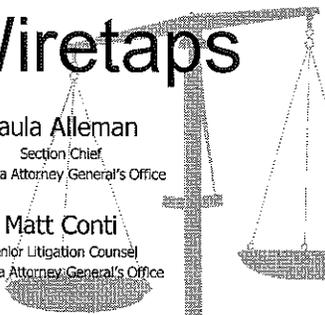


Introduction to Wiretaps



Paula Alleman
Section Chief
Arizona Attorney General's Office

Matt Conti
Senior Litigation Counsel
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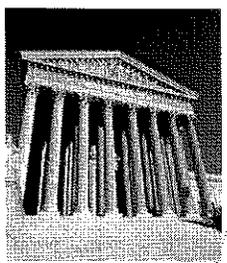
WHAT IS A WIRETAP?

- Monitoring of conversations by a third party
- Historical perspective
- Some medium is used:
 - Phones
 - Email
 - Room/Area Bugs

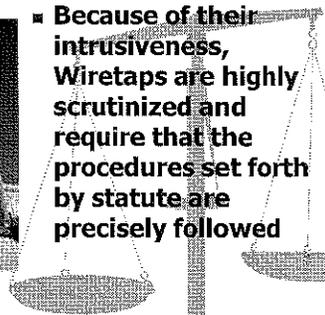


THE WIRE
SEASON 1
LISTEN CAREFULLY

WIRETAPS



- Because of their intrusiveness, Wiretaps are highly scrutinized and require that the procedures set forth by statute are precisely followed



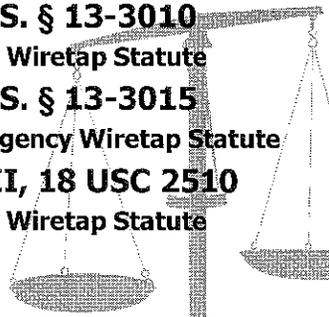
WIRETAPS

- Ex Parte Orders
- Secret per ARS §13-3011
- Code words:
Investigations,
Title 3s, T-IIIs,
T-3s, CWTs, WTs



WIRETAP STATUTES

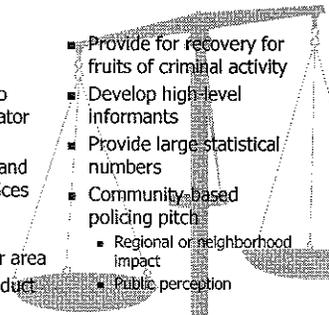
- A.R.S. § 13-3010
Arizona Wiretap Statute
- A.R.S. § 13-3015
Arizona Emergency Wiretap Statute
- Title III, 18 USC 2510
Federal Wiretap Statute



Wiretap Benefits

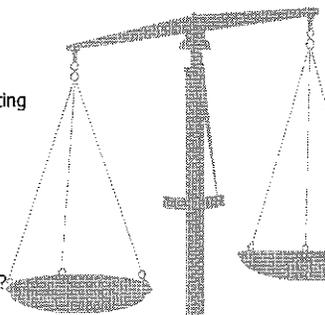
Wiretaps Can:

- Dismantle/disrupt organizations
- Provides window into secretive co-conspirator conversations
- Provide intelligence and education into practices and organizational structure of criminal organizations in your area
- Show pattern of conduct
- Provide for recovery for fruits of criminal activity
- Develop high-level informants
- Provide large statistical numbers
- Community-based policing pitch
 - Regional or neighborhood impact
 - Public perception



Wiretap Investigation Considerations

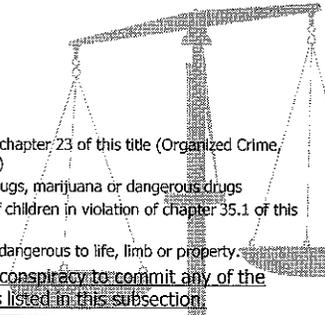
- Complex
- Take Time
- Require Lengthy Writing
- Exhaust Resources
- Cost Money
- Require Flexibility
- Experience of Investigators
- Is it a proactive or reactive victim crime?



For the purposes of A.R.S. § 13-3010(P), "crime" means:

- Murder
- Gaming
- Kidnapping
- Robbery
- Bribery
- Extortion
- Theft
- An act in violation of chapter 23 of this title (Organized Crime, Fraud, and Terrorism)
- Dealing in narcotic drugs, marijuana or dangerous drugs
- Sexual exploitation of children in violation of chapter 35.1 of this title
- Or any felony that is dangerous to life, limb or property.

Crime includes conspiracy to commit any of the offenses listed in this subsection.



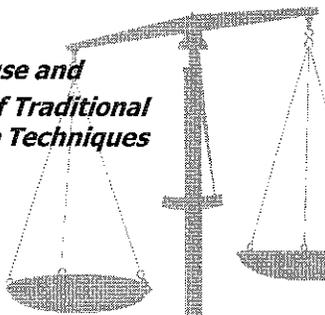
Non-Drug Wiretap Cases?

- Gang cases
- Gambling
- Homicide/Cold Case Homicide
- Human Trafficking
- Child Pornography
- Stolen Property/Organized Retail Theft/Chop Shop
- Securities Fraud



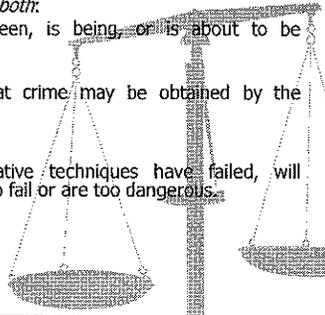
Legal Requirements

- 1) **Probable Cause and**
- 2) **Exhaustion of Traditional Investigative Techniques**



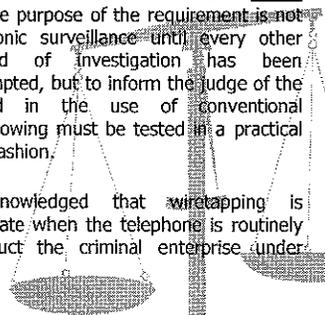
Legal Requirements

- Probable cause that *both*:
 - (1) a crime has been, is being, or is about to be committed
 - and*
 - (2) evidence of that crime may be obtained by the interception.
- Traditional investigative techniques have failed, will reasonably appear to fail or are too dangerous.



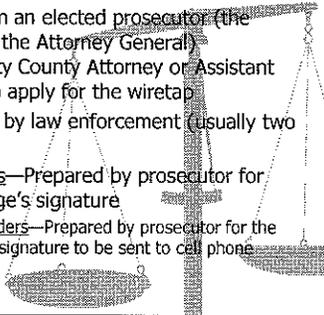
EXHAUSTION EXPLAINED

- Interception of communications need not be used **ONLY** as a last resort. The purpose of the requirement is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but to inform the judge of the difficulties involved in the use of conventional techniques. The showing must be tested in a practical and commonsense fashion.
 - Caveat
- Courts have acknowledged that wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation.



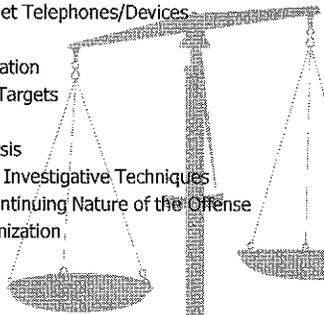
Wiretap Paperwork

- **Application**—Prosecutor must be the one to apply for the wiretap
- **Authorization**—From an elected prosecutor (the County Attorney or the Attorney General) authorizing a Deputy County Attorney or Assistant Attorney General to apply for the wiretap
- **Affidavit**—Prepared by law enforcement (usually two or more affiants)
- **Findings and Orders**—Prepared by prosecutor for the authorizing judge's signature
 - **Service Provider Orders**—Prepared by prosecutor for the authorizing judge's signature to be sent to cell phone company



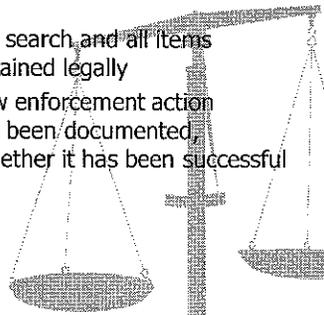
Sections of the Affidavit

- Introduction
- Identification of Target Telephones/Devices
- Affiants' Experience
- Goals of the Investigation
- Identification of the Targets
- Narrative
- Telephone Toll Analysis
- Failure of Traditional Investigative Techniques
- Basis for Request/Continuing Nature of the Offense
- Monitoring and Minimization
- Prior Applications



Pre-Wire Investigation

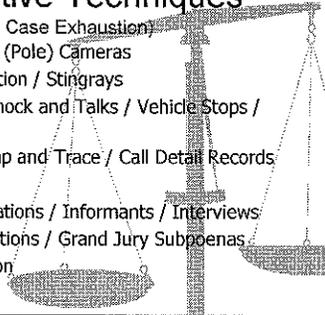
- Make sure every search and all items obtained are obtained legally
- Make sure all law enforcement action (everything) has been documented, regardless of whether it has been successful



Exhaustion—Traditional Investigative Techniques

(Drug Case Exhaustion)

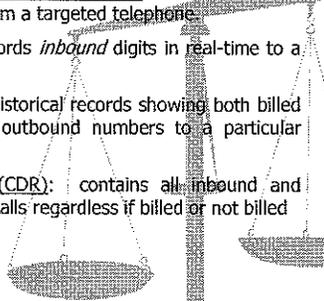
- Surveillance / Covert (Pole) Cameras
- GPS / Precision Location / Stingrays
- Search Warrants / Knock and Talks / Vehicle Stops / Consent Searches
- Pen Register and Trap and Trace / Call Detail Records
- Trash Runs
- Undercover Investigations / Informants / Interviews
- Grand Jury Investigations / Grand Jury Subpoenas
- Financial Investigation





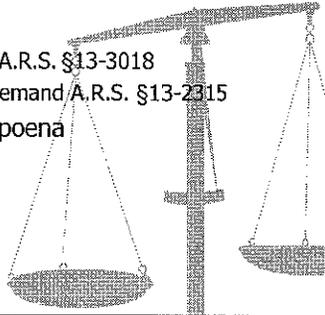
Pen Register/Trap and Trace

- **Pen Register/Dialed Number Recorder:** records *outbound* digits in real-time from a targeted telephone.
- **Trap and Trace:** records *inbound* digits in real-time to a targeted telephone.
- **Toll records:** billed historical records showing both billed inbound and billed outbound numbers to a particular phone.
- **Call Detail Report (CDR):** contains all inbound and outbound historical calls regardless if billed or not billed.



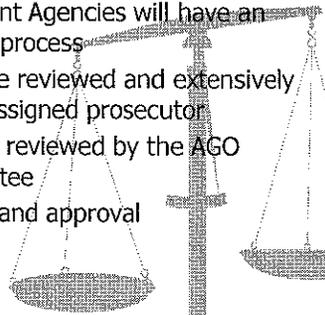
Types of Subpoena Duces Tecum

- Desk Subpoena
 - Phone records A.R.S. §13-3018
 - Racketeering Demand A.R.S. §13-2315
- Grand Jury Subpoena
- Trial Subpoena



Affidavit Review Process

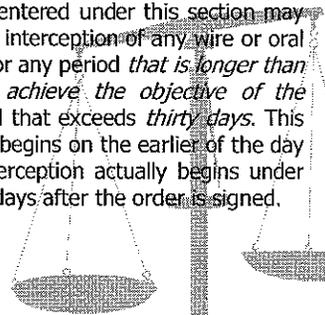
- Law Enforcement Agencies will have an internal review process
- Affidavits will be reviewed and extensively edited by the assigned prosecutor
- Affidavit will be reviewed by the AGO wiretap committee
- Judicial review and approval



Length of Interception

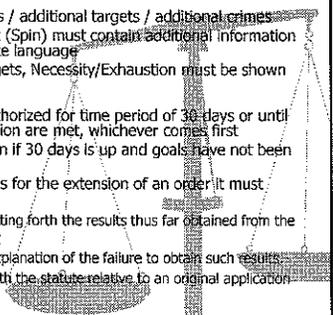
A.R.S. §13-3010(E)

- An order that is entered under this section may not authorize the interception of any wire or oral communication for any period *that is longer than is necessary to achieve the objective of the authorization* and that exceeds *thirty days*. This thirty day period begins on the earlier of the day on which the interception actually begins under the order or ten days after the order is signed.



Amended Affidavits / Spins and Extensions

- Spins
 - For additional lines / additional targets / additional crimes
 - Amended Affidavit (Spin) must contain additional information and not boiler plate language
 - For additional targets, Necessity/Exhaustion must be shown
- Extensions
 - Wires are only authorized for time period of 30 days or until goals of investigation are met, whichever comes first
 - Apply for extension if 30 days is up and goals have not been met
 - If the application is for the extension of an order it must contain:
 - a statement setting forth the results thus far obtained from the interception, or
 - a reasonable explanation of the failure to obtain such results
 - Must comply with the statute relative to an original application



“ROVING” WIRETAPS

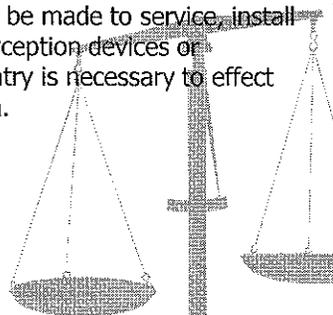
- Roving interceptions are permissible only when the applicant demonstrates that a particular identified individual/individuals can be expected to use numerous telephones or locations to discuss their crimes as a means of evading surveillance.
- The roving wiretap provision requires the application to show and the judge to find that the targeted individual switches telephones for the purpose of thwarting surveillance.
- Practical concerns

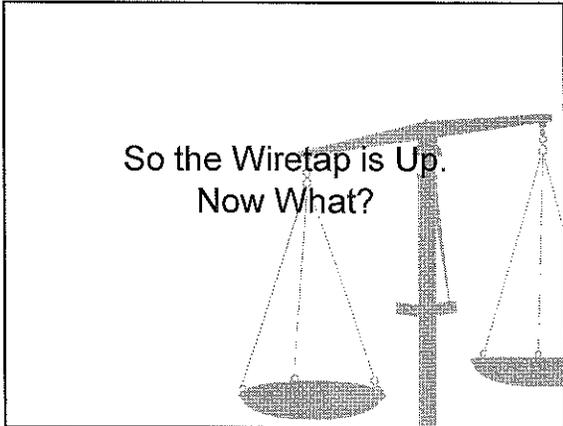


Installation of Listening Devices

A.R.S. § 13-3010(D)7

- That entry may be made to service, install or remove interception devices or equipment if entry is necessary to effect the interception.





Minimization Briefing



- Minimization: Law enforcement must conduct the wiretap so as to minimize the interception of communications not specified in the order and privileged communications:
 - Non criminal conversations
 - Privileged Communications
 - Attorney/Client
 - Crime-Fraud Exception
 - Marital Privilege
 - Physician/Patient
 - Clergy/Parishioner
 - Crimes not covered by court order

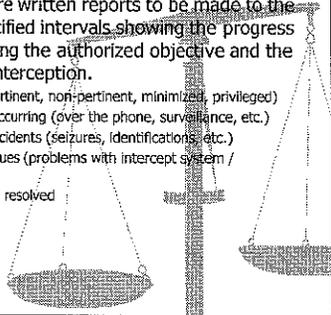
Monitoring

- If the intercepted communication is in a code or foreign language and an expert in that code or foreign language is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after the interception (A.R.S. § 13-3010(M)).
- An interception under this chapter may be conducted in whole or in part by government personnel or by an individual operating under a contract with the government or acting under the supervision of a law enforcement officer who is authorized to conduct the interception (A.R.S. § 13-3010(N)).

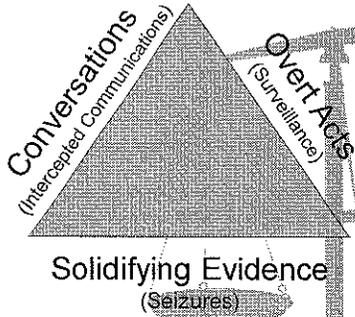
Judge's Reports

(A.R.S. § 13-3010(K))

- The order may require written reports to be made to the issuing judge at specified intervals showing the progress made toward achieving the authorized objective and the need for continued interception.
 - Report the statistics (pertinent, non-pertinent, minimized, privileged)
 - Tell the judge what is occurring (over the phone, surveillance, etc.)
 - Report any exception incidents (seizures, identifications, etc.)
 - Report any technical issues (problems with intercept system / malfunctions)
 - Report how issues were resolved



Triangle of Success

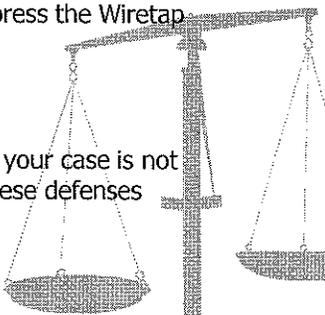




Defenses in Drug Wiretap Cases

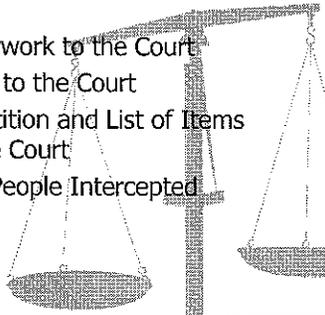
- Motions to Suppress the Wiretap
- It's not me
- It's not drugs

- Ways to ensure your case is not vulnerable to these defenses



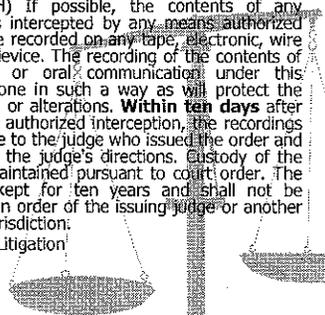
End of Interception Procedures A.R.S. §§13-3010 (G) & (H)

- Sealing of Disks
- Return of Paperwork to the Court
- Return of Disks to the Court
- Termination Petition and List of Items Returned to the Court
- Notification of People Intercepted



Sealing of Disks

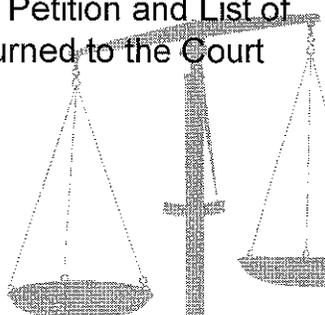
- A.R.S. § 13-3010 (H) If possible, the contents of any communication that is intercepted by any means authorized by this section shall be recorded on any tape, electronic, wire or other comparable device. The recording of the contents of any wire, electronic or oral communication under this subsection shall be done in such a way as will protect the recording from editing or alterations. **Within ten days** after the termination of the authorized interception, the recordings shall be made available to the judge who issued the order and shall be sealed under the judge's directions. Custody of the recordings shall be maintained pursuant to court order. The recordings shall be kept for ten years and shall not be destroyed except on an order of the issuing judge or another judge of competent jurisdiction.
- BUT—Beware Recent Litigation



Sealing of Paperwork

- A.R.S. § 13-3010 (G) Within ten days after the termination of the authorized interception, applications made and orders granted under this section shall be returned to and sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. The applications and orders shall be disclosed only on a showing of good cause before a judge of competent jurisdiction or as otherwise provided.

Termination Petition and List of Items Returned to the Court



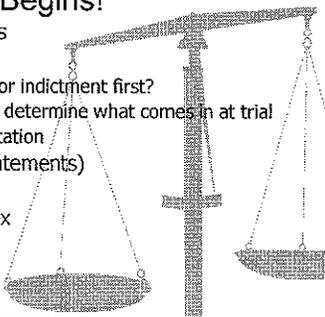
Notification

A.R.S. § 13-3010(I)

- Within **ninety days** after an application under subsection A is denied, or the period of an order or any extension expires, the issuing or denying judge shall serve the persons named in the order or application and any other parties to the intercepted communications as the judge may determine the interests of justice require with an inventory, including notice of all of the following:
 - The fact of the entry of the order or the application.
 - The date of the entry and the period of authorized interception, or the denial of the application.
 - The fact that during the period of authorized interception wire, electronic or oral communications were or were not intercepted. On motion, the judge may make available to the person or the person's attorney for inspection such portions of the intercepted communications, applications and order as the judge determines to be in the interest of justice. On an ex parte showing of good cause to the judge, the serving of the notice required by this subsection may be postponed.

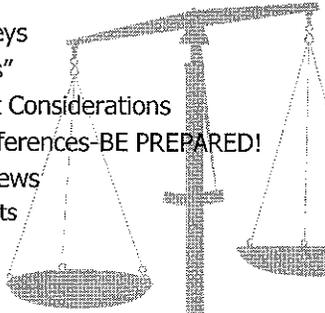
Prosecution of the Wire— Now the Work (I Mean Fun) Really Begins!

- Charging Notebooks
- The Indictment
 - When? Takedown or indictment first?
 - Charges and dates determine what comes in at trial
 - Grand Jury presentation
- Form IVs (or PC statements)
- Discovery
 - Organization--Index
 - Delivery
- Transcripts



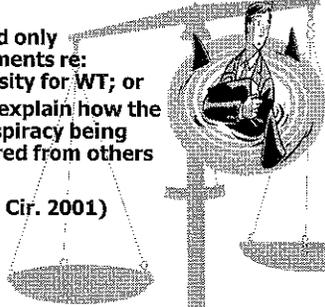
Logistics of Prosecuting a Wire Case

- Defense Attorneys
- "Show and Tells"
- Plea Agreement Considerations
- Settlement Conferences-BE PREPARED!
- Defense Interviews
 - How to herd cats



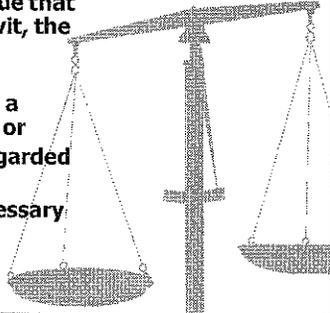
BOILER PLATE LANGUAGE

- **Defense Will Argue:**
 - Affidavit contained only generalized statements re: exhaustion/necessity for WT; or
 - Affidavit failed to explain how the organization/conspiracy being investigated differed from others
 - *US v. Blackmon*, 272 F.3d 1204 (9th Cir. 2001)



Franks v. Delaware

- Defense will argue that in the WT affidavit, the affiants:
- Intentionally or knowingly made a false statement, or
- Recklessly disregarded the truth; and
- A hearing is necessary.



Franks v. Delaware



- However, **NO EVIDENTIARY HEARING UNLESS:**
- Allegations are more than conclusory
- Alleged violations are material
- Defense provides an offer of proof

