UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

v. CRIMINAL ACTION NO. 3:15CR-99-DJH

CHRISTOPHER A. MATTINGLY DEFENDANT

RESPONSE TO MOTION TO SUPPRESS WIRETAP EVIDENCE
AND ALL EVIDENCE DERIVED THEREFROM
***(Filed Electronically)***

Comes now the United States of America, by counsel, and responds as follows to the defendant's motion to suppress the wiretap evidence and all evidence derived therefrom, opposing same.

Statement of Facts

In December 2013, Detective Tim Murphy of the Bullitt County Drug Task Force began an investigation of the defendant, Christopher Mattingly, after hearing from confidential informants that Mattingly was the leader in the Bullitt County area of an extensive interstate drug trafficking organization that was selling large amounts of marijuana in Bullitt County and elsewhere in Kentucky. Murphy developed information that Ronald Shewmaker, who worked for Mattingly, also was involved.

In May 2014, DEA Riverside informed DEA Louisville, who in turn informed Detective Murphy, that Shewmaker had been arrested near Perris, California, and that a consent search of his vehicle had resulted in the seizure of $418,930 in U.S. currency from hidden compartments inside the front and rear passenger side door panels. The money was sealed in plastic packets.

The vehicle, a black 2010 Chevrolet Malibu bearing Kentucky registration 943-PSK, was registered to Shewmaker. During post-Miranda questioning, Shewmaker denied any knowledge of the money, but said he worked for Mattingly Auto Sales, a company owned by the defendant, and that he had purchased the vehicle at an auction six months previously. He said the vehicle had been in his continuous possession since he bought it. Actually, Kentucky DMV records show that the vehicle was owned by Mattingly Auto Sales in March 2014 when title was transferred to Shewmaker. DEA seized the money and the car for asset forfeiture, which Shewmaker has not contested.

After the seizure, DEA Riverside briefed DEA Louisville and Detective Murphy and informed them that two separate California wiretaps (Order 14-120, authorized on 3/11/14, with an extension authorized on 4/8/14, and Order 14-183, authorized on 4/7/14) had recorded conversations between their California target and "Chris" (last name unknown at that time) , indicating that "Ronnie" (last name unknown at that time) would be delivering a large amount of cash to the California target as payment for prior marijuana shipments. No calls had been intercepted between the California target and Ronald Shewmaker, but the target had called "Chris" on the morning of 5/4/14 and asked when he could expect "Ronnie" to arrive. "Chris" told the target that "Ronnie" would be there "for sure" that afternoon. DEA alerted patrol officers in the Perris area. The stop of Shewmaker and the seizure of the $418,930 in cash occurred at approximately 3:00 p.m. that same day.

The investigations continued in California and Kentucky. Wiretap authorizations were obtained on October 27, 2014 (Order 14-558) for another phone used by the California target and on February 19, 2015 (Order 15-108) for another phone used by Mattingly. Conversations by Mattingly were intercepted and recorded in each of these wiretaps.

The investigation in Kentucky resulted in the indictment (DN 1) of Mattingly on September 1, 2015, for conspiracy to distribute more than 1000 kilograms of marijuana. A superseding indictment (DN 29) was returned on February 17, 2016, charging Mattingly, Shewmaker, Raymundo Carillo (the California target), and others with conspiracy to distribute 1000 kilograms or more of marijuana and conspiracy to engage in money laundering. Mattingly was also charged with conspiracy to distribute 500 grams or more of methamphetamine.

Statement of Issues

In his motion to suppress, Mattingly contends that the California wiretaps were not lawfully authorized because the California Penal Code, Section 629.50, provides that a wiretap may only be authorized by a district attorney "or the person designated to act as district attorney in the district attorney's absence." It is undisputed that each of the wiretaps in question was authorized by an Assistant District Attorney (ADA) who had been designated to act as District Attorney (DA) in the DA's absence. Mattingly maintains, however, that the designated ADAs had no authority to approve wiretap applications unless the DA was physically absent from the office. The United States disputes this interpretation of California law as well as Mattingly's argument that the United States has the burden to prove that the DA was physically absent from the office when the particular wiretaps at issue here were authorized by the designated ADA.

Mattingly also contends that the wiretaps were premature and not necessary. He argues that the affidavits submitted in support of the wiretap applications, particularly in the necessity sections, are factually deficient and amount only to "boilerplate." The United States will show that the affidavit accurately sets forth the reasons why the traditional investigative techniques that were attempted were unsuccessful and why other techniques would be unsuccessful or too risky if attempted.

Mattingly's final argument is that the recorded conversations and all derivative evidence must be suppressed if the Court finds that the wiretaps were not lawfully authorized. The United States will show that Mattingly has not met his burden to prove that the wiretaps were not lawfully unauthorized, and that his claims about "boilerplate" in the affidavit are not serious enough to warrant suppression or even an evidentiary hearing.

## Argument

### Lawful Authorization

18 U.S.C. § 2516 provides in pertinent part that the principal prosecuting attorney of any political subdivision of a state may apply for a wiretap if authorized by state law. Section 629.50 of the California Penal Code allows "a district attorney, or the person designated to act as district attorney in the district attorney's absence," to apply to a judge for a wiretap. In a case that is directly on point, the Ninth Circuit Court of Appeals held that an ADA designated to act in the absence of the DA may authorize a wiretap application so long as the ADA has been designated to act for other purposes in the DA's absence, and not just for the limited purpose of authorizing wiretap applications. United States v. Perez-Valencia, 727 F.3d 852, 855 (9th Cir. 2013) (*cert. denied*, 135 S. Ct. 131). The case involved a defendant whose motion to suppress wiretap evidence was based on an argument that the ADA who authorized the wiretap was not the "principal prosecuting attorney" of a political subdivision of a state as required by 18 U.S.C. § 2516. The district court denied the motion and the defendant appealed. On appeal the Ninth Circuit remanded to district court to answer the following questions: (1) Did the ADA have all the powers of an acting district attorney or merely the limited authority to sign wiretap applications; (2) What was the DA's purpose in designating three people to act in his absence; (3) Did the designation memorandum give all three of the listed ADAs simultaneously the power

to apply for state wiretaps in the DA's absence, or was it a "progressive, hierarchical designation of power, meaning that, at any given time, only one person on the list could exercise the powers of the district attorney and the others did not have any powers unless those above them in the hierarchy were absent and unavailable?" United States v. Perez-Valencia, 2013 WL 6385264 (C.D. California). From the nature of the questions, it is clear that the definition of "absence" was not an issue under review. After the district court answered the questions, the Ninth Circuit held that the wiretap application was valid and affirmed the district court's denial of the motion to suppress. The decision recited the findings of the district court, one of which was that the DA was absent on the day in question attending to his wife in the hospital. That finding was not, however, necessary for the Ninth Circuit's decision, which was based on the scope of the designation in the DA's absence rather than any definition of "absence."

> "The record developed by Judge Anderson leaves no doubt that in Ramos' absence, Christy was running the office. No one else was authorized to do so. This finding satisfies our concern that the delegation might have been only for wiretap applications. It was not. Christy was functioning as the principal prosecuting attorney for all regular decisions the office made."

United States v. Perez-Valencia, 744 F.3d 600, 604 (9th Cir. 2014) (*cert. denied* 135 S.Ct. 131).

The California wiretap statute does not require the DA or the designated ADA to maintain or provide documentation concerning the DA's absence when wiretap applications are authorized. The legislature easily could have done so if it believed such a documentation requirement was important. With no such statutory requirement, this Court should not presume that the California legislature intended any kind of documented proof of physical absence away from the office before the actions of the designate were authorized. Moreover, the statute does not define "absence" or shed any light on precisely what it entails. Does it mean (1) out of the physical office, or (2) out of the jurisdiction, or (3) both, or (4) unavailable due to other official

duties, or (5) unavailable for any reason? While being physically away from the office obviously would constitute one form of "absence," so could being unavailable to perform the duties of the office for other reasons. After all, the important duties of the office of the district attorney are constant and must be performed whether the DA himself is available to act or not. Again, if the California legislature intended to restrict the authority of the DA's designate to act only in cases where the DA was literally, physically, out of the office or jurisdiction, it could have defined "absence" to mean just that. It did not.

In the instant case, the designations all comply with the Perez-Valencia decision. By letter dated January 2, 2014 (Exhibit A), the DA for Riverside County designated ADA Jeffrey A. Van Wagenen, Jr., as having authority "In my absence, … to make all decisions necessary to the administration of the District Attorney's Office." This designation complies with Perez-Valencia and was made prior to the wiretap applications on 3/11/14 (Order 14-120), 4/8/14 (Order 14-120 extension), and 4/7/14 (Order 14-183), which were authorized and made by ADA Van Wagenen. By a similar letter (Exhibit B) dated October 14, 2014, the DA designated ADA Creg G. Datig to act in his absence "to make all decisions necessary to the administration of the District Attorney's Office." ADA Datig authorized the application for Order 14-558 on October 27, 2014. By a similar letter (Exhibit C) dated January 5, 2015, a newly elected DA (Michael Hestrin) designated ADA John Aki "In my absence, to make all decisions necessary to the administration of the District Attorney's Office." ADA Aki authorized the application for Order 15-108 on February 19, 2015. Copies of the letters were sent to the judges of the Riverside County Superior Court who would be reviewing the wiretap applications. Each of the wiretaps was reviewed and approved by a Riverside County Superior Court judge.

Mattingly argues that despite the language of the designation letters, the wiretaps were not lawful because the government has not proven that the DA was absent. He argues that the DA was not absent, but he offers no evidence to support his argument, other than newspaper accounts critical of the Riverside County District Attorney's wiretap practices in general, but containing no specific information as to whether the DA was absent on the dates of the particular wiretap applications involved in the instant case. The United States obtained from the DA's office a declaration of unavailability (Exhibit D) dated January 27, 2016, showing that the DA was absent when wiretap 15-108 was approved by the designated ADA and presented to the court. Regarding wiretaps 14-120, 14-183, and 14-558, the declaration of unavailability stated that the DA in office during 2014, Paul Zellerbach, "did not keep records or a calendar that consistently, regularly, or accurately reflected his day-to-day business." But since this declaration was provided, the United States has been able to acquire from the Riverside District Attorney's Office the appropriate pages from the calendar kept by the executive assistant to the District Attorney (Exhibit E) and a declaration of authenticity (Exhibit F), which states that DA Zellerbach kept a personal calendar but took it with him when he left in the office. So the attached calendar kept by the DA's executive assistant constitutes the best evidence as to the availability of the District Attorney on the dates in question. Even so, it does not constitute absolute proof that the DA was absent when the wiretap applications were authorized, but the government does not bear the burden of proof on this issue.

Burden of Proof

A federal district court in New York addressed a similar challenge to the Riverside County District Attorney's wiretap authorization practice and denied suppression. In United States v. Ruiz, 2010 WL 4840055 (S.D. New York 2010), the question was whether an ADA

was properly designated to authorize wiretaps under California Penal Code Section 629.50(a). In that case, as in the instant case, there was a designation memorandum stating that the specified ADA was authorized to sign wiretap applications in the DA's absence. The court in Ruiz was satisfied that the designation memorandum "demonstrates that there was no violation of California state law, let alone any violation of federal law." Id. at 4.

But the defendant in Ruiz also argued that "without evidence of the District Attorney's absence, (ADA) Jay Orr's signature cannot be accepted and there remains a violation of state law." Id., at 5. The court in Ruiz disagreed, noting that "while the Government offers no proof that the District Attorney was absent, defendant has the burden to show that Jay Orr (the designated ADA) abused his authority." Id. The district judge cited United States v. Terry, 702 F.2d 299, 310-11 (2nd Cir. 1983), which held that a designated official is "presumed to have properly exercised" the power to apply for a wiretap "unless the defendant offers evidence, apart from mere conjecture or speculation, to rebut this presumption." In United States v. Gray, 521 F.3d 514, 527 (6th Cir. 2008), the Sixth Circuit held that an official is presumed to have properly exercised power and the conditions precedent are presumed to have been met unless the defendant offers evidence, apart from mere speculation or conjecture, to rebut the presumption."

The court in Ruiz found that the defendant had not provided any evidence that the designation by the Riverside County District Attorney's Office was not proper. Accordingly, the court said it "is not going to impose a burden on investigative agencies or prosecutors to be required to prove they were absent when a designee acts on their behalf." Id. A wiretap order, like a search warrant, is presumed valid and the movant bears the burden to overcome the presumption. United States v. Radcliffe, 331 F.3d 1153, 1160 (10th Cir. 2003) (citing United States v. Mitchell, 274 F.3d 1307, 1310-11 (10th Cir. 2001).

Suppression

Even if this Court should find one or more of the wiretap applications to be deficient in some manner, suppression of the recorded communications or of derivative evidence is not necessarily required. Not every failure to fully comply with statutory requirements for a wiretap will render the wiretap unlawful and require suppression of its fruits. United States v. Chavez, 416 U. S. 562, 574-75 (1974), held that misidentification of the official authorizing a wiretap application did not require suppression of wiretap evidence under § 2518(10)(a)(i) when the application was in fact authorized by an appropriate official. "Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for employment of this extraordinary investigative device." United States v. Giordano, 416 U. S. 505, 527 (1974). Wiretap evidence is to be suppressed only when provisions that are "intended to play a central role in the statutory scheme" are violated. Id. at 528. As the Sixth Circuit has held, "every circuit to consider the question has held that §2518(10)(a)(i) does not require suppression if the facial insufficiency of the wiretap order is no more than a technical defect." United States v. Gray, 521 F.3d 514, 522 (6th Cir. 2008) (listing cases).

In United States v. Donovan, 429 U.S. 413 (1977), the issue was whether the district court had properly suppressed wiretap evidence because the wiretap application failed to name the targets of the wiretap, as required by statute. The Supreme Court found that the affidavit was insufficient, but that suppression was not required, because not every failure to fully comply with the wiretap statute renders the interception of communications unlawful. "To the contrary,

suppression is required only for a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." Id. at 434. (quoting Giordano)

Thus, in the instant case, suppression is implicated only if this Court finds that the California legislature intended to require each district attorney, no matter how large or small their particular jurisdiction might be, to personally review and authorize every single wiretap application unless they were physically absent from the office, in which cases a properly designated subordinate might perform the review and authorization, and that the legislature regarded this requirement as a central purpose of the legislative intent to ensure that wiretaps were only authorized in appropriate cases. Surely, had this been the legislative intent, the law would be more specific about what "absence" means. It seems obvious that the legislature was primarily concerned about the scope of the designation, that is, to ensure that the authorization to review a wiretap application was given to a high-ranking assistant who was essentially authorized to run the office in the district attorney's absence. In this manner, as recognized in the Perez-Valencia case, *supra*, the requirement that authorization must be from the "principal prosecuting attorney" is maintained.

Probable Cause

18 U.S.C. § 2518(3) provides that a wiretap application must establish: (a) probable cause to believe that an individual is committing, has committed, or is about to commit an enumerated offense; (b) probable cause to believe that particular communications concerning that offense will be obtained through the interception; (c) that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too

dangerous; and (d) probable cause to believe that the target phone is being used, or is about to be used, in connection with the commission of the offense. Subparts (a), (b), and (d) are usually aggregated into what is called the probable cause requirement. Subpart (c) is usually referred to as the necessity requirement. The purpose of the necessity requirement is "to ensure that a wiretap is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Alfano, 838 F.2d 158, 163 (6th Cir.) *cert. denied* 488 U.S. 821 (1988). Mattingly does not challenge the probable cause requirement, but contends that the wiretap applications were premature and did not meet the necessity requirement.

Necessity

Mattingly argues that the statements in the necessity sections of the wiretap affidavits are "boilerplate" with no particular relevance to the case under investigation. The United States disagrees and contends that in this extensive interstate drug trafficking conspiracy case, where most traditional investigative techniques would not be effective or would be too dangerous, the wiretaps were necessary to accomplish the particularized objectives of the investigation. The California state judges who reviewed the affidavits and signed the orders also obviously believed that the wiretaps were necessary. As with probable cause determinations, findings of necessity are entitled to a high degree of deference. United States v. Oriakhi, 57 F.3d 1290, 1298 (4th Cir. 1995). The necessity requirement does not impose a heavy burden on the government to show that normal investigative techniques are inadequate. The adequacy of the showing is to be tested in a "practical and commonsense fashion that does not hamper unduly the investigative powers of law enforcement agents." United States v. Smith, 31 F.3d 1294, 1297 (4th Cir. 1994); United States v. Farmer, 924 F. 2d 647, 652 (7th Cir. 1991). The affidavit in support of an application for a wiretap is adequate if it indicates a "reasonable likelihood that alternative investigative

techniques would fail to expose the crime." United States v. Ashley, 876 F.2d 1069, 1073 (1st Cir. 1989). The necessity for a wiretap must be evaluated in context of the government's need not merely to collect some evidence, but to develop "an effective case" against those involved in the crime. United States v. Boone, 792 F.2d 1504, 1506 (9th Cir. 1986). An "effective case" is defined as "evidence of guilt beyond a reasonable doubt." United States v. McGuire, 307 F.3d 1198, 1199 (9th Cir. 1993).

The necessity requirement is not tantamount to an exhaustion requirement. United States v. Lopez, 300 F.3d 46, 52-53 (1st Cir. 2002). The affidavit does not need to demonstrate "a comprehensive exhaustion of all possible techniques, but must simply explain the retroactive or prospective failure of several investigative techniques that reasonably suggest themselves." United States v. Van Horn, 789 F.2d 1492, 1496 (11th Cir. 1986). "The purpose of the necessity requirement is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." United States v. Pacheco, 489 F.2d 554, 555 (5th Cir. 1974); United States v. Carter, 449 F.3d 1287, 1293 (D.C. Cir. 2006).

In the instant case, the investigation was of an extensive multi-state drug trafficking conspiracy rather than one or two individuals. Where, as here, the investigation seeks to identify co-conspirators, sources of supply, stash locations, financial transactions and couriers, the necessity requirement is satisfied if conventional investigative techniques have been or would be unsuccessful in exposing the full extent of the conspiracy. United States v. Lopez, 300 F.3d 46, 53-54 (1st Cir. 2002); United States v. Diaz, 176 F.3d 52, 110-111 (2nd Cir. 1999); United States v. Cooper, 868 F.2d 1505, 1509-10 (6th Cir. 1989); United States v. Canales-Gomez, 358 F.3d 1221(9th Cir. 2004). As the foregoing cases illustrate, the nature and objectives of the

investigation are of critical importance in any determination of whether wiretaps are necessary. Paragraph 45 of the affidavit in the application for wiretap 14-120 sets forth with clarity the objectives of the investigation and the reasons why a wiretap is necessary:

> "Interception of the electronic cellular telephone and electronic digital pager communications over the target devices is the only reasonable, viable means to gather evidence against the target subjects because normal investigative techniques have failed, appear reasonably likely to fail if tried, or are too dangerous. Such information is necessary to enable the government to achieve the objectives of this investigation – to obtain direct evidence that will convince a jury beyond a reasonable doubt of:
>
> a. The full scope of involvement and identification of key personnel …
>
> b. The identities and roles of all the target subjects suppliers …
>
> c. The identities of the target subjects' customers and other unidentified co-conspirators …
>
> d. The stash locations where the target subjects' supplies of narcotics are stored.
>
> e. The management and disposition of proceeds generated by the organization's illegal narcotics trafficking.
>
> f. The methods and routes used by the target subjects to import illegal narcotics into the United States and deliver to the various states.
>
> g. Evidence that will support a conviction against the target subjects and any later identified targets for the alleged violations set forth herein."

Mattingly argues that the necessity sections are insufficient because they contain "boilerplate" language rather than an extensive discussion of all investigative steps taken. He also contends that the necessity sections in the other subsequent wiretap affidavits contain identical language, with no differentiation between the different wiretap applications. But the law does not require the necessity sections to be so highly detailed and differentiated. A wiretap application need not be an "exhaustive recitation" of every step taken during the course of an investigation. United States v. Alonso, 740 F.2d 862, 868 (11th Cir. 1984). Successive wiretap applications related to the same investigation often contain repeated language in the necessity

sections. This does not constitute "boilerplate" simply because the same facts and problems are repeated. The "fact that drug investigations suffer from common investigative problems does not mean that agents' assertions about these common problems, couched in similar language, constitute "boilerplate." United States v. Milton, 153 F.3d 891, 895 (8th Cir. 1998); United States v. Carillo, 1123 F. Supp. 2d 1223, 1246 (D. Colorado. 2000); United States v. Bellomo, 954 F. Supp. 630 (S.D. New York 1997).

A short look at each of the investigative techniques described in the necessity section of the affidavit in support of the application for order 14-120, the first application, is instructive.

Paragraph 47. Interviews. The affidavit states that interviews would not be effective because they would alert members of the conspiracy and result in destruction or concealment of evidence. This is a clear and true statement. Mattingly has not shown otherwise, nor does he allege that the statement is untrue.

Paragraph 48. Confidential Informants. The affidavit states that the drug trafficking organization under investigation is a "close-knit organization whose members are either blood relatives, mutual friends and/or very familiar with one another" and that "no single informant or informants are available or expected to become available." Mattingly does not allege that this statement was not true when made.

Paragraph 50. Undercover officers/agents. The affiant states that in his experience, "a narcotics seller will rarely permit a customer to meet or deal directly with a supplier … (and) due to the close-knit structure of this organization, infiltration by an undercover police officer appears to be an investigative technique fraught with peril and would most likely jeopardize both the safety of the officer and the progress of the investigation." This is a common problem in the

investigation of drug conspiracies, but that does not make it any less true. Mattingly does not challenge the truth of the statement, but only alleges that it is "boilerplate."

Paragraph 53. Controlled Purchases. The affiant states that while a controlled purchase could result in the arrest and conviction of a target subject, it would not accomplish the larger objectives of the investigation such as the identification of sources of supply and the identities of other conspirators. Based upon the affiant's experience and the stated objectives of the investigation, this explanation is reasonable. Mattingly does not allege that the statement is untrue.

Paragraphs 56-65. Surveillance. The affiant describes the physical surveillance that has been used during the investigation and the extent to which it has furthered the investigation. But the affiant explains that surveillance operations cannot establish the purpose of an observed meeting or identify other co-conspirators who do not attend the meeting. Moreover, the affiant explains that regular surveillance will increase the opportunity for suspects to detect the surveillance, which would compromise the investigation. Mattingly argues that the affiant uses "boilerplate" language and is silent as to what less intrusive methods than a wiretap were used to follow up on the few documented surveillance attempts. He also contends that the exact same boilerplate language is used in the next application to attempt to justify not doing more surveillance before requesting another wiretap. But only a few weeks went by between the two applications and the affiant explained why regular surveillance is risky. As cited above in Milton and Oriahki, it is well established that successive wiretaps in the same investigation may often contain repeated language in the necessity sections and may rely on the same facts without being considered "boilerplate." Mattingly does not allege that the affiant made any false statements.

Paragraphs 66-70. Search Warrants. The affiant describes the search warrants for phone records which were used in the investigation. He then explains why search warrants for physical locations would not serve to accomplish the investigative objectives of the instant case. Obviously, the execution of a search warrant at a physical location informs the owners and occupiers of the property that an active investigation is underway. They will alert other co-conspirators, who will change their operational methods and seek to identify informants. Search warrants are very useful in simple investigations involving a few suspects, but are counter-productive in cases such as this involving large interstate drug trafficking organizations. Mattingly does not allege that the affiant has made any untrue statement, but merely argues that he should have discussed in detail the investigative steps taken to follow up on the phone records obtained with the search warrants that were employed.

Paragraphs 70-71. Pen Registers and Telephone Tolls. The affidavit states that data derived from pen registers and telephone toll records have been used during the investigation and have been somewhat helpful, but are not sufficient to identify suspects because drug traffickers typically to not subscribe to telephones using their real names. Again, Mattingly challenges this section because "no specific details have been outlined and the section uses the same boilerplate as the application made on March 11th. But, as noted above, a wiretap affidavit "need not be an exhaustive recitation of the progress of an investigation." United States v. Alonso, 740 F.2d 862, 868 (11th Cir. 1984). Mattingly does not challenge the truth of the affiant's statements, but only that they are not specific enough.

Paragraph 73. Closed Circuit Television Monitoring. The affidavit explains why closed circuit television monitoring would not yield evidence of conversations and agreements necessary to prove conspiratorial relationships. Mattingly claims that the language is boilerplate

and that the affidavit is silent about any attempt to use this investigative technique against him, but Mattingly was not a target subject in wiretap order 14-120 or its extension. The application for wiretap order 14-183 lists "Chris" as a target subject, but states that his place of residence is unknown. (Affidavit for Wiretap Order No. 14-183, page 9). Obviously, closed circuit television monitoring of Mattingly was not possible at that stage of the investigation.

Paragraphs 74-79. Trash Searches of Target Locations. The affidavit explains the risk of detection inherent in this investigative technique and why it is difficult to perform and not likely to yield much evidence. Mattingly claims again that this is "boilerplate" but it actually is a specific and detailed explanation of why trash searches are risky and, in this type of case, usually unproductive.

Paragraph 80. Financial Investigation. The affidavit sets forth the obvious fact, known to all drug investigators and prosecutors, that large-scale drug traffickers deal in cash and do not keep financial records in places subject to subpoena. Again, Mattingly claims that this is "boilerplate" and argues for more detail, but does not challenge the truth of the affiant's statements.

Paragraph 81. Grand Jury. The last investigative technique discussed in the respective affidavits is the use of a grand jury. The affiants explain that there is no reason to believe that any of the suspects or conspirators would cooperate and agree to testify, and that requesting their testimony obviously would alert them that an investigation was active. Mattingly, of course, argues that the language is boilerplate, but does not contend that it is untrue. Surely it is obvious that using grand jury subpoenas to seek testimony or the production of records relating to a drug trafficking conspiracy will alert the recipients of the subpoenas to the investigation. Use of a

grand jury may be very helpful during the later stages of an investigation after the conspirators are identified, but wiretaps are essential to identify the conspiratorial relationships.

Burden of Proof on Necessity Questions

Mattingly relies on United States v. Blackmon, 273 F.3d 1204, 1207 (9th Cir. 2001), for the proposition that the burden is on the government to prove necessity by showing why traditional investigative tools are unlikely to succeed in a particular investigation of a particular target, and that "boilerplate conclusions that merely describe inherent limitations of normal investigative procedures" are not sufficient. The United States agrees with the general principle enunciated in Blackmon, that the determination of necessity must be made in the context of the particular case under investigation and the objectives of that particular investigation. Blackmon is a very significant case, because it requires this Court to consider only the wiretap applications which are the subjects of the motion to suppress, rather than a host of other applications by the same district attorney's office, as argued by the defendant.

The Blackmon court on *de novo* review suppressed the wiretap evidence because of "material misstatements and omissions" relating to the necessity requirement. For example, the application in Blackmon claimed that surveillance teams were compromised on several occasions while attempting to conduct surveillance on the defendant, when actually the attempts at surveillance had been made in a related case involving a different person. The court in Blackmon found the statement to be untrue and that it could have misled the issuing judge to believe that the FBI had attempted surveillance on the defendant when actually no such attempted surveillance had ever occurred. The court also found that the affidavit contained material misstatements about the usefulness of informants, and that the issuing judge could not have found the application to be sufficient, even if purged of the misstatements.

Here, unlike in Blackmon, there are no allegations of untruthfulness or material misstatements in the affidavit. Moreover, and quite significantly, the application in Blackmon contained a generalized investigative purpose, unlike the applications at issue here, where the nature of the investigation and the investigative objectives are set forth with particularity.

There was a strong dissent in Blackmon, and several later cases disagreed with Blackmon's use of *de novo* review, holding that a court reviewing a wiretap application must use an abuse of discretion standard and examine only the four corners of the application to determine if there is a substantial basis for the finding of probable cause, including the necessity sections, giving deference to the determination of the issuing judge. United States v. Canales-Gomez, 358 F.3d 1221 (9th Cir. 2004); United States v. Martinez, 452 F.3d 1, 4 (1st Cir. 2006).

Mattingly also relies on United States v. Rice, 478 F.3d 704,710 (6th Cir. 2007), for the proposition that "generalized and uncorroborated information about why grand jury subpoenas, witness interviews, search warrants, and trash pulls would not be useful" was not enough to establish necessity. In the application under consideration here, the statements in the necessity section are not "generalized and uncorroborated," but relate to the nature of the case and the particularized investigative objectives set forth in the application. Some investigative techniques simply will not work or are too risky in the type of investigation involved here, involving the need to identify multiple conspirators, sources of supply, and distributors in an interstate drug trafficking organization, with the core offenders being very close-knit and secretive.

Moreover, Rice reaffirms the principle that the government is not required to prove that "every conceivable method has been tried and failed or that all avenues of investigation have been exhausted. Rather, all that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the Court be informed

of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely to be inadequate." Id. at 710, quoting United States v. Alfano, 838 F.3d at 163. 164.

By this standard, it is clear that the necessity sections of the applications under review are appropriate. Wiretap suppression motions require specific allegations with factual support. "A motion to suppress must allege facts which, if proven, would provide a basis for relief. A court need not act upon general or conclusory assertions founded on mere suspicion or conjecture." United States v. Corriette, 171 Fed. Appx. 319, 322 (11th Cir. 2006), quoting United States v. Richardson, 764 F.2d 1514, 1527 (11th Cir. 1985). The motion to suppress here does not allege that any of the affiants' statements in the necessity sections are untrue, but only that they are not detailed enough and constitute "boilerplate." Whatever that means, it clearly is a conclusory allegation founded on conjecture. Mattingly does not allege any specific facts which, if proven, would provide a basis for relief. As several federal district courts have held, there is a presumption that designated officials have properly exercised their authority and that wiretap orders are presumed lawful unless the defendant offers evidence, apart from speculation or conjecture, that rebuts the presumption. United States v. Terry, 702 F.2d 299, 310-11 (2nd Cir. 1983); United States v. Gray, 521 F.3d 514, 527 (6th Cir. 2008); United States v. Ruiz, 2010 WL 4840055 (S.D. New York 2010). Mattingly has offered no such evidence. His argument is based on newspaper accounts of the general wiretap practices in the office of the District Attorney in Riverside County, California, rather than on any specific evidence of false statements or other unlawful acts by any officials involved in the applications and wiretaps at issue here.

Evidentiary Hearing Not Required

Thus there is no need for an evidentiary hearing in this case regarding the sufficiency of the affidavit. Under Franks v. Delaware, 438 U.S. 154 (1978), a defendant is entitled to an evidentiary hearing regarding the veracity of an affidavit only "if he can make a substantial preliminary showing that the affidavit contains intentionally or recklessly false statements, and … (that) purged of its falsities would not be sufficient to support a finding of probable cause." To be entitled to a Franks hearing, Mattingly must (1) specifically allege which portions of the affidavit are claimed to be false, (2) assert that the false statements were deliberately or recklessly made, (3) provide a detailed offer of proof, including affidavits, to accompany the affidavit, (4) challenge specifically the veracity of the affiant, and (5) show that the challenged statements are necessary for a finding of probable cause. Id. at 158-59. The necessity requirement in a wiretap application is subject to this rule. United States v. Stewart, 306 F.3d 295, 304 (6th Cir. 2002). As the motion to suppress does not meet these conditions, an evidentiary hearing is not called for. The Court must consider the four corners of the affidavit and accord "great deference to the determinations of the issuing judge." United States v. Corrodo, 227 F.3d 528, 539 (6th Cir. 2000). Unredacted copies of the wiretap applications/orders under consideration have been filed under seal for *in camera* review.

Summary and Conclusion

To summarize and conclude, the wiretaps in this case were authorized in accordance with state and federal law by the District Attorney of Riverside County, California, acting through an Assistant District Attorney authorized to act for all purposes in the absence of the District Attorney. The wiretaps were supported by probable cause and were necessary because other investigative techniques were unsuccessful, likely to be unsuccessful if tried, or too risky. The

defendant has not met his burden to overcome the presumption of validity attaching to the wiretaps. He is not entitled to an evidentiary hearing absent a showing of intentional or reckless falsehood in the affidavit. This Court should decide the suppression issue by examining the "four corners" of each application, giving deference to the decisions of the California Superior Court judges who authorized the wiretaps, and considering only the wiretap applications before the Court in this case, according to the dictates of the Ninth Circuit in Blackmon and the Sixth Circuit in Rice, Stewart, and Gray.

Wherefore, for all the foregoing reasons, the motion must be denied.

Respectfully submitted,

JOHN E. KUHN, JR.
UNITED STATES ATTORNEY

/s/ Larry Fentress
Assistant United States Attorney
717 West Broadway
Louisville, Kentucky 40202
(502) 582-6772

CERTIFICATE OF SERVICE

I certify that the foregoing response was filed electronically on March 21, 2016, to be served through the CM/ECF system on **Brian Butler** and **Alex Dathorne**, counsel for the defendant.

/s/ Larry Fentress
Assistant United States Attorney
Western District of Kentucky

# ATTACHMENT A

PAUL E. ZELLERBACH
DISTRICT ATTORNEY

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF RIVERSIDE

**MEMORANDUM**

January 2, 2014

TO: Wiretap Staff

FROM: Paul Zellerbach

SUBJECT: Designation Pursuant to Penal Code section 629.50

---

In my absence, Assistant District Attorney Jeffrey A. Van Wagenen, Jr., is my designee and is authorized to make all decisions necessary to the administration of the District Attorney's Office. If he is unavailable, Assistant District Attorney Creg G. Datig is authorized to act on behalf of the District Attorney's Office.

The above authorization was first made on February 16, 2011, and shall continue until amended, altered, or revoked, in writing by me.

If any questions or concerns arise with respect to wiretap authorization and/or protocol, please feel free to contact me.

# ATTACHMENT B

RIVERSIDE COUNTY
DISTRICT ATTORNEY
3960 ORANGE STREET
RIVERSIDE, CALIFORNIA 92501-3643
951-955-5520

PAUL E. ZELLERBACH
DISTRICT ATTORNEY

October 14, 2014

Honorable Mark Cope
Riverside County Superior Court
4050 Main Street
Riverside, CA 92501

Dear Judge Cope:

Subject: Designation Pursuant to Penal Code section 629.50

In my absence, Assistant District Attorney Creg G. Datig is my designee and is authorized to make all decisions necessary to the administration of the District Attorney's Office. If he is unavailable, Assistant District Attorney Sean Lafferty is authorized to act on behalf of the District Attorney's Office.

This authorization shall continue until amended, altered, or revoked, in writing by the District Attorney.

If any questions or concerns arise with respect to wiretap authorization and/or protocol, please contact Deputy District Attorney Deena Bennett.

Very truly yours,

PAUL E. ZELLERBACH
District Attorney

cc: Judge Michele Levine
Judge Helios J. Hernandez

# ATTACHMENT C

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF RIVERSIDE
3960 ORANGE STREET
RIVERSIDE, CALIFORNIA 92501-3643

MICHAEL A. HESTRIN
DISTRICT ATTORNEY

January 5, 2015

Presiding Judge Harold W. Hopp
Riverside County Superior Court
4050 Main Street
Riverside, CA 92501

Dear Presiding Judge Hopp:

Re: Designation Pursuant to Penal Code section 629.50

In my absence, Chief Assistant District Attorney John Aki is my designee and is authorized to make all decisions necessary to the administration of the District Attorney's Office.

This authorization shall continue until amended, altered, or revoked, in writing by the District Attorney.

If any questions or concerns arise with respect to wiretap authorization and/or protocol, please contact Deputy District Attorney Deena Bennett.

Sincerely,

Michael A. Hestrin
District Attorney

cc: Judge Becky Dugan
Judge Helios J. Hernandez

# ATTACHMENT D

MICHAEL A. HESTRIN
District Attorney
County of Riverside
Deena M. Bennett
Deputy District Attorney
3960 Orange Street
Riverside, CA 92501
Telephone: (951) 955-5400
Fax: (951) 955-9673
State Bar No. 165447

SUPERIOR COURT DISTRICT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

| | |
|---|---|
| IN THE MATTER OF WIRETAPS UNSEALING WIRETAP #14-120, #14-120 EXTENSION 1, #14-183, #14-558, AND #15-08 | DECLARATION IN SUPPORT OF UNAVAILABILITY BY THE DISTRICT ATTORNEY & AUTHORIZATION OF DESIGNEE |

DECLARATION OF DEENA M. BENNETT, DEPUTY DISTRICT ATTORNEY:

I, DEENA BENNETT do hereby declare:

1. I am licensed to practice law in the State of California and am employed by the Riverside County District Attorney's Office. I have been with this office since September 1993. I am currently assigned to the Asset Forfeiture Unit and I am the Deputy District Attorney assigned to handle all wiretaps within the County of Riverside. I have held this assignment since February 2011. My office location is the Western Division which is located in the City of Riverside.

2. Paul E. Zellerbach was sworn in as the District Attorney of the County of Riverside in January 2011. He was the elected official for four years through December 2014. Mr. Zellerbach lost his bid for a second term to Michael A. Hestrin, and Mr. Hestrin was sworn in as the District Attorney on January 5, 2015.

3. During his tenure in office, and pursuant to the provisions of Penal Code section 629.50(a), District Attorney Paul E. Zellerbach named his second in command as his primary designee. On February 16, 2011, Mr. Zellerbach issued an office memorandum indicating that

Assistant District Attorney (ADA) Jeffrey A. Van Wagenen would be the primary designee. (See Attachment A.)

5. On January 2, 2014, District Attorney Paul E. Zellerbach issued a new designation memorandum in accordance with current case law. The designation memorandum authorized ADA Jeffrey A. Van Wagenen "to make all decisions necessary to the administration of the District Attorney's Office." (See Attachment B.)

6. Following the 2014 election and prior to the swearing in of District Attorney-Elect Michael A. Hestrin, ADA Van Wagenen left employment at the District Attorney's Office. Upon ADA Van Wagenen's departure in October 2014, and pursuant to the provisions of Penal Code section 629.50, District Attorney Zellerbach issued a designation letter, addressed to the Riverside County Superior Court, authorizing Assistant District Attorney Creg G. Datig, his second in command, to act as his primary designee. (See Attachment C.)

7. At all time, all involved judicial officers who reviewed and authorized the wiretap applications were personally informed of all designees and any changes to the Penal Code section 629.50 designation by the District Attorney.

8. On January 5, 2015, Michael A. Hestrin was sworn in as the Riverside County District Attorney. Following a change in personnel, Michael A. Hestrin issued a designation letter, addressed to the Riverside County Superior Court, indicating that pursuant to the provisions of Penal Code section 629.50, Chief Assistant District Attorney (CADA) John Aki, his second in command, would be the primary designee. (See Attachment D.)

9. The Riverside County District Attorney's Office received a request from Assistant United States Attorney from the Western District of Kentucky regarding the following wiretap applications:

| | |
|---|---|
| 14-120 | Signed by Jeffrey A. Van Wagenen on 03/11/2014 |
| 14-120 Ext. 1 | Signed by Jeffrey A. Van Wagenen on 04/08/2014 |
| 14-183 | Signed by Jeffrey A. Van Wagenen on 04/08/2014 |
| 14-558 | Signed by Creg Datig on 10/27/2014 |
| 15-108 | Signed by John Aki on 02/19/2015 |

10. All of these wiretap affidavits were reviewed by the authorized designee of the District Attorney. The applications were subsequently signed by the designee and the affidavits

were presented to the court.

11. District Attorney Hestrin took office on January 5, 2015. District Attorney Hestrin immediately changed a number of the policies, practices and procedures in the administration of the office, including wiretaps.

12. On February 19, 2015, when Chief Assistant District Attorney John Aki reviewed and signed wiretap #15-108, District Attorney Hestrin was unavailable. His calendar indicates that he was in the Eastern Division of the County and not physically present in the Western end of the county.

13. Riverside County is the 3rd largest county in the state of California and 10th largest in the nation. Riverside County extends from its Western end, which begins at the borders of Orange and San Bernardino Counties, to its Eastern end at the Arizona border. Riverside County's southern border reaches to San Diego County. The District Attorney's Office is divided into three divisions: Western, Southwest/Mid-County, and Eastern.

14. Geographically, the Eastern Division's main office in the City of Indio is located approximately 146 miles from the Western Division's main office in the City of Riverside. The designated judicial officer who authorizes and signs wiretap orders is physically located in the Western end of the county, in the City of Riverside.

15. Pursuant to the provisions of Penal Code section 629.50, Chief Assistant District Attorney John Aki reviewed wiretap #15-108 because District Attorney Hestrin was not available to review and sign the wiretap. District Attorney Hestrin was not physically present in the Western Division's main office in Riverside for the entire day, nor was he in the Western end of the County. District Attorney Hestrin's calendar reflects that he was in the Indio office in the morning hours for scheduled meetings. In the afternoon, he was outside the Indio office but remained in the Eastern end of the County to attend a meeting with another County agency. Given that District Attorney Hestrin was not present in the Western end of the County where wiretap applications are processed and signed, and was instead over two hours away in Indio, District Attorney Hestrin was unavailable to personally review the affidavit and sign the application. Given this unavailability, the Chief Assistant District Attorney reviewed the affidavit

and signed the application.

16. In 2014, regarding wiretaps #14-120, #14-120 Extension 1, #14-183, and #14-558, pursuant to the protocol created by District Attorney Paul E. Zellerbach, following the preparation of the wiretap paperwork, all wiretap affidavits and applications were submitted directly to the Assistant District Attorney of the Administrative Division Jeffery A. Van Wagenen. After Assistant District Attorney Van Wagenen left the office in October of 2014, all wiretap affidavits and applications were submitted directly to ADA Creg G. Datig. In his letter dated October 14, 2014, Paul E. Zellerbach designated Assistant District Attorney Creg G. Datig as the designee pursuant to Penal Code section 629.50 (See Attachment C.)

17. Mr. Zellerbach, Mr. Van Wagenen and Mr. Datig have since departed the office. This declaration is based on my own recollection of the events. Mr. Zellerbach did not keep records or a calendar that consistently, regularly, or accurately, reflected his day-to-day business.

I certify under penalty of perjury and the laws of the State of California, that the above is true and correct to the best of my knowledge. Executed in Riverside County, California.

Dated: January 21, 2016

DEENA M. BENNETT
Deputy District Attorney

# ATTACHMENT E

# March 11, 2014

Tuesday

March 2014

| Su | Mo | Tu | We | Th | Fr | Sa |
|---|---|---|---|---|---|---|
| | | | | | | 1 |
| 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 9 | 10 | 11 | 12 | 13 | 14 | 15 |
| 16 | 17 | 18 | 19 | 20 | 21 | 22 |
| 23 | 24 | 25 | 26 | 27 | 28 | 29 |
| 30 | 31 | | | | | |

April 2014

| Su | Mo | Tu | We | Th | Fr | Sa |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 | 26 |
| 27 | 28 | 29 | 30 | | | |

11 Tuesday

**Laura - Dr. Appt PM**

7 am

**Copy: Breakfast w/Dave W.**
Marriott
8 00 Zellerbach, Paul

9 00 **Coffee**
Molinos

10 00 **Copy: SPS Sensitive Case Meeting**
Exec. Conf. Room
Zellerbach, Paul

11 00

**Lunch w/John Delarosa**
CPK
12 pm

1 00

2 00

**Meet w/Benoit & DeArmond**
Z Office
3 00

**BLOCKED**

4 00

5 00

6 00

Daily Task List

Arrange By: Due Date

Notes

# April 07, 2014

Monday

April 2014

| Su | Mo | Tu | We | Th | Fr | Sa |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 | 26 |
| 27 | 28 | 29 | 30 | | | |

May 2014

| Su | Mo | Tu | We | Th | Fr | Sa |
|---|---|---|---|---|---|---|
| | | | | 1 | 2 | 3 |
| 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 11 | 12 | 13 | 14 | 15 | 16 | 17 |
| 18 | 19 | 20 | 21 | 22 | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | 31 |

7 Monday

**Willmon;** Sacramento

7 am

8 00

**Anti-Human Trafficking News Conference**
San Diego

9 00

10 00

11 00

12 pm

1 00

**Copy: DP Staffing (Banuelos) Haringsma**
Exec. Conf. Room
Zellerbach, Paul

2 00

**Copy: DP Staffing (Redd&Mosley) DeLim**
Exec. Conf. Room
Zellerbach, Paul

3 00

**DP Staffing (Zavala) DeLimon;** Exec. Co

**Copy: Meet w/Sue Aguilar & Sue Mandell (WeTip)**
Z Office
Zellerbach, Paul

4 00

5 00

6 00

Daily Task List

Arrange By: Due Date

Notes

# April 08, 2014

Tuesday

April 2014

| Su | Mo | Tu | We | Th | Fr | Sa |
|---|---|---|---|---|---|---|
| | | 1 | 2 | 3 | 4 | 5 |
| 6 | 7 | 8 | 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 | 17 | 18 | 19 |
| 20 | 21 | 22 | 23 | 24 | 25 | 26 |
| 27 | 28 | 29 | 30 | | | |

May 2014

| Su | Mo | Tu | We | Th | Fr | Sa |
|---|---|---|---|---|---|---|
| | | | | 1 | 2 | 3 |
| 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| 11 | 12 | 13 | 14 | 15 | 16 | 17 |
| 18 | 19 | 20 | 21 | 22 | 23 | 24 |
| 25 | 26 | 27 | 28 | 29 | 30 | 31 |

8 Tuesday

**PALM DESERT**

**Willmon & Fineman;** Sacramento

7 am

**Copy: CANCELED Breakfast w/Dave W.**
Marriott
8 00 Zellerbach, Paul

9 00

10 00

11 00

12 pm **Barbara Sinatra Center - 3rd Annual Child Abuse Prevention Luncheon**
Rancho Mirage, Babe's BBQ Brewhouse

1 00

2 00

3 00

4 00

5 00

6 00 **Copy: UNABLE TO ATTEND Norco State**
Nellie Weaver Hall, Norco
Zellerbach, Paul

7:00pm - 8:30pm Indio Candlelight Vigil(Palm Desert Civic Center (Amphitheatre))

Daily Task List

Arrange By: Due Date

Notes

# October 27, 2014

Monday

October 2014

| Su | Mo | Tu | We | Th | Fr | Sa |
|---|---|---|---|---|---|---|
| | | | 1 | 2 | 3 | 4 |
| 5 | 6 | 7 | 8 | 9 | 10 | 11 |
| 12 | 13 | 14 | 15 | 16 | 17 | 18 |
| 19 | 20 | 21 | 22 | 23 | 24 | 25 |
| 26 | 27 | 28 | 29 | 30 | 31 | |

November 2014

| Su | Mo | Tu | We | Th | Fr | Sa |
|---|---|---|---|---|---|---|
| | | | | | | 1 |
| 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 9 | 10 | 11 | 12 | 13 | 14 | 15 |
| 16 | 17 | 18 | 19 | 20 | 21 | 22 |
| 23 | 24 | 25 | 26 | 27 | 28 | 29 |
| 30 | | | | | | |

27 Monday

**OUT OF OFFICE**

7 am

8 00

9 00

10 00

11 00

12 pm

**Drug Court Master Plan Committee Meeting (10/27/14)**
Larson Justice Center Judicial Conference Room with video connections to the Hall of Justice and Southwest Justice Center

1 00

2 00

**Copy: Prop 47 Impact Meeting**
Probation - 6th Floor
Zellerbach, Paul

3 00

4 00

5 00

6 00

Daily Task List

Arrange By: Due Date

Notes

# ATTACHMENT F

MICHAEL A. HESTRIN
District Attorney
County of Riverside
Deena M. Bennett
Deputy District Attorney
3960 Orange Street
Riverside, CA 92501
Telephone: (951) 955-5400
Fax: (951) 955-9673
State Bar No. 165447

SUPERIOR COURT DISTRICT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF RIVERSIDE

| | |
|---|---|
| IN THE MATTER OF WIRETAPS #14-120, #14-20 EXTENSION 1, #14-183 AND WIRETAP #14-558, | DECLARATION IN SUPPORT OF UNAVAILABILITY BY THE DISTRICT ATTORNEY & AUTHORIZATION OF DESIGNEE |

DECLARATION OF KELLI M. CATLETT, SUPERVISING DEPUTY DISTRICT ATTORNEY:

I, KELLI M. CATLETT do hereby declare:

1. I am licensed to practice law in the State of California and am employed by the Riverside County District Attorney's Office. I have been an attorney with this office since May of 2006. I am currently assigned as the Supervisor to the Asset Forfeiture Unit which handles all wiretaps within the County of Riverside. I have held this assignment since April of 2015.

2. Paul E. Zellerbach was sworn in as the District Attorney of the County of Riverside in January 2011. He was the elected official for four years until December 2014. Mr. Zellerbach lost his bid for a second term to Michael A. Hestrin.

3. In a signed directive and pursuant to the provisions of Penal Code Section 629.50(a), District Attorney Paul E. Zellerbach named his second in command as his primary designee.

4. The Riverside County District Attorney's Office was sent a request from Assistant United States Attorney from the Western District of Kentucky regarding the following wiretap applications:

| | |
|---|---|
| 14-120 | Signed by Jeffrey A. Van Wagenen on 03/11/2014 |
| 14-120 Ext. 1 | Signed by Jeffrey A. Van Wagenen on 04/08/2014 |
| 14-183 | Signed by Jeffrey A. Van Wagenen on 04/08/2014 |
| 14-558 | Signed by Creg Datig on 10/27/2014 |

6. All of these wiretap affidavits were reviewed and signed by the authorized designee of the District Attorney.

7. As the Asset Forfeiture Unit Supervisor I am informed and do believe that Superior Court Judge Helios J. Hernandez, set a standing appointment time and location for the review and signing of all wiretap related documents on a daily basis in the designated department of the downtown Riverside County Courthouse. All of the subject orders in the above-listed applications were signed in accordance with this set schedule.

8. Subsequent to District Attorney Michael A. Hestrin formally taking office in January of 2015, the office computer files of former District Attorney Paul E. Zellerbach were archived and preserved on an optical disc, which was then stored in our secured data center, by restricted staff in the Technical Services Bureau of the Riverside County District Attorney's Office. Included in these computer files is former District Attorney Zellerbach's electronic calendar in the Microsoft Office program Outlook.

9. Attachment A is a printed copy of former District Attorney Zellerbach's partial electronic calendar reflecting the specific dates the applications were signed.

10. Former District Attorney Zellerbach further kept a personal physical calendar, which he solely maintained. We do not possess this calendar and are unaware of its whereabouts or content.

11. Any changes or amendments to former District Attorney Zellerbach's daily schedule that were not expressly communicated to his Executive Assistant would not be reflected in his electronic Outlook Calendar. In the event Mr. Zellerbach communicated a schedule change or conflict to his Executive Assistant, the following entry would be notated in Mr. Zellerbach's electronic Outlook Calendar: "Unable to attend."

12. Former District Attorney Zellerbach did not always communicate scheduling changes or conflicts to his Executive Assistant.

13. Former District Attorney Zellerbach is the only person who can authenticate the accuracy of either his electronic Outlook calendar or his physical personal calendar.

Dated: March 14, 2016

KELLI M. CATLETT
Supervising Deputy District Attorney
Riverside County

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA PLAINTIFF

v. CRIMINAL ACTION NO. 3:15CR-99-DJH

CHRISTOPHER MATTINGLY DEFENDANT

ORDER
***(Filed Electronically)***

This matter is before the Court on motion by the defendant to suppress the wiretap evidence and all evidence derived therefrom. Having considered the motion and the opposing response by the United States, and being sufficiently advised,

IT IS HEREBY ORDERED that the motion is denied.