, or

"(iii) conspiratorial activities characteristic of organized crime, that requires a wire, oral, or electronic communication to be intercepted before an order authorizing such interception can, with due diligence, be obtained, and

"(b) there are grounds upon which an order could be entered under this chapter to authorize such interception, may intercept such wire, oral, or electronic communication if an application for an order approving the interception is made in accordance with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

* * *

Honorable Carl Washington — Request #24812 — Page 5

"(11) The requirements of subsections (1)(b)(ii) and (3)(d) of this section relating to the specification of the facilities from which, or the place where, the communication is to be intercepted do not apply if—

"(a) in the case of an application with respect to the interception of an oral communication—

"(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

"(ii) the application contains a full and complete statement as to why such specification is not practical and identifies the person committing the offense and whose communications are to be intercepted; and

"(iii) the judge finds that such specification is not practical; and

"(b) in the case of an application with respect to a wire or electronic communication—

"(i) the application is by a Federal investigative or law enforcement officer and is approved by the Attorney General, the Deputy Attorney General, the Associate Attorney General, an Assistant Attorney General, or an acting Assistant Attorney General;

"(ii) the application identifies the person believed to be committing the offense and whose communications are to be intercepted and the applicant makes a showing that there is probable cause to believe that the person's actions could have the effect of thwarting interception from a specified facility;

"(iii) the judge finds that such showing has been adequately made; and

"(iv) the order authorizing or approving the interception is limited to interception only for such time as it is reasonable to presume that the person identified in the application is or was reasonably proximate to the instrument through which such communication will be or was transmitted.

* * * (Emphasis added.)

To ascertain the meaning of a statute, we begin with the language in which the statute is framed (*Leroy T. v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 434, 438; *Visalia School Dist. v. Workers Comp. Appeals Bd.* (1995) 40 Cal.App.4th 1211, 1220). When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it (*People v. Benson* (1998) 18 Cal.4th 24, 30). Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive (*Consumer Product Safety Com. v. GTE Sylvania, Inc.* (1980) 447 U.S. 102, 108).

In clear language, subsection (11) of Section 2518 authorizes only federal officials to apply for a roving wiretap. We think it equally clear that this was intentional, as other portions of the same section authorize a broader group, including state officials, to apply for

Honorable Carl Washington — Request #24812 — Page 6

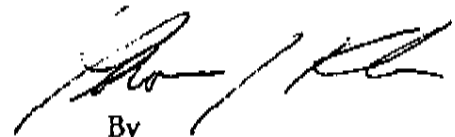
other kinds of wire interception authority. Under subsection (1) of Section 2518, general authority for wire interception is provided to "investigative or law enforcement officers," who are defined to include officers of "any State or political subdivision thereof" (18 U.S.C. Sec. 2510(7)). Similarly, under subsection (7) of Section 2518, emergency authority extends to these same officers if designated by the "principal prosecuting attorney of any State or subdivision thereof." In contrast, when using the phrase "investigative or law enforcement officers" in the context of the roving wiretap authorization, subsection (11) of Section 2518 limits that authority by referring to "federal investigative or law enforcement officers" (emphasis added).

In support of this conclusion is the legislative history of the 1986 amendments to the interceptions of communications provisions, which provide the authority for roving surveillance. In the Senate Report from the Committee on the Judiciary concerning language that was to become this law, the committee discusses the 1986 addition of the roving surveillance provisions, noting that "only a limited list of Federal officials can apply for [this] special order" (Sen. Rep. No. 99-647, 2d Sess. (1986), reprinted in 1986 U.S. Code Cong. & Admin. News, at p. 3585). This is especially significant because state authority for wiretapping was virtually coextensive with the federal authority until the 1986 act added these roving surveillance provisions.⁴

For these reasons, it is our opinion that a state statute authorizing "roving wiretaps" would be invalid as beyond the limited wiretapping authority provided to the states by federal law.

Very truly yours,

Legislative Counsel



By
Thomas J. Kerbs
Deputy Legislative Counsel

TJK:emb

⁴ Aside from the specification of criminal charges for which interceptions of communication were authorized, and the level of authority within prosecution ranks required to make or authorize an application for an order, we identify no significant difference in the pre-1986 federal provisions authorizing state and federal communications interception orders.