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.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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The People's Argument For National Eavesdropping Authority For New York Judges Is Contrary To Both The New York Eavesdropping Statute And The Omnibus Crime Control And Safe Streets Act.

The Fourth Amendment protects people, not places. The Brooklyn District Attorney argues for a rule that allows a New York State judge to issue an eavesdropping warrant on any phone anywhere in the United States. Under the People's rule, it would not matter where the subject phones are located or whether a crime had been committed in New York State. New York trial judges and the police within New York, the People argue, should have unfettered authority to eavesdrop on the conversations of anyone at any time in anyplace in the Nation. Such a rule is contrary to the Fourth Amendment, the Omnibus Crime Control and Safe Streets Act, and to New York's Article 700.

When New York State first passed its eavesdropping laws, in 1970, it was illegal for a policeman from New York to go to California and physically place a wiretap on the phone of a California resident based on an order issued by a judge sitting in New York. The lower courts held that because an advancement in technology enables law enforcement and the phone company to re-direct the phone signal of any conversation in the United States to any location within New York for purposes of eavesdropping, New York judges should now have unlimited national authority to issue an eavesdropping order on any U.S. Citizen's phone conversations, even if the call never touches New York. The lower courts are wrong.

The Constitutional principles that protected citizens in separate States in 1970, still protect them today, no matter how advancements in technology may enable the police. The earliest version of wiretaps required both the physical placement of a wiretap on the phone lines of the eavesdropping subject and authorization from a judge or magistrate within the physical jurisdiction of the tapped phone. Advancements in technology cannot shout down what the Constitution was intended to protect: people, not places. The Constitutional safeguards have not changed; they still protect the privacy of citizens, no matter where the uninvited ear is listening, no matter where their voices may be carried.

The People's Arguments

In support of their argument, the People make three separate points: 1) the plain meaning of New York's eavesdropping statute gives a New York judge unlimited, national authority; 2) the case law in both New York State and in federal courts supports this rule; 3) policy reasons militate in favor of granting a New York State judge national authority to issue eavesdropping orders.

The People Have No Factual Basis For Issuing An Eavesdropping Warrant

The People's argument is based on a factually erroneous assumption: that Joseph Schneider committed a crime or had some contact with the State of New York. The People are wrong and there is no evidence that Joseph Schneider committed a crime in New York, or had any contact with anyone in New York, or

belonged to a criminal enterprise that did business in New York. I supplied this Court with the full panoply of applications and affidavits supporting the eavesdropping orders that were issued against Joseph Schneider; there are no facts in any application or supporting affidavit that support the People's contentions that Joseph Schneider had any contact with, or clients in, New York.

The applications and affidavits for the eavesdropping warrants are cleverly crafted, placing side by side the actions of Joseph Schneider with Gordon Mitchnick, in the same paragraphs, the same prose, glossing them with the same false patina for the benefit of the lower court. But when read carefully, they show the operations of Schneider and Mitchnick to be distinct, like two parallel lines, they never meet or cross. Joseph Schneider was not part of national criminal enterprise and did not have any clients in New York.

The People Incorrectly Argue That The Plain Meaning Of New York's Eavesdropping Statute Allows New York Judges To Issue Eavesdropping Orders On Any Phone In The Nation.

The People argue that the plain meaning of the language found in CPL Article 700 gives a Justice jurisdiction to issue an eavesdropping warrant on any phone in the United States, regardless of where the phone call is made or received. (See People's brief page 13). The People argue that the following language, in combination, grants this authority to a New York State Supreme Court judge: CPL § 700.10(1), authorizing a justice upon the application of a person who is authorized

by law to investigate…a designated offense; § 700.05(4), defining justice as a justice of the supreme court in which the eavesdropping warrant is executed; § 700.35(1), requiring the eavesdropping warrant to be executed according to its terms; §700.30(7), requiring the eavesdropping warrant to be executed as soon as practicable; and § 700.05(3) defining an intercepted communication as a telephonic communication which was intentionally overheard or recorded.

The People fail to explain or provide any support for the contention that New York's eavesdropping statute gives a judge authority to issue an eavesdropping warrant on cell phones where the calls begin and end outside of New York. There is no case law that supports such an eavesdropping order and no New York court has so interpreted the statute.

Most importantly, the People fail to make any mention in their statutory interpretation of the enabling statute, 18 U.S.C. §2516(2), under Title III of the Omnibus Crime Control and Safe Streets Act or the important distinctions between the New York statute and the Federal statute in defining telephonic communications. The definition of "intercepted communication" under § 700.05(3) is dependent upon the term "telephonic and telegraphic communication," which are defined differently under New York Law, Penal Law § 250.00(3), compared to its Federal counterpart under Tittle III.

The New York Eavesdropping Statute Is Distinct From The Federal Eavesdropping Statute In A Significant Way.

The definition of wire communications under Title III of the Omnibus Crime Control and Safe Streets Act, found in 18 U.S.C. § 2510(1), is the point of departure for all eavesdropping communications. It defines what type of communications may be intercepted by Federal authorities under Tittle III, which includes a direct reference to both interstate and foreign communications:

> " 'wire communication' means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for **the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce**;" [emphasis added]

The New York eavesdropping statute is almost identical in its wording, but is different from the Federal eavesdropping statute in one significant way: it excludes from the definition of telephonic communications "the transmission of interstate or foreign communications." Penal Law § 250.00(3) is imported into the eavesdropping statute under CPL § 700.05(1), defining eavesdropping as "'wiretapping', 'mechanical overhearing of conversations,' or the 'intercepting or accessing of an electronic communication,' as those terms are defined in section 250.00 of the penal law." Under Penal Law § 250.00(3), New York defines "telephonic communications" as follows:

> "Telephonic communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of communications and such term includes any electronic storage of such communications.

The New York statute defining telephonic and telegraphic communications, so heavily relied on by the People in their plain meaning argument, is almost verbatim to the federal statute, but deliberately and conspicuously excludes the terms "*transmission of interstate or foreign communications or communications affecting interstate or foreign commerce*."

This Court has consistently held that any variance between the New York eavesdropping statute and the federal eavesdropping statute must be regarded as purposeful. *People v. Gallina*, 66 N.Y.2d 52, 56 (1985) (holding that although our own wiretapping statute is patterned largely upon the Federal statute, any variances between the two must be regarded as purposeful); *People v. Washington*, 46 N.Y.2d 116, 122 (1978) (holding that there is no escaping the conclusion that the Legislature's enactment of this variance was purposeful). See also *People v. Glasser*, 58 A.D.2d 448, 450 (2d Dept. 1977), *People v. Pecoraro*, 58 A.D.2d 462, 467-468 (2d Dept. 1977).

The Legislature omitted from New York's definition of telephonic communications the transmission of interstate or foreign communications or

communications affecting interstate or foreign commerce. The variance between the New York statute and the Federal statute must be seen as a purposeful omission. In terms of the plain meaning of the New York statute, there is nothing plainer than the verbatim use of the language in the Federal statute and the intentional omission of a specific term: *interstate communications*. The Legislature omitted this phrase from the definition of telephonic communications because it intended to limit and preclude New York judges from authorizing eavesdropping warrants on any interstate communications or foreign communications or communications affecting interstate or foreign commerce.

Additionally, the New York Statute expressly limits the authority of New York judges to issuing eavesdropping warrants where interceptions are within New York State. CPL § 700.05(4) 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***. [emphasis added]

The People's plain meaning argument fails to mention that the definition of telephonic communications in the New York statute deliberately omits interstate communications and any communications affecting interstate commerce, or that eavesdropping warrants must be executed and intercepted within the state.

The definition of telephonic communications is at the heart of the People's plain meaning argument and that argument must fail because of the Legislature's conspicuous omission of interstate communications.

New York Courts Have Frequently Interpreted The New York Eavesdropping Statute Differently Than The Federal Eavesdropping Statute.

Although the New York eavesdropping statute is modeled after the Federal statute, New York Courts have not always moved in lockstep with federal courts in the interpretation and application of their respective eavesdropping statutes. In fact, the New York Court of Appeals has interpreted the New York eavesdropping statute more strictly, providing greater Constitutional protections to the individual, than the federal courts have interpreted Title III, on numerous occasions. This Court should do the same in this case and restrict eavesdropping orders to communications taking place within the borders of New York State.

The listening post rule advanced by the People is an adaptation of a Federal rule and an extraterritorial application of New York's laws through the use of the phone company's new technology. The phone company, using switching technology, can re-direct phone signals from anywhere in the United States to anywhere. No New York court has ever interpreted New York's eavesdropping statute as giving a judge authority to eavesdrop on phone calls that both begin and end outside the borders of New York State just because a new technology enables them to re-direct the signal to the place of their choosing.

The difference in New York's interpretation of similarly modeled statutes is significant because of the limits it imposes on the authority of New York judges and because of the greater Constitutional protections it provides for individuals. Just as this Court has done in the past, it should interpret the authority of a New York State judge under New York's eavesdropping statute differently than Federal courts interpret the authority of federal judges under Title III. The authority of New York judges to issue eavesdropping orders must be limited to telephonic communications within the borders of New York State as New York's Legislature intended.

New York Courts Interpret New York's Eavesdropping Statute Differently

The majority of federal courts hold that where the Government fails to strictly comply with eavesdropping procedures, the burden of proof is on the defendant to show some prejudice before the court will suppress the evidence. *United States v. Fury*, 554 F.2d 522, 529 (2d Cir. 1977); *United States v. Principie*, 531 F.2d 1132 (2d Cir. 1976), *United States v. Bohn*, 508 F.2d 1145, 1148 (8th Cir. 1975), *United States v. Burgos-Montes*, 786 F.3d 92, 109 (1st Cir. 2015), *United States v. Vento*, 533 F.2d 838, 864 (3rd Cir. 1976).

Conversely, the New York Court of Appeals interprets the New York eavesdropping statute differently. The Court of Appeals has consistently held that the burden of proof regarding strict compliance with the procedures set out in New York's eavesdropping statutes rests with the prosecution. *People v. Winograd*, 68

N.Y.2d 383, 390-391 (1986), *People v. Schulz*, 67 N.Y.2d 144, 148-149 (1986), *People v. Gallina*, 66 N.Y.2d 52, 56-57 (1985), *People v. Capolongo*, 85 N.Y.2d 151, 165 (1995). This is an important distinction in the interpretation of the New York eavesdropping statute, even though modeled after Title III of the Omnibus Crime Control and Safe Streets Act. Often, the same or similar statutory language in the New York statute is interpreted differently by New York Courts than its Federal statutory counterpart is interpreted by Federal courts. Because this has often led to suppression of evidence in New York Courts but not in Federal courts, it is a distinction that makes a difference.

In *People v. Washington*, 46 N.Y.2d 116, 121-123 (1978), New York law enforcement officers failed to seal the tape recording from electronic surveillance until 39 days after the expiration of the warrant. CPL700.50(2) requires the officers to present the recordings to a judge immediately upon the expiration of the warrant. The Court of Appeals ruled that the New York Statute was distinct from the federal statute (18 U.S.C. §2518(8)), and strict compliance was required where the tapes had to go to the judge immediately when the warrant expired. But in *United States v. Fury*, 554 F.2d 522 (2d Cir. 1977), the Second Circuit, interpreting the federal counterpart of New York's CPL §700.50, held that the government only needed to seal the tapes once the extension of the original order was terminated. See also *People v. Basilicato*, 64 N.Y.2d 103, 115-116 (1984).

Additionally, in *People v. Winograd*, 68 N.Y.2d 383 (1986), the police failed to seal and present tapes to the judge because he was on holiday. The Court of Appeals held that the intercepted communications contained in wiretaps were not sealed pursuant to requirements of the eavesdropping statute, and the mistake was not an excuse and the tapes should have been suppressed. See also *People v. Sher*, 38 N.Y.2d 600, 604 (1976). But in *United States v. Massino*, 784 F.2d 153, 157-158 (2d Cir. 1986) the Second Circuit, interpreting the Federal statute, held that the federal authorities lack of personnel on the day the tapes were to be sealed was an acceptable excuse for failing to immediately seal the tapes, and the court deemed them admissible.

In *People v. Gallina*, 66 N.Y.2d 52 (1985), this Court held that the application for an order of extension of a wiretap must be made prior to the expiration of the eavesdropping warrant and that a contrary interpretation would render the timeliness requirement a nullity. *Gallina,* 66 N.Y.2d at 56. The Court of Appeals noted in *Gallina* that there is an important distinction between the New York wiretapping statute and the Federal wiretapping statute because Federal law does not require federal law enforcement to make an extension application before the expiration of the original warrant. *Gallina*, 66 N.Y.2d at 56.

The People Incorrectly Assert That New York Courts Have Previously Allowed Eavesdropping Warrants On Out Of State Telephonic Communications.

The People argue that Federal and State courts have addressed the question of a New York judge's authority to issue eavesdropping warrants as long as the telephonic communication is redirected to within the jurisdiction of the issuing judge. (See People's brief page 16) This is a faulty analysis because the facts of this case are distinguishable.

In support of this argument, the People cite New York cases *People v. Perez*, 18 Misc.3d 582 (Sup. Ct. Bronx Cty. 2007); *People v. Delacruz*, 156 Misc.2d 284 (Sup. Ct. Bronx Cty 1992); and *Stegemann v. Rensselaer County Sheriff's Off.*, 155 A..3d 1455 (3d Dept. 2017). None of these cases address the issue that is before the Court. Both *Perez* and *Delacruz* dealt with eavesdropping warrants that tapped telephonic communications taking place entirely within New York State. In this case, the telephonic communications took place entirely outside New York State.

Additionally, the *Stegemann* case had nothing to do with New York's eavesdropping statute, but was the Appellate Division, Third Department's interpretation of a Massachusetts statute that was not at issue in the case. *Stegemann* was a civil case and the issue before the court was whether or not *Stegemann* had properly served the summons and complaint on one of the parties. The People's reliance on the *dicta* of *Stegemann*, which makes a pronouncement on a Massachusetts statute, is not controlling, or even persuasive in this case.

The People also cite to *United States v. Rodriguez*, 968 F.2d 130 (2d Cir. 1992) and its progeny of federal cases. Although *Rodriguez* is the seminal case for the listening post rule in the federal system, it can hardly be seen as a ringing endorsement of the practice. In a concurring opinion in *Rodriguez*, which reads more like a dissent, Judge Meskill disagreed with the other two panel members and specifically rejected the listening post rule because it allows for forum shopping and grants too much authority, nationwide to a single judge. His concurring opinion stated:

> I write separately because I do not agree with the majority's treatment of the wiretap issue, which effectively repeals 18 U.S.C. § 2518(3)'s requirement that a judge may only enter an order authorizing the interception of communications within the territorial jurisdiction of the court in which the judge is sitting.
>
> Under the majority's interpretation of the statute any federal district court, circuit court of appeals or appropriate state court may authorize a wiretap any place in the country. A judge in the Southern District of New York may now authorize a tap on a phone in Chippewa Falls, Wisconsin, Nome, Alaska or Prescott, Arizona, even if no calls are ever placed to the east coast, as along as the listening post is set up in Manhattan. citations omitted. Law enforcement officials are now able to shop, free from territorial constraints, for a judge, who would be likely to authorize a wiretap. If a judge in one district denies authorization, law enforcement officials may simply move their listening posts to another jurisdiction until they find a judge willing to authorize the wiretap.
>
> The majority accomplishes this result by holding that a single captured communication is "intercepted" in more than a single jurisdiction, and that authorization in any one such jurisdiction is sufficient to satisfy Tittle III. While I agree that federal court siting in the jurisdiction in which the telephone to be tapped is located has authority to authorize a wiretap, I cannot join the majority in holding that the unilateral decision of law

> enforcement agents as to where to set up their listening post can grant authority to a judge in any jurisdiction to authorize a phone tap in any other jurisdiction.
>
> The heart of the definition of "intercept" in 18 U.S.C. § 2510(4) is the "acquisition of the contents" of a communication. The contents of the Imperio Café communications were acquired by law enforcement officials when they were diverted in New Jersey [site of the call]. In Manhattan the previously acquired contents were transformed into sound, but, because they were already within the control of the law enforcement agents, they were not newly "acquired." I do not believe that the contents of a communication become acquired anew each time they are transformed into a different medium.
>
> *U.S. v. Rodriguez*, 968 F.2d at 143-146

Judge Meskill's concurring opinion, although addressing the authority of Federal judges, is equally applicable here. Allowing State judges to have national authority for eavesdropping warrants encourages forum shopping and gives judges too much authority outside the borders of their intended jurisdiction and in places where they are not accountable to the citizens. The People's argument that there is some sense of unity among the courts in adopting the listening post rule is wrong. No State court has held that a State judge has the authority to issue an eavesdropping warrant on phone calls that both begin and end outside of the State.

The People Point To Unsound And Baseless Policy Reasons To Support The Contention That New York State Judges Should Have National Eavesdropping Authority.

The People make three policy arguments in support of their contention that New York judges should have national eavesdropping authority. First, they argue

that a single judge will be able to protect the privacy interests of the individual citizens if the eavesdropping orders are sought from the same court. This argument has no basis in fact and none in empirical evidence. Additionally, it is unlikely that a judge sitting in New York would be as enthusiastic about protecting the rights of citizens in Alaska, Hawaii, Arizona, or Louisiana as would a judge from those jurisdictions. A judge sitting thousands of miles away from where his/her orders will take effect is not likely to be as vigilant and not as capable of monitoring the effects that the order might have. The People's argument that a judge sitting in New York will be more likely to protect the rights of a citizen sitting anywhere else in the United States and that the wiretapping will not be as long has no empirical support anywhere.

Second, the People argue that eavesdropping warrants in multiple jurisdictions would divide supervision of the execution of the warrants amongst several judges and law enforcement would have to obtain warrants in multiple States. This is not true. The People conduct multi-State investigations with the assistance of Federal authorities every day; it is nothing new or overly cumbersome.

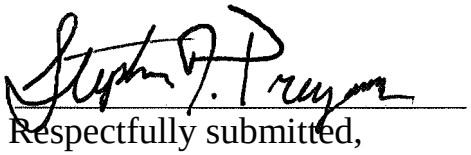
Finally, the People argue that it would be impossible to anticipate where a target might travel and targets would avoid eavesdropping warrants by travelling to another State. This argument assumes that the target knows that his phone is being tapped and he/she knows from where the eavesdropping order was issued. This is

baseless because targets never know they are being tapped and would never have any idea as to who or where the order for eavesdropping came from. Additionally, federal authorities have the ability to track from State to State without having to obtain new eavesdropping warrants.

Conclusion

The Appellant asks that this Court reverse the lower courts' rulings, vacate the conviction and remand to the lower court.

Dated: August 12, 2020
New York, New York



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CERTIFICATE OF COMPLIANCE

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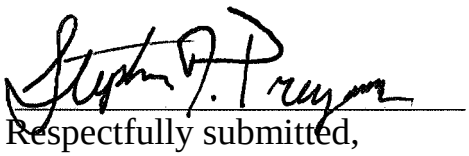

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