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## Eavesdropping Under New York and Federal Law: How New York is Departing from Long-Standing Interpretations Mirroring Federal Law - People V. Rabb

Cover Page Footnote

28-3

**EAVESDROPPING UNDER NEW YORK AND FEDERAL LAW:  
HOW NEW YORK IS DEPARTING FROM LONG-STANDING  
INTERPRETATIONS MIRRORING FEDERAL LAW**

**NEW YORK COURT OF APPEALS**

People v. Rabb<sup>1</sup>  
(decided February 15, 2011)

**I. INTRODUCTION**

Defendant Reginald Rabb was indicted by a grand jury for second-degree grand larceny and enterprise corruption for using coercive techniques against construction companies.<sup>2</sup> The Supreme Court denied defendant's motion to suppress, to which Rabb pled guilty to the previously-mentioned offenses, in addition to others.<sup>3</sup> Defendant was then sentenced to a term of eight-and-a-half to seventeen years' imprisonment.<sup>4</sup> Rabb's accomplice, Steven Mason, also pled guilty to most of the crimes committed by Rabb after the Supreme Court denied his motion to suppress, too.<sup>5</sup> Mason was sentenced to a prison term of seven-and-a-half to fifteen years.<sup>6</sup>

Both defendants appealed the judgment, alleging that the eavesdropping warrant application failed to meet the requirements necessary for permitting the use of electronic surveillance, and thus violated their Fourth Amendment rights.<sup>7</sup> Specifically, defendants

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<sup>1</sup> 945 N.E.2d 447 (N.Y. 2011).

<sup>2</sup> *Rabb*, 945 N.E.2d at 450.

<sup>3</sup> *Id.* Apart from the enterprise corruption and grand larceny charges, Rabb also pled guilty to attempted grand larceny and criminal possession of a weapon. *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* Mason pled guilty to all the same crimes as Rabb did except for the criminal possession of a weapon charge. *Rabb*, 945 N.E.2d at 450.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 448. The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

alleged that the People “failed to establish that normal investigative measures had been exhausted, were reasonably unlikely to succeed if tried, or were too dangerous to employ,” thereby violating New York Criminal Procedure Law section 700.15.<sup>8</sup> Pursuant to CPL 700.15, investigators may not utilize electronic eavesdropping as an initial first step, which is what Rabb and Mason believed they did.<sup>9</sup>

After review, the judgments were affirmed by the Appellate Division which held that the warrant applications complied with New York law and therefore the warrant was valid.<sup>10</sup> On appeal, the Court of Appeals found supporting evidence for this conclusion and affirmed the judgments against Rabb and Mason.<sup>11</sup> The purpose of this article is to analyze whether the Court of Appeals should have borrowed from CPL 700’s federal counterpart when following electronic eavesdropping procedures.

## II. THE OPINION—PEOPLE V. RABB

In 2002, the Labor Racketeering Unit of the New York District Attorney’s Office (“LRU”) commenced an investigation into suspected racketeering of Akbar’s Community Services (“AKS”), a minority labor coalition.<sup>12</sup> Derrick Walker and his associate, Frederick Rasberry, headed AKS and used the coalition to “force construction companies, under the threat of vandalism or intimidation, to hire coalition workers and/or pay money for ‘security’ from intimidation from other labor coalitions.”<sup>13</sup> To aid their investigation, the LRU planted an undercover investigator to pose as a construction company owner.<sup>14</sup>

Defendants Rabb and Mason were implicated in the criminal activities of Walker and Rasberry when, in May 2004, the undercover

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and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>8</sup> *Rabb*, 945 N.E.2d at 448.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 448-49.

<sup>11</sup> *Id.* at 453.

<sup>12</sup> *Id.* at 449.

<sup>13</sup> *Rabb*, 945 N.E.2d at 449.

<sup>14</sup> *Id.*

officer conducted an interview with another construction company owner.<sup>15</sup> The interviewee claimed not to have been contacted by either Walker or Rasberry, but rather by an agent for a company called P & D.<sup>16</sup> After obtaining telephone records, LRU discovered that this agent had placed over seventy calls to Walker and Rasberry over a six month period.<sup>17</sup> Moreover, investigators soon learned that the phone number on the agent's business card was registered to defendant Rabb.<sup>18</sup>

Around February 2005, an agent from another construction company approached LRU and claimed to have been confronted by a representative from P & D demanding that her company use laborers from the community on all of her job sites.<sup>19</sup> The business card the agent handed to her had the same phone number on it as the business card handed to the other contractor.<sup>20</sup>

After this incident, LRU applied for and was granted an eavesdropping warrant against Rabb in March of 2005.<sup>21</sup> The purpose of the surveillance, set forth in the warrant, was to “determine the full scope of Rabb’s leadership position in P & D and gather sufficient evidence to prosecute the participants in that illegal conduct.”<sup>22</sup> In November, LRU secured an eavesdropping warrant against Mason, setting forth the same goals.<sup>23</sup> LRU used the information gathered from these warrants to aid its prosecution, and both Mason and Rabb pled guilty to, most significantly, enterprise corruption.<sup>24</sup>

Under New York law, an eavesdropping warrant may be issued only “[u]pon a showing 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 to employ.”<sup>25</sup> Additionally, “[a] full and complete statement of facts” confirming the existence of at least one of the above requirements must accompany an applica-

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Rabb*, 945 N.E.2d at 449.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 449-50.

<sup>23</sup> *Rabb*, 945 N.E.2d at 450.

<sup>24</sup> *Id.*

<sup>25</sup> N.Y. CRIM. PROC. LAW § 700.15(4) (McKinney 2011).

tion for an eavesdropping warrant.<sup>26</sup>

On appeal, both defendants challenged the judgments against them, asserting that investigators improperly used eavesdropping as an initial first step in the investigation against them and that these investigators did not provide a particularized showing that traditional investigative procedures were unlikely to succeed.<sup>27</sup> Additionally, Rabb alleges that the People failed to satisfy the particularity requirements in that they relied on their investigatory experiences with Walker and Rasberry rather than what actually happened during their investigation into Rabb.<sup>28</sup> Furthermore, defendants argued that the use and success of other surveillance techniques, such as “undercover operations, witness interviews and search warrants in the Walker/Rasberry investigation,” proves that normal investigative techniques would have provided the same success to their investigation, which would have invalidated the People’s argument that such procedures were unlikely to succeed.<sup>29</sup>

The Appellate Division and Court of Appeals disagreed with defendants and affirmed the judgments against them.<sup>30</sup> The Court of Appeals found that the People had sufficiently satisfied the requirements under N.Y. Criminal Procedure Law sections 700.15(4) and 700.20(2)(d).<sup>31</sup> According to the court’s analysis, wiretapping was not the initial step in LRU’s investigation of P & D: the application referenced the May 2004 meeting between the P & D agent and another construction contractor; the application acknowledged the registration of the phone number back to defendant Rabb and P & D; Rasberry implicated P & D in an interview with an LRU undercover agent; and evidence of continuous telephone communications between Rabb’s phone number and Walker, Rasberry, companies with known ties to organized crime, and companies that had previous encounters with Akbar.<sup>32</sup>

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<sup>26</sup> N.Y. CRIM. PROC. LAW § 700.20(2)(d) (McKinney 2011).

<sup>27</sup> *Rabb*, 945 N.E.2d at 451.

<sup>28</sup> *Id.* at 451. Defendants do not, however, challenge the trial court’s determination that the eavesdropping warrants were issued based upon probable cause. *Id.*; N.Y. CRIM. PROC. LAW § 700.15(2), (3), (5).

<sup>29</sup> *Rabb*, 945 N.E.2d at 451.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 451-52. As a result of the eavesdropping performed on Walker, the investigation turned up dozens of phone calls that took place between Walker and Rabb. *Id.* at 452.

Furthermore, the court found that the attempts to identify Rabb through other surveillance techniques proved unsuccessful.<sup>33</sup> In addition, the court noted how there was evidence in the record to support the lower court's finding that "normal investigative procedures were unlikely to succeed."<sup>34</sup> For example:

[T]he LRU investigator explained that physical surveillance was of limited use because, although it might show subjects meeting with each other, it would rarely allow LRU to hear the conversations, and that any attempts by LRU investigators to get closer to the subjects to hear the conversations would render it more likely that the subjects would discover they were under investigation.<sup>35</sup>

The application also pointed out how various avenues of evidence-gathering would also prove ineffective.<sup>36</sup> Search warrants would have an equal effect, creating a prospect that the confidentiality of the investigation would be compromised, leading to the destruction of inculpatory records.<sup>37</sup> Lastly, undercover operations with Akbar exposed their limitations, leading LRU to believe an investigation into P & D, a similar organization with similar activities, would be just as restrictive.<sup>38</sup>

The People drew on their "experiences from the Walker/Raspberry investigation" to demonstrate why "normal investigative techniques would be ineffective as to Rabb" and P & D.<sup>39</sup> Defendants contended that the use of general allegations against minority

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These phone conversations detailed collusive efforts between Akbar and P & D and also tipped off investigators where meetings between Walker and Rabb would take place. *Rabb*, 945 N.E.2d at 452. All efforts to observe these meeting, however, proved unsuccessful in identifying Rabb. *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 452-53.

<sup>36</sup> *Rabb*, 945 N.E.2d at 453. Issuing grand jury subpoenas would publicize the investigation to the custodians of business records, a grand jury investigation would be futile because the "witnesses were participants in the criminal conduct, and victims of that conduct would be unlikely to testify out of fear of retaliation." *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* LRU's undercover operations consisted mainly of paying Raspberry and Walker \$800 per month. *Id.* LRU came to the conclusion that a similar undercover investigation into P & G would be no more likely to succeed than the one against Akbar. *Id.*

<sup>39</sup> *Rabb*, 945 N.E.2d at 453.

labor coalitions failed to satisfy the requirement of particularity for eavesdropping warrants, but the court pointed to the intercepted phone calls, collusive efforts to conduct criminal activities, and the similarities of the two organizations' objectives to reject their contentions.<sup>40</sup>

In short, the Court of Appeals ruled that although eavesdropping is prohibited as a routine initial step in surveillance, law enforcement officials are not required to resort to futile techniques.<sup>41</sup> In other words, it is unnecessary for law enforcement to exhaust all conceivable techniques that will clearly be unproductive before resorting to electronic surveillance.<sup>42</sup> It is sufficient for an affidavit to describe how standard techniques have been tried or would be ineffective in order to satisfy CPL 700.15 and 700.20, as was the case here.<sup>43</sup>

### III. THE FEDERAL APPROACH AND ITS INFLUENCE ON THE NEW YORK LEGISLATURE

Intercepting conversations via electronic devices is considered a search under the Fourth Amendment.<sup>44</sup> In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act ("Title III") to provide guidance when wiretap evidence is at issue.<sup>45</sup> Title III was a response to the United State Supreme Court's ruling in *Berger v. New York*,<sup>46</sup> where the Court held that eavesdropping warrants must state with particularity the premises to be searched and the persons to be seized.<sup>47</sup> Title III satisfies the Court's requirements by "incorporat[ing] the Fourth Amendment's protections by placing probable cause and particularity conditions on the issuance of a wiretap."<sup>48</sup> As such, electronic surveillance that comports with the re-

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (citing *United States v. Concepcion*, 579 F.3d 214, 218 (2d Cir. 2009)).

<sup>43</sup> *Id.* (citing *United States v. Terry*, 702 F.2d 299, 310 (2d Cir. 1983)).

<sup>44</sup> *See Berger v. New York*, 388 U.S. 41, 51 (1967) (holding that the interception of a conversation via an electronic device is a search within the meaning of the Fourth Amendment); *see also* U.S. CONST. amend. IV, *supra* note 7.

<sup>45</sup> *United States v. Serrano*, 450 F. Supp. 2d 227, 235 (S.D.N.Y. 2006).

<sup>46</sup> 388 U.S. 41 (1967).

<sup>47</sup> *Id.* at 55.

<sup>48</sup> *Serrano*, 450 F. Supp. 2d at 235 (quoting *United States v. Segura*, No. 3:99CR85(EBB), 2001 WL 286850, at \*3 (D. Conn. Feb. 27, 2001)).

quirements under Title III satisfies the Fourth Amendment.<sup>49</sup>

In *Berger*, the constitutionality of New York's then-current eavesdropping statute was called into question.<sup>50</sup> Section 813-a of New York's Code of Criminal Procedure authorized the use of eavesdropping upon "oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof . . . ."<sup>51</sup> This oath had to establish a "reasonable ground to believe that evidence of crime may be thus obtained, and particularly describe[ing] the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof . . . ."<sup>52</sup>

While this statute satisfied the Fourth Amendment by requiring a neutral and independent authority to issue the order,<sup>53</sup> the broad application and scope of the statute is what immediately captured the attention of the Supreme Court.<sup>54</sup> The Court noted that there was a probable cause problem with the statute's language, which allowed a warrant to be issued upon a showing that "there [are] reasonable ground[s] to believe that evidence of crime may be thus obtained . . . ."<sup>55</sup> This was an issue because, according to the Supreme Court, "[p]robable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed."<sup>56</sup> Having reasonable grounds to believe that the issuance of this warrant may lead to evidence of a crime is clearly not the same as believing that a crime has taken place or will soon take place.

Thus, New York's eavesdropping statute lacked the particu-

<sup>49</sup> See *United States v. Bianco*, 998 F.2d 1112, 1121 (2d Cir. 1993) ("[S]urveillance that is properly authorized and carried out under Title III complies with the fourth amendment.").

<sup>50</sup> *Berger*, 388 U.S. at 43.

<sup>51</sup> *Id.* at 54.

<sup>52</sup> *Berger*, 388 U.S. at 70 (Black, J., dissenting).

<sup>53</sup> See *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("[The Fourth Amendment's] protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

<sup>54</sup> *Berger*, 388 U.S. at 54.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 55.

larity requirements the Fourth Amendment demands and as such it was ruled to be unconstitutional.<sup>57</sup> In response to the Court's holding, Congress enacted Title III to address *Berger's* concerns regarding the Fourth Amendment and to set forth the requirements for issuing an eavesdropping warrant.<sup>58</sup> In addition, New York also responded to the decision by formulating a new eavesdropping statute that was heavily influenced by Title III.<sup>59</sup> In many respects, New York's current eavesdropping statute, codified as CPL 700, contains provisions that are identical or substantially the same as its federal counterpart.<sup>60</sup>

For example, in New York, the application to obtain an eavesdropping warrant cannot be granted without "a showing 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 to employ."<sup>61</sup> In addition, the application for the warrant must contain "[a] full and complete statement of facts establishing" those showings.<sup>62</sup> Likewise, Title III requires an electronic surveillance warrant application to contain "a full 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."<sup>63</sup> Federal law also requires the judge granting the warrant to determine 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."<sup>64</sup>

<sup>57</sup> *Id.* at 64.

<sup>58</sup> *Rabb*, 945 N.E.2d at 454 (Lippman, C.J., dissenting).

<sup>59</sup> *Serrano*, 450 F. Supp.2d at 236 n.76 ("The federal and New York State statutory requirements for obtaining an electronic eavesdropping warrant are basically the same and there is no discernible difference between federal and state case law regarding these requirements."). In *Rabb*, Judge Pigott, writing for the majority, noted how it was the New York State Legislature's intention to "conform 'State standards for court-authorized eavesdropping warrants with federal standards.'" *Rabb*, 945 N.E.2d at 450 (quoting *People v. McGrath*, 385 N.E.2d 541, 547 (N.Y. 1978)).

<sup>60</sup> *Id.* at 450 (noting that it was not merely coincidental that the provisions of Title III and CPL 700 are substantively identical because it was the New York Legislature's intent to conform New York eavesdropping standards to that of federal standards).

<sup>61</sup> N.Y. CRIM. PROC. LAW § 700.15.

<sup>62</sup> N.Y. CRIM. PROC. LAW § 700.20(2)(d).

<sup>63</sup> 18 U.S.C. § 2518(1)(c) (2006).

<sup>64</sup> 18 U.S.C. § 2518(3)(c). It is a prerequisite under both New York and federal law to demonstrate that less intrusive investigation techniques had be tried or would be futile if attempted. *See United States v. Lilla*, 699 F.2d 99, 102 (2d Cir. 1983) ("Both [New York and

In addition, neither New York law nor federal law requires law enforcement agents to exhaust all other possible avenues of surveillance before resorting to electronic surveillance.<sup>65</sup> So long as employing a wiretap is not a routine initial step or used when traditional investigative techniques would be sufficient, the use of a wiretap will be valid.<sup>66</sup> All that is required for an electronic surveillance warrant is a demonstration that those traditional techniques would fail or be likely to fail.<sup>67</sup>

#### IV. INSTANCES WHERE NEW YORK PROVIDES EQUAL OR MORE PROTECTION THAN TITLE III

Despite the identical, or at the very least substantially similar language of CPL 700 to Title III, the New York Court of Appeals has interpreted some provisions of CPL 700 more narrowly than Title III. For example, in *People v. Washington*,<sup>68</sup> law enforcement officers failed to seal the tape recording from electronic surveillance until thirty-nine days after the expiration of the warrant.<sup>69</sup> CPL 700.50(2) requires the officers to present the recordings to a judge “immediately upon the expiration of the period of an eavesdropping or video sur-

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federal law] require a showing that investigative procedures less intrusive than a wiretap have been tried or are unlikely to succeed if tried.”)

<sup>65</sup> See *Sarrano*, 450 F. Supp. 2d at 236 (“Neither the New York nor the federal statute requires that any particular investigative procedures be exhausted before a wiretap may be authorized.” (quoting *Lilla*, 699 F.2d at 104)).

<sup>66</sup> See *United States v. Kahn*, 415 U.S. 143, 153 n.12 (noting how the New York and federal statutes are “designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime”). Because CPL § 700 is substantively identical to Title III, the Court of Appeals in *Rabb* cited to federal law as persuasive authority to establish that law enforcement officials need not “exhaust all conceivable investigative techniques before resorting to electronic surveillance.” *Rabb*, 945 N.E.2d at 452 (citing *Concepcion*, 579 F.3d at 218).

<sup>67</sup> See *United States v. Giordano*, 416 U.S. 505, 515 (1974) (explaining that applicant for a wiretap “must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous” (citing 18 U.S.C. §§ 2518(1)(c), (3)(c))); see also *Lilla*, 699 F.2d at 103 (stating that an affidavit “must provide some basis for concluding that less intrusive investigative procedures are not feasible”). *But see* *United States v. Maxwell*, 25 F.3d 1389, 1394 (8th Cir. 1994) (“Even if conventional techniques have been somewhat successful, however, a wiretap may still be authorized.” (citing *United States v. O’Connell*, 841 F.2d 1408, 1415 (8th Cir. 1988), *cert. denied*, 487 U.S. 1210 (1988), *and*, 488 U.S. 1011 (1989))).

<sup>68</sup> 385 N.E.2d 593 (N.Y. 1978).

<sup>69</sup> *Id.* at 594.

veillance warrant.”<sup>70</sup> The court ruled that the tapes were due to the judge immediately upon the expiration of that particular warrant or extension, and not at the termination of the original order.<sup>71</sup> On the contrary, in *United States v. Fury*,<sup>72</sup> the Second Circuit held that the government only needed to seal the tapes once the extension of the original order was terminated.<sup>73</sup>

In *People v. Winograd*,<sup>74</sup> the police failed to seal and present the tapes to a different justice when the issuing justice was unavailable due to a religious holiday.<sup>75</sup> The Court of Appeals held that the mistake by the police did not constitute a valid excuse and the tapes should have been suppressed.<sup>76</sup> However, in *United States v. Massino*,<sup>77</sup> an excuse was provided and accepted by the court for failing to immediately seal the tapes, allowing the tapes to be admissible.<sup>78</sup> Furthermore, federal courts depart from the New York’s demand for immediacy, allowing for delays ranging from six to forty-two days depending on the circumstances.<sup>79</sup>

Perhaps one of the more significant departures of CPL 700 from Title III was the New York Legislature’s intent to use eavesdropping as a primary weapon against organized crime.<sup>80</sup> The court

<sup>70</sup> *Id.*; N.Y. CRIM. PROC. LAW § 700.50(2).

<sup>71</sup> *Washington*, 385 N.E.2d at 598.

<sup>72</sup> 554 F.2d 522 (2d Cir. 1977).

<sup>73</sup> *Id.* at 533.

<sup>74</sup> 502 N.E.2d 189 (N.Y. 1986).

<sup>75</sup> *Id.* at 191.

<sup>76</sup> *Id.* at 195. *See also* *People v. Gallina*, 485 N.E.2d 216, 220 (N.Y. 1985) (“Inadequate police procedures, apparently responsible for the delay, do not constitute a valid excuse. Nor does the unavailability of the issuing justice constitute a valid excuse for the failure to timely seal the tapes produced by wiretap four in a county where several other justices are present each business day.” (citing *Washington*, 385 N.E.2d at 597-98)).

<sup>77</sup> 784 F.2d 153, 157 (2d Cir. 1986).

<sup>78</sup> *Id.* at 158. *See also* *Fury*, 554 F.2d at 533 (holding that a six-day delay due to the unavailability of the supervising judge was a reasonable excuse).

<sup>79</sup> *See* *United States v. McGrath*, 622 F.2d 36, 43 (2d Cir. 1980) (holding that a “relatively short” delay of three to eight days is excusable where the tapes have to be shipped to their destination); *United States v. Scafidi*, 564 F.2d 633, 641 (2d Cir. 1977) (holding that a seven-day delay where there was a lack of bad faith or attempt to evade the statute’s provisions was excusable); *United States v. Poeta*, 455 F.2d 117, 122 (2d Cir. 1972) (holding that a thirteen-day delay caused by confusion over which judge would seal the tapes did not require suppression); *United States v. Caruso*, 415 F. Supp. 847, 851 (S.D.N.Y. 1976) (holding that twenty-four and forty-two day delays do not warrant suppression when efforts were made to prepare the tapes for sealing and when the prosecutor heading the investigation was hospitalized).

<sup>80</sup> *Rabb*, 945 N.E.2d at 451.

in *Rabb* acknowledged how former Governor Rockefeller championed the eavesdropping law for providing “greater flexibility in the employment of eavesdropping as an effective weapon against crime[,]” especially against organized crime where evidence is often difficult to collect for prosecution.<sup>81</sup> The New York Legislature recognized the “tight structure of organized crime groups, their use of brutal force to discourage informants, and the high degree to which key members have insulated themselves from criminal liability.”<sup>82</sup> Therefore, traditional investigative and surveillance techniques most frequently result in the arrest and conviction of lower-echelon members of organized crime groups and not the leaders.<sup>83</sup> By contrast, no federal laws or cases emphasize the importance or use of eavesdropping as it relates to organized crime.<sup>84</sup>

In other ways, however, the Court of Appeals has interpreted identical or substantially similar provisions in ways that demand no more than what the federal law requires. Neither CPL 700 nor Title III requires that the eavesdropping warrant specifically state the telephone number to be tapped.<sup>85</sup> Instead, as long as the telephone line is specified in the application, the electronic surveillance will be upheld.<sup>86</sup>

Additionally, Title III requires law enforcement officials to file progress reports if the issuing judge so demands,<sup>87</sup> usually in order to facilitate the judge’s supervision of the wiretap.<sup>88</sup> However, the Second Circuit in *United States v. Scafidi*<sup>89</sup> denied the defendant’s

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at 455 (Lippman, C.J., dissenting) (noting that Title III contains “no special dispensation for organized crime investigations”).

<sup>85</sup> *See generally* 18 U.S.C. § 2518; N.Y. CRIM. PROC. LAW § 700.20.

<sup>86</sup> *See* *People v. Darling*, 742 N.E.2d 596, 600 (N.Y. 2000) (holding that the telephone number does not need to be stated in the warrant and noting that 18 U.S.C. § 2518 also does not require a specific telephone number). *See also* *United States v. Feldman*, 606 F.2d 673, 680 (6th Cir. 1979) (holding that listing the specific telephone numbers is not required under the particularity requirements of the Fourth Amendment or Title III).

<sup>87</sup> 18 U.S.C. § 2518(6).

<sup>88</sup> *See Scafidi*, 564 F.2d at 641 (stating that the progress reports are “designed to enable the district judge to evaluate the continuing need for surveillance”); *People v. Marino*, 403 N.E.2d 179, 180 (N.Y. 1980) (explaining that while CPL 700.50 does not mandate progress reports, a supervising judge may require them in order to be informed of the status of the investigation).

<sup>89</sup> 564 F.2d 633 (2d Cir. 1977).

motion to suppress the eavesdropping evidence despite the government's failure to file the reports in a timely fashion.<sup>90</sup> Similarly, in *People v. Marino*,<sup>91</sup> the Court of Appeals held that the failure of the District Attorney to file progress reports as per CPL 700.50 did not warrant suppression of the eavesdropping tapes.<sup>92</sup> As such, the language of CPL 700.50 and its federal counterpart are substantively similar, and the sanctions imposed for violating those provisions are similar too.

#### V. INSTANCES WHERE NEW YORK CONFLICTS WITH FEDERAL INTERPRETATIONS BY OFFERING LESS PROTECTION THAN TITLE III

It is clear that Title III heavily influenced the New York Legislature when it drafted CPL 700. As mentioned above, the New York law relating to exhausting investigative methods and employing methods that would be useless or ineffective was largely borrowed from federal law.<sup>93</sup> However, there are also instances where New York did not borrow the interpretations of Title III and instead offers less protection.

As pointed out by the dissent in *Rabb*, it is arguable that the People did not satisfy the requirements for an eavesdropping warrant.<sup>94</sup> The warrant application against Rabb and P & D was granted after an investigation into Akbar and its principals, Walker and Raspberry.<sup>95</sup> At the time, investigators believed that Rabb was somehow connected to the racketeering activities of Akbar, but the extent of these activities was unascertained.<sup>96</sup> Moreover, the supporting affidavit accompanying the warrant application contained generalized statements about Rabb's activities, and most of the arguments in the affidavit were virtually identical to those arguments from the Akbar warrant application.<sup>97</sup>

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<sup>90</sup> *Id.* at 641.

<sup>91</sup> 403 N.E.2d 179 (N.Y. 1980).

<sup>92</sup> *Id.* at 180.

<sup>93</sup> *Rabb*, 945 N.E.2d at 450.

<sup>94</sup> *Id.* at 458-59 (Lippmann, C.J., dissenting).

<sup>95</sup> *Id.* at 455.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 456-57. The dissent noted that the allegations purporting to establish a need for a wiretap occupied less than four pages of the entire sixty-four page affidavit. *Rabb*, 945

The most important aspect of the dissent's analysis is noting the lack of particulars in the warrant application which are required by the Fourth Amendment when granting an eavesdropping warrant.<sup>98</sup> In the affidavit, the People only noted "a number" of traditional surveillance attempts at identifying Rabb or P & D before applying for an eavesdropping warrant, claiming that "normal investigative procedures [had] been tried and [had] failed."<sup>99</sup> Most of the supporting information in the affidavit was based solely on the investigation into Akbar and not into Rabb.<sup>100</sup> It appeared as though the court granting the warrant relied on the results of normal investigative methods used against Akbar to determine that those same methods would be ineffective against Rabb.<sup>101</sup>

By permitting a judge to issue a warrant against one organization based on the successful – or unsuccessful – nature of investigative techniques employed against a separate, albeit related organization, the court is circumventing constitutional protections.<sup>102</sup> Essentially, by reiterating the arguments made for the Akbar warrant, the People explained why the previous investigative methods failed for Akbar, not Rabb and P & D, therefore failing to satisfy CPL 700.15(4) and 700.20(2)(d).<sup>103</sup>

Several federal cases have addressed similar situations as this one, providing greater clarity and interpretation for New York's statutory counterpart. For example, in *United States v. Santora*,<sup>104</sup> an

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N.E.2d at 456-57 (Lippmann, C.J., dissenting). In addition, most of those arguments were "barely distinguishable" from the arguments set forth against Walker and Rasberry, drawing the inference that the government just substituted those names for Rabb and P & D. *Id.* at 456.

<sup>98</sup> *Id.* at 457.

<sup>99</sup> *Id.* at 456.

<sup>100</sup> *Id.*

<sup>101</sup> *Rabb*, 945 N.E.2d at 456 (Lippmann, C.J., dissenting).

<sup>102</sup> This bears on the particularity requirements needed to issue a warrant. The grounds for issuing the warrant must be specific to the person against whom the warrant is being issued. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). Substituting the particulars from one investigation to another ignores the particularity requirements for the specific investigation. *United States v. Gonzalez, Inc.*, 412 F.3d 1102, 1115 (9th Cir. 2005).

<sup>103</sup> *Rabb*, 945 N.E.2d at 457. *See also* *United States v. Abascal*, 564 F.2d 821, 826 (9th Cir. 1977), *cert. denied*, 435 U.S. 942 (1978) ("Less intrusive investigative procedures may succeed with one putative participant while they may not succeed with another.").

<sup>104</sup> 600 F.2d 1317 (9th Cir. 1979).

initial eavesdropping warrant had been granted for an investigation into a conspiracy for selling airline tickets, but the court refused to grant subsequent eavesdropping warrants during the same investigation.<sup>105</sup> The court determined that the applications for the subsequent warrants were not sufficiently made out and that the government could not “dispense with the required [particularity] showing when applying to tap the telephones of other conspirators.”<sup>106</sup> Similarly, in *United States v. Gonzalez, Inc.*,<sup>107</sup> the court found that previously issued eavesdropping warrants did not provide a sufficient basis to demonstrate the necessity of further wiretaps.<sup>108</sup>

This is the first instance where the Court of Appeals has directly departed from the federal approach concerning electronic eavesdropping. In *Rabb*, the court issued an eavesdropping warrant against Rabb and P & D solely based on the People’s prior experience with their investigation into Akbar.<sup>109</sup> Although P & D and Akbar were similar organizations with similar objectives, there is little to no evidence supporting a claim that both were engaged in a racketeering conspiracy or criminal enterprise.<sup>110</sup>

The dissent explained how, even if there had been any supporting evidence, “the showing of necessity made in justification of the Akbar wiretaps was not transferrable to support the P & D wiretaps.”<sup>111</sup> In essence, the majority dispensed with the necessity requirement for Rabb and P & D to justify transferring the necessity found for employing wiretaps against Akbar to Rabb.<sup>112</sup> This is in direct conflict with federal case law where courts have expressly forbidden dispensing with the statutorily mandated showing of necessity

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<sup>105</sup> *Id.* at 1321-22.

<sup>106</sup> *Id.* at 1321.

<sup>107</sup> 412 F.3d 1102 (9th Cir. 2005).

<sup>108</sup> *Id.* at 1115 (“[T]he government is not free to transfer a statutory showing of necessity from one application to another—even within the same investigation. This court has held that an issuing judge may not examine various wiretap applications together when deciding whether a new application meets the statutory necessity requirement. Each wiretap application must separately satisfy the necessity requirement.”). See *United States v. Carneiro*, 861 F.2d 1171, 1180-81 (9th Cir. 1988) (invalidating subsequent applications for wiretaps despite upholding the order granting the initial wiretap because the government failed to show that particularized investigative methods were employed against each suspect and were unsuccessful or unlikely to be successful).

<sup>109</sup> *Rabb*, 945 N.E.2d at 452.

<sup>110</sup> *Id.* at 459 (Lippman, C.J., dissenting).

<sup>111</sup> *Id.* (citing *Santora*, 600 F.2d at 1321-22; *Gonzalez*, 412 F.3d at 1115).

<sup>112</sup> *Rabb*, 945 N.E.2d at 459.

for a particular organization or person, regardless of their association with the initial suspect or organization for which the original warrant was issued.<sup>113</sup>

Because New York statutory law and case law regarding eavesdropping has a history of being influenced by Title III and other federal cases, the dissent felt the court should have adopted this interpretation of CPL 700. Under this interpretation, the affidavit would have been inadequate to support the issuance of the warrant, leading to the suppression of the tapes against Rabb and Mason.<sup>114</sup> It is unclear whether the Court of Appeals knowingly departed from the federal approach or did so indirectly. However, the fact remains that this was the initial step to taking New York law on eavesdropping in a direction away from established federal case law. Given the history of New York mirroring its interpretations of its own laws on eavesdropping on the federal approach, though, it is unlikely that this decision will significantly impact the future of eavesdropping law in New York.

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<sup>113</sup> See *Santora*, 600 F.2d at 1321-22; *Gonzalez*, 412 F.3d at 1115.

<sup>114</sup> *Rabb*, 945 N.E.2d at 460 (Lippman, C.J., dissenting). See *id.* at 458 (“There, of course, was no remotely comparable history to recount with respect to the newly commenced investigation of ‘Divine’ and P & D, and in its absence the affidavit’s pat recitation of difficulties endemic to organized crime probes was patently insufficient to explain why ordinary investigative means would likely be fruitless with respect to ‘Divine’ and P & D.”).

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