IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
Plaintiff,	:	NO. 04-0370
	:	
v.	:	
	:	
RONALD A. WHITE, ET AL.,	:	
	:	
Defendants.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. DECEMBER 7, 2004

I. BACKGROUND

Four Defendants in the instant action have filed motions to suppress evidence,[1] challenging the validity of

[1] The motions before this Court are:

1. Defendant Francis D. McCracken's motion to suppress (doc. no. 171);

2. Defendant Janice Knight's motion to suppress (which is virtually identical to Defendant McCracken's motion) (doc. no. 198);

3. Defendant Charles LeCroy's motion to join the motions to suppress filed by Defendant McCracken, Defendant Knight, and Defendant Hawkins (doc. no. 229); and

4. Defendant Anthony C. Snell's motion to join all pre-trial motions filed by other Defendants (doc. no. 163).

certain wiretap interceptions approved by this Court.[2] Before the Court are two issues:

1. Whether the wiretap applications were properly approved by a Justice Department official, as required under 18 U.S.C. § 2516(1); and
2. Whether the Orders authorizing the wiretap interceptions properly identified the Justice Department official who had approved the respective wiretap applications, as required under 18 U.S.C. § 2518(4)(d).

After considering each issue,[3] this Court finds that

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[2] An aggrieved person may move to suppress contents of a wiretap, or evidence therefrom, if, inter alia, "the order of authorization or approval under which it was intercepted is insufficient on its face." 18 U.S.C. § 2518(10)(a)(ii).

[3] Under Local Criminal Rule 41.1(b), any motion challenging the validity or sufficiency of an order authorizing or approving a wiretap shall be heard by the judge who approved the wiretap. E.D. Pa. Fed. R. Crim. P. 41.1(b). To that end, because this Court approved the wiretaps implicated by these motions, pursuant to the Order of the Chief Judge, without objection by the Government and Defendants, and with the consent of Judge Baylson, the trial judge to whom the case was assigned, this Court will hear Defendants' challenges. See United States v. Forte, 684 F. Supp. 1288, 1290 (E.D. Pa. 1988) (Bechtle, J.).

Defendants also argued that the wiretap applications were not randomly assigned to this Court under Local Criminal Rule 41.1(b) and therefore the fruits from the interceptions should be suppressed. In part, Local Criminal Rule 41.1(b) states that "[a]ll applications for wire interceptions shall be assigned on a random basis to each Judge of the Court, or in his or her absence the Emergency Judge, in accordance with the provisions of Local Civil Rule 40.1." E.D. Pa. Fed. R. Crim. P. 41.1(b). In this connection, I adopt Judge Fullam's reasoning in United States v.

Defendants' motions to suppress are denied for the reasons stated below.

II. DISCUSSION

A. Validity of the Government's Wiretap Applications

Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2522 ("Title III"), before the Government submits a wiretap application to a Federal judge for consideration, the proper Justice Department official must authorize the application. 18 U.S.C. § 2516(1). According to 18 U.S.C. § 2516(1),

> [t]he Attorney General, Deputy Attorney General, Associate Attorney General, or any Assistant Attorney General, any acting Assistant Attorney General, or any Deputy Assistant Attorney General or acting Deputy Assistant Attorney General in the Criminal Division specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518[4] of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the

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Weaver, No. Crim. 04-320-01, 2004 WL 2399820 (E.D. Pa. Sept. 29, 2004) and find Defendants' arguments to have no merit.

[4] Section 2518 governs the procedure for the interception of wire, oral, and electronic communications.

> investigation of the offense as to which the application is made . . . .

Id. (emphasis added). Each wiretap application must include "the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application." 18 U.S.C. § 2518(1)(a). Wiretap interceptions that violate Title III may result in suppression of evidence deriving from the interceptions. 18 U.S.C. § 2515.[5]

In this case, as part of its wiretap applications (the original application and all subsequent applications), the Government submitted Attorney General Order No. 2407-2001 ("AG Order No. 2407-2001"), in which Attorney General John Ashcroft designated other Justice Department officials (by office, not name) to approve wiretap applications.[6] Additionally, each

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[5] Section 2515 states:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515.

[6] In relevant part, AG Order No. 2407-2001 states:

> By virtue of the authority vested in me by 28

wiretap application was accompanied by a Memorandum, entitled "Authorization for Interception Order Application" (the "Authorization Memorandum" or, collectively, the "Authorization Memoranda"), from either the Assistant Attorney General or Acting Assistant Attorney General to Maureen H. Killion, Director, Office of Enforcement Operations, Criminal Division ("Director Killion"). Each Authorization Memorandum described the perimeters of the wiretap application.

According to the Authorization Memoranda's headings and signature lines, either the Assistant Attorney General or Acting

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> U.S.C. §§ 509 and 510, 5 U.S.C. § 301, and 18 U.S.C. § 2516(1), and in full recognition that 18 U.S.C. § 2516(1) empowers the Attorney General, Deputy Attorney General, and Associate Attorney General to authorize applications to a Federal Judge of competent jurisdiction for orders authorizing the interception of wire and oral communications, and in order to preclude any contention that the designations by the prior Attorney General have lapsed, I hereby specially designate the Assistant Attorney General in charge of the Criminal Division, any Acting Assistant Attorney General in charge of the Criminal Division, any Deputy Assistant Attorney General of the Criminal Division, and any Acting Deputy Assistant Attorney General of the Criminal Division to exercise the power conferred by section 2516(1) of title 18, United States Code, to authorize applications to a Federal judge of competent jurisdiction for orders authorizing or approving the interception of wire or oral communications . . . .

U.S. Att'y Gen. Order No. 2407-2001 (emphasis added).

Assistant Attorney General sent the correspondence to Director Killion; however, different individuals holding the position of Deputy Assistant Attorney General, Criminal Division, (collectively, the "Deputies"), who were duly designated by the Attorney General to approve the applications, actually signed the Memoranda. The signature line of the Assistant Attorney General or Acting Assistant Attorney General was blank in all the wiretap applications. No other part of the Authorized Memoranda contained the signature of the Assistant Attorney General or the Acting Assistant Attorney General.

Defendants contend that the Justice Department's authorizations for the wiretap applications are ambiguous and do not clearly identify the official approving the applications; therefore, the applications are deficient under 18 U.S.C. § 2516(1) and all intercepted communications and evidence stemming therefrom should be suppressed. This Court disagrees with Defendants' assertions.

In United States v. Chavez, 416 U.S. 562 (1974), the Supreme Court determined that "misidentification of the officer authorizing the wiretap application [does] not affect the fulfillment of any of the reviewing or approval functions required by Congress." Id. at 575. In that case, the Attorney General actually approved a wiretap application, but the authorization memorandum and order misidentified another Justice

Department individual as the authorizing official. Id. at 565, 572-73. Under those circumstances, the Supreme Court held that the error did not warrant suppression of evidence deriving from the wiretap interception. Id. at 579-80. The Supreme Court noted that:

> Failure to correctly report the identity of the person authorizing the application, however, when in fact that Attorney General has given the required preliminary approval to submit the application, does not represent a similar failure to follow Title III's precautions against the unwarranted use of wiretapping or electronic surveillance and does not warrant the suppression of evidence gathered pursuant to a court order resting upon the application.

Id. at 571 (emphasis added).

Other courts have reviewed essentially identical Authorization Memoranda – where a typed memorandum appears to be from the Assistant Attorney General (or Acting Assistant Attorney General), but is signed by an authorized Deputy – and found them to be valid. In re Grand Jury Proceedings, Doe, 988 F.2d 211, 214-15 (1st Cir. 1992) (per curiam) (validating authorization memoranda signed by Deputy Assistant Attorneys General, but sent from the Assistant Attorney General, Criminal Division, and containing a blank line for the Assistant Attorney General's signature); United States v. Citro, 938 F.2d 1431, 1435-36 (1st

Cir. 1991) (same); United States v. Anderson, 39 F.3d 331, 338-40 (D.D.C. 1994) (same, except the memoranda went out under the Acting Assistant Attorney General, Criminal Division).

Nor has Congress legislated the specific method of procedure to be employed by the Justice Department in internally authorizing wiretap applications. As the First Circuit recognized:

> In insisting that only certain senior officials could authorize a wiretap, Congress did not go on to prescribe the methods they should use to satisfy themselves that a wiretap was in order. Nowhere did Congress forbid them the assistance of subordinates in reviewing the application. Other courts have uniformly held that once the proper official is found to have authorized a wiretap application, his authorization is not subject to further judicial review.

United States v. O'Malley, 764 F.2d 38, 41 (1st Cir. 1985).

This Court finds that the wiretap applications involved in this case were properly approved by the Deputies, all of whom were duly designated by the Attorney General as required under 18 U.S.C. § 2516(1); therefore, the evidence deriving from the authorized wiretap interceptions will not be suppressed under this basis.

B. Validity of Court Orders Authorizing Wiretap Interceptions

In part, Section 2518(4) of Title III states that "[e]ach order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter shall specify . . . (d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application." 18 U.S.C. § 2518(4)(d) (emphasis added). Defendants contend that the wiretap Orders issued by this Court failed to identify the specific Justice Department official approving the applications and consequently are deficient under 18 U.S.C. § 2518(4)(d).

The wiretap Orders state:

> WHEREFORE, it is hereby ORDERED that Special Agents of the Federal Bureau of Investigation ... are authorized, pursuant to the application authorized by an appropriate official of the Criminal Division of the United States Department of Justice pursuant to the power delegated to that official by special designation of the Attorney General under the authority vested in him by Section 2516 of Title 18, United States Code, to intercept and record wire and oral communications ....

(emphasis added).[7] According to Defendants, the description of "an appropriate official of the Criminal Division" does not sufficiently identify the Justice Department official who authorized the wiretap application; therefore, the evidence stemming from the wiretap interceptions approved by these Orders must be suppressed.

This Court must first decide if the Orders are facially invalid. United States v. Traitz, 871 F.2d 368, 379 (3d Cir. 1989). If the Orders are invalid, the Court must then determine whether the defect is technical. Id. A technical defect does not require suppression of evidence stemming from the wiretap interception. Id.

The parties did not cite to – nor did further investigation identify – any binding authority that explicitly addresses whether a wiretap order is invalid when the order does not specifically identify, by name or title (such as, "an appropriate official of the Criminal Division of the United States Department of Justice"), the Justice Department official who authorized the application. Third Circuit and Supreme Court precedence, however, offer helpful guidance.

In United States v. Ceraso, 467 F.2d 647 (3d Cir. 1972), the Third Circuit held that a wiretap application and the

[7] The original wiretap Order and the extension Orders contain this language.

corresponding order were not invalid where both failed to identify accurately the authorized official who had approved the application. Id. at 649. While the application and order stated that the Assistant Attorney General – the signor of the memorandum – authorized the wiretap application, in fact the Attorney General had done so. Id. at 650-51. In examining the issue, the Third Circuit acknowledged Congress's reasoning behind § 2518, which requires identification of the authorizing official in the wiretap application and order:

> Senate Report No. 1097 states that Sections 2518(1)(a) and (4)(d), which require identification of the authorizing officer in the Government's application and in the court's subsequent order, were inserted to assure that responsibility for the wire-taps could be fixed.

Id. at 652 (emphasis added). Relying on this reasoning, the Third Circuit examined the "chain of investigation" that occurred to trace the Justice Department's decision-making process. Id. The Third Circuit analyzed an affidavit of a field attorney assigned to the case; the affidavit described the authorization process. Id. Also, the Third Circuit reviewed the district court's recitation of the application's history. Id. The Third Circuit determined that "[a] fair reading of both [the affidavit and the court's recitation] show that both the Attorney General and the Assistant Attorney General share personal responsibility

for this authorization." Id. Because "official responsibility" could be established, the Third Circuit found that the application met § 2518(1)(a)'s requirements. Id. The Third Circuit determined that "[t]he court's order broadly repeats the same statement of facts with regard to the identity of the authorizing individual, and therefore, it meets the requirements of Section 2518(4)(d)." Id.

Under the teaching of Ceraso, a court determining whether to issue a wiretap order must be able to fix "official responsibility" to an individual at the Justice Department who approved the wiretap application. In Ceraso, the Third Circuit was able to fix this responsibility, subsequent to the issued order, through a "fair reading" of an attorney affidavit and the lower court's recitation of the application's history. In the instant case, this Court was able to fix "official responsibility" on the Deputies by determining that the applications were signed by the Deputies.[8]

Further, "[e]ven if, arguendo, it can be said that the Order [authorizing the wiretap] failed to adequately make the relevant identifications [regarding who approved the

[8] Like the Third Circuit in Ceraso, a reviewing court could also conclude through a "fair reading" of the wiretap applications and the Court's Orders approving the applications that "official responsibility" is fixed to the Deputies. 467 F.2d at 652.

applications], these omissions are properly viewed as technical defects not warranting suppression of the evidence discovered as a result of the electronic surveillance." Traitz, 871 F.2d at 379.[9] A close look at the purpose behind § 2518(4)(d) supports the conclusion that, under the circumstances of this case, failure to identify the person who approved the application by name and title is technical and not substantive.

In Chavez, the wiretap order erroneously identified the official who had in fact approved the wiretap application. 416 U.S. at 565, 572-73. The Supreme Court recognized that "[r]equiring identification of the authorizing official in the application facilitates the court's ability to conclude that the application has been properly approved under § 2516; requiring identification in the court's order also serves to 'fix responsibility' for the source of the preliminary approval." Id. at 575. Additionally, from the information contained in both the wiretap application and order, judges can readily make reports to the Administrative Office of the United States Courts as required

[9] In United States v. Radcliff, 331 F.3d 1153 (10th Cir. 2003), the Tenth Circuit considered whether an order identifying every Justice Department official with authority to authorize a wiretap application (by title) met the requirements of § 2518(4)(d). Id. at 1160-63. The Court determined that this "general language" failed to meet the requirements of § 2518(4)(d); therefore, the order was facially insufficient. Id. at 1162. The Tenth Circuit, however, found that such a defect was only technical and suppression was not required. Id. at 1163.

under 18 U.S.C. § 2519. Id. at 576. These reports "form the basis for a public evaluation of the operation of Title III and . . . assure the community that the system of court-order[ed] electronic surveillance" is administered correctly. Id. at 577 (citing to S. Rep. No. 1097, 90th Cong., 2d Sess., 107, U.S. Code Cong. & Admin. News 1968, p. 2196) (internal quotations omitted). Given the purpose of the identification requirement, the Supreme Court concluded:

> While adherence to the identification reporting requirements of § 2518(1)(a) and (4)(d) thus can simplify the assurance that those whom Title III makes responsible for determining when and how wiretapping and electronic surveillance should be conducted have fulfilled their roles in each case, it does not establish a substantive role to be played in the regulatory system.

Id. at 577-78 (emphasis added).[10]

The Court finds that the wiretap applications clearly disclosed the identity of the official who approved the wiretap applications; therefore, this Court was able to fix "official

[10] The Supreme Court also stated: "Nor is there any legislative history concerning these sections, as there is, for example, concerning § 2516(1), to suggest that they were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." Chavez, 416 U.S. at 578 (internal citation omitted).

responsibility” on the appropriate Justice Department official. Moreover, even assuming that it did not, the violation is technical and not substantive. Therefore, this Court finds that Defendants’ motions to suppress, based upon alleged deficient Orders, should be denied.

III. CONCLUSION

For the reasons set forth above, the motions to suppress are denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
Plaintiff,	:	NO. 04-0370
	:	
v.	:	
	:	
RONALD A. WHITE, ET AL.,	:	
	:	
Defendants.	:	

O R D E R

AND NOW, this **7th** day of **December, 2004**, it is hereby **ORDERED** that the following motions are **DENIED**:

1. Defendant Francis D. McCracken's motion to suppress (doc. no. 171);

2. Defendant Janice Knight's motion to suppress (doc. no. 198);

3. Defendant Charles LeCroy's motion to join the motions to suppress filed by Defendant McCracken, Defendant Knight, and Defendant Hawkins (doc. no. 229); and

4. Defendant Anthony C. Snell’s motion to join all pre-trial motions filed by other Defendants, as it relates to suppression of the wiretap Orders. (doc. no. 163).

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.