To Be Argued By:
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APL-2020-00010

Kings County Clerk's Indicment No. 4087/16
Appellate Division, Second Department Docket No. 2018-09853

Court of Appeals

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOSEPH SCHNEIDER,

Defendant-Appellant.

BRIEF FOR DEFENDANT-APPELLANT

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Introduction

Federal judges are cloaked with the authority to issue eavesdropping orders anywhere in the United States. The source of that authority is Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Commerce Clause of the U.S. Constitution. (U.S. Const. art. I section 8). Within Title III is the enabling statute: 18 U.S.C. §2516 subsections (1) and (2), which, respectively, supply the statutory authority for both Federal judges and State judges to issue orders for eavesdropping and intercepting electronic communications. The two subsections of 2516 are written very differently and confer authority upon Federal judges to issue eavesdropping and interception orders anywhere in the United States, but preemptively limit the authority of State judges to within the borders of their respective States.

On December 3, 2015, with the borrowed robes of his Federal brethren, a New York State judge sitting in Brooklyn issued orders to eavesdrop on the phone and intercept electronic communications of Joseph Schneider, beyond the borders of the State of New York. All the communications intercepted began and ended outside of New York State.

Joseph Schneider is a California resident. He has lived and worked in California his entire life. Prior to his arrest in this case, he had never set foot in New York, he did not know anyone in New York, and had no contacts with anyone in New York. The December 3, 2015 eavesdrop and interception order, and all the subsequent orders that followed, allowed the NYPD to eavesdrop on phone conversations and electronic communications between Joseph Schneider and people located principally in California, but also in Arkansas, Colorado, Florida, Michigan, Nevada, New Jersey, Hawaii, and Costa Rica – none of the communications began in, ended in, or had any relation to New York State.

In fact, after Joseph Schneider was arrested in California and transported to Brooklyn, the District Attorney stated at his arraignment "*As far as connections to New York, the People are not aware of any Schneider connections with New York, with the exception of the deceased Patrick Deluise*..." (A99-100)[1] Mr. Deluise was, in fact, a resident of New Jersey, not New York.

Whether a New York judge may order an extraterritorial eavesdropping warrant, and where that eavesdropping warrant is "executed" under Criminal Procedure Law § 700.05(4), presents an issue of first impression for this Court. A

[1] A numbers refer to Appendix.

New York judge's order for eavesdropping and intercepting electronic communications that is applied extraterritorially and monitored by police in New York simply because the phone company's switching and re-routing technology allows them to, has implications regarding Due Process, the Privileges and Immunities Clause, the Full Faith and Credit Clause, the Supremacy Clause as well as the Doctrine of Separate Sovereignty.

Statement As To This Court's Jurisdiction To Review The Questions Raised

This Court has jurisdiction to entertain the issues raised here as they were all raised and preserved for appellate review in the courts below. The motions filed in the lower court can be found in the record at A120 and A1171 and the appellate briefs were previously supplied to this Court.

Procedural History

In June 2016 Joseph Schneider was indicted in King's County, New York and charged with one count of enterprise corruption under Penal Law § 460.20 (COUNT 1 of Indictment 4087/2016); seventeen counts of promoting gambling in the first degree under Penal Law § 225.10(1) (COUNTS 2-18 of Indictment 4087/2016); one count of possession of gambling records in the first degree under Penal Law §

225.20(1) (COUNT 54 of Indictment 4087/2016); and one count of conspiracy in the fifth degree under Penal Law § 105.05(1) (COUNT 57 of Indictment 4087/2016).

The charges stem from a more than yearlong investigation conducted by the King's County District Attorney's Office and their detectives. The investigation included numerous eavesdropping warrant applications made to a King's County, New York Supreme Court Judge. Extensive eavesdropping evidence was collected by the King's County District Attorney, which makes up the overwhelming majority of the evidence in this case.

Motions And Decisions In The Lower Court

After Joseph Schneider's arrest and arraignment, Defense counsel moved, in an Omnibus motion and an extensive memorandum of law (A120), to suppress the evidence obtained through the eavesdropping warrants as being illegally obtained because Mr. Schneider is a California resident and never set foot in New York and never made or received calls from New York.

The argument for suppression was based on the fact that none of the criminal activity alleged to have been committed by Mr. Schneider took place in New York. Mr. Schneider had no communications with anyone in New York and his gambling websites took no bets from anyone in New York. Additionally, the defendant argued

that the principles of state sovereignty and due process prohibit the King's County District Attorney's Office from eavesdropping on the private electronic communications of the defendant, a resident of California, in violation of California's privacy statute. California Law does not authorize eavesdropping for gambling related offenses and prohibits eavesdropping by out-of-state law enforcement officials. (See California Penal Code §§ 630, 629.52, 629.50)

Most importantly, the overwhelming majority of the phone calls that were monitored by the King's Count District Attorney took place between California residents (i.e. phone calls were from California to California) and all the other phone calls and electronic communications were between Mr. Schnieder in California and residents of other States. No phone calls or electronic communications were made to or received from New York by Mr. Schneider.

The Lower Court's Decisions

The lower court denied the suppression motion by defense counsel and held that the eavesdropping warrant was "executed" in King's County where the King's County District Attorney, with the assistance of the phone company, electronically diverted the signal from the out of State phone calls to a listening post in Brooklyn, New York. The lower court veiled its reasoning with the Federal listening post rule

and held that because the out of State phone conversations were first listened to in Brooklyn that the eavesdropping warrants were "executed" within the lower court's jurisdiction. (A1368)

In support of this decision, the Brooklyn court cited to *People v. DeLaCruz*, 156 Misc2d 284 (1992); *People v. Perez*, 18 Misc.3d 582 (2007); and the seminal case establishing the listening post rule, *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992).

The lower court did not address the concern that through technological advancements, the phone company re-directs phone calls occurring anywhere in the nation to a location of the NYPD's choosing, or how these technological advancements affect the jurisdictional and geographic boundaries of a New York State Judge's authority to act outside the borders of New York.

The Plea and Sentence: Issues Preserved For Appellate Review By Agreement Of The District Attorney and The Lower Court

On March 6, 2018 Joseph Schneider pleaded to count one, enterprise corruption, a class B felony; counts two through eighteen, promoting gambling in the first degree, a class E felony; count fifty-four, possession of gambling records, a class E felony; and count fifty-seven, conspiracy in the fifth degree, a class A misdemeanor. (A1376)

The District Attorney consented to allow Mr. Schneider to remain out on bail while his appeal is pending. (A1378, 1382). He remains out of custody on bail by order of this Court.

At sentence, Defense counsel and the court and the District Attorney agreed that the arguments raised in the pre-trial motions would be preserved for appellate review. (A1399) The lower court then sentenced Mr. Schneider on count one to an indeterminate sentence of one to three years concurrent to all other counts; on counts 2 through 18 he was sentenced to an indeterminate sentence of 1 to 3 years to run concurrent to all other counts; on count 54 possession of gambling records an indeterminate term of 1 to 3 years to run concurrent with all other counts; and on count 57 conspiracy in the fifth degree a definite term of one year in jail to run concurrent to all other counts.

Appeal To the Appellate Division, Second Department

Mr. Schneider filed an appeal to the Appellate Division, Second Department, arguing that the lower court acted beyond the scope of its statutory authority when it issued eavesdropping orders to intercept communications that took place entirely outside the State of New York. He argued that the Federal Statute, The Omnibus Crime Control and Safe Street Act of 1968, conferred authority upon federal judges

that it did not confer upon New York State judges. Mr. Schneider also argued that the eavesdropping orders violated several Constitutional provisions such as the Privileges and Immunities Clause, the Full Faith and Credit Clause, and the separate sovereign's doctrine.

The Appellate Division donned the habit of the Second Circuit and imported the federal listening post rule established in *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992). The court held that an eavesdropping warrant is "executed" when a communication is intercepted by law enforcement officers and when the communication is intentionally overhead or recorded by law enforcement officers. Additionally, the Appellate Division rejected the notion that the eavesdropping warrants constituted an unconstitutional extraterritorial application of New York State law. (A3)

Application To The New York Court of Appeals

Mr. Schneider petitioned this Court for leave to appeal, arguing that the lower court exceeded the scope of its authority in issuing the eavesdropping orders and that those orders violated a host of Constitutional principles. The Petition for leave to appeal was granted on January 15, 2020. (A2)

The Substance Of This Appeal: The Eavesdropping Applications And Supporting Affidavits

From November 2015 through June of 2016, the King's County District Attorney's office conducted an investigation of Mr. Joseph Schneider that involved only New York City law enforcement officials. Based on the eavesdropping applications, the New York law enforcement officials did not enter into any joint investigation with California law enforcement authorities.

The first eavesdropping application to monitor the phone, email, and other electronic communications of Joseph Schneider (number 626-701-7266) and accompanying GPS and/or cell site data was made on December 3, 2015 by the Kings County District Attorney's Office through the affidavits of assistant district attorneys and the affidavit of Detective John Mullen. (A120)

December 3, 2015 Probable Cause Alleged By Detective Mullen For The Eavesdrop Warrant

For the first time, Detective Mullen alleged in his December 2, 2015 eavesdropping application to a Brooklyn Judge that there was probable cause for eavesdropping on the phone and other electronic communications of Joseph Schneider. (A120)

In his statement of probable cause for the eavesdropping warrant Mullen alleges the following facts: 1) that "JOE" (Joseph Schneider) using telephone

number 626-701-7266 to communicate with a Mr. Deluise and that Deluise uses the website www.wagerspot.com as his primary gambling website to place bets (Deluise was located in New Jersey and the Kings County District Attorney had already applied for and obtained an eavesdropping warrant on him); 2) In a conversation from April 10, 2015 Schneider asked Deluise which webpage he currently utilized and Deluise said "Wagerspot"; 3) Schneider instructed Deluise to inform his "players" that the prefix to their accounts had been changed from "JK" to "JKK"; 4) Schneider explained that the numbers and passwords to the accounts would be the same; 5) Schneider advised Deluise that the new webpage was Web1.wagerspot.com and that Deluise should notify his agents of this change; 6) In a conversation from October 19, 2015 Deluise received a phone call from Schneider using phone number 626-701-7266 where Deluise informed Schneider that he was in Florida and that he would see Schneider at the end of the week; 7) Deluise said to Schneider that he was going to drop something; 8) Schneider informed him that his balance was twenty-eight ninety-four; 9) Deluise told Schneider "I'll do fifteen"; 10) Schneider responded please text me when you do it so I can look in there and credit you. (A400-402)

Mullen interprets this information for the court as Deluise had an outstanding account balance of two thousand eight hundred and ninety four dollars with Schneider's gambling website business and that Deluise intended to make a payment of one thousand five hundred dollars towards the balance; 12) In a conversation on November 19, 2015 Deluise called 626-701-7266 to let him know that he dropped Sixteen hundred; 13) Mullen interprets this for the court as meaning that Deluise was informing Schneider that he had made a sixteen hundred dollar payment towards his balance; 14) Mullen alleged other conversations occurred on November 20, 2014, December 22, 2014, February 14, 2015, February 20, 2015, March 12, 2015, March 16, 2015, and April 27, 2015. (A402-403) None of those conversations are quoted in Mullen's affidavit.

Finally, Mullen states in his probable cause section the following: "*Additionally, I am aware that SCT 19 (626-701-7266) was in contact at least fifteen times or more during the same time period with telephone numbers whose area codes originate from States other than California, such as, Arkansas, Colorado, Florida, Michigan, Hawaii, and Nevada. Lastly, I am aware that SCT 19 received three incoming calls from telephone number 01150687307941 during that same period. I am aware that this telephone number originates from Costa Rica*." (A403).

It was never alleged in the December 3d application or any subsequent application that Joseph Schneider ever had any contacts with New York, in any form.

No Contact With New York Is Alleged In Mullen's Affidavits

Mullen's affidavit is significant for several reasons. There is no allegation that Schneider is taking any bets from New York. There is no allegation that Deluise was ever in New York when he communicated with Schneider. In fact, Deluise says that he is in Florida when speaking with Schneider. Additionally, there is no evidence or indication that Schneider or Deluise take bets from anyone in New York.

Finally, and most importantly, Mullen alleges that Schneider does business in other states in the United States; he, in fact, lists several states, but none of them are New York. He then goes on to infer that the website that Schneider runs illegal sports gambling on is run out of Costa Rica where gambling is legal and that Schneider has had phone calls from Costa Rica.

The mention of incoming calls from Costa Rica means that Detective Mullen has already placed a trap and trace on the phone of Schneider without any application made in California where Schneider resides. Detective Mullen illegally obtained the information that Schneider had incoming calls from Costa Rica because California

does not allow law enforcement to obtain such information concerning eavesdropping or trap and trace of gambling related crimes.

Mullen does not mention in his affidavit that eavesdropping on a California telephone line for purposes of a gambling investigation is prohibited by law in California and does not inform the court that the communications never touch New York or that Mr. Schneider never set foot in or solicited gambling clients in New York. There are no allegations that the clients referred to Schneider are from New York or that Schneider has any connection to New York State at all.

Although the King's County District Attorney did not seek approval of the eavesdropping applications before a California judge, they would later go before a California judge to obtain a search warrant for the physical premises of Mr. Schneider when he was arrested in June 2016. The King's County District Attorney's Office was aware that California would not approve an eavesdropping warrant for investigation in a gambling case because California State law does not allow eavesdropping to investigate gambling operations. See California Penal Code §§ 630, 629.52, 629.50)

There were numerous wiretaps orders issued by the judge sitting in Brooklyn on Mr. Schneider's phone in California where he is recorded speaking to people in

several States, but no contacts with New York were ever recorded or alleged. The numerous affidavits supporting the applications for wiretap orders never mention that the majority of Joseph Schneider's conversations being recorded are between him and other people in California and between Schneider and people in other States. There are no conversations or contacts or gambling clients from New York.

Although the People allege that Mr. Schneider is part of some larger enterprise, there is no evidence that he coordinates a gambling operation with anyone else.

POINT I

THE LOWER COURT ERRED AND ACTED BEYOND THE SCOPE OF ITS AUTHORITY WHEN IT AUTHORIZED EAVESDROPPING WARRANTS FOR A CALIFORNIA RESIDENT WHO NEVER SET FOOT IN NEW YORK AND NEVER MADE CALLS TO OR RECEIVED CALLS FROM NEW YORK AND COMMITTED NO CRIMES IN NEW YORK.

The lower court erred when it authorized an eavesdropping warrant on the cell phone of a California resident who never set foot in New York and never made any calls to New York or received calls from New York for the purpose of conducting any of the alleged criminal activity. The statute governing the authorization of eavesdropping warrants, Criminal Procedure Law Article 700, does not permit New York State judges to authorize eavesdropping warrants on cell phones outside the State. The lower court should have suppressed all evidence collected as a result of the illegal eavesdropping warrants, and this Court must reverse the lower court's decision, vacate the plea arrangement, and remand the case to the lower court, ordering suppression of all such evidence.

The Authority Of A New York State Judge Is Derived From Title III Of The Omnibus Crime Control And Safe Streets Act Title 18 U.S.C. § 2516(2)

In 1968, the United States Congress passed the Omnibus Crime Control and Safe Streets Act of 1968. That legislation was passed in response to the United States

Supreme Court's decision in *Berger v. New York*, 388 U.S. 41 (1967). In that case, the Supreme Court struck down New York State's eavesdropping statute as unconstitutional. The New York statutory scheme was held to be too broad in its sweep in that it contained no requirement for particularity as to what specific crime had been or was being committed or specifying the place to be searched or conversations sought as required by the Fourth Amendment.

A significant part of the 1968 legislation is Title III, which contains an enabling statute, allowing federal and state judges to issue eavesdropping orders. When Congress enacted Title III, it relied on the broadest reach of its commerce clause powers, imposing on the States the minimum constitutional criteria for electronic surveillance legislation mandated by the *Berger* case. *People v. Shapiro*, 50 N.Y.2d 747, 762 (1980)

The legislative intent was not to supersede State regulation on eavesdropping entirely, but to limit it through the enabling language of 18 U.S.C. § 2516(2). A State is free to either adopt procedures and standards more restrictive than those imposed by the Federal Act or, if it desires, to prohibit wiretapping within its borders altogether. Under pre-emption principles, any State law drawn more broadly than

Title III's standards runs afoul of the Supremacy Clause (U.S. Const. art VI, cl. 2)

People v. Shapiro, 50 N.Y.2d at 763.

The Enabling Language Of 18 U.S.C. § 2516(2) Limits States' Authority On Eavesdropping And Electronic Interception

Title 18 United States Code § 2516 has two subsections. Subsection one sets out the circumstances under which a federal judge may issue an eavesdropping order, and subsection two sets out the much more limited circumstances under which a state judge may issue an eavesdropping order. The enabling section 2516(2) carefully enumerates the crimes considered serious enough to warrant investigation by wiretap, namely murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb or property and punishable by imprisonment for more than one year. *People v. Shapiro*, 50 N.Y.2d at 763-764.

More important than the subject matter delineated in 2516(2) is, by comparison to 2516(1), what it does not include. Subsection one is much more extensive in the subject matter listed and in the express and inferred ability of Federal judges to issue eavesdropping and interception orders outside of their jurisdictions. For example, 2516(1) includes the authority for Federal judges to issue eavesdropping orders when Federal authorities are investigating crimes such as

arson within special maritime and territorial jurisdiction, transportation of slaves from United States, interstate and foreign travel or transportation in aid of racketeering enterprises, theft from interstate shipment, interstate transportation of stolen property, conspiracy to harm persons or property overseas, and relating to construction or use of international border tunnels (see 18 U.S.C. § 2516(1)(c)), the location of any fugitive from justices (see 18 U.S.C. 2516(1)(l)), and any crime relating to the smuggling of any aliens (see 18 U.S.C. § 2516(1)(m)).

The enabling statute for Federal judges gives express and inferred authority to Federal judges to issue eavesdropping orders on a host of crimes that would naturally occur in more than one geographic jurisdiction and outside the jurisdiction of any single Federal judge or magistrate. Additionally, section 2516(1) makes express reference to and incorporates 18 U.S.C. § 2518, which gives express authority to a Federal judge to issue an eavesdropping order outside of a Federal judge's geographic jurisdiction; § 2518(3) states: "…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)…" Thus, under the enabling statute of Title III, Federal judges have express authority to issue eavesdropping orders outside of their geographic jurisdiction.

Conversely, the enabling statute for State judges – § 2516(2) – is only one paragraph long and does not contain any language concerning crimes that would normally occur in more than one jurisdiction. Because New York State's eavesdropping statute is modelled after, and derives its limited authority from, the enabling statute under Tittle III of the Omnibus Crime Control and Safe Streets Act, a New York State judge does not have the authority to issue eavesdropping orders beyond the borders of New York State, especially in a case such as this where none of the communications touched New York and there was no nexus to any crime committed within the borders of the State of New York.

The lower court was not vested with the authority to issue eavesdropping orders on a phone beyond the borders of New York that had no contact or communication with New York. The Appellate Division's decision to import a rule applicable to Federal judges – the listening post rule, adopted from *United States v. Rodriguez*, 968 F.2d 130 (1992) – tears at the fabric of Congressional intent, and

runs afoul of the Supremacy Clause by interpreting the authority of a State judge too broadly. See *People v. Shapiro*, 50 N.Y.2d 747, 763 (1980).

Statutory Authority For New York State Judges To Issue Eavesdropping Warrants Is Limited To Within The Borders of New York State

Sections 700, 700.25, and 700.05(4) of New York's Criminal Procedure Law limit the authority to grant warrants for electronic surveillance to Appellate Division Justices, Supreme Court Justices and County Court Judges. Each of those Jurists is further limited to issuing such a warrant within a specific geographic area: Appellate Division Justices are limited to issuing such warrants where the warrant is to be executed within the Justice's jurisdiction; Supreme Court Justices are limited to issuing such warrants within the judicial district where the warrant will be executed, and similarly, county court Judges are limited to act only within the county. See CPL § 700.05(4) The statute further limits the geographical boundaries of these warrants to being executed only within the State of New York. The statute states:

> *When such a justice issues such an eavesdropping warrant, such warrant may be executed and such oral or wire communications may be intercepted anywhere in the state.* See CPL § 700.05(4)

The language of the statute requires that the interception must occur within the State of New York. The lower court ruling and the Appellate Division opinion

in this case state that the electronic communication can be intercepted anywhere in the United States and may be re-directed to the jurisdiction of the judge issuing the warrant. However, as the New York statute commands – the interception must take place within the State of New York. Any other interpretation would violate the limitations set out in the New York statute (CPL § 700.05(4)) and would go beyond the authority in the enabling statute (18 U.S.C. § 2516(2)) under Tittle III of the Omnibus Crime Control and Safe Street Act and would constitute a violation of the Supremacy Clause (U.S. Const. art VI, cl. 2).

In 1988, Section 700.05(4) was amended in response to technological advancements such as mobile car phones, which allowed communications to be fluid, where a single conversation could literally travel through multiple districts. Consequently, the legislature amended the definition of "justice" to include, within New York State, "any justice of the supreme court of the judicial department or any county court judge of the county in which the eavesdropping device is to be installed or connected or of any judicial department or county in which the communications are expected to be intercepted." This additional language still confines the eavesdropping activity to within New York State and in no way allows New York State judges to go beyond the borders of New York.

The 1988 Amendment makes clear that only judges in the county or judicial department in which the eavesdropping device was to be installed or connected to the mobile car phone, or in which communications were expected to be intercepted, had authority to issue eavesdropping warrants. This limits the authority of New York judges to the territorial boundaries of New York State, and not the nation. Nothing in the language of the statute authorizes a judge to grant a local New York prosecutor authority to exercise national jurisdiction when conducting eavesdropping. To the contrary, the New York statute is clear that both the execution of the warrant and the interception of the communications must occur within New York State.

In this case, both the lower court and the Appellate Division interpret the word "execute" in CPL § 700.05(4) to mean the eavesdropping warrant is executed where law enforcement first listens to the conversations. This gives a New York State judge unbounded jurisdiction anywhere in the nation. Because phone companies have the technology to re-direct phone conversations from anywhere in the United States to anywhere, both the lower court's and the Appellate Division's interpretation of "execution" allows local judges to permeate any jurisdiction and intercept any phone anywhere in the nation and re-direct that signal back to Brooklyn with the aid of the phone company.

The interpretation by the Appellate Division is not consistent with New York's eavesdropping statute, and it violates the Supremacy Clause of the U.S. Constitution by stretching the boundaries of a New York State judge's authority beyond that granted by the Federal enabling statute under 18 U.S.C. § 2516(2).

No New York Court Has Ever Held That A New York Supreme Court Judge May Issue An Eavesdropping Warrant For A Cell Phone Or Email Or Any Electronic Communication That Begins And Ends Outside The Borders of New York.

No New York court has determined that a New York judge may authorize eavesdropping warrants against an out-of-state communication or that a New York judge may authorize eavesdropping warrants beyond the borders of New York State. It is even more significant in this case where California, the State in which the subject of the eavesdropping lived, does not allow eavesdropping for gambling – the offense designated in the eavesdropping warrant. An analysis of the Appellate Division's citation to a number of miscellaneous cases shows that its reliance on those cases is erroneous and the underlying reasoning flawed.

In *People v. DeLaCruz*, 156 Misc.2d 284 (1992) the Bronx County Supreme Court upheld the issuance of a warrant that monitored communications which passed through multiple jurisdictions within New York. There, the court found that where an eavesdropping Order was issued in Bronx County and the phone company

intercepted the cell phone calls and rerouted them to the Bronx, and the cell phone was located in Queens County, that the Bronx Supreme Court judge was authorized to issue such a warrant. The Court reasoned that "to execute an eavesdropping warrant intercepting a telephone conversation is to order the intentional overhearing or recording of the human voice as it is transferred through the use of wire, cable, or other like communication." 156 Misc.2d 284, 287-88 (1992). The court then concluded that "[t]he jurisdiction where the conversation is overheard or recorded constitutes the jurisdiction of the issuing justice." *Id.* at 288.

Most importantly, the court's reasoning in *DeLaCruz* was that if the place where the calls were traced to was the proper jurisdiction, the only judges in New York State who would be authorized to issue eavesdropping warrants would be those who happen to preside in jurisdictions where the necessary telephone services were erected. This would have resulted in a limited number of jurisdictions authorized to issue eavesdropping warrants. The *DeLaCruz* Court, in 1992, was concerned with the limited number of cell phone towers that existed and this was the main reason that it found that the jurisdiction where the conversation is overheard or recorded constitutes the jurisdiction where the warrant was executed. *People v. DeLaCruz*, 156 Misc.2d at 288.

It is important to consider the limited holding of *DeLaCruz*. There, the court found that the primitive technology of the time and the limited number of judges that could authorize such a warrant to be too restrictive. Nevertheless, *DeLaCruz* makes clear that a judge in New York has jurisdiction to issue an eavesdropping warrant if, in the case of a Supreme court judge, either the tapped phone is located in the jurisdiction of the court within the state, or if the intercepted calls are routed to and first heard by law enforcement within the court's jurisdiction. In any case, CPL 700.05(4) commands that both the location of where the warrant is executed and the interception occurs must be within the State of New York.

Similarly, in *People v. Perez*, 18 Misc. 3d 582 (2007), the Bronx Supreme Court issued wiretap warrants on both land lines and cell phones located in both New York County and in the Bronx. The police in Bronx County monitored the conversations. The *Perez* Court relied heavily on the *DeLaCruz* case and the Second Circuit's *Rodriguez* case where it was held that the interception takes place where the conversations are overheard. However, once again that Court maintained that the communications were all within the State of New York and the Court never authorized the interception of conversations that began and ended outside of New York.

In fact, that Court made special reference to the New York Court of Appeals decision in *People v. Capolongo*, 85 N.Y.2d 151 (1995). In *Capolongo*, the Court found that New York responded to the problems raised by electronic surveillance with greater protection than is conferred under Federal Law, and any interpretation of article 700 must be sensitive to the constitutional protections against impermissible searches and seizures. Because of its concern about the invasiveness of electronic surveillance, the Court has sometimes interpreted various provisions of Article 700 more strictly than its federal counterpart, even when the language of the state and federal provisions was identical or substantially the same. *People v. Perez*, 18 Misc.3d at 590.

The decisions in *DeLaCruz* and *Perez* are the only two instances where courts have interpreted the meaning of the word "execute" under CPL § 700.05(4). Although both courts relied heavily on the listening post rule established by the Second Circuit in *United States v. Rodriguez*, 968 F.2d 130 (1992), neither court held that a New York State judge had authority to issue eavesdropping warrants on electronic communications originating outside the borders of New York. Any other interpretation would allow a judge sitting in New York to have national jurisdiction and impose his authority beyond the borders of New York State, giving unwarranted

extraterritorial effect to the authority of New York judges and unwarranted authority to the New York State legislature by imposing the eavesdropping laws of New York on citizens of other States.

The Appellate Division also relied on *Stegemann v. Rensselaer County Sheriff's Off.*, 155 A.D.3d 1455 (3d Dept. 2017) in support of the proposition that an eavesdropping warrant is valid as long as it is first overheard by police within the jurisdiction of that judge, adopting the listening post rule of *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992). However, the Appellate Division in this case and the Appellate Division, Third Department in *Stegemann* are both wrong.

The *Stegemann* case is distinguishable from this case on its facts and is inapplicable here. In *Stegemann*, the Appellate Division, Third Department was dealing with a civil procedure issue. The Plaintiff was suing New York and Massachusetts law enforcement for eavesdropping on his phone, and the civil claim was dismissed for failure to effectuate service of process in a timely manner.

The plaintiff in that case had been smuggling drugs between New York and Massachusetts, and a Massachusetts judge issued an eavesdropping order on plaintiff's phone. With the evidence gathered, the plaintiff was charged in the U.S. District Court in the Northern District of New York and convicted of selling drugs

between New York and Massachusetts. Stegemann had been distributing drugs directly in Pittsfield, Massachusetts on a large scale. As part of his drug dealing operation, Stegemann regularly made phone calls to Massachusetts and consistently travelled to Massachusetts.

In the civil suit, Stegemann sued Massachusetts law enforcement and failed to effectuate proper service of the summons and complaint. The New York State Supreme Court of Rensselaer County dismissed the civil suit, holding that plaintiff had failed to establish personal jurisdiction over the defendants. On appeal, the Third Department conducted an interest of justice analysis to determine whether the plaintiff had any meritorious claims in light of his failure to properly effectuate service of process in a civil suit. The Court reviewed only the summons and complaint and the plaintiff's motion papers in support of its analysis of the wiretap orders issued by a Massachusetts Court. The New York eavesdropping statutes were not at issue in that case.

The Third Department attempted to define the term "interception" and clearly did not do any statutory analysis of the Massachusetts statute it was interpreting. In the same paragraph, the court stated that the interceptions occurred in New York, but then went on to say that the "actual interceptions" occurred in Massachusetts. In

any case, the court did not do any analysis of the New York eavesdropping statute as it was not at issue. The Third Department, without making any reference to the Massachusetts eavesdropping statute and whether or not it defines the term interception or gives a Massachusetts judge authority to issue an eavesdropping warrant on an out of state cell phone, determined that under Massachusetts law the eavesdropping warrants were valid. The Third Department had no authority to interpret a Massachusetts statute and determine whether a Massachusetts judge had authority to issue eavesdropping orders on Stegemann.

In the case before this Court, the *Stegemann* case is inapplicable for several reasons. First, it did not involve the eavesdropping statutes of New York; second, the issue in that case was completely different as it dealt with a civil suit and whether the plaintiff had properly served the summons and complaint; third, the Third Department had no authority to determine whether a Massachusetts judge and Massachusetts law allow a State Court judge to issue a warrant on a cell phone out of his jurisdiction; fourth, the defendant in that underlying criminal case was travelling back and forth between New York and Massachusetts – not so in this case because Joseph Schneider never set foot in New York; fifth, the defendant in that case was making phone calls into Massachusetts – not so in this case because Joseph

Schneider never made any phone calls into New York; sixth, the defendant in that case was actively participating in crimes in Massachusetts – not so in this case because Joseph Schneider never committed any crimes in New York.

The Appellate Division's reliance on miscellaneous cases and the Federal listening post rule is misplaced, and the reasoning is flawed. The *DelaCruz* case and the *Perez* case never held that a New York judge may issue an eavesdropping warrant where the electronic communications began outside the State and terminated outside the State. The facts are simply not the same here, and foisting the same rule from those cases onto the facts of this case is unconstitutional and unsuitable.

Additionally, the application of the Second Circuit's *Rodriguez* listening post rule is equally ill-fitted. The enabling statute, 18 U.S.C. § 2516(1), for Federal judges gives them greater geographic authority then the enabling statute, 18 U.S.C. § 2516(2), for New York State judges. The listening post rule cannot be applied to the facts of this case where the electronic communications have no nexus to New York.

Other States' Highest Courts Are Divided On The Listening Post Rule And The Application Of Eavesdropping And Interception Statutes Modeled After Title III Of The Omnibus Crime Control And Safe Streets Act.

Eight other States' highest courts have interpreted the eavesdropping and interception statutes modeled after Tittle III of the Omnibus Crime Control and Safe

Streets Act. The issue addressed by each of those courts is whether a judge may issue an eavesdropping or interception order when the electronic communication originates outside the judge's jurisdiction. These courts are divided in their findings.

The eight cases are *State v. Brinkley*, 132 A.3d 839 (Delaware 2016), *State v. McCormick*, 719 S.2d 1220 (Florida 1998), *Luangkhot v. State*, 736 S.E.2d 397 (Supreme Georgia 2013), *Davis v. State*, 43 A.3d 1044 (Maryland 2012), *State v. Brye*, 935 N.W.2d 438 (Nebraska 2019), *State v. Ates*, 86 A.3d 710 (Supreme New Jersey 2013), *State v. Nettles*, 2020 WL 1056825 (Ohio 2020), and *Castillo v. State*, 810 S.W.2d 180 (1990 Texas).

In all of these cases, there was some nexus between the criminal activity and the jurisdiction issuing the eavesdropping warrant or there was a statute that expressly authorized a judge to issue intercept orders outside the jurisdiction. The common thread in these cases is that the highest courts in all these States required that there be some nexus between the criminal activity and the jurisdiction. None of the cases, however, deal with the issue presented here where the communications and the alleged criminal activity take place entirely outside the jurisdiction of the issuing judge and outside the State.

The Delaware Supreme Court Listening Post Rule: There Must Be Some Nexus To The State

In *State v. Brinkley* the Delaware court did an extensive analysis and comparison of the Delaware eavesdropping statute to the federal statute 18 U.S.C. 2518(3). That court found that that there is a distinction between the language of the statute and the authority of state and federal judges. The ultimate holding in that court, as is advocated here, is that the authority of the state judge is to intercept electronic communications within the State, regardless from where it originates. In other words, the electronic signal must either begin or end within Delaware in order for a judge in Delaware to legally order the interception – the electronic communication must have some nexus to the State.

The rule set out by the Delaware Supreme Court is distinguishable from the rule applied by the Appellate Division in this case. In Delaware, the electronic communication must have some clear nexus to the State. The electronic communication must either begin or end in the State of Delaware. This is distinct from the Appellate Division's holding in this case because none of the electronic communications began or ended or had any nexus to New York.

The Florida Supreme Court Rule: The Within-State Listening Post Rule

In *State v. McCormick*, 719 S.2d 1220 (Florida 1998), the issue was whether a police officer in one Florida city (Melbourne, Florida) could intercept a phone conversation that originated or ended in another Florida city (Merritt Island, Florida). The Florida Supreme Court's version of the listening post rule applies to cities within the State of Florida.

This is distinguishable from the version of the listening post rule applied by the Appellate Division, Second Department in this case where the electronic communication both began and ended outside the State of New York. The Florida Supreme Court's ruling pertains to only within-State communications and is, therefore, distinguishable from this case.

Georgia Supreme Court: Georgia Rejects The Listening Post Rule and Restricts Judges To Issuing Orders To Within Their Respective Jurisdictions.

In *Luangkhot v. State*, the Georgia Court specifically found, after analysis and comparison of the Georgia eavesdropping laws to 18 U.S.C. 2518(3), that the authority of a State court judge is dependent upon State law, not the laws of the United States. The State law and State constitution of Georgia restricts the State judge to within the boundaries of his own judicial district. The rule adopted by the Georgia Supreme Court applied to electronic communications all within the State of

Georgia. Georgia rejected the within-State listening post rule and found that Georgia law restricted judges to issuing eavesdropping and interception orders to within their jurisdictions.

Nebraska Supreme Court: The Electronic Communication Must Have Some Nexus To The Issuing Court's Jurisdiction.

The issue in *State v. Brye*, 935 N.W.2d 438 (Nebraska 2019) was whether the judge issuing interception orders acted beyond the scope of his authority when communications intercepted originated in Texas and the phone calls were made to Nebraska, but the police listening post was within the issuing judge's jurisdiction in Nebraska. The Defendant, Brye, was a resident of Nebraska and his phone calls for the purposes of selling illegal narcotics were both from Nebraska to Nebraska and, as he travelled to Texas, from Texas to Nebraska.

The Nebraska Supreme Court held that because the interception occurs both at the origin or point of reception and where the communication is redirected and first heard, both of these locations must be considered when deciding whether the interception is within the court's territorial jurisdiction. The Nebraska Supreme Court, without alluding to or doing any analysis or comparison to Title III's enabling statute, adopted the Federal listening post rule and held that the Nebraska judge can

authorize the interception of communications within the court's territorial jurisdiction where the communication is redirected and first heard.

The Nebraska decision is distinguishable from this case. The phone calls intercepted in that case were from Texas to a phone inside the jurisdiction of the judge issuing the interception order. Additionally, the defendant was operating his illegal narcotics business principally within the territorial jurisdiction of the issuing judge and only travelled to Texas periodically. Thus the principal illegal activity was occurring within the territorial jurisdiction of the issuing judge. Conversely, Joseph Schneider never set foot in New York; he never solicited any business in New York; he did not have any contacts in New York, and, most importantly, he never had any communications with New York.

Texas Court of Criminal Appeals: Judges Issuing Interception Orders Restricted To Their Own Judicial Districts.

In *Castillo v. State*, 810 S.W.2d 180 (1991 Texas), the issue was whether a judge in one county in Texas (Travis County) was authorized to issue wiretap orders on phones in another Texas county (Ellis County) and the listening post for the police was in yet another Texas county (Navarro County). The Texas Court of Criminal Appeals, sitting *en banc*, found, after analysis and comparison of the state eavesdropping law to Title III, that Texas State law contains restrictions on judges

issuing interception orders. Specifically, judges in one jurisdiction within Texas may not issue wiretap orders where the interception is to occur outside the judicial district of the issuing court, specifically because the technology allows for some listening post to be established hundreds of miles from the place of actual surveillance.

The Texas case is distinguishable from the facts and holding of the Appelalte Division in this case. First, the electronic communications being monitored in *Castillo* all occurred within Texas. None of the communications in question were from out of State. Second, the holding in *Castillo* did not adopt the listening post rule as the Appellate Division did in this case. The communications in this case all occurred outside of New York, and none of them touched New York in any way.

The two state cases that allowed a judge to issue eavesdropping orders outside the states' borders are *Davis v. State*, 43 A.3d 1044 (Court of Appeals Maryland 2012) and *State v. Ates*, 86 A.3d 710 (Supreme New Jersey 2013), both of which are distinguishable from this case.

Maryland Supreme Court: Maryland Statute Different Than New York Statute Because It Gives Express Authorization To Issue Orders Outside The Jurisdiction.

In *Davis v. State*, the Maryland Court was applying the Maryland eavesdropping statute, which is much different than that of New York's eavesdropping statute. The Maryland Statute is found at Md. Code Ann. Cts. & Jud.

Proc. § 10-408(c)(3). The pertinent language of that statute expressly gives the Maryland judge the authority to issue an eavesdropping order where the communications and the device are not located within the judicial district of the judge. It states in pertinent part:

(3) If an application for an ex parte order is made by the Attorney General, the State Prosecutor, or a State's Attorney, *an order issued under paragraph (1) of this subsection may authorize the interception of communications received or sent by a communication device anywhere within the State so as to permit the interception of the communications regardless of whether the communication device is physically located within the jurisdiction of the court in which the application was filed at the time of the interception.* The application must allege that the offense being investigated may transpire in the jurisdiction of the court in which the application is filed. [emphasis added]

Because the Maryland Court was applying a much different statute than New York's eavesdropping statute, one where the judge had express authority to issue an eavesdropping warrant outside his district, it is distinguishable from this case. The same express language in Maryland's statute simply does not exist in New York.

New Jersey Supreme Court

Similarly, in *State v. Ates*, 86 A.3d 710 (New Jersey Supreme 2014), the New Jersey Court was interpreting a statute that is substantially different from New York's eavesdropping statute. The New Jersey statute defines the point of interception as follows: "Point of interception" means the site at which the

investigative or law enforcement officer is located at the time the interception is made N.J. Stat. Ann. § 2A:156A-2 (West). Additionally, the application for the eavesdropping warrant must demonstrate that there is some nexus within the State of New Jersey. *Ates*, 86 A.3d at 716.

Both the Maryland case and the New Jersey case are distinguishable from this case. In those cases, the statutes are distinctly different from the New York Statute and, although the constitutionality of those statutes is questionable, they contain express language that allowed the Maryland and New Jersey judges to rule as they did. That express language is not contained in New York's statute and, thus, those cases are distinguishable from this case.

POINT II

THE LOWER COURT VIOLATED THE DUE PROCESS CLAUSE, THE PRIVILEGES AND IMMUNITIES CLAUSE, THE FULL FAITH AND CREDIT CLAUSE OF THE U.S. CONSTITUTION, AND THE SEPARATE SOVEREIGN DOCTRINE WHEN IT AUTHORIZED AN EAVESDROPPING WARRANT ON A CELL PHONE IN A STATE THAT DOES NOT PERMIT ELECTRONIC EAVESDROPPING FOR GAMBLING RELATED OFFENSES AND DOES NOT PERMIT EAVESDROPPING FROM ANOTHER STATE ABSENT A JOINT STATE INVESTIGATION.

The lower court violated the Due Process Clause of the 14th Amendment and Article IV §§ 1 and 2 of the U.S. Constitution, the Full Faith and Credit Clause and the Privileged and Immunities Clause, and the separate sovereign doctrine when it issued an electronic eavesdropping warrant for a California resident who never set foot in New York and never made any phone calls to New York and never received phone calls from New York. The violation of these Constitutional principles was especially egregious because California law prohibits eavesdropping for gambling-related offenses and prohibits eavesdropping from other States absent a joint investigation with California authorities. The evidence collected from the electronic eavesdropping warrants relating to both phone calls and emails and other electronic communications was obtained illegally and must be suppressed.

Due Process, The Privileges and Immunities Clause, and The Full Faith and Credit Clause

Article IV § 1 of the U.S. Constitution, the Full Faith and Credit Clause, states in pertinent part: *Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State*. It is well settled that a statute is a public act within the meaning of the U.S. Const. Art IV, § 1 of the Federal Constitution. *See Franchise Tax Bd. of California v. Hyatt*, 136 S.Ct. 1277, 1281, 194 L.Ed.2d 431 (2016); *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1955). Article IV § 2 of the U.S. Constitution, the Privileges and Immunities Clause (also known as the Comity Clause), reads in pertinent part: *The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States*.

A New York judge may not extraterritorially impose the laws of New York outside the borders of New York and within the borders of the State of California, especially where it violates the laws of the State of California. To do so violates the principal of separate sovereignty of the States and violates the Article IV §§ 1 and 2 of the U.S. Constitution and the Due Process Clause of the 14th Amendment. The U.S. Supreme Court has held that

> "laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by

> the comity of other states. The general rules of international comity upon this subject were well summed up, before the American Revolution, by Chief Justice De Grey, as reported by Sir William Blackstone: 'Crimes are in their nature local, and the jurisdiction of crimes is local.'" *Huntington v. Attrill*, 146 U.S. 657, 669, 13 S.Ct. 224, 228 (1892).

In this case, a local judge sitting in Brooklyn, New York authorized the Kings County DA to eavesdrop on phone conversations that took place entirely outside of New York. This extraterritorial application of New York's laws violated Due Process, the Privileges and Immunities Clause and the Full Faith and Credit Clause of the U.S. Constitution because it was an extraterritorial application of New York Law into another State.

Privileges and Immunities Clause Violation

The Federal Constitution provides that the citizens of each state are entitled to all the privileges and immunities of citizens of the several states. U.S. Const. art. IV sec. 2 cl. 1. The intent of this provision is to confer on the citizens of the United States a general citizenship, conferring in every state all the privileges and immunities to which the citizens of any state would be entitled to under like circumstances. It is intended to prevent discrimination by one state against citizens of other states as to the fundamental privileges of citizenship.

Under the Privileges and Immunities Clause, Joseph Schneider has the fundamental right to avail himself of the protection of the laws of his home State of California. He has the right to not have a foreign authority thrust itself into the jurisdiction of his home State of California and extraterritorially impose New York criminal statutes upon him.

New York law provides that sister states may not impose their laws within the State of New York and likewise, New York may not extraterritorially impose its laws in other States. Because these laws against extraterritorial application are enjoyed and afforded to every New York citizen, they must also be afforded to Joseph Schneider, a citizen of a sister State, under the Privileges and Immunities Clause of the U.S. Constitution.

Privileges And Immunities Clause: New York Does Not Allow Sister States To Impose Their Criminal Statutes Within The State Of New York And This Court Must, Likewise, Afford Joseph Schneider The Same Privileges And Immunities Under The Constitution.

Under New York Criminal Procedure Law § 140.55 whenever a peace officer of a sister State enters into New York to make an arrest, after having apprehended the suspect, he must appear in a New York Court so that a New York judge can make

certain that the New York citizen being arrested has violated a criminal statute under New York law. CPL § 140.55 (2) and (3) state:

> 2. Any peace officer of another state of the United States, who enters this state in close pursuit and continues within this state in such close pursuit of a person in order to arrest him, shall have the same authority to arrest and hold in custody such person *on the ground that he has committed a crime in another state which is a crime under the laws of the state of New York*, as police officers of this state have to arrest and hold in custody a person on the ground that he has committed a crime in this state. [emphasis added]
>
> 3. If an arrest is made in this state by an officer of another state in accordance with the provisions of subdivision two, *he shall without unnecessary delay take the person arrested before a local criminal court which shall conduct a hearing for the sole purpose of determining if the arrest was in accordance with the provisions of subdivision two*, and not of determining the guilt or innocence of the arrested person. If such court determines that the arrest was in accordance with such subdivision, it shall commit the person arrested to the custody of the officer making the arrest, who shall without unnecessary delay take him to the state from which he fled. If such court determines that the arrest was unlawful, it shall discharge the person arrested. [emphasis added]

The statute requires that a peace officer of another State, before completing the arrest and bringing the suspect back to the sister State, must first appear before a judge in New York to ensure that some criminal statute of the sister State also constitutes a violation of a New York State criminal statute. Subsection two of the statute requires that the crime in the other State must also be a crime under the laws

of the State of New York. Thus, the application of a sister State's criminal laws are not permitted, and New York does not allow a sister State to extraterritorially impose its criminal laws in New York, unless it is also a violation of New York's penal law.

This statute was applied in *People v. LaFontaine*, 92 N.Y.2d 470 (1998) where this Court held that out-of-State police officers, from Patterson, New Jersey, were not authorized to make an arrest based on an arrest warrant. In that case, the New Jersey officers had both a New Jersey arrest warrant and a federal arrest warrant and were trying to enforce this warrant in New York City. This Court found that the issue of the New Jersey warrant had not been properly preserved for appellate review, but that the New Jersey police did not have the authority to enforce the federal arrest warrant in the New York because they did not fall under New York's definition of peace officer.

One of the fundamental protections that New York provides its citizens is that New York does not allow sister States to impose their criminal statutes within the borders of the State of New York. Since New York provides this protection to its own citizens, it must, likewise under the Privileges and Immunities Clause, provide the same protections to Joseph Schneider as a citizen of a sister State.

Privileges And Immunities Provided To All New York Citizens Must Be Equally Applied To Joseph Schneider, A Citizen of California: New York's Rules Of Statutory Construction Dictate That There Can Be No Extraterritorial Application Of The Laws Of The State Of New York.

In addition to the New York law that prohibits sister States from imposing their criminal statutes in New York, New York rules of statutory construction also prohibit New York statutes from being applied extraterritorially in other States. That no law may be applied extraterritorially under New York's rules of statutory construction is one of the privileges and immunities provided to every New York citizen and, thus, under the Privileges and Immunities Clause, must also be applied to Joseph Schneider, a California citizen.

The law of statutory interpretation in New York specifically prohibits the extraterritorial application of a State's laws. The statute reads as follows: *The laws of one state can have no force and effect in the territorial limits of another jurisdiction, in the absence of the consent of the latter*. § 149. Extraterritorial operation, NY STAT § 149.

The absence of California's consent is apparent. California law does not permit eavesdropping or interception of electronic communications with regard to the offense of gambling, and it is distinguishable in this respect to New York's eavesdropping statute. See California Penal Code §§ 629.50 and 629.52. New York

may not reach into the State of California and impose criminal liability under New York law where it is contrary to the laws of the sister State. This statutory construction applies to the citizens of New York and, thus, must also apply to a citizen of a sister State under the Privileges and Immunities Clause.

The eavesdropping order applied to an out of state cell phone – where the owner of that phone had never set foot in New York and never made any calls to New York – is illegal under New York's law of statutory interpretation.

The New York Court of Appeals adopted this statutory interpretation in the *Padula v. Lilarn Properties Corp.*, 84 N.Y.2d 519, 523 (1994). There, the Court stated: "under our State's rules of statutory construction, there is no basis for inferring extraterritorial effect in the face of legislative silence on the question. McKinney's Cons. Laws of N.Y., Book 1, Statutes § 149 ('all laws are co-extensive, and only co-extensive, within the political jurisdiction of the lawmaking power; and every statute in general terms is construed as having no extraterritorial effect')." *Padula v. Lilarn Properties Corp.*, 84 N.Y.2d 519, 523, (1994); see also *Global Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 735 (2012) (holding the established presumption is against the extraterritorial operation of New York law) McKinney's Consolidated Laws of N.Y., Book 1, Statutes § 149; *Miller v.*

Miller, 22 N.Y.2d 12, 31 (1968) (holding that like statutes, constitutional provisions are almost always intended to apply only to acts within the territory. Absent an express choice-of-law provision, they are deemed intended as plenary within a territory and nonfunctioning outside the territory.)

The law of statutory construction adopted in the civil cases cited above is equally applicable to the interpretation of the statutes in this case concerning wiretap warrants under CPL Article 700. The laws of the State of New York may not be given extraterritorial effect, and the warrant issued by the lower court to eavesdrop on the cell phone and emails of Joseph Schneider was illegal. Our law on statutory construction applies to all New York citizens and must, therefore, be applied to the citizens of all sister States.

Mr. Schneider never made phone calls or sent emails to New York and never received phone calls or emails from New York. The lower court erred and violated both the laws of New York statutory construction and the Privileges and Immunities Clause when it applied the wiretap statutes of New York to eavesdrop on an out of state phone and other electronic communications.

Full Faith and Credit Clause

Article IV § 1 of the U.S. Constitution, the Full Faith and Credit Clause, states in pertinent part: *Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State*. It is well settled that a statute is a public act within the meaning of the U.S. Const. Art IV, § 1 of the Federal Constitution. *See Franchise Tax Bd. of California v. Hyatt*, 136 S.Ct. 1277, 1281, 194 L.Ed.2d 431 (2016); *Carroll v. Lanza*, 349 U.S. 408, 75 S.Ct. 804, 99 L.Ed. 1183 (1955). Article IV § 1 of the U.S. Constitution requires that the public acts, records and judicial proceedings of each State should be given full faith and credit in every other State. New York must give full faith and credit to the conflicting laws of California where a New York judge issues an eavesdrop order on a phone in California that has no connection to New York

California law regarding the criminal subject matter of eavesdropping orders does not allow for interception for the purpose of investigating gambling. See California Penal Code § 629.52. This is the law in California where Joseph Schneider resides and where he uses the cell phone that was intercepted pursuant to the orders of the Brooklyn judge. Given the extraterritorial application of New York's eavesdropping laws into the State of California, the Full Faith and Credit

Clause is applicable and the interception orders were not legal as they conflicted with the laws of that jurisdiction where the criminal activity was alleged to have taken place.

The underlying purpose of the Full Faith and Credit Clause is to avoid basic conflicts among judicial systems of the States. *Luna v. Dobson*, 97 N.Y.2d 178, 182 (2001). In this case, the extraterritorial application of New York's eavesdropping laws create a direct conflict with the laws of the State of California. The Full Faith and Credit Clause is applicable to this conflict and this Court should find that the Brooklyn orders violate the Full Faith and Credit Clause and are unconstitutional.

The Extraterritorial Application Of New York's Eavesdropping Statutes Violates The Separate Sovereigns Doctrine Because New York May Not Impose Its Criminal Statutes Into Another State.

The issuing of the interception order from a judge sitting in Brooklyn on a phone in California that made no calls and had no contact with criminal activity in New York violates the separate sovereigns doctrine because one State may not impose its criminal statutes within the borders of a sister State.

The United States Supreme Court has uniformly held that the States are separate sovereigns with respect to the Federal Government because each State's power to prosecute is derived from its own inherent sovereignty, not from the

Federal Government. *Heath v. Alabama*, 474 U.S. 82, 89 (1985) ("The States are separate sovereigns from the Federal Government because each State's power to prosecute is derived from its own 'inherent sovereignty, not from the Federal Government."). Because States rely on "authority originally belonging to them before admission to the Union and preserved to them by the Tenth Amendment," state prosecutions have their roots in an "inherent sovereignty" unconnected to the U.S. Congress. *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863, 1866 (2016).

The United States Supreme Court has held that one State may not override the legislative authority of another and impose its laws extraterritorially for the purpose of punishing a citizen of the other State. In *Nielsen v. State of Oregon*, 212 U.S. 315 (1909) the U.S. Supreme Court held that Oregon could not impose its criminal statutes within the borders of the State of Washington. In that case, the two states had concurrent jurisdiction over the Columbia River. Nielsen, a resident of Washington, was operating a purse net in the Columbia River. The use of such nets was a criminal violation in Oregon, but not in Washington. After Nielsen was arrested and prosecuted in Oregon, the case reached the U.S. Supreme Court where the Court ruled that one State may not impose extraterritorially its own criminal

statutes. The court held that, "[c]ertainly, as appears in the present case, the opinion of the legislatures of the two states is different, and the one state cannot enforce its opinion against that of the other; at least, as to an act done within the limits of that other state." *Nielsen v. State of Oregon*, 212 U.S. at 321. *See also Sandberg v. McDonald*, 248 U.S. 185, 195 (1918) (holding that "[l]egislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction."

In this case, the law in California prohibits eavesdropping for gambling-related offenses. *see* Cal. Penal Code § 629.52 (enumerating offenses in connection with which a warrant authorizing interception of wire or electronic communications may issue). California Penal Code § 629.52 only permits law enforcement to conduct lawful eavesdropping on specific offenses enumerated in the statute, and gambling offenses are not included. Additionally, California law does not authorize New York authorities to conduct eavesdropping in California, absent a joint investigation. California also provides, by statute, that the superior court has the authority to review an application to conduct eavesdropping within its borders. See Cal. Penal Code § 629.50 and 633.

The eavesdropping warrant issued by a judge sitting in Brooklyn, New York, and enforced by the New York City Police Department violated the statutes of the

State of California. A New York judge may not give unwarranted extraterritorial effect to its orders, nor may the New York State Legislature give unwarranted extraterritorial effect to its legislative authority, nor may the New York City Police Department carry out an order that violates the laws and policies of the State of California.

The extraterritorial application of New York laws or an order from a New York judge to a resident of California, while in California, violates both the Due Process rights of that citizen of California and violates the Full Faith and Credit Clause of Art. IV § 1 U.S. Const. and violates the Privileges and Immunities Clause; one sovereign (New York) may not impose its laws extraterritorially within the borders of another separate sovereign (California), especially where New York's laws directly violate the laws and policies of California.

The King's County District Attorney Deliberately Circumvented The Laws Of The State Of California When It Applied For An Eavesdropping Warrant In A New York Court And Violated The Fourth Amendment Rights Of Mr. Schneider.

The District Attorney's office deliberately circumvented the laws of the State of California when it made its application for an eavesdropping warrant to a New York Court. The King's County DA was well aware that California does not allow eavesdropping warrants to investigate allegations of gambling-related crimes. In

fact, the King's County DA chose to observe the principles of state sovereignty and due process when it went to California authorities and to a California judge in June of 2016 to apply for a search warrant and warrant of arrest for Joseph Schneider. Thus, there is no explanation grounded in acceptable legal analysis to justify why the DA respected Mr. Schneider's Fourth Amendment right when crossing state borders, to search and seize his property and person, but not before seizing his private telephonic and electronic communications. This is an obvious and egregious offense considering that the United States Supreme Court has made it clear that the Fourth Amendment protects private electronic communications. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

On June 9, 2016, the King's County District Attorney, in conjunction with the Los Angeles County Sherriff's Department, applied to a Superior Court Judge in Los Angeles, California for a warrant to both search the home of Joseph Schneider and for his arrest. This joint warrant application is proof that the King's County DA was aware that they needed to conduct a joint application for the physical search and arrest of Joseph Schneider and that they were well aware of the laws of the State of California. The King's County DA's failure to make the same type of application to intercept the electronic communications of Mr. Schneider demonstrates a

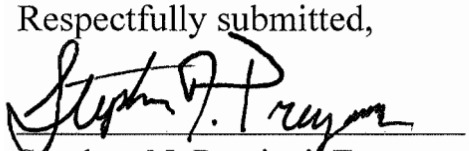
deliberate circumvention of the laws of the State of California. This purposeful perambulation of California law violated the Fourth Amendment search and seizure law, the Due Process Clause, the Full Faith and Credit Clause and the Privileges and Immunities Clause of the U.S. Constitution; the evidence obtained as a result of this violation must be suppressed.

CONCLUSION

Mr. Schneider respectfully requests that this Court reverse the lower court's decision and suppress the evidence obtained through the eavesdropping order and that all such evidence be suppressed and that the conviction be reversed and sentence vacated.

Dated: March 13, 2020
New York, New York

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

Pursuant to 22 NYCRR § 500.13(a)(1), the foregoing brief was prepared on a computer.

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