

TO: Michigan District Judges Association

FROM: Judge Kirk Tabbey, Chair- Information/Technology Committee

RE: District Court Search Warrants issued under the ECPA

DATE: 01/11/2017

RESEARCH MEMORANDUM

QUESTION PRESENTED:

Recently an issue has been revived concerning the authority of the District Court to issue Search Warrants under the Electronic Communications Privacy Act (ECPA) 18 U.S.C. Sec. 2703(a). The question arose due to the language used in the Act defining a “court of competent jurisdiction”, as including “...a court of general criminal jurisdiction of a State authorized by the law of that state to issue search warrants.” 18 U.S.C. Sec. 2711(3) (B). The question is whether the language in ECPA granting jurisdiction for state courts to issue search warrants, limits this authority in Michigan to circuit courts because circuit courts in Michigan are defined as being “a court of general criminal jurisdiction...”, regardless of the remaining language in the sentence that modifies this phrase, “of a State authorized by the law of that State to issue search warrants”?

MICHIGAN CONSTITUTION:

Constitution 1963, Article 6, Section 1

“The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.”

STATUTES:

18 U.S.C. Sec. 2703(a) provides that search warrants may be issued “by a court of competent jurisdiction”. At the federal level, that includes a federal district or circuit court that “has jurisdiction over the offense being investigated (or) is in or for a district in which the provider of a wire or electronic communication service is located.”

18 U.S.C. Sec. 2711(3)(B). At the state level, it includes “a court of general criminal jurisdiction of a State authorized by the law of that State to issue search warrants.”

MCL 600.8301 “the district court is a court of record”

MCL 600.8304 “In a district court district in which the district court is affected by a plan of concurrent jurisdiction adopted under Chapter 4, the district court has concurrent jurisdiction with the circuit court or probate court, or both, as provided in the plan of concurrent jurisdiction,…”

MCL 780.651 “A judge” includes district and circuit judges.

MCL 750.54 “When complaint is made, on oath or affirmation, to any magistrate authorized to issue warrants in criminal cases, ... such magistrate, ... shall issue and deliver a search warrant... “

MCL 750.145d regarding criminal use of the internet, telecommunications or computer system, gives jurisdiction to Michigan for any violation or attempted violation in any jurisdiction in which the communication originated or terminated.

MCL 762.2 in the Code of Criminal procedure provides for the prosecution of individuals who commit crimes whether they are inside or outside the state, depending on whether the crime is partially committed here, or whether people are harmed or defrauded here.

MCL 767.1 Circuit, recorders’ and courts of record that have jurisdiction of criminal causes, shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon the informations for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein.

CASE LAW:

United States v Orisakwe, 624 F. App’x 149, 155 (5th Cir. 2015)

The Court held that the plain text of the federal statute permits a state to issue a search warrant if authorized by the law of that state. In this case there was no dispute that Nevada and Texas law authorized the search warrants issued to Facebook and Yahoo, by those state’s district courts, despite these entities’ storing the requested information outside the issuing state. N.R.S Sec. 193.340 & Tex. Code Crim. Proc. Ann. Art. 18.01. Both of these statutes contain no restrictions based on the company’s data being stored elsewhere.

United States v Gardner, No. 4:14-CR-61-1H, 2016 WL 2597530, a *6 (E.D.N.C. Apr. 1, 2016), report and recommendation adopted, No. 4:14-CR-61-1H, 2016 WL 2347870 (E.D.N.C. May 3, 2016)

North Carolina law states “...general jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice”. N.C. Gen. Stat. Sec. 7A-270. “A magistrate is an officer of the district court” N.C. Gen. Stat. Sec. 7A-170, and is empowered to “...issue search warrants valid throughout the county,” N.C. Gen. Stat. Sec. 7A-273. The Court found sufficient

State authority for issuing search warrants under ECPA for those courts as authorized by North Carolina Law.

Judges of the 74th Judicial District v Bay Co., 385 Mich 710 (1971)

The Michigan Constitution created “One Court of Justice” divided into different courts, including courts of limited jurisdiction created by statute. [Const 1963, art 6, Sec 1]. The statute creating the District Court refers to the court in the singular and states that the court is divided into administrative units called judicial districts. [MCL 600.8101(1)]. Michigan has but one District Court.

People v Fiorillo, 195 Mich. App. 701 (1992)

The statute governing the issuance of search warrants does not limit the authority of the warrants territorially. [MCL 780.651]. The limited jurisdiction language applies only to subject matter, not territory. “No constitutional or statutory limits exist which prevents the district court from issuing search warrants to be executed outside the county of issuance. Since there is only one district court within the state, there is no need for explicit statutory authorization allowing the district court to issue statewide search warrants.”

ARGUMENT:

The phrases used in ECPA “...court of general **criminal** jurisdiction...”, and in the Michigan Constitution “...court of general jurisdiction...” are the same except for the word “criminal” used in the ECPA. The position that this language was intended to and does prevent Michigan’s District Court from exercising its search warrant authority relies entirely on this similarity even though it is not identical, and completely disregards the remainder of the ECPA definition. The contrary position, which would not restrict ECPA search warrants in Michigan to only circuit courts, and is apparently the position of the Federal Courts that have reviewed this language in the ECPA, places the focus on the entire ECPA definition and gives greater weight to the State laws authorizing search warrant authority to the administrative divisions within the court system, regardless of the phrases used to determine subject matter jurisdiction between these same divisions.

The position taken by the Fifth Circuit Court of Appeals in ***Orisakwe, supra***, was that since both Texas and Nevada law authorized their state courts (circuit and district) to prosecute cases where evidence of those crimes existed outside their jurisdictions, thus requiring search warrants for outside their own criminal jurisdiction, the search warrants issued in those states under the ECPA were valid. Neither Texas nor Nevada law prevented the state courts from searching for evidence outside their territorial jurisdictions. Michigan statutes MCL 750.145d and 762.2 similarly authorize the state courts to prosecute cases outside their territorial jurisdictions and do not prevent the courts from searching for

evidence contained outside their jurisdiction. The Michigan Appeals Court in *Fiorillo, supra*, similarly ruled that Michigan law did not restrict the courts from searching for evidence of crimes outside their territory.

The position taken by the Federal District Court in *Gardner, supra*, is that the North Carolina Law that authorized courts to issue search warrants (which included the circuit and district divisions of that Court), does give authority to district courts of that state to issue search warrants under the ECPA. The North Carolina law reads: "...general jurisdiction for the trial of criminal actions is vested in the superior court and the district court divisions of the General Court of Justice." N.C. Gen. Stat. Sec. 7A-270. "A magistrate is an officer of the district court" N.C. Gen. Stat. Sec. 7A-170, and is empowered to "...issue search warrants..." N.C. Gen. Stat. Sec. 7A-273.

Similarly, Michigan's Constitution also divides the general criminal jurisdiction between the divisions of the "...one trial court...". The Michigan Supreme court similarly ruled that the constitutional and statutory provisions, in Michigan, established Michigan as having "One Court of Justice" divided into different courts, including courts of limited jurisdiction, i.e., the "District Court". The statute creating the "District Court" divides the court into administrative units called judicial districts. Michigan has but one District Court. *Judges of the 74th Judicial District, supra*.

Further defining these judicial powers conferred by the Constitution, MCL 767.1 establishes that the trial court divisions of Circuit, recorder's and ***courts of record*** that have criminal jurisdiction, as possessing "...the same power and jurisdiction to hear, try and determine prosecutions upon the information for crimes, misdemeanors and offenses, to issue writs and of process and do all other acts therein." "The district court is a ***court of record***" MCL 600.8301; "When complaint is made, on oath or affirmation, to any magistrate authorized to issue warrants in criminal cases,... such magistrate...shall issue and deliver a search warrant..." "magistrate includes judges." MCL 750.54; "A judge" includes district and circuit judges." MCL 780.651; More jurisdiction sharing has been occurring administratively, "In a district court district in which the district court is affected by a plan of concurrent jurisdiction adopted under Chapter 4, the district court has concurrent jurisdiction with the circuit court or probate court, or both, as provided in the plan of concurrent jurisdiction,..." MCL 600.8304.

CONCLUSION:

Michigan law, therefore, supports the authority of the district court as having full and complete authority to issue search warrants for general criminal matters as part of the singular "One Court of Justice" and has sufficient "general criminal jurisdiction of a State authorized by the law of the state to issue search warrants". The Michigan District Court is an administrative creation from Judicial and Legislative authority, similar to the states of Texas, Nevada, and North Carolina, which also give their district court division the same statewide blanket of judicial authority to authorize search warrants as Michigan. The Federal Courts have construed the language of the ECPA definition to include courts that have criminal jurisdiction sufficient to handle general misdemeanor and felony process and have consistently found that these state courts, despite some different creative language or division names

that exist between them, have similar search warrant authority that make them a “court of competent jurisdiction” under the ECPA. Michigan, arguably, is no different in this analysis and would be treated similarly.

In summation, the District Court in Michigan meets the ECPA definition of a court of competent jurisdiction. The focus of the ECPA definition, as read from the federal case law, is not on the subject matter jurisdiction, even though these limitations overlap and are shared, or the particular names or phrases used by the states to identify their courts and their administrative divisions, but by the courts being fully authorized to issue search warrants for general criminal matters.