Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD Date: Monday, Sept. 12, 2016
Re: *United States v. Carey,* 2016 WL 4651408 (9th Cir. Sept. 7, 2016): ***Wiretaps****:* New "plain hearing" exception applied to Title III tap (that got wrong guy!)

"Well, if you're going to wiretap your people you are going to hear things."

Players: Decision by Judge Gould, joined by Judge W. Fletcher. Dissent by Judge Kozinski.

Facts: Feds got a Title III order to tap a suspected drug dealer, Escamilla. *Id.* at *1. They listened to calls on the target line for seven days, and *at some point* they realized the target, Escamilla, wasn't using this line. *Id.* After consulting with AUSAs, *id.* at *2, agents continued listening. *Id.* at *1. Based on these intercepted calls, Carey was eventually indicted for a conspiracy to distribute cocaine. *Id.* Carey's motion to dismiss was denied. *Id.*

Issue(s): "Carey moved to suppress the evidence obtained from the wiretaps, arguing that the government violated the Wiretap Act by never applying for a wiretap as to him or his coconspirators." *Id.* "In Carey's view, the government instead had unlawfully relied on the validity of the Escamilla order to justify the independent and unrelated use of wiretap surveillance against Mr. Carey." *Id.* at *2. "Here the government showed [Title III] necessity and probable cause for a wiretap of the target conspiracy. But what happens when a wiretap that is valid at its inception is later used to listen to someone who is not involved in the conspiracy under surveillance? It is that novel question to which we turn our attention." *Id.* at *4. "The question here is whether the government could use that valid wiretap to listen to unrelated people's phone calls . . ." *Id.* at *5.

Held: "The Fourth Amendment provides an exception to the warrant or probable cause requirement when police see contraband in 'plain view.' We adopt a similar principle today and hold that the police may use evidence obtained in "plain hearing" when they overhear speakers unrelated to the target conspiracy while listening to a valid wiretap, without having complied with the Wiretap Act requirements of probable cause and necessity as to those specific speakers. However, the agents must discontinue monitoring the wiretap once they know or reasonably should know that the phone calls only involved speakers outside the target conspiracy." *Id.* at *1. "The district court did not apply these principles, and the record in this case does not show exactly when agents knew or should have known that the phone conversations did not involve Escamilla and his coconspirators. We vacate the . . . denial of Carey's motion to suppress and remand to the district court on an open record to determine what evidence was lawfully obtained in 'plain hearing.'" *Id.* at *2. "[O]nce the officers know or should know they are listening to conversations outside the scope of the wiretap order, they must discontinue monitoring the wiretap until they secure a new wiretap order, if possible." *Id.* at *6.

Of Note: Brief opinion, big new rules. In a holding of first impression aggravating to the defense, Judge Gould holds that the Fourth Amendment "plain view" exception expands to "plain hearing" in a Title III wiretap. In a holding of first impression aggravating to the government, Judge Gould limits that exception by requiring agents to *stop* listening once they realize the Title III target isn't on the line. Where's the next round of litigation? Whether the inevitable downstream Title III application will have adequate necessity and probable cause showings to justify the tapping order of the schmo unlucky enough to have the original target's number.

How to Use: The government groused that the original order allowed the use of communications relating to "other crimes." *Id.* at *5. *Carey* agrees – but helpfully observes that the order limited collateral intercepts to when feds listened *in a manner authorized by the order*. *Id.* A useful (albeit obvious) principle and a good cite when fighting Title III taps: wiretap orders have internal limits, and those limits should be respected.

For Further Reading: From 2007 through 2015, NorCal DJs have ordered 35 (non-terrorism) wiretaps that have been terminated. A whopping 45% of the taps granted over these 8 years ***originated in 2015 alone***. Notably, 68% of the 2015 wiretap orders were signed by Oakland DJs. In 15 of the 16 wiretaps initiated in 2015 there is "no prosecutor report." Curious what the Feds are up to in your own district? Hit this site:
http://www.uscourts.gov/statistics/table/wire-a1/wiretap/2015/12/31