

28 Electronic Surveillance—Title III Applications

The Application should meet the following requirements:

- A. It must be prepared by an applicant identified as a law enforcement or investigative officer. The application must be in writing, signed by the United States Attorney, an Assistant United States Attorney, and made under oath. It must be presented to a Federal district court or court of appeals judge and be accompanied by the Department's authorization memorandum signed by an appropriate Department of Justice official. **The application may not be presented to a magistrate.** See 18 U.S.C. §§ 2510(9) and 2516(1); see also *In re United States of America*, 10 F.3d 931 (2d Cir. 1993), cert. denied, 115 S. Ct. 64 (1994).
- B. It must identify the type of communications to be intercepted. "Wire communications" include "aural transfers" (involving the human voice) that are transmitted, at least in part by wire, between the point of origin and the point of reception, i.e., telephone calls. 18 U.S.C. § 2510(1). This includes cellular phones, cordless phones, voice mail, and voice pagers, as well as traditional landline telephones. "Oral communications" are communications between people who are together under circumstances where the parties enjoy a reasonable expectation of privacy. 18 U.S.C. § 2510(2). An "electronic communication" most commonly involves digital-display paging devices or fax machines, but also includes electronic mail, computer transmissions, and, in some cases, satellite transmissions. It does not include tone-only paging devices, tracking devices (as defined by 18 U.S.C. 3117), or electronic funds transfer information. 18 U.S.C. § 2510(12).
- C. It must identify the specific Federal offenses for which there is probable cause to believe are being committed. The offenses that may be the predicate for a wire or oral interception order are limited to only those set forth in 18 U.S.C. § 2516(1). In the case of electronic communications, a request for interception may be based on any Federal felony, pursuant to 18 U.S.C. § 2516(3).
- D. It must provide a particular description of the nature and location of the facilities from which, or the place where, the interception is to occur. An exception to this is the roving interception provision set forth in 18 U.S.C. § 2518(11)(a) and (b). The specific requirements of the roving provision are discussed in [USAM 9-7.111](#). Briefly, in the case of a roving oral interception, the application must show, and the court order must indicate, that it is impractical to specify the location(s) where oral communications of a particular named subject are to be intercepted. 18 U.S.C. § 2518(11)(a)(ii) and (iii). In the case of a roving wire or electronic interception, the application must state, and the court order must indicate, that a particular named subject is using various and changing facilities for the purpose of thwarting electronic surveillance. 18 U.S.C. § 2518(11)(b)(ii) and (iii). The accompanying DOJ document authorizing the roving interception must be signed by an official at the level of an Assistant Attorney General (including Acting AAG) or higher. 18 U.S.C. § 2518(11)(a)(i) and (b)(i).
- E. It must identify, with specificity, those persons known to be committing the offenses and whose communications are to be intercepted. In *United States v. Donovan*, 429 U.S. 413 (1977), the Supreme Court stated that 18 U.S.C. § 2518(1)(b)(iv) requires the government to name all individuals whom it has probable cause to believe are engaged in the offenses under investigation, and whose conversations it expects to intercept over or from within the targeted facilities. It is the Department's policy to name as potential subjects all persons whose involvement in the alleged offenses is indicated. See *United States v. Ambrosio*, 898 F. Supp. 177 (S.D.N.Y. 1995); *United States v. Marcy*, 777 F. Supp. 1400 (N.D. Ill. 1991); *United States v. Martin*, 599 F.2d 880 (9th Cir.), cert. denied, 441 U.S. 962 (1979).
- F. It must contain a statement affirming that normal investigative procedures have been tried and failed, are reasonably unlikely to succeed if tried, or are too dangerous to employ. 18 U.S.C. § 2518(1)(c). The applicant may then state that a complete discussion of attempted alternative investigative techniques is set forth in the accompanying affidavit.
- G. It must contain a statement affirming that the affidavit contains a complete statement of the facts—to the extent known to the applicant and the official approving the application—concerning all previous applications that have been made to intercept the oral, wire, or electronic

communications of any of the named subjects or involving the target facility or location. 18 U.S.C. § 2518(1)(e).

- H. In an oral (and occasionally in a wire or electronic) interception, it must contain a request that the court issue an order authorizing investigative agents to make all necessary surreptitious and/or forcible entries to install, maintain, and remove electronic interception devices in or from the targeted premises (or device). When effecting this portion of the order, the applicant should notify the court as soon as practicable after each surreptitious entry.
- I. It should, when requesting the interception of wire communications, contain a request that the authorization and court order apply not only to the target telephone number(s) identified therein, but to any changed telephone number(s) subsequently assigned to the same cable, pair, and binding posts used by each targeted landline telephone. With regard to a cellular telephone, the request should be that the authorization and order apply not only to any identified telephone number, but also to any changed telephone number or any other telephone subsequently assigned to the instrument bearing the same electronic serial number as the targeted cellular phone. The application should also request that the authorization apply to background conversations intercepted in the vicinity of the target phone while the phone is off the hook or otherwise in use. See *United States v. Baranek*, 903 F.2d 1068 (6th Cir. 1990).
- J. It must contain, when concerning the interception of wire communications, a request that the court issue an order directly to the service provider, as defined in 18 U.S.C. § 2510(15), to furnish the investigative agency with all information, facilities, and technical assistance necessary to facilitate the ordered interception. 18 U.S.C. § 2511(2)(a)(ii). The application should also request that the court direct service providers and their agents and employees not to disclose the contents of the court order or the existence of the investigation. *Id.*
- K. It should contain a request that the court's order authorize the requested interception until all relevant communications have been intercepted, not to exceed a period of thirty (30) days from the earlier of the day on which the interception begins or ten (10) days after the order is entered. 18 U.S.C. § 2518(5).
- L. It should contain a statement affirming that all interceptions will be minimized in accordance with Chapter 119 of Title 18, United States Code, as described further in the affidavit. 18 U.S.C. § 2518(5).

U.S. v. Oliva, No. 10-30126 archived on July 30, 2012