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# Enhanced Oversight of Search Warrants and Title III Wiretaps

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*Search warrants and wiretaps were once used primarily to investigate organized crime, drug dealing and terrorism. In recent years, however, prosecutors have employed these tools increasingly in the context of white-collar crime to the point where it is now commonplace.*

Prosecutors and federal agents are entrusted with broad and largely unchecked authority to conduct most aspects of their investigations. For example, they serve grand jury subpoenas that compel the production of evidence and witness testimony. They can conduct physical surveillance of subjects and even introduce undercover agents and confidential informants to them in order to build prosecutions. All of this can be done without any judicial approval. However, two of the most potent investigative tools that prosecutors and agents use to build their investigations the search warrant and the Title III wiretap do require judicial approval under the Fourth Amendment. As some commentators (including one of the authors of this article) have observed, search warrants and wiretaps were once used primarily to investigate organized crime, drug dealing and terrorism. In recent years, however, prosecutors have employed these tools increasingly in the context of white-collar crime to the point where it is now commonplace. *See*, Robert H. Hotz, Jr. & Harry Sandick, "Search Warrants in White-Collar Crime Cases," The Review of Securities and Commodities Regulation, Vol. 45 No. 12 (June 20, 2012).

The warrant requirement is grounded in the fact that it is a serious intrusion on privacy when the government either makes a physical trespass on private property or records someone's private telephone conversations. Under the Constitution, the government may take these steps only if a neutral magistrate concludes that probable cause exists to believe that these steps will uncover evidence of criminal activity. While the warrant requirement is a crucial protection for all Americans, there are limits to the utility of the safeguard of judicial approval. As we discuss in this article, there are steps that the courts and Congress can take to strengthen these safeguards and thereby protect both the accused and those who are never even charged with a crime.

## THE WARRANT REQUIREMENT IS AN IMPERFECT SAFEGUARD OF FOURTH AMENDMENT RIGHTS

As an initial matter, the process of obtaining a search warrant is not an adversarial process; the prosecutor and case agent bring the application papers to a federal judge, who reviews and approves the application without any input from defense counsel. The target of the warrant or wiretap and their counsel (if any) are necessarily unaware of the government's investigation and only receive a copy of the warrant application after the defendant is indicted, as part of discovery. The reviewing judge will often be unable to identify factual misstatements in the application, as the judge will not be familiar with the case and typically only spends a short period of time examining the application, which is reviewed while the judge might be handling a

host of other "Part I" business (such as arrest warrants, arraignments, presentments, pen register applications, bail hearings, and temporary restraining orders).

Therefore, the more meaningful judicial check on the government's use of search warrants and Title III wiretaps comes after the warrant has been executed, in post-indictment litigation when the defendant can file a motion to suppress. However, that motion practice only comes after the Court sees the fruits of the wiretap, often in the form of very incriminating evidence upon which the indictment is based. At that point, it becomes more difficult to convince the trial court or an appellate court that, as the saying goes, the defendant must go free because the constable has blundered. This is especially so because when the defendant files a motion to suppress, he is not only challenging the constable's "blunder," but forced to ask one judge to conclude that another judge erred in deciding to issue a warrant. Even though the judge who signed the warrant lacked the ability to see the factual defects in the application, this is something that may further discourage the grant of a suppression motion.

Apart from these structural obstacles that limit the effectiveness of the judicial safeguard, courts have made it even more difficult for defendants who seek to challenge the use of a search warrant or Title III wiretap as violative of the Fourth Amendment, which we discuss below.

**CHALLENGING GOVERNMENT'S PROOF**

Even when the government makes apparent misrepresentations in its warrant and wiretap applications, defendants are often not permitted to challenge the government's proof in a hearing.

One key obstacle faced by defendants who seek to suppress a search warrant or wiretap is the difficulty of persuading the district court to conduct an evidentiary hearing about the factual accuracy of the application. Based on the Supreme Court's decision in *Franks v. Delaware*, 438 U.S. 154 (1978), a defendant only gets to challenge the government's proof in a hearing if he or she passes a two-part test. First, the defendant must make a "substantial preliminary showing" that the agent made false statements "knowingly and intentionally or with reckless disregard for the truth[.]" *Id*. at 155-56. Second, the defendant must show that "the allegedly false statement is necessary to the finding of probable cause." *Id*. at 155-56. Only after clearing these hurdles will the district court conduct a so-called "*Franks* hearing."

Recent judicial decisions in the Second Circuit have demonstrated that passing this test is no easy accomplishment. For example, in *United States v. Sandalo*, the Second Circuit affirmed the denial of a *Franks* hearing by a 2-1 vote. The dissenting judge stated that the defendant "plausibly discredit[ed]" the account of the police informant whose information supported the search warrant application. *United States v. Sandalo*, 70 F.4th 77, 100 (2d Cir. 2023). Despite this, the majority agreed with the district judge that no hearing was necessary.

The court's analysis in *Sandalo* was focused on two statements by the informant: that the defendant admitted to drug dealing activity in phone calls and text messages sent to the informant, and that the informant saw drugs in the defendant's home the night before the warrant application was submitted. The court concluded that neither statement was intentionally or

recklessly reported by the agent, who only relied on what he learned from the informant, and that in any event, ample additional evidence supported the warrant. *Id*. at 87 90.

In dissent, Judge Jacobs critiqued the manner in which *Franks* was applied by the majority, a critique that he implicitly recognized may also apply to other cases in which a *Franks* hearing was denied. Prior decisional law demonstrates that "it is difficult to obtain a *Franks* hearing in practice." *Id*. at 101 (emphasis in original). For example, courts routinely say that the burden under *Franks* requires "more than a mere conclusory showing" and is a "high" and "heavy" burden. But as Judge Jacobs explains, "[e]very burden in law is greater than conclusory," and the burden to get a *Franks* hearing cannot be greater than the burden to prevail at such a hearing. *Id*. at 100. That is to say, the standard as explicated by the courts has become so elevated that "a defendant cannot get a *Franks* hearing without all but establishing that he will prevail." *Id*. At 101. Where the defense can point out inconsistencies and contradictions in the wiretap affidavit, the defense "should be able to question the relevant witnesses" about crucial events in the record during a *Franks* hearing. *Id*. at 104.

This is not to say that *Franks* hearings are never held. Just one day following the *Sandalo* decision, the Second Circuit decided *United States v. Lauria*, a case involving alleged misstatements in connection with a search warrant for phone records relating to an armed robbery conspiracy. The affidavits contained a host of errors, some of which were admitted by the government: the affidavits wrongly stated that toll records linked the defendant to the one robbery; stated the wrong date for another robbery; stated that records from that incorrect date placed the phones for the defendant and two co-conspirators in the vicinity of the location of the robbery and showed the three phones in communication with one another; stated that the defendant's phone had accessed the cell tower closest to the robbery location; and that the defendant's phone was in communication with that of a co-conspirator shortly after that same robbery. *United States v. Lauria*, 70 F.4th 106, 116-18 (2d Cir. 2023). Despite this, the district court did not conduct a *Franks* hearing.

The Second Circuit reversed and first held that the statements in question were necessary to establish probable cause, satisfying the second prong of *Franks*. As to whether the misstatements were made intentionally or recklessly, the Second Circuit acknowledged that they "could be more indicative of negligence or mistake," given the number of phones law enforcement was investigating, and that the record did not reflect "a motive for the warrant affiant to have deliberately or recklessly misled" the judges issuing the warrants. *Id*. at 131. Nevertheless, the court emphasized that it "is possible that with more factual development concerning the warrant affiant's state of mind, the pervasiveness of errors could support a finding that ... certain misstatements were made deliberately or with reckless disregard for the truth." *Id.* Accordingly, the Second Circuit vacated the defendant's convictions on robbery counts and remanded the case to the district court to hold a *Franks* hearing and determine the affiant's state of mind.

While there need not be a *Franks* hearing in every case, the Lauria court recognized that additional factual development is sometimes necessary to determine whether the supporting affidavit is intentionally or recklessly false. And as the *Sandalo* dissent explains, the rhetoric surrounding how difficult it is to get a *Franks* hearing often leads some judges to believe that a *Franks* hearing is almost always unwarranted. Where there are multiple significant errors alleged

and articulated in detail by the defendant, as in *Lauria* and *Sandalo*, courts should hold *Franks* hearings in order to figure out what really happened.

**THE NECESSITY REQUIREMENT FOR TITLE III WIRETAPS IS RARELY ENFORCED IN LITIGATION**

When a prosecutor seeks a wiretap under Title III, he or she must certify to the Department of Justice Office of Enforcement Operations and then to a district judge why a wiretap is necessary for the government to investigate the particular crimes and subjects at issue. In particular, the case agent must provide a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. §2518(1)(c). When alternative means might equally achieve the goals of the investigation, then a wiretap should not be used. When this rule is not followed, the fruits of a wiretap can be suppressed. This is an important safeguard against the government making Title III wiretaps routine investigative steps.

In practice, though, courts have made it more challenging for defendants who present "necessity" arguments than one might imagine based on this demanding statutory text. Most notably, in *United States v. Rajaratnam*, 719 F.3d 139, 147 (2d Cir. 2013), the government agent swore in its application that "normal investigative techniques" such as physical surveillance, grand jury subpoenas, witness interviews and use of confidential informants had been tried and failed. *Id*. At 145. In particular, the government agent stated that interviewing the defendant or other subjects was "too risky at the present time." *Id*. at 149. The government also explained that asking for trading records from the defendant's investment management firm "would jeopardize the investigation." *Id*.

All of these statements were contradicted by the record. In fact, the defendant and his investment management firm had been the subject of ongoing investigations by the SEC which involved the production of trading records and depositions of the defendant and other employees. *Id*. But none of this was disclosed in the application. Id. The district court concluded that the government omitted this information with "reckless disregard" for the truth, although it held that the omissions were not material to the district court's ruling on necessity, and therefore denied the suppression motion. *Id*. at 150.

The Court of Appeals affirmed the denial of the suppression motion, and also went on to reject the district court's conclusion that the government's actions amounted to reckless disregard of the truth. *Id*. at 155-56. It held that an affiant cannot be expected to include in an affidavit every piece of information gathered in the course of the investigation, even when that evidence is critical in the view of the district court. The prosecutor and agent who handled the wiretap application each said that they did not believe that the prior SEC investigation was relevant to the question of alternative means.

In Rajaratnam, there were multiple obvious misstatements about the availability of alternative means, and yet in the view of the Second Circuit, this was not enough even to support the district court's finding that these false statements were made recklessly, a finding made after the district court heard live witness testimony. The decision sent a message that courts would be very

indulgent of the government's use of boilerplate language, where prosecutors and agents are liable to cut sections written for a prior wiretap application and paste them into a new application. Since Rajaratnam, no decisions within the Second Circuit have suppressed a wiretap based on a failure to comply with the "alternative means" requirement.

**THERE IS NO NECESSITY REQUIREMENT FOR SEARCH WARRANTS**

Even as toothless as it may sometimes appear to be, the necessity requirement at least exerts some restraint on the government's ability to obtain Title III wiretap authorization. There is no comparable restraint in the context of search warrant applications.

As one of us has argued before, there is no reason for Congress not to require a showing of alternative means, as exists in the Title III context, to favor the use of a subpoena over that of a search warrant. *See, id*. The use of a search warrant to obtain documents or electronic data in the white-collar context is problematic as it allows the government to obtain vast quantities of information, often including privileged information that may be difficult to cull out, and without any prior review to determine if the seized information falls within the scope of the search warrant. The execution of a search warrant often becomes public, causing a punitive impact on businesses and their employees even before any charges are brought.

In the context of white-collar investigations of lawful businesses, there should be little need for recourse to search warrants given that the Department of Justice strongly encourages cooperation with investigations and the voluntary reporting of possible wrongdoing. *See*, Harry Sandick & Hilarie Meyers, "Carrots and Sticks: DAG Lisa Monaco Puts Her Stamp on DOJ'S Corporate Criminal Enforcement Policies," Business Crimes Bulletin, Vol. 30 No. 3 (Nov. 2022) (https://bit.ly/3X8P6JX). A search warrant for documents from a lawful business should be an exception reserved for cases where there is a concern that the use of a grand jury subpoena may lead to the destruction of evidence, or where there is some particular need for the evidence to be obtained quickly. Congress should amend Federal Rule of Criminal Procedure 41 to include a necessity requirement.

**COURTS SHOULD GIVE CLOSER SCRUTINY TO THE GOVERNMENT'S USE OF WARRANTS IN ORDER TO DETER UNLAWFUL POLICE CONDUCT**

Limitations on the government's ability to execute search warrants and Title III warrants are important to safeguarding Fourth Amendment rights. To be sure, they help protect the Fourth Amendment rights of the accused who are indicted and who can file motions to suppress unlawfully obtained evidence. Just as important, these types of safeguards also deter unconstitutional government actions that impact those who are innocent of any crime. After all, the Supreme Court has held the "prime purpose" of the exclusionary rule "is to deter future unlawful police conduct" that violates the Fourth Amendment. *United States v. Calandra*, 414 U.S. 338, 347 (1974); *see also*, *United States v. Janis*, 428 U.S. 433 (1976) (suggesting that deterrence may by the "sole" purpose of the exclusionary rule). It may be that the Court's view of the rule's purpose is too narrow and that *Calandra*, *Janis* and their progeny represent a doctrinal wrong turn. As the *Calandra* dissenters contended, a deterrence-focused interpretation fails to recognize that the "the exclusionary rule is 'part and parcel of the Fourth Amendment's limitation

upon [governmental] encroachment of individual privacy,' and 'an essential part of both the Fourth and Fourteenth Amendment.'" *Calandra*, 414 U.S. at 360 (quoting Mapp v. Ohio, 367 U.S. 643, 651, 657 (1961)) (Brennan, J., dissenting) (alteration in original) (internal citation omitted).

Still, the rules proposed in this article would advance the purpose of the exclusionary rule even with this narrow understanding, by helping to deter future unlawful police conduct. An agent or police officer who knew that their decisions and conduct would be examined closely in a *Franks* hearing would be more likely to take greater care in preparing warrant affidavits to make sure that they are accurate. In addition, by requiring the agent or officer to justify the necessity for a serious intrusion on privacy, the courts will deter over-reaching by the authorities.

Deterrence is especially important not only for doctrinal reasons, but for practical reasons as well. While only those who are indicted may file suppression motions, those who are not indicted including some who are innocent beyond any question can be gravely harmed by an errant warrant. The case of Level Global is instructive. (One of the authors of this article has written at length about the Level Global case. *See*, "Federal Agent's Misrepresentation in LG Search Warrant Affidavit Insufficient to Clear Qualified Immunity Hurdle" (https://bit.ly/3tD4XGH).) *See also*, Ganek v. Leibowitz, 874 F.3d 73 (2d Cir. 2017). This hedge fund closed its doors after the execution of a search warrant of the firm's offices that the government publicized by encouraging reporters to watch and photograph the warrant's execution. In fact, the supporting affidavit contained what all parties ultimately agreed was a false statement made on a crucial issue: whether the founder of the hedge fund was personally engaged in insider trading. Despite this harm and the government's conceded error, there was no civil remedy for Level Global. Only adequate pre-warrant deterrence perhaps in the form of a necessity requirement could have prevented the harm that was caused to Level Global.

In short, to protect both the innocent and the guilty, to deter police misconduct, and to achieve the objective of the Fourth Amendment of keeping us "secure in our persons, houses, papers and effects," the courts and Congress should take the actions discussed in this article.

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