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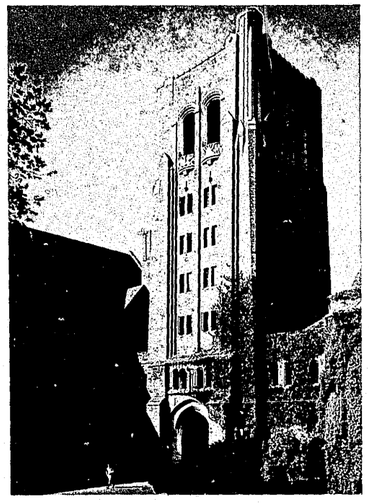

Techniques in the Investigation and Prosecution of Organized Crime

Electronic Surveillance: Two Views Volume 1

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Cornell Institute on Organized Crime

Techniques in the Investigation
and Prosecution of Organized Crime

ELECTRONIC SURVEILLANCE: TWO VIEWS

Based on lectures by
G. Robert Blakey and
James J. Hogan delivered
at the Cornell Institute
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and 1979 Summer Seminar.

edited by:
G. Robert Blakey

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PREFACE

These materials were produced by the Cornell Institute on Organized Crime. The Institute is a training and research center developed as a joint program of the Cornell Law School and the Law Enforcement Assistance Administration (LEAA). Now in it's fifth year of operation, the Institute is engaged in a number of major undertakings, including an empirical study of the "Rackets Bureau" concept designed to illuminate the most productive paractices of existing organized crime investigation and prosecution units, the establishment of a computerized bibliography of materials relating to organized crime to facilitate scholarly research, and the training of organized crime prosecutors in the legal and practical aspects of the most advanced techniques of investigation and prosecution of organized crime. It is with these goals in mind that these materials have been prepared.

Perhaps the most difficult to use, but the most productive investigative technique in the prosecutor's kit of evidence-gathering tools, electronic surveillance must be carefully and lawfully employed, if it is to realize its full potential. If these materials can contribute to raising the quality of legal work in this important area, a major aspect of the mission of the Institute will have been advanced.

G. Robert Blakey
Director

Cornell Institute on
Organized Crime
Cornell Law School
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Law and Strategy (Prosecution)*

G. Robert Blakey**

Introduction

In 1968, Congress broke a legislative log jam of over 40 years and enacted Title III of the 1968 Crime Control Act.*** This afternoon I'd like to do three things with you: (1) describe the nature of that decision; (2) discuss the history of the use of the 1968 statute, both on the federal and the state level; and (3) address myself to some problems associated with its implementation.

Nature of the 1968 Decision

Let's take a look first at the nature of the 1968 decision. There is a myth, propogated by some defense counsels and losing civil libertarians, that Title III was the product

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*Transcript of edited lectures delivered in 1979 to a seminar offered by the Cornell Institute on Organized Crime on the Techniques in the Investigation and Prosecution of Organized Crime.

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***Omnibus Crime Control and Safe Streets Act, Title III, 18 U.S.C. §2510 et seq. (1970).

of a strange coalition of southern resentment towards the Supreme Court and popular anxiety about lawlessness. It was, in short, a blend of racism and [the] law and order mentality. Nothing could be further from the truth. In fact, the Congress made a conscientious effort in 1968 to follow the teachings of the Supreme Court in the area of electronic surveillance. Indeed Supreme Court decisions were cited some 66 times in 20 pages of technical commentary on Title III. Katz* and Berger**, the Supreme Court's two key cases at that time on electronic surveillance, were themselves cited some 16 times in the legislative history. Title III was the product, at least in the senate, of a fair and open debate. A motion was made to strike it, and the motion was defeated by a vote of 68 to 2. Such "right wing racists" as Senator Bye of Indiana, [and] Senator Brook of Massachusetts supported the bill. I can also include in that category people like Percy, Musky, Ervin and Tydings.

My point is straightforward. Title III was, in fact, the culmination of a debate that began, not in the context of law and order in 1968, but in context of what to do about electronic surveillance. The dialogue between Congress and the Supreme Court had its origins in 1931 with

*Katz v. United States, 389 U.S. 347 (1967).

**Berger v. United States, 388 U.S. 41 (1967).

the recommendation by then Attorney General Mitchell that there be some court order system on the federal level. Title III was also recommended by the Katzenbach Commission, put together by President Johnson in 1967. In addition, it was endorsed by the Judicial Conference of the United States when Earl Warren was chief justice of the United States. If you know anything about Earl Warren, and if you know anything about the Judicial Conference of the United States . . . . The best way to explain it to you if you don't is to say that the Judicial Conference was to Earl Warren a lot like the teamsters union was to Jimmy Hoffa. In any event, what Earl said he wanted, Earl got. Earl Warren's reaction and attitude towards the Judicial Conference was: "leave it to me. I'll bargain for us." So when the Judicial Conference of the United States endorsed electronic surveillance, it was perfectly clear to those people who were working in the legislative process that what we had was a constitutional product

History of the Use

Let me turn my attention then to the history of the use of Title III in the years after 1968. One of the innovations that was a product, or part of, the 1968 legislation was the creation of a wire tap commission, a commission that came into existence a number of years after the statute was enacted and then sat for approximately 2 years holding hear-

ings and studying the operation of the statute. For those of you who work with electronic surveillance, I recommend that you read the commission's Final Report. This is what it looks like. You can get it from Government Printing Office. It's entitled "Electronic Surveillance": Report of the National Commission for the Review of Federal and State Laws Relating to Wire Tapping and Electronic Surveillance. It was published in 1976. It critically reviews the experience on [the] federal and state level with the use of Title III and makes specific recommendations for amendments [to] the statute. But of far more significance to you, [recommendations] on how to use it, and summarizes what has been the experience, the good experience, and points out the bad experience. If you work with it on a day to day basis - again, I repeat, - you ought to read the commission's Final Report, particularly the summary of the evidence. The commission heard from some 100 witnesses over a 17 day period. Based on that testimony, it made 4 key findings: (1) That wire tapping is, or electronic surveillance is, an indispensible aid in the gathering of evidence; (2) that it's been to date primarily useful in gambling and narcotics prosecutions, a little less so in loansharking; [(3)] that there ha[s] been a failure to use electronic surveillance imaginatively in fencing and similar prosecutions (that "similar category" clearly includes labor racketeering); [and] (4) - and I think probably the most significant finding on

the part of the commission - was that it was best used when an experienced prosecutor, well trained in the law, worked closely with law enforcement people. The Commission study overwhelmingly reaffirmed the experience of the racket bureau concept, that is, that good investigations are conducted well when prosecutors and law enforcement officers work closely together.

Let me now outline for you somewhat in general terms the current data on the use - at least in the order of [the] magnitude - of electronic surveillance throughout the United States. There are, as some of you obviously know, reports that have to be filed in connection with each wire tap. They are collected and annually published by the Administrative Office of the United States Courts and if you want to find out what your brothers are doing and not just talking about in the racket business, go read the annual reports to see how many wires were put in and where they put them in. . . . If you find a guy at a conference like this talking about the hot shot unit from which he comes and you find out he put in no wires last year you can dismiss him as a serious organized crime prosecutor.

At any rate, there are today 25 states and the federal government that have authority to conduct electronic surveillance. Ironically, Oregon, Pennsylvania, South Dakota and Wisconsin, never used their statutes! There were 582 applications (and 2 denials) which is a 9% decrease in applications

over the preceding year. I guess crime is declining in this country if we're not going to use the sophisticated tools to deal with it. There were only 81 federal wire taps last year. There were 489 state wire taps, down 11%. I suppose again that correlates with the decline in organized crime and racketeering in the United States! 76% of the orders came from four states, Florida, Maryland, New Jersey and New York, and the honest truth of the matter is that between New York and New Jersey you've accounted for about all that's done. 152 in New Jersey: 125 in New York. And I might note that New York is down 64 in number.

[The] typical wire tap can last anywhere from one day to 150 days. The average wire tap lasts 24 days, it overhears 68 people, or 738 conversations, 28% of which are incriminating. If those statistics are sound, 28% are incriminating, that raises some serious question[s] about minimization, something I'll talk a little bit about later.

One of the things the wire tap commission found is that these statistics are not very accurate, that they are more in the order of magnitude than they are in any sense of precision. 42% of the wires were gambling. 34% were narcotics. That means 76% of these cases were either gambling or narcotics. That tells me that the wire tap statute is not being used with imagination. A gambling wire is easy to get on, easy to put up, easy to pull down, easy to make an arrest on - all other things being equal. Narcotics a

little less so. But the sophisticated work with wire tapping is not being done. If in fact there were only 45 racketeering wire taps, if in fact there were only 25 homicide taps, out of that total figure, they're being used in the easy cases, they're not being used with imagination. There may be honest explanations for this.

One of the things we found on the wire tap commission on the federal level was that, of course, the FBI tended to do gambling cases and the DEA obviously tended to do drug cases. But when we looked carefully at the way the DEA was administering, or working with, the wire tap statute . . . we found, much to our suprise, . . . that the problem was the wire taps were too productive. Let me repeat that in case you didn't hear it. They were too productive. So much evidence came in off the wire, that it required additional manpower to run after leads. It required additional manpower to man it. They had so much evidence that they had to carve out a center piece that they used to prosecute, and they had no manpower or facilities to disseminate the rest to the state and local [agencies]. So the solution on the part of the DEA was not to ask for additional manpower to utilize the tool that obviously was giving them too much evidence, it was to cut down . . . the number of wires. I wonder if the American people fully underst[an]d what it means not to have sophisticated narcotics prosecutions.

There's something else I suppose I should mention. A gambling wire can normally be put in sometime between 9 and 5. Gamblers tend to work business hours, or bankers hours. Unfortunately narcotics wires can't be put in during regular hours, and there was on the part of law enforcement officers [a disinclination] to sit up all night and keep narcotics distributor's hours. They wanted to go home and watch TV, and drink beer and play with the kids, too. Again, it's sort of troubling to learn that the problem was not with the tool but with those who were supposedly utilizing it.

Of the 572 applications, 510 were for wire taps, only 27 were for bugs. What does that tell me . . .? It tells me that the cops and the prosecutors are taking the easy way out. Look, a wire tap is a good thing. It gets you a lot of evidence. It's easy to put in, it's easy to manage but it won't get you the best [evidence]. The experience of the FBI from about 1959, when they began doing wire tapping outside of the 4th Amendment to about 1965, when President Johnson told them to stop, particularly in organized crime cases, was that all of the good information was over bugs. The FBI in that period of time was able to establish, as no other investigative agency in this country has, the nature and character of organized crime in the United States. It's organization, it's structure, it's folkways. They did it with bugs, they didn't do it with wire taps. Ironically, it would have

been illegal for them to put the wire taps in too, but they were willing to violate the 4th Amendment, but not the attorney general's permission rules, which existed at that time. What I'm saying to you is a carefully planned bug is worth ten times what a wire tap is in getting the good information. You can defend against a wire tap by not using phones. What are you going to do against the sophisticated bug? Where can you go? The answer is, nowhere; which is one of the frightening aspects of the statute, I suppose. On the other hand, if it is used consistent with the the 4th Amendment, the statute and some sound discretion, I'm not terribly troubled that criminals have no place to go to hide from lawful police conduct.

Wire tapping can be expensive. The most expensive federal tap . . . was in the Eastern District of Pennsylvania. According to the statistics, they spent $141,695 on a racketeering tap. I'm not terribly sure how they calculate the money. The most expensive state wire came to New York City [with] reported costs [of] $332,770 in a murder prosecution. I'm not terribly sure how Mr. Morganthal calculated that either. It looks like he actually planned it to solicit a federal grant with that as a background! In any event, average cost of a wire is $11,278, which I suppose sounds expensive. But it is better to have an expensive wire that results in evidence than an inexpensive physical surveillance that just tells you who's meeting with whom, but not what

they're saying. I can't be convinced that wire tapping is not cost effective, as opposed to expensive. Since 1969 there have been 28,133 arrests and 13,788 convictions, about [a] 49% [conviction] rate. More convictions are pending. If I did not know that the majority of those were low level gambling arrests and convictions, I would feel a lot better about the statistics. If I thought that the wire tapping had been used in narcotics, labor racketeering, political corruption and other organized crime cases, I know the conviction rate would be that or higher and I'd feel a little bit better about it. My point is, whatever Ramsay Clark says to the contrary notwithstanding, the objection you cannot lodge against wire tapping is that it doesn't work. It indeed does work. The problem is how do we make it work consistent with the 4th Amendment and the federal statute.

Problems Associated With Implementation

I have used as I should not, loosely the phrase wire tapping or electronic surveillance. What I mean by that I ought to define now before I go into discussing some current problems with the statute.

Definitions

If I say recording, what I mean is one party consenting recording. This is a tape recorder on one party in a conversation. Generally, that is not wire tapping or bugging,

loose language to the contrary notwithstanding. I am not talking about transmitting. That's when one guy's wired [and] broadcasts [out]. There are some states that have confused bugging in the proper sense with transmitting and insist on requiring warrants in transmission situations. I think that mistake in part flows from the loose use of the term wire tapping or electronic surveillance. Neither one party consent recording nor one party consent transmitting is what I'm talking about this afternoon. What I'm talking about is wire tapping and by that I mean listening over the telephone or bugging, which is a microphone in place either on the outside of the wall or the inside of the wall, it doesn't make any difference anymore.

So what I want to talk to you about is wire tapping and bugging in [the] context of Title III as enacted in 1968 and as currently administered by the courts. There are in your background materials detailed papers on recording and transmitting which speak pretty much for themselves.

Practice

Title III is an interesting piece of legislative work. Many people say . . . and we ha[d] this problem on the wire tapping commission . . . we asked the FBI, for example, to tell us how they wire tapped. What were the standards that they used in administering the statute? And it suddenly became clear in talking with the working officials, not only

in the Bureau, but in the Department of Justice; that they didn't understand the sense in which the question was being asked. If we asked: "when can you wire tap?" they tended to come back and tell us the legal rules . . . . That's not what we meant. When do you do it? How do you do it? They tend to come back with the technical manual. It was as if the two categories, the law and techniques, explain the practice and what those of us on the commission were trying to find out was the practice neither described by the law nor described by the electronics of putting a bug in. It's, when do you wire tap?

Title III in fact says nothing about when you should put in a wire. It says nothing about when you ought to put in the wire. . . . It's structure is, there shall be no wire tapping, there shall be no bugging, and then there's an exception. The exception says you <u>may</u>, doesn't say you must, doesn't say <u>you ought to</u>. It simply says you may and then there's a long list of don'ts. Specific don'ts. Not one <u>do</u> in the statute (in the proper sense of the word do and don't). Title III is a series of limitations on you. Now there's no way that you can draft a series of limitations without having a general concept of what it is that you're about.

<u>Title III as Tool</u>

That general concept of what you're about is what I'd like to talk to you about for a few minutes this afternoon.

It's not on the face of the statute. It's not in the literature. I haven't seen it in the organization manuals in the Bureau. I haven't seen it in organization manuals on the State level. Some hint of it appears in the wire tap commission report.

What is wire tapping then? Not law and not technique. What's the idea behind the statute? Well, the idea behind the statute is that wire tapping and bugging is a tool, designed to solve certain investigative problems. So you have to understand what a tool is and you have to understand what the investigative problems are to understand the wire tapping statute. And I've come back right now to where I was this morning when Ron [Goldstock] was talking [on investigative planning.] Ron attributed [the concept of] the "can't do-can do lawyer" to me. Well, the truth is, I didn't think it up. My understanding of [the] "can do and can't do lawyer" comes from Robert Kennedy. When I was in the department in the 1960's, in meeting after meeting after meeting, Robert Kennedy would say: "I want to do such and such," and five lawyers would say: "Mr. Attorney General, you can't do that." And the refrain would come in: "will somebody here please tell me what I can do and stop telling me what I can't do." His attitude was that we had problems in our society, civil rights and organized crime and anti-trust, and the function of government was to something about those problems. And the function of the law was to see to it

that what we did about those problems was consistent with our values and our traditions. It wasn't the function of law to turn and tell people that you can't do this, you can't do that. If you think of wire tapping, and I'm talking to you now as prosecutors who will be supervising wire tapping, as a series of don'ts, you will inhibit the investigatory process. If you think of it as a series of ways things can be done and can't be done, [and] you put the emphasis on the ways they can be done, you will make a creative contribution to the partnership between prosecutor and investigator. If you get nothing else out of this lecture and out of this week, [get a] change in attitude, and I mean [a] change in attitude primarily among supervisory people, supervisory people in a prosecutor's office or supervisory people in investigative agencies or in the Department of Justice in Washington. Don't come to every situation to find a problem. If there is a reason for that mindset among lawyers, it is attributable to law professors, like myself, who in the first semester of law school, in the socratic method, train you into finding things that are wrong and then continue that process for three years, never giv[ing] you an opportunity to think imaginatively, positively, or creatively. Forget what you learned in law school on figuring out how not to do things.

What kinds of problems will wire tapping solve. Think about it for yourself. (1) It will turn hearsay information into admissible evidence. You can use hearsay for probable cause and if the wire works, you go from an informant's report, which is hearsay and probably not usable, into admissible evidence. A great way of thinking about it is a way of changing evidence. It will take investigative suspicion, if you massage it a little bit, turn it into a probable cause, into proof beyond reasonable doubt. . . . Isn't that what the whole process is all about? You start at one end with some suspicion, you massage it a little bit, you get it up to probable cause, you put a wire in and you've got proof beyond a reasonable doubt. That's no minor thing.

Goldstock was talking about an informant this morning and somebody raised the question, well, is he reliable? The only people [that] really rel[y on] informants, are judges issuing search warrants. I would have real problems relying on most informants. The typical informant has already turned against the culture in which he lives and he's dealing with us because of what? Fear, favor, or revenge, all motives to lie. The reliable informant is a fiction in the law, an appropriate one I suppose, that you can't get around and that you must live with. But what will wire tapping do for you? It will take a "reliable" informant's hearsay testimony that is suspect and impeachable, and turn it into unimpeachable tapes. Now it's true people can complain that you can edit tapes. [But] the wire tapping

commission studying all surveillance in the United States found not one instance of documented police tampering with tapes. In fact, in the literature, although this is one of the largest single objections to electronic surveillance, there is not one incident documented where an effort was made by law enforcement to doctor a tape and use it for the disadvantage of a defendant. Not one incident. So while it is an allegation, it is in fact contrary to experience. You take evidence that is impeachable and put it into a virtually unimpeachable form. Remember what the jurors in the Watergate case said. One of them came out and was quoted in the paper, I immediately wrote it down, a Nixon juror said "It is hard to argue with tapes. It's too bad we couldn't have tapes in every trial." Think about that. It's true. Richard Nixon was done in by wire tapping. Appropriately enough in light of Watergate. Is there any real difference between a wire tap that is put in with a search warrant and brings back a tape, and subpoenaeing a person's tapes? It's a court order that brings out a tape of the actual conversation. There's no functional difference. Richard Nixon was done in by wire tapping, appropriately enough!

(2) Largely unnoticed [in] the effect of wire tapping is that it not only cuts deep into a conspiracy, it also cuts wide. . . . [I]t picks up all of the peripheral people in the conspiracy. The easiest and best illustration of

that is one of the cases that was examined by the national wiretap commission: the Sherbergen case in Detroit. One wire placed in Detroit, in a narcotics case, not only picked up the basic distribution group in the city of Detroit, it picked up the pilot that was flying the "stuff" in from Peru. [O]ne phone conversation was actually between Detroit and Peru, so [the wire] picked up the exporter in Peru. It got the whole of the conspiracy as it was laid out.

Now, I have to tell you frankly, it did not get all of the conspiracy. There is some evidence that it was financed by L.C.N.* people and the investigation never got to the L.C.N. level. But it took out the whole exportation-importation-distribution-organization in one fell swoop. Conventional methods of investigation could perhaps have taken out some of the members of that organization sequentially. And, if [done] sequentially--person by person--the likelihood is that each would have been replaced. What happened when one wire investigation identified virtually simultaneously the entire group and permitted the indictment of the entire group [was that] it eliminated the whole organization. Now, I am not going to kid you; you can still buy heroin on the streets of Detroit. But that may be more a function of the absence of additional wiretaps, or further investigative methods; it may also be attributable to [the

*L.C.N. = La Cosa Nostra (Mafia)

lack of] reform of the socioeconomic conditions that led to addiction. But from an investigative point of view, if the objective was to take out that organization, wire tapping was appropriate for that goal or objective.

If I say that wire tapping is a problem solving tool, finding out what the problem is, is a major dimension to it. Now ironically, there is only one place in the wire tap statute where this concept appears. The word "objective" appears only once in the wire tap statute in 18 U.S.C. §2518 (5) in reference to time. It says you can put in the tap long enough but not longer than the objective that you have. What does the statute mean by objective? What the statute presupposes is that in your investigative plan, ([and] there's no place in the statute where it talks about investigative plan, but you can't meaningfully say that you have an objective until you've sat down and planned it) that you can keep it in until you realize your objective. That's a clear case in the statute where the underlying, the inarticulate assumption of the statute is investigative planning and objectives. [Similarly, with regard to alternative means] unless you have a concrete objective in mind, how can you say that you looked to see whether you can reach another way and having failed or found it to be too dangerous, you put in your wire. The same thing can be said in terms of parties. How do you identify which parties you ought to tell the judge about. Case law talks about probable cause, but its really in terms of the

investigative plan. Isn't it? With the little bit of suspicion and a little bit of probable cause you get a wire on two or three people but your objective is to fill in the size of the conspiracy that you're working with, to fill in the other parties. To get evidence against the other parties, that's your objective; and it is a problem solving tool in terms of those objectives: identifying people, parties, offenses and times.

In the context of a fencing investigation, for example, what is your objective?* It is primarily, in my judgment, or ought to be, to gather evidence against all members of the organization and potentially to gather in all members of necessarily allied organizations. If you are putting a wire in on a fence, sit down and try to figure out what role that particular fence is playing. Do we know, from what we understand about the redistribution system, what other parties probably play a role in what he is doing? If he, for example, is a legitimate outlet fence, he [probably does not deal with] thieves; [the outlet fence] is the last level before the general public. If he is a legitimate outlet fence, he has a wholesaler fence dealing with him. So it is fairly clear that you want to get the wholesaler. An objective that would only aim at the retail outlet is

*See generally, Blakey and Goldsmith, "Criminal Redistribution of Stolen Property: The Need for Law Reform," 74 Mich Law Rev 1511 (1976): Strategies for Combatting the Criminal Receiver of Stolen Goods (LEAA 1976).

too narrow. You have to say: "Hey, there's probably a wholesale fence out there he's dealing with."

If you are going after that wholesaler or broker fence, you can also reasonably assume that retail outlets exist and your investigative objective ought to be to identify all of them that your broker fence is dealing with. If the broker fence is truly a broker, that is to say, if he is setting up hijackings along the line, you can reasonably assume that hijackers are involved and your investigative objective ought to be to identify all the hijackers he works with, [and] all the retail outlets he works with. He may very well be dealing with certain other specialty fences. [He] is primarily a broker picking up whatever comes along--targets of opportunity. He is going to have to "job-that-out," very often, to a specialist. Therefore, your objective ought to be to find who the specialists are. If he has a sophisticated operation, the likelihood is, corruption is involved. That means there is a crooked cop somewhere, and you can be assured, as sure as you are sitting here, that there will probably be a crooked lawyer around somewhere, too; [the fence] needs professional services. Not always, but too often. He may very well need an accountant, he may very well need a lawyer, he may very well need a bail bondsman. Your ultimate investigative objective should be to identify all of those parties. That is the scope of the real functioning organization; those are some of the other

people or organizations that are working with him. A wire offers you some promise, not simply of a fencing case against the first person, but to take out that whole distribution network.

My own judgment is that, as a long term operation, you really ought not always to focus entirely on the fence. Every time you can find one of our people, a lawyer or a crooked cop, you ought to take the time and trouble to make that collateral case. If there were no crooked lawyers, a lot of crimes would not exist. We do more harm, frankly, than a lot of other people.

Let me make two preliminary remarks before we get into the question of meeting the formal requirements of the statute. I sound like I am suggesting to you that wire tapping is a good idea and that it will solve problems for you. Let me be openly candid about it. Wire tapping will wipe your shop out if you don't do it right. That statute not only has criminal penalties in it, it has civil penalties in it. It will not only suppress the evidence that is improperly taken, it will also result in liquidated damages and attorney's fees against everybody who participates in putting it in, if you don't do it right. There is a major disincentive on anybody's part to put in surveillance without two things: (1) technical training in it, and by this I mean learn the don'ts so that you can operate them correctly and in good faith, [and (2)], go in with technically

trained law enforcement officers who know how to put it in properly and man it properly so that they can draw out of it what's there. And by technically trained law enforcement officers, I also hope that you'll have adequate equipment. Look LEA through grantsmanship will get you the adequate electronic equipment. Nevertheless, 65% to 70% of the major Supreme Court cases dealing with wire tapping and bugging record on the face of the opinion that the bug did not work, that the tap failed in some way. I have never had a conversation with an FBI agent or other people involved in putting in surveillance [who] could not tell me one story after another about equipment that failed. Good Lord, if you're going to spend all that time working on the affidavits, get equipment that will work. That ought to be the minimum, yet time after time you get guys in there with stuff that won't work.

Authorizing Surveillance

What are the requirements for a wire tap? There are six. Let me explain them to you a little bit for the reasons behind them and I think you'll understand how they operate.

Requirements: Prosecutive Decision

First, wire tapping under Title III is a prosecutive decision. It is no longer a police decision. The decision by the Congress to take the wire tap away from the police

is based on two things. (1) A perceived experience that the police abused it. We can argue whether that's true or not, but the perception was there that built up over 40 years. The police, left to their own devices, abused it. And they abused it because they were arrest minded and not conviction minded. Because they were arrest minded, if the evidence was suppressed or no conviction [resulted], it didn't make any difference, the cops were counting collars. [The] decision [was] to make it a prosecutor's judgment whether a wire tap or a bug should be used, because prosecutors, bless their souls, care only about one thing and that is convictions, "not sentences, not impact in the community, but convictions." They are as crazy about convictions as cops are about collars and both, unless it's part of the general policy or general strategy, are largely irrelevant. Nevertheless, the fear that your evidence will be suppressed and you will lose your conviction [is a factor that motivates prosecutors.] [That factor was] the assumption the Congress [had in mind when it] made it a prosecutive decision and not a police decision [to conduct surveillance.] Now there are a lot of technical rules that have developed about who's supposed to sign things and whether people can delegate them and whether the signatures have to be in writing. That kind of prosecutor baroque is contained in the background papers. For God's sake, don't lose a wire tap on the grounds that the prosecutor didn't sign the order

or whether the delegation was proper. There's just simply no proportion between the suppression of evidence and the loss of that case and the failure to live up to those kind of rules.

Offense Requirements: Designated

Second major point: Title III deals with designated offenses, which means you can't get a wire tap for everything. You have to get a wire tap for the designated offenses. How do you learn the designated offenses? Go read them. They are on the face of the statute and make sure that you are using them in that context. Why did Congress choose to go with designated offenses? Well this is a story that is worth telling. What Congress didn't want to do was authorize surveillance for the sex crimes: adultery, fornication, homosexuality. But there was no way Congress could vote to exclude adultery, fornication, homosexuality from the list of crimes, directly. I mean how can you legislatively be against that, particularly if privately you are for it? So a mechanism or word or phrase, a euphemism, was developed and the euphemism was: dangerous to life, limb or property and punishable by more than year in jail. If you think about it for a minute, what in the criminal code except sex offenses is not [dangerous to] either life, limb or property? Only the sex offenses. It is in fact a euphemistic way of saying the negative.

Unfortunately that has caused some confusion in the states. The question is where the "and" applies. Normally, the way that [phrase] should be construed, and legislative history is explicit on this. Designated offenses in the federal list are clear and designated offenses in the state list are clear. There's a series that are set out specifically, for example gambling, but then there's the catchall clause at the end that says dangerous to life, limb or property punishable by a year. What does "and" apply to? The better opinion is that you can get a misdemeanor gambling wire. The less well reasoned opinion is that the felony limitation applies as well to gambling. That wasn't the intention of Congress, although the intent was not expressly set out in the terms that I have given it to you. Yet the legislative history is explicit on the "and".

What must you do in terms of that designated offense? You must link up probable cause, which you all know about from regular search warrants, with the person, phone and place, and subject matter. It is different from an arrest or typical search and seizure. [In] a typical search and seizure there is no necessity to have a person involved. All you have to do is know the thing is evidence and it's located in some place. For an arrest all you need is probable cause as to person, place or phone, and subject matter, and it must be in terms of the designed offenses.

The probable cause problems for wire tapping are not

that terribly different from search and seizure. Two hints for you for practice. It is a good idea to think of every fact in your wire tapping application as standing on some footing and the facts should be in one paragraph and the footing ought to be in the next. This is what I know and this is how I know it. Normally, how I know it is going to be from an informer. And then you have to do two things under Spinnelli*. You've got to establish the reliability of the information and the reliability of the source of the information. That means, and this is in rough terms, you need three paragraphs for any fundamental idea. One paragraph to set out the idea, one paragraph to set out the source of the idea, and one paragraph to give the judge reasons to believe the content of the idea and the person who gave it to you. If you have that kind of small rule for yourself, - think three - think that you have got to do three things, an idea, a person and a source, that is, an evaluation of the person and the idea, you won't have any Spinelli problems, or you shouldn't have any Spinelli problems.

Designated Person

Now the wire tapping statute has another provision in it. It says you have to designate the person that you ex-

*United States v. Spinnelli, 393 U.S. 410 (1969).

pect to overhear, if known. What does that mean? Well, I'll tell you what we thought it meant in '68. In 1968, if you had asked me whether you have to designate the person to be overheard in terms of the 4th Amendment, I would have said yes. The wire tap statute in fact has that clause in it, designate the person if known, because I thought the constitution under the 4th Amendment required [it]. . . . I was wrong. The Supreme Court has now told us that you don't have to designate people, that the 4th Amendment only requires the designation of crimes. But there's a statutory clause based on my misperception of the constitution at that time that says you have to designate persons. What it means is that if you don't have probable cause for one of those people in Goldstock's outline [on investigative targets as part of investigative planning], you can't put his name in as a designated person. If you don't have probable cause, you can't put his name in because you can't secure authorization to overhear a known person, by known I mean his name, if you don't have probable cause. If you do have probable cause, you must put his name in. So there's only two categories. Probable cause or no probable cause. That's obviously a dilemma, because probable cause is an elastic standard. One man's probable cause is another man's lack of probable cause. What's the solution for it? My solution for it is as follows: go down in a very careful articulation of your investigative objectives, identify all the people you know to be in the

situation and ones that you may reasonably suspect to come into it. Get as many of the names as you can. Go down the list and say "which ones do I have . . . probable cause for?" Those you must put in. "Which ones do I certainly not have probable cause for?" Those you cannot put in. What about the ones in the middle, the gray ones? My solution to you is, designate them in the application but not in the order. Bring them to the judge's attention, and say: "Your honor, I do not think I have probable cause as to these three people. So while they're known to me, and this is the basis on which they're known, they're not ones that I want an order for because I think I haven't got probable cause. But what I want you to do for me is if there are any special rules of minimization that you would want to put on these people, because they are for example a lawyer or priest or bailbondsman, or something, then tell me what they are, and should these people come into the tap, although I do not have legal probable cause to believe that they will, we will minimize those people accordingly." What you have done by this is met what I think is the Supreme Court standard in Donovan*. [The] Supreme Court told us in Kahn** you don't have to [designate] if there's no probable cause. They told us in Donovan, if you have probable cause you must. But they wouldn't suppress

*United States v. Donovan, 429 U.S. 413 (1977).

**United States v. Kahn, 415 U.S. 143 (1974).

for a failure to designate unless two things were present: the failure was deliberate and it caused prejudice. The only sense in which I understand the word prejudice here is that the failure to bring it to the judge's attention deprived the person to be overheard of some protection that he would have had had the judge known about it. I think the way around that is straightforward. Bring it to the judge's attention, but don't ask to have it in the order. Have it only in the application and ask to have any special minimization rules applied to you, or any prohibition against listening to this person. If the judge doesn't give it to you [there's no prejudice].

Requirements: Exhaustion of Other Procedures

The fourth requirement is that you exhaust other investigative procedures before you put in a wire tap. I think I ought to be explicit when I say that I feel about wire tapping and about bugging a lot like I feel about battlefield surgery. It's always bloody, it is not always successful, but in certain situations there is no practical alternative. It's only when there is no practical alternative that wire tapping is tolerable in a free society. It is a gross invasion of privacy. Do not do it unless you have to. What this means to you is: look what the alternatives are. If you can make a case without wire tapping, do it. It is cheaper. The average wire tap costs about

$12,000. It involves enormous lawyer time. I do not want to overemphasize this. In fact, a good wire which has been put in carefully will avoid trial, and trial is more expensive than a motion to suppress. The study of the commission [shows] that if you put a good wire in and the defense counsel and the defendant hear it in the preliminary proceedings, the defendant will usually plead guilty. He does not want to go before a jury with that kind of evidence. It may be in one sense money-saving if you do it right; time-saving if you do it right. If you do it wrong, you have years of litigation. It is, therefore, a technique of last resort.

What [the alternative means] clause in the wire tapping statute does is try to make the prosecutor articulate the reasons for his decision . . . that to advance this investigation there's no practical alternative. Again, its only in terms of an investigative plan that has [an] articulated objective in which you have considered what the alternatives are, that this clause can be complied with. It is no longer your prosecutive decision as soon as its a requirement in the statute. It now becomes a judicial decision whether the investigative alternatives have been examined, thought through and rejected, either because they're not apt to be successful or they're apt to be too dangerous. That tells you a couple things. One is you must share your reasons with the judge. Now that's great the first time you draft

an application. It will be a fresh expression on your part of what the alternatives are. What happens, my good lawyers, the second time you put in an application? You grab for the old papers, right? You change a couple words, you throw it into the typewriter and out comes boilerplate. The chief difficulty with drafting these applications is precisely the tendency on the part of the prosecutors to take forms and just fill in a couple of different words. The courts are troubled with boilerplate in this area. Try to figure some fresh imaginative way of particularizing to this case why the investigative alternatives have been adequately resolved. Let's be realistic, too, . . . if you put one gambling wire in and you put another gambling wire in, they will all look alike. If you put in one narcotics wire and you put in another narcotics wire, it's not entirely the fact that you are inarticulate that you can't express in different words why this case is not unlike the other. Nevertheless, even though boilerplate may be an adequate explanation of why this case is different, try to look for the facts and to articulate . . . for the judge [why] in this case . . . the investigative alternatives are not adequate.

Requirements: Time

Number five. Time. The federal statute authorizes electronic surveillance for not longer than 30 days or your

investigative objective whichever is less. Why did Congress take 30 days? In fact, the prosecutive descretion on the part of the department of justice is about 20 days. Some states have state statutes that cut it down to 20 days. I'm familiar with the process in a number of state legislatures that have arrived at this and it's because I am that in 1968 we set it at 30. I figured we would set the federal level at 30 for two reasons . . . . We made a careful examination of staleness cases in probable cause. Staleness is: on the 30th day of wire tap your surveillance is premised on probable cause set out in your now 30 day old application. In the federal system when it takes 6 to 8 weeks to get a wire tap in, your probable cause may even be older. That means that there is increasingly a staleness problem. We found no case that sustained probable cause after about 45 days so we set the federal limit at 30. We didn't set it at 20, which would probably be more appropriate, because we knew that state legislatures that would follow the federal approach would probably say, like all legislatures do, "I want to be in favor or privacy so I'll cut the limit down." So we set it at 30, which is high enough to let the state legislatures cut it back a little bit and not be too tight to restrict the statute. That's the heart of time. It's not much more complicated than that. You can justify a surveillance as long as you can justify it in terms of the facts of the individual case.

Requirements: Previous Applications

Number six. There is a requirement in the statute that you tell the court about previous applications. Why? There was a fear that the prosecutor would harrass individuals and seek to gain evidence against them by repeated wire tapping. Unless the court was informed of the previous unsuccessful wire taps, they would not be in a position to prevent harrassment. A lot of people haven't noticed this, but there is within the concept of the federal statute absolute judicial discretion to deny any wire tap for any reason or no reason at all. One reason that a judge could decline to authorize a wire tap is the thought that even though you have probable cause in this instance, it is an harrassment to go back on the same guy again. The only way he is going to know about the fact of harrassment is if you tell him about your past applications involving this person. What does this tell you? The only way you're going to know whether you had previous applications on this guy is to have records. You've got to have some adequate system of indexing previous taps and previous applications. If only for this reason. Listen, there are a thousand other reasons why you ought to have good records, but this is one of them. A problem is presented by that requirement. It has gone unnoticed, I think, by defense counsel; but eventually it is going to get to them. In Giordano* [the Supreme Court] suppressed

*United States v. Giordano, 416 U.S. 505 (1974).

not only the first case in front of it but the derivative cases on the grounds, and no other grounds . . . , that the first application was noted in the second application and therefore as a matter of law the second application was the fruit of the first. See the dilemma? If you don't put it in it violates rule number six. If you do put it in and it was bad, you suppress the second wire tap. What do you do then when you have a questionable wire tap that has played a role in the investigation and you don't want to rely on it in the next application? . . . My solution for you though is straightforward. Tell the judge about the prior wire tap. Tell him only enough about it to make the kind of decision I've discussed with you and then ask him for a specific finding that he does not rely on the prior wire tap in granting the second wire tap. Now, I don't know if this will get around Giordano, but . . . if the judge is notified of the wire tap because of rule six, and then specifically declines to rely on it in issuing the current order, I don't see how the rationale of the suppression rule would apply, and if the rationale doesn't apply the rule won't apply. I can't believe that the Supreme Court laid down a per se rule here that's not going to be amenable to argument case by case. Nevertheless, look what this puts on you. Every time you cooperate with somebody who hasn't done the wires as carefully as you have, you've got to know what his wires are to notify about a previous applica-

tion. And second, in light of Giordano, you have to really make a judgment as to whether his wires are good, because if his wires are bad it will bring down like a house of cards a whole series of very sophisticated cases.

Executing Surveillance

Let us take a look at executing surveillance. What have been the major problems? As I see it, there are two real problems and two specious problems. The two real problems are minimization and amendment and the specious problems are notice and sealing. Let me talk about the specious problems first.

The Specious Problems: A) Sealing

Will you tell me why there is a problem with notice and sealing? Would you please tell me why prosecutor[s] and police people have had problems with notice and sealing? Sealing is nothing more than custody and integrity. In the New York County District Attorney's office, they have large series of reels where they have been taking inventory, in effect, sealing taps that go back to where they do not have tapes any more; they have wax discs. This business of taking a couple of tapes and throwing them in a trunk and leaving the trunk in your basement or in a file cabinet for six or twelve months is outrageous. There is no reason for a prob-

lem with sealing. You finish it and you seal it. What is the seal? It is a piece of tape that the judge puts on it. That is a specious problem.

The Specious Problems: B) Notice

Would you please tell me what the problem with notice is? In effect, it is a penny postcard. You must notify everybody that was named in the application; that is not a big deal. My own suggestion to you is: you ought to bring to the judge's attention anybody who was overheard for whom you have a name, so he can determine the question of notice. The statute requires that in addition to the named people in the order, all other people overheard, in the interest of justice, must get notice. I would say anybody that you plan to indict, anybody that you plan to call as a witness, or any other person who is more or less affected by the surveillance [should receive an "in the interest of justice" notice]. If it is an illegal surveillance, I think you must notice everybody for whom you have a name.

The purpose of notice is to get around the problem of surreptitious surveillance. Traditionally, when you executed a search warrant, you went to the front door, knocking and announcing who you were. The citizen knew that you were there and had an opportunity, at least, to allow you to come in peacefully and, if necessary, turn over the property that he was holding. He could subsequently sue to vindicate his

rights. With a wire tap or a bug that is not the case. Thrown in in the dead of night, listened to, filed away--nobody knows it ever happened. The purpose of the notice provision is to guarantee that while surveillance may be initially surreptitious, ultimately it will not be. Give them notice, and if it is illegal, stand back and be willing to take the civil suits that I hope they file.

When to Give Notice

[Persons who have been under electronic surveillance] should be notified within a reasonable period of time. [The statute says 90 days after the termination of the surveillance unless you have a reason to postpone. A reason to postpone is "good cause," and "good cause" means an investigative reason. The presumption is that notice goes out and [that it does so] regularly. The 90 days is not something you take every time. Somebody is going to have to set up a filing system, just like you keep an office calendar: who has been overheard, who should notices go to--notice must go out. If there is a problem with noticing, a real problem and not a routinely assumed problem, disclose it to the judge: it is good cause.

Failure to Give Notice as Constituting Grounds for Suppression

One of the issues that the Supreme Court has now decided is: "Does a failure to [give] notice constitute grounds

for suppression?" [You must ask: was the defendant] prejudiced? Clearly, if [he was] prejudiced, it should be suppressed. If [he was] not prejudiced or had actual knowledge, you have a different case; the rule appears to be: no prejudice--no suppression. If the courts decide to get tight because prosecutors are intentionally not supervising [their taps] and [are] not giving notices, [prosecutors] are in trouble.

The Real Problems: A) Minimization

Let me talk about what I understand to be the real problems. The real problems are minimization and amendment. Minimization is not really, in my judgment, a problem. It is simply that you must exercise intelligence in the execution of surveillance. In a traditional search and seizure, you searched a place for a specific thing over a very limited period of time. In a wire tap, you search a channel of communication or a place of communication over a relatively long period of time. You can foresee at the beginning that conversations have several aspects; some are related to A, some are related to B, but you are only entitled to listen to A. What minimization [represents] is a goal: no more invasion of privacy than necessary. That is not something that [can be] simply worked out by the judge when he issues the order. It is something that continually must be worked out during the process of the surveillance.

The cases are, in my judgment, fairly clear. [There are] two rules. What is required here, federally, is [a] good faith effort to minimize, not to eliminate completely, but to minimize. That means you have to have an investigative plan; you have to know the probable people you are going to listen to; you have to instruct your officers. The key difference, if there is a difference in the cases, is between the whole world and New Jersey. The whole world says, primarily, intrinsic minimization; that is, you must listen call-by-call. If it is the proper person and the proper subject matter, you may continue to listen. If it is not the proper person or not the proper subject matter, you must stop listening and you may spot-sample. That requires an act of faith: you [have to] believe the people [conducting the tap] will, in fact, do it this way.

I am afraid maybe we just have to accept acts of faith once in a while. There is no ultimate answer to: "what if the police are going to lie?" That is a "what if" question to which there is no answer. If they are going to lie on minimization, they are going to lie on informants; if they are going to lie on wire tapping, they are going to lie on planting evidence. If the police, in fact, are liars, all bets are off. It is a problem for police selection and training. It is not something the law can do much about. The law ultimately has to assume that its agents have integrity. I do not want to sound like Pat Gray, talking about

a presumption of regularity. Nevertheless, I do not think you can construct a legal system that works on the assumption that its agents generally act unlawfully and cannot be trusted to tell the truth.

Nevertheless, the genius of the American people has been in setting up safeguards. The genius of Congress, in setting up the statute, was to get lawyers into the process of execution. This means [that] if you have one duty in this game, it is to supervise the execution of that surveillance order. This means you should be in daily contact with [your] people. You should be reviewing the minimization instructions: wide in the beginning, narrow in the end. Once you find out she is a babystter, once you find out it is grandma calling the grocery store--do not listen. As soon as you find out that he is talking to a lawyer and you know who the lawyer [is] and [there is] no indication of corruption, minimize the lawyer out, intrinsically.

The New Jersey rule, which is a special thing, is extrinsic minimization, although I understand they are now changing their practice. This means [that] you set the times of day or possibly get a visual fix, for example, in a public phone booth, and you only turn [the tap] on when he comes in. Once he comes and begins talking, you never shut it off, except if a lawyer is involved, or an indicted defendant. It may very well be in short taps, in areas like gambling and maybe narcotics, in effect there is no difference between

extrinsic and intrinsic minimization. In the fencing area--underline in the fencing area-- the difference between intrinsic and extrinsic minimization is the difference between day and night. I do not see how you can get by with anything other than intrinsic minimization in fencing, homocide, bribery--where you do not have that pattern of regular calls. You are going to have to sample it as you go along.

The statute permits you to gather not only evidence, but investigative leads that are evidentiary. For example, one of the first wire taps that was ever put in by the F.B.I. was put in the Miami airport and the story that I am told is that they had a visual fix on it. They were able to minimize by looking [at the defendant] when he walked in. [It] turned out the defendant himself had hung an out-of-order sign on the public phone booth that he turned on and off when he went in. When they got him, he was a bookmaker and he primarily placed bookmaking lay-off bets. One of his calls was to a flower shop and he had flowers delivered to his address. While that is not a bookmaking call, it is an identity call. It gave you the name and address of the person making the call. Consequently, I think that is of sufficient evidentiary significance in the investigation and, under the circumstances, is incriminating. [It] may be not incriminating as to gambling, but [it is] incriminating as to identity and therefore not something that necessarily would have to be minimized.

The Supreme Court did the government, at least, a favor in Kahn.* Unbeknownst to [the] author [of the statute], the Supreme Court, in Kahn, found that the key thing [in minimization] is not names, but subject matter; that subject matter, and not identity, determines the relevancy of the call [in] fit[ting] it into the category of "incriminating." What Kahn tells me is that the Supreme Court is not going to read Title III narrowly; it is not going to say that there is one primary interest here called privacy, one subordinate interest called law enforcement, and, on the whole, the balance of [these factors] favors privacy. Stewart [is the author of] the opinion; [he is not well known for favoring intrusions]. [The Court is] going to look at the statute in a balanced way and it is going to say: "Hey, wire tapping is distasteful, but it is necessary and I am going to interpret the statute in such a way that it works reasonably. Therefore, we are going to let them listen to [unknown persons] as long as the subject matter is appropriate." I think they are going to permit it. [Thus] if your facts justify [the surveillance of unknowns] and you have artfully drafted your order to fit your facts, Kahn permits, (if your facts justify a large-scale scheme) a rather wide . . . net as to these [unknown] people. Finally, the court did law enforcement another favor in Scott,** in which it held that the test

*United States v. Kahn, 415 U.S. 143 (1974).

**436 U.S. 128 (1978).

for a failure to minimize was objective, that is , look to see what happened first before you look to the bad faith of the officers. That means that it is going to be hard to show failure in short tapes. Nevertheless, you ought to have good faith--and be able to prove it.

The Real Problems: B) Amendment

Let me go to the other problem that is a real one and is "screwed" up right now. That is amendment. It is a misnomer to talk about it as amendment, for, indeed, there are [actually] two problems. One of them is amendment: retroactive amendment. The other one is a thing the courts have begun to talk about as amendment; what they really mean is a new order.

Retroactive Amendment

Let me first talk about retroactive amendment. When the statute was drafted, the problem arose as follows. In light of the Marron* case in the Supreme Court, if you go in for liquor and you designate liquor, what can you seize? The answer is liquor. In Marron the Supreme Court permitted the seizure of books and records, not pursuant to the search warrant but incident to the arrest. But the law never fully developed in this area. Typically, under the Rabin-

*Marron v. United States, 275 U.S. 192, 196 (1927).

owitz-Harris* line of decisions, when you went in to conduct a physical search, you normally made an arrest. While your warrant specified liquor, anything beyond liquor that was related to it was always justifiable under [a] search incident to an arrest theory. Now, under Chimmel** when your search incident to an arrest is going to be narrow, you [have] a problem. Under the wire tap statute, when almost by definition you do not have an incidental arrest and search, you have a [larger] problem.

[For example], I go in for narcotics, and I overhear murder. Can I take it? We were afraid that what Marron meant was that you could not take murder if you went on a narcotics tap because, under Marron, you did not have a warrant designating it. We drafted Title III . . . before the Supreme Court began playing around with the "plain view" doctrine. The plain view doctrine, or the inadvertent plain view doctrine, depending on whether you buy the plurality opinion in the Coolidge case***, permits pretty wide incidental seizure. When the wire tap statute was drafted, it was pre-plain view, at least pre- Coolidge. What we had to get around was this. If you go in for narcotics and overhear

*Harris v. United States, 390 U.S. 234 (1968); United States v. Rabinowitz, 339 U.S. 56 (1950).

**Chimel v. California, 395 U.S. 752 (1969).

***Coolidge v. New Hampshire, 403 U.S. 443 (1971).

murder, you may use it on a quasi-emergency basis, but you must get a retroactive order of approval, in the nature of a search warrant, that establishes that you were not in there under a subterfuge and that it was incidentally seized. That would permit you to use it at trial and for judicial purposes. Unfortunately, the Seventh Circuit and the Second Circuit in Brodson and Marion,* have interpreted the phrase "relating to other offenses" as follow[s]. The order authorizes A and the conversations overheard are A. No problem. What if you hear B? No problem, you need a retroactive order. What if you hear A-B? Have you got to get a new order? In the Brodson case [the investigators] threw in a wire, in a gambling case; the gambling offense I think [was] 18 U.S.C. §1952. When it came time [for trial], [the investigators] decided to try the gambling case under 18 U.S.C. §1955. It was a situation of A-B. The Seventh Circuit, in what in my mind was a wooden opinion, decided that, although it was lawfully seized under §1952(A) since it was going to be used at trial for another offense (B), [the prosecution] had to have an order of amendment. It was simply wrongly decided. It was followed again by the Second Circuit in Marion, so that if you go in for narcotics, overhear narcotics and later decide that you want to use it for tax evasion, you have to get an amendment as soon as possible.

*United States v. Brodson, 528 F.2d 214 (7th Cir., 1975); United States v. Marion, 535 F.2d 697 (2d Cir., 1976).

If you go in for narcotics and you overhear murder, I say that it would be only then that you would have to have [the order amended]. In other words, a retroactive amendment, on the better construction, only applies to a wholly unanticipated offense not within the scope of the original order. Marion has interpreted it to [include] any evidence seized that is going to be used under a designation different from the original offense; it's wrong, but it is the law.

Prospective Amendments or New Orders

[The New York Court of Appeals], in DiStefano,* [states] that you have two problems. [First], you have a retroactive problem. Until you understand [the] relevancy [of the evidence] and make decision to use it for either a different offense or a wholly unrelated offense, you have no duty for retroactive amendment. The second half of that problem is: if on a 30-day warrant [for narcotics] you pick up on the second day some evidence of robbery, the question [becomes]- before you use that evidence must you get an amendment? If [the wire] was for narcotics and you heard robbery, the answer is yes--within a reasonable period of time. If you want to listen on the third, fourth and successive days to succeeding robbery conversations, you now have a problem, not of retroactive amendment, but of prospective amendment,

*People v. DiStefano, 38 N.Y.2d 640, 345 N.E.2d 548, 382 N.Y.S.2d 5 (1976).

or in effect a new order--[an] amendment opening up the wire. I think you have a problem.

The question is: what is the unit of surveillance? If you conceptualize the unit of surveillance as one of 30 days, I think you probably (and underline the word probably) do not need a prospective amendment until you go in for a renewal. Frankly, you are better off with 15-day warrants, in which case it would probably take you as much time to amend prospectively as it would to get a renewal.

The Court of Appeals decision in DiStefano is that, if at this point you have probable cause to believe that succeeding conversations will occur dealing with robbery, you must have an amendment or a new order for a prospective amendment to be approved by the court before you listen to the robbery, even though you could continue listening to narcotics. The problem then is a question of time: when do you have to get it? Right away or only when you renew? I think the best theory is you have to get it as soon as it is required, and I would say it is probably required quick on long taps, but at least on the renewal with short taps.

One of the difficulties with long surveillance is that it seems like a long time between when you have probable cause and when you have the order. Therefore, could these later overheard robbery conversations have been inadvertent? If you are conducting short surveillance, it

is probably not a problem because you are going to renew it about the time that you would amend anyway. The Second Circuit has allowed you to avoid enormous amendment problems by saying that if you just tell the court about it, you can assume that it is amended. I am thinking that you ought to be very explicit with the court and tell them precisely that you want to amend this narcotics tap to robbery.

Let me end by summing up. Wire tapping works, but it has to be worked carefully. I like privacy, too, but as the Court of Appeals said in Kaiser:*

> [M]uch as we might like, we cannot ignore the realities of life. We cannot ignore the rise of organized criminal activity and 'families' who promise to provide the true 'big brothers' of 1984. As the fact of this case reveals, some intrusion under the most severely regulated and restricted conditions are [sic] necessary, lest the only security we enjoy is that from government intrusions.

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*Kaiser v. New York, 21 N.Y.2d 86, 96, 286 N.Y.S.2d 801, 811, 233 N.E.2d 818, 824 (1967), affirmed on other grounds, 394 U.S. 280 (1968).

ELECTRONIC SURVEILLANCE:
Law and Strategy (Defense)*

James J. Hogan, Esq.**

I kind of feel like Justice Douglas sitting with a hundred Rehnquists.

Professor Blakey told me that I did not have to go through the law and give you the law in the cases. He says that I should just give you my strategy and tactics. Unfortunately, in the present-day scheme of things, the defense attorney's strategy and tactics [are] the law. [One] very seldom win[s] on the facts these days. What I am going to attempt to do is to tell you what I do from . . . the first time a client of mine knows that he has been the subject of electronic surveillance. I have broken it down into [five] stages: the pre-indictment stage, the indictment pre-trial stage, the motion to suppress, the trial of the case,

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and comments on the use of wiretapping under RICO.*

Hello. Is my phone bugged?

The first thing I do, and the thing that you people should stop, is make an inquiry to the phone company. I did it last week, [with] Southern Bell, in Florida, to determine if my telephone was being tapped. They [came] out and check[ed] it, and, interestingly enough, they told me: "No, your telephone has not been tapped and you are not the subject of a legal court order." If they do not tell you that, they refer you to the Federal Bureau of Investigation or to a local agency; so you pretty well know, in that case, that your phone is being tapped. It seems to me that this destroys the purpose [of the tap], but that is one of the little tactics we use.

Don't call me.

The first thing in talking to clients in a wiretap case . . . I don't want clients around. I don't socialize with them. I don't go to dinner with them, and I don't want them in my office. Once I'm hired, I tell them: "Don't call me. I don't want to hear from you. I don't want you calling up to see how things look because things look terrible." Anytime somebody's on a wire tap, it looks bad.

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*Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. (1976).

The toughest thing in my business is to stay clean. Once you get to a position where you're charging big fees and you're representing people like Dellacroche or Lanski, the government wants you. They think you're part of organized crime if you're representing criminals. A lot of defense attorneys are. One, Gino Bellino, an FBI informer at the time, was recently killed in New York. He was so wrapped up with his clients that he became their partner. That's the worst thing that can happen.

The Pre-Indictment Stage

The first thing I usually know is when somebody is served with an inventory which has to be served, as you know, within 90 days after the termination of the tap. ([Unfortunately,] very seldom do clients come to you when they get the inventory. They just put it in a drawer someplace . . . and then usually a year later they're indicted, and then you find out they did get an inventory.) At this time I generally move, pursuant to Section 2518(8)* (which is the inventory provision in the federal code . . . allow[ing] the judge to give you, at that time, the papers: the order, the affidavit, the application, and the transcripts of the conversation, which [the judge] deems are in the interest of justice

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*18 U.S.C. § 2518(8) (1976).

[to give you]). The [Florida] circuits and the federal circuits are pretty uniform in that you do not get that, but I move for it anyway because [the judge] could give it to you if he wanted to. This [is] especially [so] if you have a grand jury witness; [if] they are looking for perjury before the grand jury, they have the tapes and the transcripts all before them. I would like to be able to go over those with my client before he testifies before a grand jury.

I have on occasion filed a motion for return. At present, the law, at least in the federal courts, is that you are not allowed to file a motion for return as to the tapes and transcripts because you do not have a possessory interest in them: they do not belong to you. One important consideration you can imagine for the defense attorney is the seizure of money. When they seize eight or ten thousand dollars, you are interested in getting that back. In Dudley v. United States,* [the court] gave the money back because [it] said that there [was] nothing as to the money that [would] increase [its] evidentiary value, if you just stipulate[d] that such money was seized. [Y]ou could file a motion to return, for instance, if your client is served an inventory, he knows he has been the subject of electronic

*320 F. Supp. 456 (N.D. Ga. 1970).

surveillance, but [was] never indicted, and then is subsequently searched and articles [seized] from him. He could file a motion for return of the articles and [the cases] provide for that. The case that [holds] that you have no right to return of the tapes or the transcript even where the interception was illegal is United States v. King.*

There is also a problem here of actual knowledge when you are not served with an inventory. [One] run[s] into this, for instance, if [one] file[s] a motion for discovery or [one] file[s] a motion to cure the lack of the filing of the inventory. The courts say, "Well, you knew about it so you were not prejudiced." I have to agree with Professor Blakey . . . that the inventory problem is going to be decided against the defense unless you can show prejudice. In [this vein], the D.C. Court of Appeals [has held] that actual notice precludes argument based upon the failure to have an inventory served.**

At the grand jury

The next problem we run into is the grand-jury witness where somebody is subpoenaed after he has an inventory.

*528 F.2d 68 (9th Cir. 1975).

**United States v. Johnson, 539 F.2d 181 (D.C. Cir.), cert. denied, 429 U.S. 983 (1976).

At that time, we move for the transcripts, we move for orders, we move for the affidavits, we move for the applications. We refuse to answer, on Fifth Amendment grounds, if we think the answer will incriminate. We also raise, at that time, the fact that there has been illegal electronic surveillance. Generally, the courts will take the application and the order and look at them in camera. If they find the order facially sufficient, then they just say that you have no right to continue to refuse once you have been granted immunity.

The Federal rules require that all grand jury testimony be recorded in federal courts. It's mandatory. And that includes the [prosecutor's] closing arguments. You're all from different states, and I don't know what your state rules are, but it's a big step forward to make prosecutors realize that what they say before a grand jury now they have to answer for. I've had cases where they were inadvertently recorded. One prosecutor in a Medicare case said: "Now, the doctors are going to come in and lie to you, but we have offered them an opportunity to testify under the Department of Justice standards." He didn't know he was being recorded. It was true that the doctors came in and lied, but their indictment was dismissed.

I also, [at this time], file a motion for the transcript of the grand jury testimony, [under] Bursey

v. United States.* I do this because [if my client] goes in to testify [and] does not have the transcripts, you fellows, by artfully questioning him, can make sure that he commits perjury. If you want to call him back, I want the transcripts of the first grand-jury testimony to go over with him. So I tell the court [that there] might have been a technical violation or an inadvertent mistake that he wishes to clear up at the second appearance.

Another question that we have, especially in the Southern District [of Florida], is whether there is a valid grand jury subpoena. This happens a lot in wiretap cases. You can image [that] the wiretap investigation, as to the Bureau or other agencies talking to the witnesses, does not really begin until the inventory has been served. So the subpoenas in the Southern District of Florida require you to appear at the U.S. Attorney's Office. [This] is an illegal subpoena; there is no such subpoena. We either just do not obey them or we use them to attack, once the government has said that [it] will give [my client] immunity. Interestingly enough, most of the witnesses [who] are called in the wiretap cases are actually targets of the investigation; if they are not going to be indicted, certainly they are going to be given immunity and are going to be witnesses. The D.C. Circuit,** in [a] grand jury investigation, [has]

*466 F.2d 1059 (9th Cir. 1972).

**In re Possible Grand Jury Investigation, 17 Crim. L. Rtpr. 2398 (D.C. 1975) (unreported decision).

said that [when faced] with this situation, you go to the court and tell [it]: 1) my man is a target of the investigation [and 2)] he is going to take the Fifth. [In this case], the judge quashed the subpoena [stating] that, [making a] man go in [to the grand jury] and take the 5th knowing that he is going to be a target of the investigation, may affect the jury and lead to indicting him. I also give each witness a grand-jury letter, which is about three pages [long], that explains to him his rights. [I] have him take it right into the grand jury with him so that, if he thinks something is going to incriminate him, he can read off the 5th, or, which I usually do, come out after each question and talk to me; we decide together whether it is going to incriminate him.

At this time, I also put the government on notice. [First] I send to the FBI or the Bureau of Narcotics, the U.S. Attorney's Office, or anybody else connected with the investigation, a letter telling them to keep their original notes. As you all know, once the inventory is served, the agents go out and start questioning the witnesses as to their involvement. Well, if they do not keep their original notes at that time, what they generally do is [that] the Bureau has [the notes] typed and [made] into a "302," which is a typewritten report that is supposed to contain the original

notes. And that is what they give you at trial under the Jencks Act.* I want [the government] to keep those original notes. Why? Not so much for what those original notes say. But, if it comes to trial and I put the government on notice to keep those original notes and they do not, it is subject, in my estimation, to a motion to strike. The [main] case on that [is] U.S. v. Harrison.** A more recent case, U.S. v. Moore,*** [states that the government is] subject to a motion to strike if, after [being] put on notice, [it] still destroy[s] the original notes.

[The same issue arises with regard to] the periodic reports that (on a 5 or 10-day interval) the judge can require you to make, but are not mandatory. Generally, [the investigators] make [them] over the telephone or just go in and say: "Well, we've done so much and we need more time." My advice to you is to take a reporter with you (if you can get into the judge's office [and] they have time), and have those periodic conferences reported. Why? You are not going to have, at the time

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*18 U.S.C. § 3500. New federal rules went into effect August 1, 1979. Prosecutors can now get Jencks material from defendants (Rule 16). Consequently, the defense attorney who takes statements from witnesses, must preserve them, just as the government must preserve them, and, in turn, give them to the prosecutor after the witness testifies. Of course that means that you are either going to get a bunch of lying defense attorneys or they are not going to take any statements.

**524 F.2d 421 (D.C. Cir. 1975).

*** 513 F.2d 485 (D.C. Cir. 1975).

of trial or [at the] motion to suppress hearing, the judge subpoenaed (which [is possible], to show his supervision over the ongoing tap). If those are all reported, then the judges are not going to be called in. And, plus, it does not leave you open to any attack that you have not given [the judge] sufficient information.

I also tell the government and the FBI that I want them to have no contact with my client whatsoever unless I am present. The reason for this is very simple. At the time of trial, if there are any voice-identification problems, the Bureau immediately goes out and attempts to talk to the witnesses that they think are going to be defendants, whether it be at the time of arrest, [and] say, "Hi, Jack, how're you boy - I'm sorry you're in this type of trouble," [getting defendants into] a conversation. [Then the agents] can get on the stand and say: "Oh, I had contact with this man when he was arrested; I recognize his voice. His voice is the one on the tapes."

The simplest thing you would think for a prosecutor is to identify the voice of the defendant on the tape. [Yet] time after time after time - I think I've had 41 wire-tap cases that have actually gone to trial - they put FBI agents on . . . Why? Why not put somebody from the guy's store or call some friend of his? Get him up there and make them identify the voice. [In one case I had] they put two FBI agents on. They spoke to him in the hall when he was arrested and that's his voice.

And then to support that, they have surveillance on the man, who was the biggest bookmaker in Michigan at the time, and they watched him. He goes into a phone booth, you see, and they have two agents sitting in the car and they look at their watch and they write down, on that Jencks statement I get: "12:09 he went into the phone booth. He made one phone call and at 12:14 he came out of the phone booth" - he was on the phone five minutes. They played that call. The call was only one minute sixteen seconds and the FBI said, "That's his voice." Well, that's the only case I ever beat on identity . . . I took a clock and set [it] up in the courtroom, took my client and the telephone men, had him stand up and pick up the telephone, and the FBI man played his call. . . . He played the call a minute and sixteen seconds and then the tape went off, he hung up. I left my client standing there for the next four minutes because he was the one they said was making that call. The jury told me that's the reason they found the man not guilty . . .

So, having FBI people identify voices, is to me a bad mistake that prosecutors make. I would have somebody that has no connection whatsoever to the Department of Justice or your state prosecutors, not a law-enforcement officer. There are millions of people around who can identify a person's voice. Call in somebody who has nothing to gain by it.

Surrendering your client

Also, at this time, I attempt to arrange with the government for the surrender of the client should he be indicted. [If I represented] the government, I would not make such arrangements because one of the most important things for the government's prosecution is the search at the time of the indictment coming down. In other words, you go out and arrest or go out and get a search warrant based upon the indictment or based upon probable cause, say . . . and you obtain information or . . . documents . . . which you can use to show a continuing criminal conspiracy. However, some prosecutors have allowed me to surrender my client [and] prevent this from happening.

[In addition], surrendering your client prevents a voice I.D. at the time of that arrest. That is generally what I do before indictment. [When] going to the arraignment, I do not allow the client to talk. The magistrates who handle arraignments in the federal jurisdictions that I practice in (and generally I only defend federal cases so I am not really up on what happens in state cases) record the testimony and the proceedings. So, if a man comes in and [the magistrate] says, "Well, what is your name and age," and [the defendant so] states, they record his name and age then [have] a voice I.D. at the time [the defendant] comes to trial. This voice I.D. problem really does not come up as much as you

think. But, there are many situations where defendants that are not really involved have problems with the voice I.D. Of course, they could obtain a voice print if they want to by ordering [the person] to appear before the grand jury, but I find prosecutors just do not do that.

The Indictment Pre-Trial Stage

Generally, I file extensive motions other than the suppression motions. The ones relating just to electronic surveillance are the discovery motions [where] I attempt to get the logs. If the government resists, generally I do not get them; I do not get them until the time of trial [by moving] under the Jencks Act. In Florida, I am entitled to police reports. Now, why do you need the police reports? You need the police reports to show that the government did not have to go for a wiretap - it was not the last resort; they had sufficient non-electronic surveillance. They either had undercover buys [or] undercover people betting with them and there was no need for electronic surveillance. You can introduce these reports at the time of motion to suppress and question the witness. I file a motion for the government to retain additional notes. I [also] file a motion to dismiss, and, of course, [a] general suppression motion. Lately, we have had some success with a motion to dismiss based upon a violation of

Section 2517(5)(3)* which is the amendment procedure Professor Blakey talked about. I do not really think it is proper to dismiss under this failure. But, for instance, in one case . . . [the court] allowed the tap for a [§] 1955 violation (which is organized gambling involving five or more people for a period of 30 days, $2,000 a day), and [the] tap intercept[ed] interstate telephone calls. They could not prove the 55 violation, but they could prove a [§] 1952 violation [of] using the interstate calls. [The defense] filed a motion to dismiss as well as a motion to suppress. The court granted it.**

Failure to disclose

The question here is: when do you raise this failure to disclose? In other words, failure to go in and get another order approving the interception of other crimes. [You should raise it] if you can get away with it (and I did it in a case four or five years ago). It actually [is] not a ground for a motion to suppress, because the interception [was] not invalid or illegal. In other words, if you are entitled to go in and intercept gambling communications relating to a [§] 1955 violation and you inadvertently overhear gambling conversations relating to interstate gambling,

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* 18 U.S.C. § 2517(5)(3) (1976).

**United States v. Campagnuolo, unreported decision, decided Dec. 31, 1975 (S.D. Fla.).

you are allowed to intercept those under the federal system. The only thing you have to do, as soon as practicable, [is] go in and get an order to be able to use those in evidence.

Now, [it] is not, as far as I am concerned, grounds for a motion to suppress [that the prosecutor] did not get [an amended] order because the statute reads that you cannot use them at trial without obtaining such an order. If your man [is] in jeopardy, at the time they go in and say: "We want to use these communications related to another crime," you [must] object. [If you then] ask them to produce the order, two things [can] happen: 1) they do not have the order, the court sustains your objection, they cannot use the tapes and your man gets a judgement of acquittal; or 2) they just obtain the order and then we argue that it has been a year later, 9 months later, it was not obtained as soon as practicable and, therefore, your objection should be sustained. You have some problems here, because the courts will say that you have waived the objection if you do not file it before trial on a motion to suppress. But I do not actually think it is grounds for a motion to suppress.

Motion for severance

Of course, we always file a motion for severance. Generally, these are better known as Byrd v. Wainright*

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*428 F.2d 1017 (5th Cir. 1970).

motions, where we allege that a co-defendant will testify. He files an affidavit, for instance, saying, "X was only a bettor; he was not laying off to me. I was not laying off to him. He was nothing but a bettor." He will so testify if he obtains a severance. This raises quite a problem in the Southern District [of Florida where] there have been a number of severances on this ground, especially in wiretap cases. Judge Fay came up with an interesting alternative, which you may want to use if it ever happens to you: he tried them all together. At the close of the case, he let the case go to the jury with those defendants and all the tapes and transcripts pertaining to those defendants, except for the defendant about whom the co-defendant said he would testify. [The judge stated] that the jury would then come back with a verdict [and obviate the need of] two trials. Then, the man who said he was going to testify [could] get on the stand and testify; [the case would] go to the jury again with [regard to] the man who had supposedly been exonerated. Unfortunately, it did not work out because there was a judgement of acquittal at the close of the government's case.

Conflict of interest

[There is another] thing I attempt to do with the government and sometimes it takes a motion to do this in wiretap cases. You can understand [that] sometimes

I will have a major gambling investigation [with] 12 or 15 or 10 witnesses before the grand jury; I do not know if they are confidential informants [because if] they [are] they will not tell me, and generally they will take the 5th. So [I] want to find out, as the defense attorney, whether there is going to be a conflict here. I file a motion telling them whom I represent, if there is an indictment, whom I represent in the indictment, [and] whom I have represented before the grand jury. [I then] let the government come forward and tell me up front whether there is a conflict. If they give immunity to a witness who has discussed his testimony with me prior to going into the grand jury and has testified and [then] gets on the stand, I am in the position to cross-examine him based upon confidential communications. So I would like to get that all out in front. A recent case of multiple representation where nine clients took the Fifth Amendment is In re Matter of Grand Jury.*

Motion to extend the time to file motions

The most important pre-trial motion you have to file is the motion to extend the time to file motions. Why? The new Rule 41 requires you to file a motion to suppress before plea. Generally, the magistrate will give you [a certain amount of] time to file motions in

*536 F.2d 1009 (3d Cir. 1976).

a wiretap case. In the Southern District of Florida, we go to trial between 10 and 40 days after arraignment. In a wiretap case, for instance one in California, there [can be] 14,000 pages of information. So, if you read 40 hours a week, it might take you 50 weeks to read it, if you listened to the tapes. What you need is all the discovery from the government prior to filing a motion to suppress; either that or you are just filing a shotgun motion to suppress (which, in truth, is what I do anyway). But, theoretically, you need all this material in order for you to be able to properly file a motion to suppress because, if you do not know what has been intercepted, you do not know if there is a minimization problem. Without the discovery, you just cannot properly file a motion to suppress.

This is a big problem in wiretap cases if the most important thing is satisfied: if the client can pay. Wiretap cases just take an immense amount of time to defend, as you can understand if you have ever gotten an order. Professor Blakey says it costs about $12,000 to develop the wiretap and to execute it. Well, I could not try a case properly for $12,000. There are very few people around today who can afford to defend in a wiretap case. You can imagine, if there are 50 or 60 hours of tapes you have to listen to, then there is execution, witnesses, motion-to-suppress hearings: it is a terribly expensive proposition. So I generally

tell a client originally the problem and tell him that if he intends to plead, certainly he can go get somebody who can plead him much cheaper than I would because I find that the cases just drag on and on. [For example] I have one, the airport case that Professor Blakey mentioned, [which] started in June of 1969 and [the] final decision was rendered in January of 1976: [my client] went broke during that time.

The Motion To Suppress

Then I file a motion to suppress. There are many grounds, of course, and I cannot cover all the grounds. [With regard to] timeliness, I would mention to you that Title III provides that [the government has] to give you the orders and applications 10 days before trial and [its rationale] in the legislative history [is to enable one to] file a motion to suppress. Of course, Rule 41 says you have to file a motion to suppress before you plead; it is just a question of when you [should] file it. Generally, as a practical matter, [the government] give[s] it to you right away, as soon as [it] get[s] an order unsealing them after the indictment. I still raise constitutionality though I do not expect the Supreme Court, with its present makeup, to rule it unconstitutional. [However], they have not ruled on the constitutionality of it.

Standing

To establish standing, you don't have to be on the tape. If it's your house, if it's your phone, if you

can show that you paid the rent on the premises [you have standing]. Anything to get standing, to try to suppress the tapes, because in multi-defendant cases, whether or not the tapes are actually coming in against you, whether or not it's your man on there, they're just as damaging if they're coming in against the other four people sitting there because it's all spill-over. The spillover effect, expecially with the new RICO prosecutions, is tremendous.

[For example, I had a case in] Jacksonville . . . and they had [them] for murder. One of the co-defendants blew up two witnesses in Jacksonville, blew the car up, they were sitting there with no legs. This kid I had was pushing cocaine, 3 ounces of cocaine . . . We had to sit there through seven weeks of trial. All the murders and everything else [came] in. By the time seven weeks [was] up, the grand jury just thr[e]w them all together like pea soup. So, no matter whether your particular defendant is on there, if you are [a] competent defense attorney you want to suppress the wire taps.

Authorization

The authorization problem is the Giordano* problem, which has been gone over many times. The only question here is who [do] you subpeona? I had the problem as to

*United States v. Giordano, 416 U.S. 505 (1974).

what I should do in finding that there were five or six different authorization signatures on the Wilson letters. The government submitted Mitchell's affidavit and Wilson's affidavit. The court [inquired] why I would not rely on those. I said: "Well, I just didn't believe Mitchell and I just didn't believe Wilson. I did not want to rely on them without some cross-examination." The court allowed me to go to Texas, to take Wilson's deposition, and to go to New York and take Peterson's deposition, and Mitchell's deposition. Subsequently, we found out that they were lying.

The probable cause situation [has been] explained, except [as to] the staleness of the probable cause. The State of Florida has ruled that [the probable cause is] stale if it has been over 30 days from the time of the offense to the time you get the wiretap.* There is a recent Second Circuit case, I believe, that says 21 days is all right.

The probable cause must be as to the place, the phone, and the person. The problem here with the phone [is clearly illustrated by] the problem that I [ran] into [in] U.S. v. Kilgore** which is now on appeal to the Supreme Court of the United STates. [In that case], there was very, very extensive probable cause

*State v. Rodegoez, 297 So.2d 15 (Fla. 1974).

**518 F.2d 496 (5th Cir. 1975), cert. denied, 425 U.S. 950 (1976).

as to a person named Greene who was giving a line out to all the bookmakers in South Florida. He was obtaining the line from Las Vegas, but he was obtaining the line and giving the line out on numerous pay telephones. [Yet], the wiretap was for his home phone. There was nothing in the affidavit mentioning that he had ever used his own phone to give out line information or to receive line information. It is presently on appeal; we have lost . . . so far.

Other investigative techniques

[As to] other investigative techniques, the only thing I can tell you here is that you must inform the judge of each technique that you have tried and that has failed. If you give him complete information, then no court, as far as I am concerned, is ever going to throw a case out on lack of developing other investigative techniques.

Minimization

When I was testifying for the Wiretap Commission, they asked me: "Do you mean you want the prosecutors to go to the judges every day?" I said: "Yes, why not?" Now, that may not be practicable in some of the New York cases where you tap for a year and you continually get extensions. But, generally in the federal cases, there was no problem with calling that judge on the telephone each day and saying: "Judge, we have a terrible problem today. The first day we have nothing but codes, people

talking, they're talking about white pants which we think is cocaine or they're talking about dollars which we think are hundred dollars and we cannot decipher the calls. We can't tell which ones at the present time contain incriminating evidence pertaining to the crime." And he may say, after learning this: "Go ahead and intercept them all until you can determine a pattern." If he does that, you can bring that up at the motion to suppress [hearing]. I submit you have had sufficient judicial supervision [and] nobody is going to throw a case out on minimization. At least in the Southern District [of Florida] and in Detroit, in the Eastern District of Michigan and Grand Rapids, those judges are ready, willing, and able to talk to the prosecutors as the tap goes along and to make those decisions.

It should not be up to the prosecutor to make that decision. If he makes the decision and the court says that it was not [his] decision, then you are in trouble, but they are not going to throw it out if the judge made that decision. The ultimate [scheme of operation], as far as I am concerned, would be to have [the conversation with the judge] reported. If not, as soon as you finish talking to that judge, I would make a contemporaneous memorandum of what occurred [with] exactly what the judge said. You can [and should] show that to the judge at that time because [the minimization issue] may not come up until a year or two years later. If you have

a memorandum, you can refresh his recollection or your own recollection on the stand as the prosecutor.

I also do not know exactly how you minimize with a bug. The mimimization that is used by the federal authorities that I have been connected with is that, if they determine the call is not pertinent, they take off [their] head phones and turn off the recorders; they can tell when the phone goes on because there is a red light. They do make spot checks; at least they tell us they do. Of course, we do not know whether they are monitoring without recording; you just have to rely on them. With a bug, I cannot see exactly how you can tell, when you have four or five people in a room and that thing is transmitting all the time, as to what is [or is not] pertinent. So I do not know how you minimize with a bug in the place. And I am sure that you maybe will raise that later . . .

Amendment

[There is a] question with the disclosure section as to whether you have to file a new application [upon receipt of wiretap evidence of a new crime]. I am [referring to] the disclosures that I went over before: [if] you are tapping for one crime and discover evidence of another crime, the statute says you have to go back and make [an] application to a judge for approval of the interception of the other crime evidence. Does that mean that you have to file a formal written application which

satisfies Title III with an affidavit under oath and get a written order from the judge? Well, I contend that it does. The Strike Forces now are doing that, at least the ones I have come in contact with. This raises another problem when you are filing your application and you have put in prior applications - do you have to put this application as one of those prior ones? I say you do. Any prior application that has been filed to intercept those individuals must [be] disclose[d] to the judge.

An interesting question was raised concerning how you would know about the prior interceptions. Of course, the Department of Justice has a centralized system in Washington that tells you who has been tapped and who has been the subject of orders. I just do not know how you do it in the states; except when Professor Blakey was explaining it he said: "It is those applications that are known to the applicant." That is not entirely true; the statute also says "or are known to the person authorizing the application." We have an interesting thing in Florida. There has been a statewide grand jury going on for a number of [months] and they have [handed down] voluminous indictments, eight or nine hundred [with] 30 or 40 taps. The police officers were the ones [who] made the applications and the affidavits; whether they did not trust the prosecutor, I do not know. But they went from Miami, Orlando, [and] Clearwater to

Tallahassee and obtained permission for authorization from the Attorney General of the State of Florida. I think you can make a good argument that he should know all the applications that have taken place in Florida whereas the District Attorney or the prosecutor in Dade County would not know [about] those applications that have been made in Clearwater or Orlando. This is a serious problem in Florida.

What I am saying is that you must track the statute as best you can, you have to say that the interception was inadvertent, in good faith [and that] you were not going in on a subterfuge in order to obtain this information. [The judge] may rule that you do not have probable cause. So he will say, "Don't intercept anything more about that." But the call itself may provide you with probable cause to continue to intercept it or for proof. Generally, if there is a gambling investigation and narcotics comes up, you have good reason to believe that it is going to come up again.

Sealing

As to the sealing problem. I cannot understand why you people have problems with that either. The Second Circuit* has ruled [that certain tapes must be suppressed] because the [Department of Justice] kept the tapes in [its files for a year before submission to the court for sealing.

*United States v. Gigante, 538 F.2d 502 (2d Cir. 1976).

The government raised the proposition: "Well, the judge sealed it after a year. So he found everything was all right." The court [stated] that [such fact] does not terminate the inquiry. The court said that the defendant does not have to prove that the tapes were tampered with. The reason for the sealing [is] to protect the[ir] integrity and to show that the tapes have not been altered. But, in this case, the Second Circuit said [that the defendant] does not have to prove that the tapes were altered when it has [been] a year [before sealing]; this is contrary to [the rule] in the Third Circuit.*

In this sealing case, I submit that there has been no violation of the interception and that sealing is not a proper ground for a motion to suppress. And, once again, as in disclosure, I would wait until my client is in jeopardy. There is nothing wrong with the interception; the only thing that sealing does is make the tapes admissible at the time of trial. All I am saying is that if the defense attorney wants to take a chance in a hopeless case, he [should] not raise the sealing problem until the client is in jeopardy. Then, when they bring in the tapes, he goes up and says: "Can I see the seal?" [If] the seal says on it that it is a year later, then you raise your objections. If [the judge] sustains your objection, there are only two alternatives: a mistrial, which raises a

*See United States v. Falcone, 505 F.2d 478, 483 (3d Cir. 1974); United States v. Cantor, 470 F.2d 890, 892-93 (3d Cir. 1972).

double-jeopardy problem, or [exclusion of] the tapes and hopefully they do not have other sufficient evidence [for a conviction].

Entry

Now the entry [problem], or what I call an illegal entry: a trespass or breaking and entering to install a bug or take out a bug. The [Supreme Court] just decided that it was legal, under [some] circumstances, for the government to go in and install the bug by breaking and entering.* [Nevertheless, w]e had a case in Florida where they obtained an order to place a transmitter in a bail bondsman's office because he was connected in narcotics and gambling and other various interesting activities. They did not tell the judge specifically [that] they were going to break and enter; they told the judge that they were going to place the microphone. The order said, [and] naturally we know the order is always written by the prosecutor, [that] you may use any reasonable means to install the transmitter. They broke into the place at night, installed the transmitter, broke in once again to repair it, broke in once again to take it out. [There was] adverse newspaper publicity [in this case] because Miami papers were up in arms over the government breaking and entering somebody's house to put a microphone in. I submit: how else are you going to get in? But [the judge] suppressed, saying: "They didn't tell me they

*Dahlia v. United States, 99 S. Ct. 1682 (1979).

were going to break in. They were afraid to face me and say we have to break in." But he signed the order "reasonable means" and I do not know any other "reasonable" means, unless you are going to obtain entry by ruse and then just slap a transmitter under a table.

Other surveillance techniques

[As to] the other surveillance techniques: first, the pen register. The Supreme Court has ruled* that when you have a pen register, without a wiretap order, there can be compulsion on the phone company. In other words, you can order the phone company to cooperate with you and give you the color code or the lease line, or install the pen register for you. [The government] said, and the legislative history says, that the pen register does not come under Title III. Therefore Title III is [now] amended to allow you to force the phone company to cooperate with you in a wiretap.

The bumper beeper cases, although I do not honestly understand them, have said that [the] 4th applies to bumper beepers. However, the Eighth Circuit** [has held] that you [can] put a bumper beeper on a car without a warrant if you have probable cause and exigent circumstances. One interesting case that recently came out of the District

*United States v. New York Telephone Co., 434 U.S. 159 (1977).

**United States v. Frazier, 538 F.2d 1332 (8th Cir. 1976).

of Hawaii concerns binoculars. This surveillance was used to obtain a wire tap. It was a gambling investigation where police officers used telescopes and binoculars, from a quarter of a mile away, to look through the windows of a bookmaker's home and to see who was coming in and out. [The government] used this to show probable cause, and interestingly enough, [it] used it also to show that normal investigative techniques were not sufficient. So they had to have a wiretap. The judge of the District of Hawaii ruled that plain view which was the government's argument means unaided plain view. [The judge] said: "If the government agents have probable cause to suspect criminal activity and feel the need for telescope surveillance, they may apply for a warrant."* If that stands up, you are in trouble.

Background conversations

The other problem with telephone taps is background conversations. I do not know if any of you have run into it, but we raised it in United States v. King.** [Assume a bug is] on [a person's] telephone. In a bookmaking operation, there are generally clerks there; generally there is more than one telephone; there are people coming in either paying, collecting, [or] discussing other things.

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*United States v. Kim, 335 F. Supp. 523 (S.D. Cal. 1971), modified on other grounds, (D.C. Haw. 1976).

**478 F.2d 494 (9th Cir.), cert. denied, 414 U.S. 846 (1973).

[If] the fellow picks up the phone and you are allowed to intercept over that phone, recorded on the tape [will be] the other background conversation in the room. We were able to suppress that [because] that did not come under the warrant. I am not so sure that part of the King decision would stand up; it has never gone to a Court of Appeals. [The decision] went up, as I recall, under the minimization issue.

Privileged communications

Now, the privileged communications ground. I have been intercepted a number of times, in the past four or five years, generally with bookmakers, because I had a bad habit in the past of betting on sports. I would call them and [the agents] would intercept me, and interestingly enough, after they learned it was my voice, which the FBI in the Southern District of Florida knows, they would stop the interception. I have never seen a problem with an interception [of an] attorney/client conversation in the Southern District [of Florida] or in the other districts around the country that I have practiced in. But, if Professor Blakey is correct about the abundance of crooked lawyers, I am sure that we will run into it much more. I know that the New York courts have raised it a couple of times and have decided it.

An interesting recent case concerned a private wiretap. In other words, [there were] two individuals, not connected with the government, [and] one intercepts the communications and records without [the] consent [of the

other]. Under federal law, you only need the consent of one; however, in Florida and California you need the consent of both parties or it [becomes] a third-degree felony. The government was not connected, whatsoever, with this interception. Then the government obtained the tapes and attempted to introduce them at the time of trial. The statute[s], [§§] 2511(2)(d) and 2515,* say that this interception is illegal if it is used for committing a criminal or tortious act, or any other injurious act. The government had nothing to do with this. The court ruled there that the defendant may prove the illegality by [a] preponderance of the evidence. In other words, the defendant raising the issue must prove that [the] interception and that [the] recordings [were] to commit a criminal act. [The court] remanded the case to see whether the defendant could prove that; the defendant had the burden of proof here. The government argued that the tape was independently admissible because [it] had no part in the decision to record or the actual recording. But [§] 2515 precludes that argument, at least according to this court and according to my view.

Prior applications and the facially sufficient affidavit

The prior applications as to the same person's facilities or places that you have to include in your application

*18 U.S.C. § 2511(2)(d) (1976).

[also present a problem]. We had an interesting [problem] in the District of Georgia, where the application incorporated, as most of them do, the FBI agents' affidavits by reference. In the application [a] particular bookmaker named Goldstein was included; they did not ask to tap him. But there was probable cause shown in the affidavit which was included in the application. We said, because they did not name Goldstein as being the subject of any prior application, that it should have been suppressed. The court suppressed it. Then the government came back on rehearing, as [it] do[es] quite often lately, and informed the judge that [Goldstein] was not in the application; that he was only in the affidavit which was incorporated in the application. The judge, as they quite often do recently, reversed himself.

We also sometimes challenge the facially sufficient affidavit if [we] can show that there has been a misrepresentation by a government agent of a material fact. This is only a recent development in criminal law. The old rule where an affidavit or application is facially sufficient used to be that [it was] all the magistrate had before him and you could not go behind it. But now, if you can prove that there has been an actual misrepresentation of a material fact by a government representative, you are entitled to go into it. If you can find an intentional misrepresentation, whether it is material, [the evidence is] subject to [a] motion to suppress.

Subpoenas

As to [subpoenas] in the motion-to-suppress hearing, this depends upon the experience, the aptitude, the ingenuity of the defense attorney. What I can tell you is who I subpoena: I subpoena the monitors. Generally, the government will produce the monitors. I do not subpoena all of them; I look for the youngest, the most inexperienced, and the most likely, as far as I am concerned, to tell the truth and not to have been subject to my interrogation before. I subpoena all the other agents as to the execution of the search warrants and as to the surveillance during the time of the tap because the agents will be out surveilling the people who are called. If you can show that the authorized objective was reached by the surveillance and that the people were discovered and that [the agents] did not terminate, then you have a chance to suppress - a slim chance. I also bring in the technicians, for instance, the listening-post layout, to show that you can monitor the conversation without recording. The circuits are in conflict as to whether monitoring and recording are interceptions. But if, as the logs generally say, "recorder turned off" [is true], you can still be listening to the conversation and still be intercepting. I bring the agents in to testify as to that and as to any unauthorized personnel in the listening post. I also call the attorneys for the government and the judge who signed the order. Generally, the courts quash the subpoena for the judge who signed the order. I bring

the government attorney in to testify. "Did you then go to the judge and tell him that you had to continue? Were you intimately connected, on a day-to-day basis, with this interception?" Of course, if he is properly versed or if he is properly prepared, he will say yes. [As to] the judges: if you report, as we mentioned, the five-day or ten-day report to them, then you do not have to call him because you have [the reports].

Which documents to introduce?

The only documents I attempt to introduce besides the general ones [are] the surveillance reports and the grand jury transcripts for [the judge's] in camera examination to see if there has been a failure of amendment or a failure of retroactive amendment of the order. [There is one thing] I always do in a tap because, generally, now there is a chain of taps [one tap leads to another which leads to another which leads to another and there may be three branches off it) - I make a chart for the judge to see, so that he can determine exactly what tap led to what tap [and] where it went. [As] to each tap, I cite the cases and the grounds on that tap that I am looking to suppress; then the judge has the whole picture in front of him. It is almost impossible for [the judges] to follow [these multiple taps] on an extensive motion to suppress hearing; the facts and circumstances of tap A led to B led to C, B and C led to D and E. It is almost impossible. But with a chart right in front of him, he understands what you are talking about.

I also introduce the Department of Justice Title III booklet, which we obtained under the Freedom of Information Act, or, if the Florida Bureau of the Law Enforcement is in the case, I introduce their Technical and Monitor Procedures for Wiretap. Why? Because, for instance, the Department of Justice manual for electronic surveillance says that these recourses to the judges on five to ten-day intervals shall be in writing. [The manuals] do not rise to a statute or to a regulation, but they are a good argument that [the agents] were not properly doing their job when they just call him on the telephone and say: "Judge, we intercepted a lot of gambling calls today and we have to continue because we don't know all of the unknown co-conspirators."

Some of the quesitons I ask the monitors: "Did you have a copy of the order with you in the listening posts?" If he says no, [then I ask]: "Well, what was the authorized objective?" "I don't know." "Well, how did you know when to stop, if you don't know what they authorized?" "Well, the authorized objective was gambling." "What statute? What are the elements? When do you reach the authorized objectives? What were you looking for? Could you listen with the recorder turned off? Who was the agent in charge? Could you stop the termination? Who had to stop it? Who had the responsibility to say the authorized objective has been reached, we can't go any further?"

The dual recorder question

An interesting thing that happens in Florida is they have two tape recorders in the listening post. One is a work tape, and one is supposed to be the originals. Actually, both of them are originals, because both of them are coming right off the tap. If they seal the one that they say is the original and they do not seal the one that they say is the work tape, you can see what may happen. There may be times when they are turning off the original and the work tape is still running. If you do not bring this up at the time of motion to suppress, you are never going to learn about that work tape. You say that the work tape should have been sealed and you go into two different minimization problems because there are two different recorders. Of course, once they have recorded, they can take the original tape and make duplicates of it; that is their argument: "We are just making a duplicate set at the time of interception." Actually, those tape recorders, no matter how good human people work, never will have the same thing on them. They will always have a place where one breaks down, they continue to record; one agent does not take his headphones off, the other does. I see no reason . . . to have two recorders in there anyway.

Appeal

The federal courts have said that you cannot appeal from a denial of a motion to suppress. In other words, if your motion to suppress was lost, you [used to] say,

"I want to preserve this Your Honor, but we are pleading guilty, [while] preserving the right to appeal the motion to suppress." That is no longer valid in federal courts. But it is a very simple proposition to say at the time of trial that what you are relying on is the motion to suppress; you just stipulate to the facts contained in the indictment. You say, "Your Honor, those facts are true. However, the government will stipulate with me that those facts could not have been proved without the introduction of the wire-tap evidence." That preserves your right to appeal the motion under U.S. v. Doyle.*

Plea bargaining

A very important part in wiretap cases is plea bargaining. Generally, [the government] will give you a better deal before [it has] to go through the motion to suppress than they will afterwards. But if [prosecutors] cause enough trouble, [defense counsel will] more than likely want to get out if [it is a] multiple conspiracy case. If there are ten lawyers involved, there are only going to be one or two lawyers doing the work; the others are going to be riding on their backs. We had [a] case, U.S. v. Lanza,** with 62 defendants, involving [a] widespread numbers operation. I filed, maybe, a hundred pages of motions.

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*348 F.2d 715 (2d Cir. 1965), cert. denied, 382 U.S. 842 (1966).

**341 F. Supp. 405 (M.D. Fla. 1972).

The Trial Of The Case

Just a few things concerning the trial in a wiretap case.

Jury selection

It's bad enough as it is in the federal courts that they won't let you talk to the jury. However, it's changing a little bit. [I tried a case in Greenville,] South Carolina [with] Judge Martin, senior judge there, 69 years old . . . [with emphysema]. Going into South Carolina with a man from Miami is a tough proposition. It's a farm community, [they're] in overalls and these fellows brought in 100,000 lbs. of marijuana, . . . so that's a little difficult. [And the most difficult thing] was Judge Martin. He won't let you talk to the jury and he won't ask the jury the questions [you] ask. "One simple question, your honor, in the wire tap here they're talking about cocaine. Could you ask the jury if they've had any problems with narcotics?" "No." What do you do? Nothing. Maybe in New York City it wouldn't be so bad, but in Greenville, South Carolina, that case was over as soon as they heard marijuana. Those are little problems that you run into. Besides that, you can't get them out on bail. But jury selection, you try to select somebody who, in the street terminology, is a wise guy. Somebody that's been around. Somebody that bet on football, somebody that bet on horses, somebody that drinks whiskey. You want people who have been around; generally, in the federal courts you get postmasters, post-office personnel,

retired people, and when those people hear those tapes, they wonder how can this defense attorney come in here and say that this man is innocent? How can he do it? I mean, if they could, they'd convict me.

Juries love wiretaps

The conception that the people [of] the United States are against wiretapping, that Congress is against wiretapping [is incorrect]. Juries love them; they eat them up. The one thing they listen to is the conversation over those tapes. You can just see the rapture on their faces that they are intruding into the private conversations of these people.

But one problem you have, especially in gambling cases, is that gamblers are the filthiest-mouthed people in the world and they will curse and have a unique way of expressing themselves concerning the sexual activities of humans. And this will come out over the tapes. You can just see those women stand up when that word comes out. You can [deal with this in either of] two ways. Generally, it is done by instructions: "Don't hold it against these poor boys because they curse." But the real way to do it, and we have done it with the Bureau, is [to] have that part deleted from the tapes. The technicians working for the Bureau are tremendously experienced in running those tapes. They do not cut out "damn" and those kinds of words. But [for] the real hard-core stuff that can hurt you, you have a pre-trial hearing where you have that stuff out. For instance, [if] betting [is] on baseball,

when a bookmaker has lost the night before, things like race, religion, sex, all of these things come up. They will say, "That dirty mackerel-snapper hit a home run in the last of the ninth; it cost me $1,000." Well, if you have four Catholics on the jury, that might hurt you. I know they will use a thing like, "That colored cook, Fryman, the pitcher, he beat me last night," or "That spade, Hank Aaron." If they say, "That spade, Hank Aaron, beat me last night in the last of the ninth," and you have four "colored" jurors on there, they might take something against this poor boy and he is only talking, not knowing that they are listening in. That can all be deleted. Even though it is admissible, it is so prejudical as to overcome the admissibility of it. But you have to look to that before they start playing those tapes, and that is generally in a pre-trial hearing.

Transcripts

The interesting part of the transcripts is that now the defense can put in their own transcripts. There's a recent RICO case [in which] that was tried; a Circuit Court Judge was indicted in Florida for running a racketeering county. His county was the racketeering enterprise and the tapes were concensually eavesdropped . . . by the sheriff and by a couple of other witnesses. Well, the judge said: "That's not what I said." . . . He was

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able to make up his own transcripts and he says, "This is authentic." The government says that it is authentic, and the jury decides which one is authentic. The jury decided he was guilty in that particular case. So you're able to get at least your side to the jury.

What if the tape is in a foreign language?

We just finished an extortion case [where] the victim and the people that were [allegedly] extorting him were all French-Canadians speaking in French. Now, what do you have to do in this case? [First], you have to bring in an expert [who] can translate the French to English. In this instance, it was a woman from the FBI; she had to be qualified. It is a big proposition here, you see; she was qualified in French, she learned her French and lived in Paris. But we were able to bring out, although they qualified her as an expert, that French-Canadian French and French [as] spoken in Paris are different, just as the Cubans in Miami could not speak to the Spanish people in Madrid [who] spoke Castillian. It is an entirely different dialect; the words mean different things. The defendant, in this case, took the stand to explain what he meant, which might be entirely different from what the experts said.

Multiple witnesses

That brings up another good point at trial. When you are introducing the tape, what do you do as to the voice identification, as to the translation, as to explaining the code used on it? There may be 40 different

people talking. The best way to do it, from [the prosecutor's point of view], is to put multiple witnesses on the stand. Tell the court what you are going to do: "I'm bringing in four FBI agents, and I'm going to swear 'em all, and they're going to identify the voices." [Then] you do not have to stop each time and say: "Well, all right, Jack, you go out and bring Joe for the next conversation." You have them all understand, at the same time, [that they are] to identify the voices they can identify. At the same time, in a foreign-language thing, you have your translator there once she has been qualified. She translates for the jury. She is under oath too. You also have the technician who is running the tape and I think he should also be sworn. If you put all these people on the stand at the same time, you are giving it all to the jury in one big piece and that is what they understand. If you keep sending people out and people in and sending people out and bringing people in, then [the jury] very often do[es] not know what is going on - they cannot differentiate the wheat from the chaff, which the defense attorneys like. I argue against putting them all on, but it is a good prosecutorial tool. The experts in gambling codes you can put on the stand at the same time. The FBI does not want to put him on the stand until the end because he is the wrap-up witness; he is the real sex of the case.

Instructions

[We] come to the instructions that are important during the trial. Of course, [there is] the instruction as to obscenity. [Another] of the problems we run into is that I do not want [the] transcripts of those conversations to go to the jury room. If [the jury has] a chance to mull over the transcripts in there, there is going to be a conviction. Most of the cases have allowed the jury to read the transcript as the tapes are played, as an aid, but [the transcript is] picked up afterwards. We do everything we can to keep those transcripts out of evidence. The Second Circuit has allowed them in; the Fifth Circuit says it is not an abuse of discretion. But the lower courts are not letting the transcripts go to the jury even in the case we just had with the foreign language. That raises another problem. The jurors, when they get back to [the jury room, are told]: "If you have any questions, write me out a note and send it in." The first question is: "Can we have the transcripts?" Of course, since they are not in evidence they do not go back. Then they say: "Well, can we hear the tapes?" "Well, of course, you can hear the tapes." But you do not have any voice I.D. on the stand, you do not have any wintesses explaining the code on the stand, you do not have a translator. And there are technical problems because the man from the Bureau has already gone back to the office and he does not have the equipment set up at that

time. [However], we have been able not to have the tapes played and not to let [the jury] have the transcripts.

You are entitled, as the defendant, to an instruction that the tapes are what control, and if there is a difference between the tapes and the transcripts, [the jury] must rely upon the tapes. You are entitled to that [instruction] immediately upon the transcripts being given to the jury and again at the close of the entire case. Also, you are entitled, at the time the tapes are played, to the co-conspirator instruction that [the tapes] are only coming in against the person speaking [and] not against anybody who was not present, unless you prove a conspiracy.

One further thing that recently has been going especially since Gannett* is barring the press and the public. If you can keep the press out while they're playing the tapes it's a tremendous help to you when you're representing people who are going to be in the newspaper the next day. We represented the people who were supposed to be part of the Purple Gang who were supposed to be killing FBI informants. In a little town of Orlando in Florida, where Disney World is, they indicted them for 31 gun counts, they purchased 31 different guns, all .22's and I was able to keep the press out during the case. Got plenty of publicity, won the case, but none of the publicity had anything to do with the material that was coming off the

*Gannett Co., Inc. v. De Pasquale, 443 U.S. ___, 99 S. Ct. 2898 (1979).

witness stand, it all had to do with the background. Now if you can't bar the press, we want to lock the jury up. But no judge will lock juries up any more. I don't know how it is in your jurisdiction, but in federal court it's almost impossible to get a judge to lock a jury up. [Take] a case like Dellacroche that's going to be in the newspapers all the time. You don't want the jury to read that Dellacroche is supposed to be a killer or Murder, Incorporated, but the federal judges won't lock the juries up. I just don't know how to keep them from reading this newspaper publicity about it. Maybe you have an idea of how to keep a jury from reading publicity. Wouldn't you as a juror read? Wouldn't that be the most interesting thing in your life? The report of the trial that you're actually sitting on. Can you honestly believe that a federal judge instructing jurors not to read the newspapers has any effect whatsoever? . . . If you can keep the press out they will have nothing to read.

Closing Comments: Wiretapping And RICO

I would just like to say [that], if there had been strict interpretation of the wiretap laws [as] written by Professor Blakey and his cohorts, there would be no tapping in the United States. The statute is impossible to follow as it is strictly written. Since June of 1969, when wiretaps were first used in the federal courts, the courts have done the following. You do not have to instruct

the monitors how to minimize. You do not have to minimize the interception if you only intercept all the calls for 9 1/2 days. You do not have to minimize even when the U.S. Attorney instructs the monitors to intercept all of the calls. The recordings of the conversations are not intercepted if they are stored and never listened to. You do not have to identify the persons intercepted even if they are known. You do not have to serve an inventory on time. You do not have to seal the tapes immediately upon termination of the interception. You do not have to file the application and obtain the order to use the interception pertaining to other crimes not mentioned in the order. You do not have to date the order of interception, even when the interception can only continue for 15 days after the day of the order. This happened in two cases in the Southern District of Florida; the order said, "You may tap for 15 days from the date of this order," and the order was not dated. How do the agents in the field who were doing the interception know? Clerical error.

You can tap [for] 18 days when there are only 15 days on the order; this is under Rule 45 where you do not include Sundays or holidays and you do not include the first day. The prosecutor [is "allowed"] to lie under oath as to who the person was who authorized the interception. (Now, the prosecutor really did not know, when he was swearing to the judge under oath, that Will Wilson had

authorized the interception; he really did not know Will Wilson had never seen the papers.) It allows breaking and entering by the police to install, repair, and remove the bug. The latter, interestingly enough, may be a problem. If it is upheld that you can break in to install the bug, does that also authorize you 15 days later, to break in and repair it, and 15 days later, to break in and take it out? I think you might need another warrant to do those subsequent things. You are allowed to wiretap where other investigative techniques have not been tried, but the applicant thinks that they would not succeed. It allows probable cause to be shown even where probable cause was shown 21 days before the order [was] signed; it was not stale because there was a continuing criminal conspiracy.

These are just some of the cases [which] have interpreted the wiretap laws as we have them now. They are the greatest tool that you people have, if you can afford them. I cannot argue that they are the greatest tool to convict people that has ever been devised. But personally, I think we are giving up too much of our individual rights [with] the way [wiretaps] are being used now, especially in the state courts.

One more thing, RICO,* as Blakey predicted three years ago when I was here, is the greatest statute the

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*Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §§ 1961 et seq. (1976).

prosecutors have ever had. I'm defending a man named Anthony Clayton who was indicted with a man named Aniello Dellacroche, a New Yorker who had some notoriety on occasions. The enterprise in the indictment, could you imagine what it is? The Gambino mob. The enterprise is the Gambino mob . . . What do you say? What do you say when you see "The Godfather" and they say all this? How do you overcome [it]? How do you overcome that your man is Mafia? . . . How do you overcome just thinking of the Gambino mob? I don't know yet. I don't know. I've moved to have it struck, but I'm going to lose. I just don't know how I can overcome that. Forget about the evidence. There's plenty of evidence, but just the Gambino mob. Can you see the prosecutor reading the indictment? He'll read it every chance he gets. "Ladies and gentlemen, the grand jury charges that these two men are members of a racketeer-influenced enterprise, and that enterprise is the Gambino mob." No wonder they convict. I'd convict them myself. And Blakey predicted that would happen.

To conclude, after 10 years with the wiretap law, I know the defendants are paranoid. I had a client come to the office, he comes at 6 o'clock in the morning and he was a bad person, connected to one of the families in New York, and he comes in with a briefcase - 6 o'clock in the morning. I thought maybe that was my last case.

[Puts] it on the table in my office, opens up the briefcase, and takes out a machine - buzz, buzz, buzz - he's checking the whole floor, checking my office for bugs. They don't even want to talk in my office, my clients. "Let's go take a walk Let's go outside." They're paranoid. And in the federal courts there are so few taps now that you don't have to worry.

APPENDIX A

Consensual Electronic Surveillance

Consensual Electronic Surveillance

OUTLINE

Summary

¶1 Electronic surveillance[1] is a useful law enforcement technique for the control of organized crime. Consensual electronic surveillance is not subject to the complex federal statutory limits on other forms of electronic surveillance. It is not a search under the Fourth Amendment. Individual states must meet at least the federal standards on electronic surveillance, though they are free to pass more restrictive legislation. New York's laws controlling consensual surveillance closely follow the federal pattern, while the Massachusetts and New Jersey statutes are each more restrictive.

¶2 Problems remain with consensual surveillance usage, most notably what constitutes a valid consent. There are also potential Fifth and Sixth Amendment issues, as well as the possibility of claims of entrapment.

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[1] As used in these materials, the phrase electronic surveillance generally includes wiretapping and bugging, although the terms electronic surveillance and wiretapping are sometimes used interchangeably. Wiretapping generally refers to the interception (and recording) of a communication transmitted over a wire from a telephone, without the consent of any of the participants. Bugging generally refers to the interception (and recording) of a communication transmitted orally, without the consent of any of the participants. The term consensual surveillance refers to the overhearing, and usually the recording, of a wire or oral communication with the consent of one of the parties to the conversation. See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, xiii (1976).

I. Introduction

¶3 Electronic surveillance is an effective technique in gathering evidence of the activities of organized crime. Two of the most useful consensual electronic surveillance techniques are recording or transmitting with the consent of one of the participants to a conversation. Consensual surveillance, however, may encompass three discrete, though related, situations where a party to a conversation, under the direction of a government agency and without the consent of the second party:

1. records his conversation with the other party;
2. uses electronic equipment to transmit the conversation to government agents; or
3. authorizes law enforcement personnel to use electronic devices to overhear and record the incriminating communication.

¶4 Electronic surveillance, but particularly consensual surveillance, offers law enforcement personnel several advantages.[2] A recorded conversation may be more reliable and often is more convincing than the testimony of the monitoring agent. The prosecution's case, too, cannot be weakened because of the fallibility of human perception and memory. Moreover, the credibility of a tape recording is far superior to that of a government informant with a "blemished" character. Such a recording can also supply the corroboration often required

[2] See Appendix for excerpts from the Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (1976) on their findings on the effectiveness and usage of consensual surveillance.

for an accomplice's testimony.[3] Electronic surveillance can be used to establish the recorded individual's state of mind or intentions. This can be particularly important in conspiracy cases. Consensual surveillance also minimizes the possibility that an unreliable informant will cease cooperating with the authorities prior to the trial. The existence of a well-guarded recording reduces the incentive for killing a key witness prior to trial. If an informant succumbs to threats of physical violence and refuses or is unable to testify, the recorded conversation can be introduced without the consenting participant's testimony. The recorded conversation can also be introduced into evidence even if the informant dies before trial.[4] Finally, the use of electronic surveillance minimizes the risk of physical harm to a police agent during an investigation. The actual conversation between the informant and the criminal can be monitored by police to ensure the agent's safety in the event that his identity is suspected.

[3] Eliminating credibility as an issue can be particularly important in political corruption cases. A reliable recording can prevent the crooked official from turning his trial into a credibility contest, relying on his position to gain acquittal; it can also act to exonerate the innocent victim of the irrational or political grudge accusation and prevent an unjust indictment.

[4] See, e.g., United States v. Lemonakis, 485 F.2d 941, 948-49 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974).

II. Federal Law

A. Statutory Provisions

¶5 Section 2511(2)(c) of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III) allows a person "acting under color of law" to intercept wire or oral communications where the person is either a party to the conversation or where one of the participating parties has given prior consent to such monitoring.[5] Consensual surveillance, therefore, is an exception to the general federal rule which imposes warrant and other requirements on electronic surveillance.[6]

¶6 Section 605 of the Federal Communications Act of 1934, which also prohibits the interception or divulgence of interstate and foreign communications, expressly excepts those procedures permitted by Title III of the Omnibus Crime Control and Safe Streets Act.[7]

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[5] 18 U.S.C.A. §2511(2)(c)(1970); 18 U.S.C.A. §2511(2)(d)(1970) also allows the interception of wire or oral communications by a person "not acting under color of law" provided that:

1. the person is a party to the conversation or has obtained the prior consent of one of the participants for such monitoring; and

2. the person does not use the intercepted communication to commit a criminal, tortious, or injurious act.

[6] 18 U.S.C.A. §2516(1970), as amended, (Supp. 1976).

[7] 47 U.S.C.A. §605 (1962), as amended, (Supp. 1976). Section 605 only restricts the actions of private parties. Under the 1968 amendments to section 605, "person does not include a law enforcement officer acting in the normal course of his duties." S. Rep. No. 1097, 90th Cong., 2nd Sess. 108 (1968). This changes the prior rule. See United States v. Sugden, 226 F.2d 281 (9th Cir. 1955), aff'd per curiam, 351 U.S. 916 (1956).

¶7 The issues surrounding consensual surveillance are, therefore, not based on problems of statutory authority; the legality of the technique depends upon an analysis of Fourth Amendment guarantees.

B. Federal Case Law--The Emergence of the White Rationale

¶8 Since 1952, the United States Supreme Court has consistently held that various forms of consensual surveillance do not violate Fourth Amendment guarantees against unreasonable searches and seizures. In On Lee v. United States,[8] a narcotics prosecution, the defendant sought to suppress two incriminating conversations which were transmitted to federal agents by an informant wired for sound. Only the agents monitoring the conversation testified at the defendant's trial. Justice Jackson, writing for the majority, relied heavily upon Olmstead v. United States,[9] which held that police surveillance without any physical trespass fell outside the scope of the Fourth Amendment. He observed that no technical trespass had been committed in placing the transmitter within the vicinity of On Lee. Consequently, there had been no search and seizure, and the defendant's incriminating remarks were admissible.[10] On Lee also con-

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[8] 343 U.S. 747 (1952).

[9] 277 U.S. 438 (1928); subsequently overruled in Katz v. United States, 389 U.S. 347 (1967), discussed infra, ¶11.

[10] 343 U.S. at 751-52.

tains language suggesting that the legality of the agents' monitoring was based on On Lee's indiscretion with one he mistakenly trusted.[11]

¶9 Rathbun v. United States[12] considered whether an incriminating telephone conversation, overheard by law enforcement officials, was admissible evidence where one party to the communication gave the police permission to listen to the discussion on a pre-existing telephone extension. The Court, in an opinion by Chief Justice Warren, concluded that there was no prohibited "interception" under section 605 of the Federal Communications Act. Recourse was not made to the "trespass" doctrine followed in On Lee. Instead, the Court focused upon the individual's expectation of privacy, or its lack, when placing a telephone call.[13]

¶10 The "misplaced trust" rationale of Rathbun appeared again in 1963 in Lopez v. United States.[14] Lopez was convicted of attempted bribery of an Internal Revenue agent

[11] Id. at 753-54. The precise fact pattern of On Lee, surveillance of an indicted defendant, is no longer permissible under expanded concepts of the Sixth Amendment. Massiah v. United States, 377 U.S. 201 (1964); discussed infra, ¶21.

[12] 355 U.S. 107 (1957).

[13] Id. at 111. Chief Justice Warren observed:

> Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain.

But see ¶38 infra, concerning the individual's expectations when using a party line.

[14] 373 U.S. 427 (1963).

on the strength of a recording containing incriminating statements that he made to a federal agent. The Court reasoned that since the agent could testify concerning the appellant's statements, Lopez took the risk that his remarks would be reproduced, and whether the medium was the agent's memory or a mechanical recording was inconsequential.[15]

¶11 The legality of consensual surveillance remained a matter of only academic concern, so long as it was valid under either the "trespass" or "misplaced trust" rationale. It became, however, increasingly a practical concern for law enforcement as the Court moved away from the trespass rationale of Olmstead.[16] Finally, in Katz v. United States,[17] the Supreme Court overruled the Olmstead "trespass" doctrine and concluded that electronic surveillance without the consent of

[15] Id. at 439. The "misplaced trust" rationale was directly dealt with in Hoffa v. United States, 385 U.S. 293, 301-03 (1966)(an informant situation without electronic surveillance). The Court stated at 301-02:

> What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area. . . .
>
> * * * *
>
> Neither this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.

[16] Berger v. New York, 388 U.S. 41 (1967), cast doubt on the validity of a warrantless wiretap, regardless of a trespass, although since an entry was involved in Berger, Olmstead survived until Katz, 389 U.S. 347 (1967).

[17] 389 U.S. 347 (1967).

one of the parties was a "search and seizure" within the Fourth Amendment. In that case, federal agents attached an electronic listening and recording device to the outside of a public telephone booth. Prior to the interception, the agent obtained neither a warrant nor the consent of either of the parties to the conversation. The Court concluded that the surveillance violated the defendant's justified expectation of privacy.[18]

¶12 Although Katz did not involve consensual surveillance, its rejection of the Olmstead "trespass" doctrine made the validity of On Lee and Lopez uncertain. If they were seen as resting on the "trespass" doctrine, then consensual surveillance which violated an individual's reasonable expectation of privacy would be a search and seizure, requiring a warrant. If they were seen as resting on the "misplaced trust" rationale, then consensual surveillance would not be a search and seizure, and no warrant would be required.

¶13 This uncertainty was subsequently faced in United States v. White.[19] In a plurality opinion,[20] Mr. Justice White concluded that Katz did not impose a warrant requirement where one of the parties to the conversation voluntarily consented to the monitoring of the communication by law

[18] Id. at 353.

[19] 401 U.S. 745 (1971).

[20] The plurality consisted of Chief Justice Burger and Justices White, Stewart, and Blackmun. Justice Black concurred on the grounds that the Fourth Amendment did not apply to any electronic eavesdropping and Justice Brennan concurred in the result only on the ground that Katz should not be given retroactive effect.

enforcement personnel. In White, a narcotics prosecution, the defendant sought to exclude the testimony of government agents who monitored a conversation between the defendant and a government informant equipped with a transmitting device. The informant could not be located and did not testify at the trial. The question presented to the Court was whether an individual could justifiably expect that, absent a warrant, his conversation would not be simultaneously transmitted to a third party. The defendant argued that under Katz he had a reasonable expectation of privacy in his conversations and that a warrant was required. The plurality rejected the defendant's argument, finding that the constitutional propriety of consensual surveillance did not rest on the "trespass" doctrine, but upon the "misplaced trust" rationale:

> Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. Hoffa v. United States, 385 U.S., at 300-03 . . . . If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.
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> * * * *
>
> . . . If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.[21]

[21] 401 U.S. at 751-52.

The White plurality clearly rejected any distinction between recording and transmitting,[22] and reaffirmed this aspect of On Lee in light of Katz.[23]

C. Post-White Problems

¶14 Although White was decided by a plurality opinion, federal courts uniformly accept White and sustain consensual surveillance against constitutional challenges.[24] There are, however, several problems that arise in applying White.

1. The Problem of Consent

¶15 The validity of consensual surveillance depends on a valid consent. In each case, it must be shown that consent was given prior to the surveillance, that it was validly given, that the consenting party had the capacity to consent, and that the consent was voluntary.

¶16 Sections 2511(2)(c) and (d) of Title III require prior consent of a party to the communication.[25] This rule parallels the case law under section 605 of the Federal Communications Act.[26] In Weiss v. United States,[27] the Supreme Court read section 605 to require that consent be given prior to the government interception or divulgence for it to be valid.

¶17 The defendant carries the burden of showing that electronic surveillance of himself occurred. The government then carries the burden of persuasion to show that the evidence is free from illegal taint.[28] Thus, where a defendant challenges the consent to the surveillance, the government carries the burden of proving its validity. Nevertheless, in the absence of a consenting party's testimony, validity can be inferred from the surrounding circumstances. In United States v. Bonanno, where the consenting party was incompetent to testify at the time of trial, the court stated:

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[22] As a separate ground for reversal of the lower court decision, the Court (the plurality plus Justice Brennan) held that under Desist v. United States, 394 U.S. 244 (1969), the decision in Katz had only prospective application. The surveillance involved in White occurred several years prior to the Katz decision.

[23] Justices Brennan, Douglas, Harlan, and Marshall deemed On Lee no longer to constitute "sound law." 401 U.S. at 755.

[24] United States v. Bonanno, 487 F.2d 654 (2d Cir. 1973) (consensual wiretap); United States v. Santillo, 507 F.2d 629 (3d Cir.), cert. denied, 421 U.S. 968 (1975) (consensual wiretap); United States v. Dowdy, 479 F.2d 213, 229 (4th Cir.), cert. denied, 414 U.S. 823 (1973) (consensual recording of phone and personal conversations--a warrant obtained by the agents as a precautionary measure was seen by the court as unnecessary in light of White); Ansley v. Stynchcombe, 480 F.2d 437, 441 (5th Cir. 1973) (consensual wiretapping and bugging); United States v. Lippman, 492 F.2d 314, 318 (6th Cir. 1974), cert. denied, 419 U.S. 1107 (1975) (consensual bugging); United States v. Quintana, 508 F.2d 867, 872 (7th Cir. 1975) (consensual wiretap); United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) (consensual wiretap); Holmes v. Burr, 486 F.2d 55, 59-60 (9th Cir.), cert. denied, 414 U.S. 1116 (1973) (consensual wiretap--the court specifically stated that it was bound by the plurality decision of White); United States v. Quintana, 457 F.2d 874, 878 (10th Cir.), cert. denied, 409 U.S. 877 (1972) (consensual wiretap); United States v. Bishton, 463 F.2d 887 (D.C. Cir. 1972) (consensual bugging).

[25] 18 U.S.C.A. §§2511(2)(c) and (d) (1970). Retroactive authorization is not permitted. S. Rep. No. 1097, 90th Cong., 2nd Sess. 94 (1968).

[26] 47 U.S.C.A. §605 (1962), as amended (Supp. 1976).

[27] 308 U.S. 321, 330 (1939).

[28] Nardone v. United States, 308 U.S. 338, 341 (1939); Nolan v. United States, 423 F.2d 1031, 1041 (10th Cir. 1969), cert. denied, 400 U.S. 848 (1970).

> [T]he extent of proof required to show that an informer consented to the monitoring or recording of a telephone call is normally quite different from that needed to show consent to a physical search. . . . Hence, it will normally suffice for the Government to show that the informer went ahead with a call after knowing what the law enforcement officers were about.[29]

The court inferred a valid consent from testimony by government agents that the consenting party was aware of their presence and purpose, yet he still engaged in the conversations.

¶18 The most difficult consent problem for the government is shown by United States v. Napier.[30] In Napier the defendant, a Miami policeman implicated in drug transactions, challenged the capacity of the government informer to consent. The informer was incompetent at the trial, and the defense argued that he was incompetent at the time of recording, pointing to his long history of mental illness. The Fifth Circuit held that consistent with its burden to prove consent, the government also had to prove capacity to consent.[31] While real, the Napier problem is of limited applicability, since few consenting parties are incompetent.

¶19 The most common problem facing the government is to show that consent was given voluntarily. Most federal courts will not find that consent was involuntarily given unless there is some proof that the consenting party's ". . . will was overcome by threats or improper inducement amounting to coercion or

[29] 487 F.2d 654, 658 (2d Cir. 1973).

[30] 451 F.2d 552 (5th Cir. 1971).

[31] Id. at 553.

duress."[32] Promises or hopes of leniency,[33] immunity,[34] or the receipt by the consenting party of "special considerations" from the government[35] are all insufficient to vitiate voluntariness.

2. Fifth and Sixth Amendment Problems and the Issue of Entrapment

¶20 Most electronic surveillances are challenged on Fourth Amendment grounds, but Fifth and Sixth Amendment objections may also be raised.[36] The Fifth Amendment protection against self-incrimination, enunciated in Miranda v. Arizona,[37] prevents an individual's statements from being used against him, if they are obtained after his freedom of movement is restrained and he does not receive the Miranda warnings. Courts, however,

[32] United States v. Silva, 449 F.2d 145, 146 (1st Cir. 1971), cert. denied, 405 U.S. 918 (1972).

[33] Id.; United States v. Jones, 433 F.2d 1176, 1180 (D.C. Cir. 1970), cert. denied, 402 U.S. 950 (1971).

[34] United States v. Osser, 483 F.2d 727 (3d Cir.), cert. denied, 414 U.S. 1028 (1973); United States v. Rich, 518 F.2d 980, 985 (8th Cir. 1975).

[35] United States v. Franks, 511 F.2d 25, 31 (6th Cir.), cert. denied, 422 U.S. 1042 (1975) (informer received an "extremely nice apartment," a living allowance, the use of a new Cadillac, in addition to not being prosecuted).

[36] See Blakey, "Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis," Task Force Report: Organized Crime (1967), at 96-98, for a discussion of the various constitutional objections to electronic surveillance. Many courts simply reject out of hand Fifth and Sixth Amendment arguments, citing White as controlling. See, e.g., Stephan v. United States, 496 F.2d 527, 528 (6th Cir. 1974); United States v. Leonard, 363 F. Supp. 1348, 1350-51 (N.D. Ill. 1973).

[37] 384 U.S. 436 (1966).

do not extend these rules to defendants against whom recordings are introduced in evidence. They stress that the conversations do not occur under circumstances of custodial interrogation; they occur without deprivation of the individual's liberty.[38] The Fifth Circuit (other courts seem not to have found the issue to merit discussion) has refused to attach Fifth Amendment significance to the fact that the consenting party initiated the recorded conversation, rejecting an attempt to analogize the inquiries of the recording or transmitting party to custodial interrogation. The court emphasized the presence of a consenting party, and cited White.[39]

¶21 The Sixth Amendment objection to electronic surveillance is an outgrowth of United States v. Massiah.[40] In Massiah, the fruits of an otherwise valid consensual electronic surveillance were suppressed because the defendant, Massiah, was under indictment at the time of the recording. To question him in the absence of his attorney was a denial of his right to counsel. The fact that the defendant was indicted was a signal that the trial process had begun, bringing the Sixth Amendment into play. The Ninth Circuit, in United States v. Keen,[41] considered a situation where recordings were made

[38] United States v. Bastone, 526 F.2d 971, 977-78 (7th Cir. 1975), cert. denied, 19 Crim. L. Rptr. 4061 (May 19, 1976); Koran v. United States, 469 F.2d 1071, 1072 (5th Cir. 1972).

[39] United States v. Quintana, 457 F.2d 874, 878 (10th Cir.), cert. denied, 409 U.S. 877 (1972).

[40] 377 U.S. 201 (1964).

[41] 508 F.2d 986 (9th Cir. 1974), cert. denied, 421 U.S. 929 (1975).

prior to any indictment. Relying on Miranda, the court found that where the defendant believed he was talking over the phone only to an acquaintance and not to the police, there was no custodial interrogation, and no "possibility of moral or physical coercion." Consequently, there was no deprivation of his Sixth Amendment right to counsel.[42]

¶22 Another issue which can arise in a consensual surveillance case is entrapment. The defendant may argue that he originally lacked the intent to commit the criminal act, but that the actions of a government agent directly resulted in the necessary state of mind and criminal conduct.[43] The government action in a consensual surveillance situation would be the initiation by the recording or transmitting party of conversations which ultimately dealt with criminal conduct. The principal element of the entrapment defense is the defendant's lack of predisposition to commit the crime.[44] Thus, it is doubtful that merely initiating conversations with an individual, who subsequently makes incriminating statements, would be seen as influencing that individual to such an extent as to constitute

[42] Id. at 989. See also Wallace v. United States, 412 F.2d 1097, 1100-01 (D.C. Cir. 1969), cert. denied, 402 U.S. 943 (1971) (surveillance occurred after the defendant and his attorney had met with the prosecutor to discuss possible cooperation of the defendant).

[43] In at least the Ninth Circuit, the accused may now assert the defense of entrapment without actually admitting guilt. Such an admission is generally required to use the defense. United States v. Demma, 523 F.2d 981 (9th Cir. 1975).

[44] United States v. Russell, 411 U.S. 423, 433 (1973); Hampton v. United States, 19 Crim. L. Rptr. 3039 (8th Cir. April 28, 1976).

entrapment.[45] To defeat an entrapment defense, law enforcement agents should always caution the consenting party not to suggest a criminal act.[46]

D. The Limits of White

¶23 The White rationale has only been extended cautiously. The Second Circuit utilized it to permit the warrantless surveillance of a conversation, where neither party previously consented to the surveillance. In United States v. Pui Kan Lam,[47] the tenants of an apartment which was previously occupied by heroin importers complained to authorities about suspicious characters who unsuccessfully sought entry to the apartment. With the permission of the current tenants, government agents bugged the room. The two defendants were eventually admitted into the apartment by a government agent posing as a superintendent's helper. An incriminating conversation was recorded and subsequently introduced into evidence at the defendants' trial. Although the agents obtained neither a warrant nor consent, the court concluded that the defendants' Fourth Amendment rights against unreasonable searches and seizures were not violated. Citing White, the court found that the subjective expectation of privacy, which was allegedly

[45] United States v. Greenberg, 445 F.2d 1158, 1161-62 (2d Cir. 1971).

[46] If the defendant introduces some evidence of government initiation of the crime, then the burden is on the government to show beyond a reasonable doubt the defendant's original propensity to commit the crime. United States v. Warren, 453 F.2d 738, 744 (2d Cir.), cert. denied, 406 U.S. 944 (1972).

[47] 483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974).

violated by the government surveillance, was not "justifiable." The interception occurred in an apartment of complete strangers that was entered under suspicious circumstances.[48] Aside from the unusual nature of the situation, the court emphasized that another ground for dispensing with the warrant requirement was the lack of sufficient time to obtain a court order.[49] Thus, Pui Kan Lam may be limited to its unusual factual circumstances.

¶24 The First Circuit, however, took a more limited view of White in United States v. Padilla.[50] Federal agents installed an electronic listening device in a hotel room without prior judicial approval, but before the defendant occupied it. The bug was activated only when government agents entered the room. The government argued that such selective monitoring was comparable to the situation where agents actually concealed the recording or transmitting devices on their persons. The court, in rejecting the argument, expressed a fear that abuse might result if electronic devices were installed for long periods of time, even though for limited purposes, without prior judicial approval.[51] It refused to extend White to allow such a procedure. The court observed:

[48] Id. at 1206.

[49] Id. at 1206-07.

[50] 520 F.2d 526 (1st Cir. 1975).

[51] See Lanza v. New York, 370 U.S. 139, 143 (1962) where the Court stated, in dicta, that a visitors room of a public jail was not a constitutionally protected area affording protection from surreptitious electronic surveillance, while a hotel room could be such an area.

> No case has been presented to us which would allow the government to engage in unlawful electronic surveillance and profit from the fruits of that surveillance on the ground that had a different means been employed, the recordings would have been admissible. We reject the invitation so to extend the holding of White.[52]

E. Miscellaneous Federal Regulations

¶25 Federal Communications Commission Regulation No. 132[53] states that a private citizen can record a telephone conversation only if his recorder-connector equipment contains a tone-warning device which produces a distinctive beep tone every fifteen seconds. This F.C.C. order does not, however, make a conversation recorded without a tone-warning device inadmissible in certain criminal prosecutions.[54] The purposes of sections 2511 (2)(c) and 2518(8)(a) of Title III[55] (requiring, if possible, the recording of intercepted communications) are seen as overriding the purposes of the F.C.C. order, which otherwise would negate the congressional intent.[56]

¶26 Section 301 of the Federal Communications Act[57] requires a license for the use of a radio transmitter. Courts, however, hold that evidence obtained by an unlicensed transmitter is admissible in court. The purpose of the licensing law is to prevent interference with radio communications. No right of the defendant is violated by the lack of a license; consequently, there is no policy reason for rendering the evidence inadmissible.[58]

¶27 Finally, Federal Communication Commission Regulation No. 15262 prohibits the use between private parties of a radio device for surveillance without the consent of all the parties; law enforcement authorities, however, acting "under law authority" are exempted.[59]

III. State Law

¶28 Section 2515 of Title III[60] prohibits the use of the contents of an intercepted communication as evidence in any court or other authority of the United States, any state, or

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[52] 520 F.2d 526, 528. It can be argued persuasively that Padilla was wrongly decided; the point can at least be made that the court ignored the substantial danger that the wire may be uncovered when informants or agents are wired. Wiring the room obviates this danger. As long as the bug is installed without an unlawful entry (i.e., before the guest rented the room), and it is activated only during conversation that could lawfully be recorded by "body bugs," there should be no objection to this technique. The court's fear of the universal installation of bugs to be ready in case surveillance might be useful should be grounds for suppression when the conduct is engaged in; there is no reason to suppress logically relevant evidence until that time.

[53] Noted in Alonzo v. State, 283 Ala. 607, 619, 219 So.2d 858, 870 (1969).

[54] Battaglia v. United States, 349 F.2d 556, 559-60 (9th Cir.), cert. denied, 382 U.S. 955 (1965).

[55] 18 U.S.C.A. §§2511(2)(c) and 2518(8)(a) (1970).

[56] United States v. Buckhanon, 374 F. Supp. 611 (D.Minn. 1973).

[57] 47 U.S.C.A. §301 (1962).

[58] See e.g., Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961), cert. denied, 368 U.S. 989 (1962).

[59] 47 C.F.R. §15.11 (March 4, 1966).

[60] 18 U.S.C.A. §2515 (1970).

political subdivision, if the disclosure of that information would be in violation of Title III.

¶29 States, although they must at least comply with federal standards on electronic surveillance, are free to pass stricter legislation. The Senate Report accompanying Title III states that:

> The State statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation.[61]

¶30 Where states do enact more restrictive legislation, such laws do not affect the admissibility of evidence in federal prosecutions.[62] In considering this issue, the Third Circuit recently said:

> So long as the information was lawfully obtained under federal law and met federal standards of reasonableness, it is admissible in federal court despite a violation of state law.[63]

It is probably more accurate to point out that state electronic surveillance laws are inapplicable to federal electronic surveillance efforts. The Second Circuit, in United States v. Pardo-Bolland,[64] interpreted New York statutes then in force not to apply to federal law enforcement officers. The court observed:

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[61] S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968).

[62] United States v. Infelice, 506 F.2d 1358, 1365 (7th Cir. 1974), cert. denied, 419 U.S. 1107 (1975).

[63] United States v. Armocida, 515 F.2d 49, 52 (3d Cir. 1975), cert. denied, ___ U.S. ___ (1976).

[64] 348 F.2d 316 (2d Cir.), cert. denied, 382 U.S. 944 (1965).

> [I]t seems most likely that the policing of federal officers was intended to be left to federal statute and the supervision of federal courts. . . .[65]

Some states, by statute, explicitly exclude officers of federal investigative and law enforcement agencies from the coverage of their wiretap laws.[66]

A. New York

¶31 New York follows federal law in permitting electronic surveillance where one of the participating parties voluntarily consents. Instead of providing an explicit statutory exception for consensual surveillance, however, the New York legislature defines the terms "wiretapping," "mechanical overhearing of a conversation," and "intercepted communication," and excludes consensual surveillance:

> 1. "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment. . . .;
>
> 2. "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device, or equipment;
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> * * * *
>
> 3. "Intercepted communication" means (a) a telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by

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[65] Id. at 323.

[66] Md. Ann. Code art. 27, §585 (1976), discussed in Wallace v. United States, 412 F.2d 1097, 1100 (D.C. Cir. 1969), cert. denied, 402 U.S. 943 (1971); Mass. Gen. Laws Ann. ch. 272, §99 (D)(1)(c)(1968).

means of any instrument, device or equipment, or (b) a conversation or discussion which was intentionally overheard or recorded without the consent of at least one party thereto, by a person, not present thereat, by means of any instrument, device, or equipment.[67]

¶32 The most recent New York Court of Appeals case considering the issue of consensual surveillance was decided in 1969, prior to United States v. White. Nevertheless, in People v. Gibson,[68] the Court of Appeals concluded that the recording of incriminating conversations, made by the defendant to a police informer equipped with a concealed radio device, was not a violation of the defendant's Fourth Amendment rights. The court relied upon On Lee and Lopez, and distinguished Katz as not dealing with a situation where there was voluntary disclosure by a participating party.[69] Subsequent New York court decisions cite both White and Gibson for the proposition that Fourth Amendment guarantees are not infringed where one party voluntarily consents to the electronic surveillance of a conversation.[70]

B. Massachusetts

¶33 The Massachusetts statute governing consensual electronic

[67]N.Y. Crim. Pro. Law §700.05 (McKinney 1971); this section defines "wiretapping" and "mechanical overhearing of a conversation" as those terms are defined in N.Y. Penal Law §250.00 (McKinney 1967).

[68]23 N.Y.2d 618, 298 N.Y.S.2d 496, 246 N.E.2d 349 (1969), cert. denied, 402 U.S. 951 (1971).

[69]Id. at 620, 298 N.Y.S.2d at 498, 246 N.E.2d at 351.

[70]See, e.g., People v. Brannaka, 46 App. Div. 2d 929, 361 N.Y.S. 2d 434 (3d Dept. 1974); People v. Holman, 78 Misc.2d 613, 356 N.Y.S.2d 958 (Sup. Ct. New York County 1974); People v. Neulist, 72 Misc.2d 140, 162-63, 338 N.Y.S.2d 794, 817 (Sup. Ct. Nassau County 1972), rev'd on other grounds, 43 App. Div.2d 150, 350 N.Y.S.2d 178 (2d Dept. 1973).

surveillance is more restrictive than its federal counterpart. Consensual surveillance is authorized only in the investigation of certain specified offenses in connection with organized crime:

> . . . it shall not constitute an interception for an investigative or law enforcement officer, as defined in this section, to record or transmit a wire or oral communication if the officer is a party to such communication or has been given prior authorization to record or transmit the communication by such a party and if recorded or transmitted in the course of an investigation of a designated offense as defined herein.[71]

The class of "designated offenses" is broad enough, however, not to hinder the use of consensual surveillance in connection with organized crime.[72]

[71]Mass. Gen. Laws Ann. ch. 272, §99(B)(4)(1968); "investigative or law enforcement officer" is defined in §99(B)(8):

> The term "investigative or law enforcement officer" means any officer of the United States, a state or a political subdivision of a state, who is empowered by law to conduct investigations of, or to make arrests for, the designated offenses, and any attorney authorized by law to participate in the prosecution of such offenses.

[72]Mass. Gen. Laws Ann. ch. 272, §99(B)(7)(1975):

> The term "designated offense" shall include the following offenses in connection with organized crime as defined in the preamble: arson, assault and battery with a dangerous weapon, extortion, bribery, burglary, embezzlement, forgery, gaming in violation of section seventeen of chapter two hundred and seventy-one of the general laws, intimidation of a witness or juror, kidnapping, larceny, lending of money or things of value in violation of the general laws, mayhem, murder, any offense involving the possession or sale of a narcotic or harmful drug, perjury, prostitution, robbery, subornation of perjury, any violation of this section, being an accessory to any of the foregoing offenses and conspiracy or attempt or solicitation to commit any of the foregoing offenses.

"Organized crime" is defined in the preamble as "consist[ing] of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services." §99(A).

The Supreme Judicial Court of Massachusetts recently considered the whole Massachusetts wiretap act (ch. 272, §99), though not specifically the aspects dealing with consensual surveillance, and found it to comply with state and federal constitutional and statutory requirements. Commonwealth v. Vitello, ___Mass.___, 327 N.E.2d 819 (1975).

¶34 The leading Massachusetts decision to address the legality of consensual surveillance is the 1968 case of Commonwealth v. Douglas.[73] Police placed a tape recorder on an extortion victim's telephone with his consent, but without prior judicial approval. The court found this to be acceptable under the relevant statutory and constitutional provisions, observing that such procedures were necessary to combat the "underworld."[74] The Court noted that:

> A defendant who speaks incriminating words over the telephone runs the risk that the person with whom he talks may be an informer (see Hoffa v. United States, 385 U.S. 293, 302-03) or that the conversation (as in the Rathbun case) may be overheard on an extension telephone. In the interests of sound law enforcement, in these days when telephone talks often supplant face to face encounters, he also should be held to take the risk that his words may be recorded by his listener. See Lopez v. United States. . . .[75]

The Court distinguished Berger and Katz as not dealing with situations where consent was given.

C. New Jersey

¶35 New Jersey recently amended its Wiretapping and Electronic Surveillance Control Act, making it more restrictive than Title III. Consensual electronic surveillance is permitted without prior approval where an investigative or law enforcement officer is a party to the communication to be intercepted, or where another officer who is a party to the communication requests or

[73] 354 Mass. 212, 236 N.E.2d 865 (1968), cert. denied, 394 U.S. 960 (1969).

[74] Id. at 222-23, 236 N.E.2d at 872.

[75] Id. at 221-22, 236 N.E.2d at 871-72.

requires such interception.[76] Electronic surveillance is also permitted where a party to the communication gives his prior consent, provided there is prior approval by the Attorney General or his designee, or a county prosecutor within his authority, who determines that there exists "a reasonable suspicion that evidence of criminal conduct will be derived from such interception."[77]

¶36 A recent New Jersey Superior Court case, State v. McCartin,[78] considered a situation where a malfunctioning private telephone was receiving a conversation between two unknown individuals concerning gambling activities. The owner summoned the police who, with the owner's permission, recorded the telephone con-

[76] It shall not be unlawful under this act for:

. . . .

b. Any investigative or law enforcement officer to intercept a wire or oral communication, where such officer is a party to the communication or where another officer who is a party to the communication requests or requires him to make such interception.

N.J. Stat. Ann. §2A:156A-4(b)(1975).

[77] It shall not be unlawful under this act for:

. . . .

c. Any investigative or law enforcement officer or any person acting at the direction of an investigative or law enforcement officer to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception shall be made unless the Attorney General or his designee or a county prosecutor within his authority determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception. . . .

N.Y. Stat. Ann. §2A:156A-4(c)(1975).

[78] 135 N.J. Super. 81, 342 A.2d 591 (1975).

versations. The court denied a motion to suppress the recordings, alleged to be inadmissible under Title III and under New Jersey law. The court found those laws to be directed against willful interceptions, while in this case the interception was inadvertent.[79] Consequently, the recordings were admissible.

¶37 In reaching its decision, the court carefully distinguished the United States Supreme Court case of Lee v. Florida.[80] In that case, the police installed a telephone directly to the defendant's party line, specifically for the purpose of recording the defendant's conversations. Incriminating conversations were recorded and introduced into evidence. The Supreme Court found this to be a violation of Section 605 of the Federal Communications Act.[81] There was neither consent of any parties to the telephone conversation, nor a regularly used telephone. Unlike Rathbun, the phone in Lee was installed solely for the purpose of surveillance.[82] The New Jersey court distinguished McCartin from Lee as not being a case of a deliberate interception.[83]

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[79] Id. at 87-88, 342 A.2d at 595.

[80] 392 U.S. 378 (1968).

[81] 47 U.S.C.A. § 605 (1962), as amended (Supp. 1976).

[82] 392 U.S. at 381-82.

[83] 135 N.J. Super. at 86, 342 A.2d at 594.

D. Florida

¶38 Florida law on consensual electronic surveillance is more restrictive than Title III;[84] a warrantless intercept must be consented to by all parties to the communication[85] or, if done by or under the direction of a law enforcement officer, by one party.[86] The Florida Supreme Court narrowed this latter exception even further. In Tollett v. State[87] the court created

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[84] The Florida Security of Communications Act, Fla. Stat. Ann., ch. 934 (West 1973), followed Title III closely until 1974 when it was amended.

[85] Fla. Stat. Ann. § 934.03(2)(d) (West Supp. 1979). This section recently survived a constitutional challenge on First Amendment grounds. In Shevin v. Sunbeam Television Corp., 351 So.2d 733 (Fla. Sup. Ct. 1977), appeal denied, 435 U.S. 920 (1978), a Miami television station claimed that the statute impaired its news gathering activities and constituted a prior restraint. In upholding the statute the Florida Supreme Court said:

> Section 934.03(2)(d) . . . . was a policy decision by the Florida legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to the conversation . . . . News gathering is an integral part of news dissemination, but hidden mechanical contrivances are not indispensable tools of news gathering. Id. at 726-727.

See also State v. News-Press Publishing Co., 338 So.2d 1313 (Fla. Dist. Ct. App. 1976) for another application of § 934.03 (2)(d) to news gathering activities.

[86] Fla. Stat. Ann. § 934.03(2)(c) (West Supp. 1979). See also State v. Walls, 356 So.2d 294, 296 (Fla. Sup. Ct. 1978), holding that Section 934.03(2)(d) prevents the use at trial of secret recordings made by an alleged victim of crime without prior authorization by a law enforcement officer.

[87] 272 So.2d 490 (Fla. 1973). The court in Tollett interpreted not only the state's statutes, but the search and seizure provision of its constitution, Fla. Const. Art. I, § 12 (1885, amended 1968).

a unique evidentiary rule requiring the consenting party to appear at trial and testify to the "prior consent."

> [A]uthentication of the giving of consent to the police to make a wiretap must be established by competent and relevant testimony of a party to the communication, subject to cross-examination by the defendant, as a condition precedent to the introduction of the wiretap recording.[88]

¶39 The most recent Florida case on consensual electronic surveillance, Aalderink v. State,[89] follows Tollett by ruling inadmissible a police officer's testimony on the content of an intercepted conversation when the consenting informant was not produced at the trial. The Court of Appeals for the Third District

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[88] Id. at 496. The court stated that failure to adhere to this rule:

> [O]pens the door for admission of hearsay testimony of an alleged participant in a communication who is not produced as a witness. Generally, it furthers the invasion of privacy by the police, encourages wiretapping, entrapment, and manufactured evidence. Id. at 495.

The serious implications of this holding were recognized by one commentator soon after the decision:

> [T]he requirement that the consenting party verify his consent may lead to the same result as would a blanket requirement for court approval of wiretaps: rather than risk its case upon the appearance of an informant, the state may feel compelled to secure a court authorization for all consensual interceptions. 2 Fla. St. U. L. Rev. 188, 196 (1974).

[89] 353 So.2d 172, 173 (Fla. Dist. Ct. App. 1977).

has restricted the use of warrantless intercepts even further, citing Tollett for the proposition that a warrant is required whenever time permits regardless of consent.[90]

E. Illinois

¶40 Illinois recently amended its statute controlling consensual surveillance. Previously, law enforcement officers could intercept and record conversations where there was one consenting party. As of July 1, 1976, the new Illinois statute requires either the consent of all parties to the conversation, or the consent of one party and prior judicial authorization.[91] The requirements for judicial authorization are closely analogous to those required for the issuing of a federal order permitting non-consensual surveillance under Title III.[92] There is a provision for "emergency situations," which allows interception without prior judicial authorization where there is insufficient time

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[90] State v. Muscara, 334 So.2d 167, 169 (Fla. Dist. Ct. App. 1976), cert. denied, 344 So.2d 327 (Fla. 1977). This appears to be a misreading of Tollett. Curiously, the same court in a subsequent decision admitted tape recorded conversations on the ground that the informant had been present at trial and had testified as to his consent. No mention was made of any requirement of a warrant. Crespo v. State, 350 So.2d 507 (Fla. Dist. Ct. App. 1977). Whether or not Crespo can be distinguished from Muscara on its facts is unclear from the opinion. The Third District recently ruled that the state constitution required a warrant for eavesdropping in the home with the consent of one party. Sarmiento v. State, 20 Crim. L. Rptr. 2132 (Fla. Ct. App., April 19, 1979). The court said sections 934.03(2)(c) and 934.08(3) (West Supp. 1979) did not authorize consensual eavesdropping in the home.

[91] Ill. Rev. Stat. ch. 38 § 14-2 (Supp. 1979).

[92] Ill. Rev. Stat. ch. 38 § 108A (Supp. 1979).

to obtain judicial approval, or there is need to protect a law enforcement officer. The officer must reasonably believe that an order permitting the interception could have been issued had there been a prior hearing. Moreover, an application for an order ratifying the use of an eavesdropping device must be made within forty-eight (48) hours of the commencement of such use.[93]

F. Michigan

¶41 The Michigan statute proves more restrictive than federal law. It makes it a felony for anyone to willfully "eavesdrop" on a conversation without the consent of all parties.[94] One exception to this rule is provided, permitting:

> Eavesdropping or surveillance not otherwise prohibited by law by a peace officer or his agent of this state or federal government while in the performance of his duties.[95]

¶42 The Michigan Supreme Court, faced with a situation almost identical to that in White, severely limited the scope of this exception. In People v. Beavers[96] the defendant engaged in a drug sale with a police informer, who simultaneously transmitted the conversation to police officers a short distance away. The court held inadmissible the testimony of the police officer

[93] Ill. Rev. Stat. ch. 38, § 108A - 6 (Supp. 1979).

[94] Mich. Stat. Ann. § 28.807(3) (1972) provides:

> Any person who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs, or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00 or both.

[95] Mich. Stat. Ann. § 28.807(7)(a).

[96] 393 Mich. 554, 227 N.W.2d 511, cert. denied, 423 U.S. 878 (1975).

pertaining to the overheard conversations, relying on the "search and seizure" clause of the Michigan Constitution.[97] Although the court did not decide the question of whether a party's recording of a conversation was a search and seizure, the court, unconvinced by White, found that the transmitting did constitute such search and seizure. Consequently, a search warrant is required in Michigan for the testimony or recordings of the monitoring agent to be admissible.

¶43 The Court of Appeals subsequently concluded that Beavers should be extended to cases of participant recording as well as transmission. In People v. Livingston[98] the husband installed a recording device on the phone and recorded conversations between his wife and a third party without the consent of either. His wife intended to murder him but subsequently changed her plans. Thereafter, their home was firebombed and the wife went to the police. Upon their request she consented to tape conversations with the hitmen.

¶44 The court found that the post-firebombing tapes did not violate §28.807(7)(a) since the recording took place before the Beavers decision and thus was constitutionally permissible. Nevertheless, any post-Beavers recording would require either a warrant or consent of all parties.[99]

[97] Mich. Const. art. 1, § 11.

[98] 64 Mich. App. 247, 236 N.W.2d 63 (1975), overruled on other grounds, 76 Mich. App. 50 (1977).

[99] Id. at 252-254. Interestingly, the court also held that the husband's taping activity violated § 28.807(3) since it took place without consent of both parties and without a warrant. Yet, it admitted the evidence and refused to create an exclusionary rule, citing the statute's civil and criminal penalties for violation. Id. at 255.

G. Rhode Island

¶45 Rhode Island closely tracks the consensual surveillance provisions of Title III. It authorizes a person acting under color of law to intercept where such person is either a party or one of the parties has given prior consent. A person not acting under such color is allowed to intercept under the same conditions, but consensual surveillance is prohibited where done for the purpose of committing a criminal or tortious act in violation of federal or state constitutions or laws.[100]

H. Louisiana

¶46 The Louisiana wiretapping statute prohibits the attachment of any device for the purpose of listening in on wires, cables, or any property owned and used by any person without the consent of the owner. It permits, however, the tapping of lines by law enforcement officers for the purpose of detecting crime.[101]

¶47 In two recent cases, the state's highest court upheld the admissibility of evidence obtained through electronic surveillance done with the consent of one party. State v. Glover[102] involved a defendant convicted of murder and rape. Part of the evidence at trial was defendant's inculpatory statements made to his common-law wife while she, with her voluntary consent, wore a transmitter permitting police monitoring of the conversation. The court held the evidence admissible, not on state constitutional or statutory grounds, but rather under Title III and White.[103]

[100] R.I. Gen. Law § 11-35-21(c)(2)(3) (Supp. 1978).

[101] La. Rev. Stat. Ann. § 14:322 (West 1974).

[102] 343 So.2d 118 (La. 1977).

[103] Id. at 123-124.

¶48 Similarly, in State v. Petta[104] the court upheld the admissibility of tape recordings and transcripts of two phone conversations between defendant and a third party on Fourth Amendment and Title III grounds, citing White. It found that the third party gave prior consent to police installation of equipment on his phone to record the conversations.[105]

I. Ohio

¶49 Ohio, like Title III, prohibits the monitoring or recording of private oral communications except:

> [C]ommunications in which at least one party thereto, in order to prevent a crime or bring an offender to justice, has consented in advance to such communication being listened to, transmitted, amplified, or recorded . . . .[106]

Despite the Ohio statute, an Ohio court admitted non-consensual tape recordings as evidence in a divorce case. In Beaber v. Beaber,[107] a husband tapped the family phone to record conversations between his wife and her lover. In holding that Ohio's anti-eavesdropping statute did not apply to familial situations,[108] the court explicitly followed the Fifth Circuit decision in Simpson v. Simpson,[109] a suit for civil damages under Title III for a similar marital taping. The Fifth Circuit was unwilling to extend Title III to familial eavesdropping. Legislative history did not

[104] 359 So.2d 143 (La. 1978).

[105] Id. at 145.

[106] Ohio Rev. Code Ann. § 2933.58(B) (Page 1975).

[107] 41 Ohio Misc. 95, 70 Ohio Op.2d 213, 322 N.E.2d 910, (C.P. Ct., Family Ct. Div., Stark County, 1974).

[108] Id. at 103-104.

[109] 490 F.2d 803 (5th Cir.), cert. denied, 419 U.S. 897 (1974).

clearly show that Title III was intended to reach such activity, but did show the statute's purpose was to combat crime. As a criminal statute, Title III was construed strictly so as not to reach conduct not clearly prohibited.[110]

J. Wisconsin

¶50 The Wisconsin Supreme Court adopted a unique analysis of the section of the Wisconsin statute allowing consensual surveillance,[111] the language of which is identical to § 2511(2)(e) of Title III.[112] Both sections provide that electronic surveillance is "not unlawful" where a person acting under color of law is a party to the communication or one of the parties has given prior consent. Similarly, where a person is not acting under such color, consensual surveillance is permissible so long as the interception is not for the purpose of committing a tortious, criminal, or other injurious act.[113]

¶51 In State ex rel. Arnold v. County Court,[114] petitioner's telephone conversations with a consenting informant were intercepted and recorded. While agreeing that such interception was not unlawful under the Wisconsin statute, the court

[110] Id. at 809-810. These cases are most likely wrongly decided. See Final Report of National Wiretap Commission 167-168 (1976).

[111] Wis. Stat. Ann. § 968.31(2)(b) (West 1971).

[112] 18 U.S.C.A. § 2511(2)(c) (1970).

[113] In State v. Waste Management of Wisconsin, 81 Wis.2d 555, 571-572, 261 N.W.2d 147, 154, cert. denied, ___ U.S. ___, 99 S. Ct. 189 (1978), the court found that taping conversations for the purpose of protecting oneself, even where such conversations proved detrimental to defendant, did not constitute an "injurious act" within the meaning of the statute.

[114] 51 Wis.2d 434, 187 N.W.2d 354 (1971).

held that the conversations were not admissible as evidence. The court defined "not unlawful" as protecting the police from the civil and criminal penalties of the act, but refused to apply the exception to permit disclosure of the recordings in court.[115]

K. California

¶52 California law prohibits both wiretapping and eavesdropping without the consent of all parties to the conversation. Penal Code Section 631 proscribes taps and unauthorized connections with telephone lines.[116] Section 632 prohibits intentional eavesdropping by a person on a "confidential communication by means of any electronic amplifying or recording device."[117] Section 632 applies to conversations

[115] Id. at 442-443. The court felt that such conversations are privileged unless a warrant is obtained. The Arnold limiting rule applies to the admissibility of the contents of the eavesdropping interceptions as governed by § 968.29(3). In State v. Smith, 72 Wis.2d 711, 242 N.W.2d 184 (1976) the court refused to apply Arnold to prohibit an undercover agent, who monitored his conversation with a prostitute, from testifying about that conversation. While the fruits of the surveillance were not admissible, the surveillance itself was not prohibited. The tapes and eavesdropping officer's testimony was suppressed. The testimony of the conversationalist, i.e., the undercover officer, was not. Id. at 714, 717.

[116] Cal. Penal Code § 631 (West Supp. 1979). See also People v. Soles, 68 Cal. App.3d 418, 420, 136 Cal. Rptr. 328, 330 (1977), holding that motel manager who stayed on the line to listen after connecting a call to defendant's room did not commit "wiretapping" prohibited by section 631. The court did not say whether the motel manager's conduct was eavesdropping prohibited by Cal. Penal Code § 632 (West Supp. 1979). Presumably, such listening would not be eavesdropping because Section 632 defines that activity as overhearing a conversation by means of electronic amplifying or recording devices.

[117] Cal. Penal Code § 632 (West Supp. 1979). See also People v. Wynick, 77 Cal. App.3d 903, 907, 144 Cal. Rptr. 38, 40-41 (1978), holding that Section 632 prohibits secret electronic recording of a conversation, but does not bar taking notes or later stenographically recording one's recollections.

conducted face-to-face or electronically by means other than radio. Where the communication cannot reasonably be expected to be confidential, the statute's prohibition does not apply.[118] Under Section 632, "person" includes an individual acting or purporting to act on behalf of federal, state, or local government.[119] Violations of Sections 631 and 632 are punishable by fine and imprisonment.[120] Evidence obtained in violation of these sections is not admissible except in a prosecution or action on the violation.[121]

¶53 Two exceptions exist to the consent requirements. First, Section 633 provides that nothing in Sections 631 and 632 shall be construed to prohibit prosecutors or police or persons acting at their direction from "overhearing or recording" a communication they could lawfully overhear before the 1967 statute took effect.[122] Because Section 633 refers to both wiretapping and eavesdropping sections, but uses only the phraseology of eavesdropping ("overhearing and recording"), it is unclear whether police can legally wiretap without consent of all parties. Evidence obtained under Section 633

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[118] Cal. Penal Code § 632(c) (West Supp. 1979). See People v. Martinez, 82 Cal. App.3d 1, ___, 147 Cal. Rptr. 208, 216 (1978) (tape recording of defendant's conversation at jail with relatives was admissible because defendant had no expectation of privacy in jail). In re Joseph A., 30 Cal. App.2d 880, 886, 106 Cal. Rptr. 729, 733 (1973) (monitoring and recording of conversation between uncle and defendant minor nephew in police interrogation room not improper since interrogation room lends little or no expectation of privacy). See also Rogers v. Ulrich, 52 Cal. App.3d 894, 125 Cal. Rptr. 306 (1975) (taping by city official of conversation with another without the latter's consent did not violate Section 632 since conversation with public employee concerning public business did not qualify as "confidential").

[119] Cal. Penal Code § 632(b) (West Supp. 1979).

[120] Cal. Penal Code §§ 631(a), 632(a) (West Supp. 1979).

[121] Cal. Penal Code §§ 631(c), 632(d) (West Supp. 1979).

[122] Cal. Penal Code § 633 (West 1970).

scheme to take the money without carrying out the killing, the third person recorded his conversations with the wife. Ultimately he surrendered those tapes to the police and, under their direction, voluntarily recorded more. The court found the initial set of tapes admissible under Section 633.5. Despite the fact that they were made pursuant to a plan to obtain money and to protect the third person, they were made to obtain evidence relating to one of the enumerated offenses and were voluntarily surrendered to the police. It was not important that the initial function of the tapes was for the third party's own purposes and not aimed at prosecution.[128]

¶56 Finally, Section 633.5 restricts the permissible recording by participants to those communications relating to at least one of the enumerated offenses. Absent such offenses, a recording by a party to a conversation is inadmissible in court.[129]

L. Missouri

¶57 Missouri has no statute regulating electronic surveillance. However, the Missouri Supreme Court confronted the issue of consensual surveillance long before White. In State v. Spica,[130] the defendant was convicted of murder. Some evidence at trial consisted of tape recordings and

[128] Id. at 377.

[129] People v. Strohl, 57 Cal. App.3d 347, 366-367, 129 Cal. Rptr. 224, 236 (1976), where the Chief Deputy Coroner's tape of conversation with defendant was admissible since it dealt with bribery; People v. Montgomery, 61 Cal. App.3d 718, 132 Cal. Rptr. 558 (1976), where the court stated that councilman himself could have taped conversations where subject was bribery.

[130] 389 S.W.2d 35 (Mo. 1965), cert. denied, 383 U.S. 972 (1965).

motion pictures of conversations made between defendant and the deceased's wife, with the wife's consent. The court on appeal refused to exclude such evidence. Given the wife's consent and active cooperation, these recordings did not constitute an unlawful search and seizure in light of the Supreme Court decisions in On Lee and Lopez.[131]

M. Texas

¶58 Texas does not regulate electronic surveillance by statute. Through its evidence rule making inadmissible any evidence obtained in violation of federal or state constitutions or laws,[132] Texas adopts federal law on consensual surveillance.[133] In Matter of Bates,[134] a Texas appellate court admitted into evidence taped conversations between the defendant, a judge, and a police informer. In the first instance the informer made the tapes independent of police assistance. The court found in this situation [similar to that in People v. Ayers, supra] that the defendant expected the informer to hear the conversation and thus could not complain when he later revealed its contents. Nor did it constitute a violation of the Fourth Amendment when the tapes were made under

[131] Id. at 45-46.

[132] Tex. Code Crim. Pro. Ann. art. 38.23 (Vernon 1979).

[133] See 23 Tex. Jur.2d Evidence § 148 (1961 and Supp. 1978).

[134] 555 S.W.2d 420 (Texas 1977).

police discretion. If they were done with the voluntary consent of one party, then, under White, there existed no unlawful police intrusion.[135]

N. Arizona

¶59 Arizona follows a one-party consent rule similar to that in Title III. It prohibits the overhearing, knowingly, or recording of a communication or conversation without the consent of a party.[136] In State v. Holmes,[137] the court

[135] Id. at 431-432. The court also found that an implied promise of leniency by the district attorney to the informer was not sufficient to vitiate the necessary voluntary nature of the consent. See also Thrush v. State, 515 S.W.2d 122 (Tex. Ct. of Crim. App. 1974) upholding one-party consensual taping of conversation between co-defendants against Fourth, Fifth, and Sixth Amendment attacks.

[136] Ariz. Rev. Stat. Ann. § 13-3005 (1978) provides:

> Except as provided in § 13-3012, a person is guilty of a class 5 felony who being:
>
> 1. Not a sender or receiver of a telephone or telegraph communication, knowingly and by means of an instrument or device overhears or records a telephone or telegraph communication, or aids, authorizes, employs, procures, or permits another to do so, without the consent of either a sender or receiver thereof; or
>
> 2. Not present during a conversation or discussion, knowingly and by means of an instrument or device overhears or records such conversation or discussion, or aids, authorizes, employs, procures, or permits another to do so, without the consent of a party to such conversation or discussion; or
>
> 3. Not a member of a jury, knowingly records or listens to by means of an instrument or device the deliberations of such jury or aids, authorizes, employs, procures, or permits another to do so.

[137] 13 Ariz. App. 357, 476 P.2d 878 (1970); cert. denied, 403 U.S. 936 (1971).

upheld over Fourth Amendment objections the admissibility of tapes, for the purposes of corroboration, made with the consent of only one party. It stated that the defendant knew what he was saying to his client, intended his communication for him, and thus took the chance that his confidence was mistakenly placed.[138]

O. Nevada

¶60 Nevada permits consensual electronic surveillance, but places restrictions on its use in wiretapping. It permits the "interception" or attempted interception of "wire communications"[139] where there exists prior consent of one party and an emergency situation exists preventing the procurement of a court order prior to interception. In this event, the person making the interception must, within 72 hours, make an application to a supreme or district court judge for ratification of the interception. Such ratification will not be given unless an emergency existed making it impractical to obtain a prior order and the interception otherwise met

[138] Id. at 359. In accord see State v. Wilder, 18 Ariz. App. 410, 502 P.2d 1087 (1972) citing Holmes and White.

[139] Nev. Rev. Stat. §§ 179.430, 179.455 (1977) define "intercept" and "wire communication" as follows:

> 179.430 "Intercept" defined. "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device or of any sending or receiving equipment.
>
> 179.455 "Wire communication" defined. "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate, or foreign communications.

all the requirements of the authorization statute [set out in Nev. Rev. Stat. §§ 179.410 - 179.515 inclusive]. If ratification is refused, the maker of the interception must notify the sender and receiver of the communication about the interception and the court's failure to ratify it.[140]

¶61 The requirements for consensual eavesdropping are far less restrictive. Nevada prohibits the attempted or actual overhearing, monitoring, and recording by mechanical or electronic devices, of any private conversations, or the disclosure of their contents, unless there exists "authorization" by one of the parties.[141]

P. Colorado

¶62 Like Nevada, Colorado provides separately for wiretapping and eavesdropping. It, however, does not severely restrict the use of consensual electronic surveillance. It prohibits intentional wiretapping or eavesdropping without

[140] Id. § 200.620.

[141] Id. § 200.650.

the consent of either sender/receiver or a party to the conversation respectively.[142] Where such consent is given, there exists no "unlawful interception" within the meaning of Section 16-15-102(10) and therefore no suppression of evidence.[143]

Q. Pennsylvania

¶63 Pennsylvania's new electronic surveillance statute allows investigative or law enforcement officers to intercept wire or oral communication when one of the parties to the conversation consents.[144] Before the interception is conducted, the attorney general or the local district attorney, or their

[142] Colo. Rev. Stat. §§ 18-9-303, 18-9-304 (1978) provides:

> 18-9-303. Wiretapping prohibited - penalty.
> (1) Any person not a sender or intended receiver of a telephone or telegraph communication commits wiretapping if he:
> (a) Knowingly overhears, reads, takes copies, or records a telephone or telegraph communication without the consent of either a sender or a receiver thereof, or attempts to do so; or
>
> 18-9-304. Eavesdropping prohibited - penalty.
> (1) Any person not visibly present during a conversation or discussion commits eavesdropping if he:
>
> (a) Knowingly overhears or records such conversation or discussion without the consent of at least one of the principal parties thereto, or attempts to do so.

[143] People v. Morton, 189 Colo. 198, 539 P.2d 1255 (1975), cert. denied, 423 U.S. 1053 (1976).

[144] 18 Pa. Cons. Stat. § 5704(2)(II), as amended by Act of ____, Publ. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

designated assistants, must be satisfied that the consent is voluntary and must approve the interception.[145] Officers must record the interception, if practicable, and must comply with the statute's provisions on recording and record-keeping.[146]

R. Washington

¶64 The State of Washington recently amended its privacy statute to broaden the exceptions to the previously existing rule against intercepting communications without the consent of all the parties.[147] The consent of one party is now sufficient when the communications: (a) are of an emergency nature, such as reports of fire, crime, or other disasters; or, (b) convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands; or (c) occur anonymously, repeatedly, or at an extremely inconvenient hour.[148] Communications not falling within one of these categories can still be intercepted and recorded by a law enforcement officer acting within the scope of his official duties, provided that he obtains written or telephonic authorization from a judge or magistrate.[149]

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[145] Id.

[146] 18 Pa. Cons. Stat. § 5714(A), as amended by Act of ____, Publ L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

[147] Wash. Rev. Code Ann. § 9.73.030(2) (Supp. 1978).

[148] Id.

[149] Wash. Rev. Code Ann. § 9.73.090(2).

¶65 Washington's statute cannot be used to exclude as evidence telephone interceptions made in another state if the interceptions were legal under that state's law and had no effect within the state of Washington.[150]

Cite checked and Shepardized through:

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March, 1979 - California, Arizona, Florida, Wisconsin
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Crim. L. Rptr. checked through May 16, 1979.

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[150] State v. Mayes, 20 Wash. App. 184, 192-193, 579 P.2d 999, 1004-1005 (1978) (phone conversations were within California, all participants were California residents, and purpose of eavesdropping was to aid California police. California law requires only one party's consent to interception).

Consensual Electronic Surveillance

Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶5; Note 6: Correction: 18 U.S.C.A § 2516 (1970), as amended (Supp. 1979).

¶13; Note 23: Replace previous with: Justices Brennan, Douglas, and Harlan deemed On Lee no longer to constitute "sound law." 401 U.S. at 755. Justice Marshall agreed, asserting that On Lee was not viable in light of the constitutional principles articulated in Katz and other cases. Id. at 796.

¶16: Correction: [T]he Supreme Court read § 605 to require that consent be given prior to the government interception or divulgence for it to be valid.[27A]

¶16; Note 27A: It is not clear from the majority opinion whether retroactive authorization is permissible under § 605 if it is obtained without threat or coercion.

¶17: Omit first three sentences and substitute: The defendant has the prima facie burden of showing that he has been the victim of an unlawful electronic surveillance.[28] But when the defendant claims that evidence is inadmissible because it is the primary product of an unlawful act, the Government is statutorily

required to affirm or deny the occurrence of the unlawful act.[28A] Thus, when the defendant challenges the consent to the surveillance, the Government must affirm or deny the lack of consent and offer evidence in support of its position.[28B]

¶17: In the fourth sentence, add "of consent" between "validity" and "can."

¶17; Note 28: Add: United States v. Phillips, 540 F.2d 319, 325 (8th Cir.), cert. denied, 429 U.S. 1000 (1976).

¶17; Note 28A: 18 U.S.C.A. § 3504(a)(1) (1970).

¶17; Note 28B: United States v. Phillips, 540 F.2d 319, 326 (8th Cir.), cert. denied, 429 U.S. 1000 (1976).

¶19; Note 34: Correction: United States v. Rich, 518 F.2d 980, 985 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976).

¶20: Omit last sentence.

¶20; Note 38: Correction: United States v. Bastone, cert. denied, 425 U.S. 973 (1976).

¶20; Note 39: Omit and substitute: Koran v. United States, 469 F.2d 1071, 1072 (5th Cir. 1972).

¶21; Note 42: Add: The Fifth Circuit extended the Massiah proscription to pre-indictment interrogations occurring after the investigation focused on a particular suspect.[42A] Later, sitting en banc, the court, in dicta, withdrew the extension and limited Massiah to "secret interrogations."[42B]

¶21; Note 42A: United States v. Brown, 551 F.2d 639, 642-643 (5th Cir. 1977), rev'd en banc on other grounds, 569 F.2d 236 (5th Cir. 1978).

¶21; Note 42B: United States v. Brown, 569 F.2d 236, 238 (5th Cir. 1978) (en banc). It is worthwhile to note some of the recent limitations placed upon the Sixth Amendment right to counsel in the context of electronic surveillance. A transcript of a taped telephone conversation was held admissible in United States v. Taxe, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977), even though the conversation occurred after formal charges had been placed. The court reasoned that Massiah did not apply where the tape was used to impeach the testimony of the defendant, and not to prove guilt directly. In United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), cert. denied, 429 U.S. 980 (1976), 429 U.S. 1051 (1977), 429 U.S. 1066 (1977), 430 U.S. 982 (1977), the Second Circuit admitted post-indictment recordings on the ground that they were obtained in an investigation wholly distinct from the indictment. Massiah does not apply in a case in which the questioner is completely unaware of the existence of the indictment and is not seeking information

about the crime the indictment charges has been committed. 543 F.2d at 1016.

The Supreme Court recently examined the scope of the defendant's right to counsel in Brewer v. Williams, 430 U.S. 387 (1977), and limited Massiah to cases of actual interrogation by the Government. This dictum was applied by the Ninth Circuit in the Patty Hearst case, United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978) to admit a recording of a telephone conversation the defendant had with a childhood friend while in custody at the San Mateo County Jail. The court found that mere eavesdropping did not constitute "interrogation" nor an attempt to elicit incriminating statements, and therefore, the actions of the Government did not trigger Sixth Amendment protection. Id. at 1347-48.

Finally, Massiah does not apply to utterances which are not statements about past conduct, but which constitute criminal acts in themselves. In United States v. Merritts, 527 F.2d 713 (7th Cir. 1975), the Seventh Circuit allowed a recording of the defendant soliciting a bribe. Even though the defendant's statements had some relation to the conduct for which he had

been indicted, they also constituted a separate criminal offense, and therefore a recording of them was admissible. The court emphasized that the defendant's right to the assistance of counsel does not extend to the commission of new crimes. Id. at 716.

¶22; Note 43: Add: The Fifth Circuit, while in general requiring the defendant to admit guilt, at the same time allows the pleading of alternative defenses when they are not totally inconsistent. United States v. Greenfield, 554 F.2d 179, 182-83 (5th Cir. 1977), cert. denied, ___ U.S. ___, 99 S. Ct. 178 (1978).

¶22; Note 44: Correction: United States v. Hampton, 507 F.2d 832 (8th Cir. 1974), aff'd, 425 U.S. 484 (1976)

¶22; Note 44: Add: There is similar defense not based on the suspect's predisposition to commit a crime. In United States v. Russell, 411 U.S. 423, 431-32 (1973) Justice Rehnquist stated:

> [W]e may someday be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking the judicial process to obtain a conviction . . . .

In United States v. Ryan, 548 F.2d 782, 788-89 (9th Cir. 1976), cert. denied, 430 U.S. 965 (1977), the Ninth Circuit recognized, as it had to, the existence of the "objective approach."

The court found, however, that the government's actions in securing the agreement of the informant to engage in one-party consent surveillance did not sink to the level described by Justice Rehnquist, where:

(1) the informant was repeatedly told he would go to jail for 10 years if he did not cooperate;

(2) the informant was told not to get an attorney, or he would no longer be useful as an informant;

(3) the informant was told that his health would deteriorate in jail;

(4) the informant was promised that his friends would be "kept out of it;" and

(5) the informant was told he would be indicted if he did not cooperate. The court noted:

> that the due process channel which Russell kept open is a most narrow one, to be invoked only when the government's conduct is so grossly shocking and so outrageous as to violate the universal sense of justice.

The court also held that the informant's conduct had been "voluntarily" secured, 548 F.2d at 789-91.

¶27: Correction: Substitute for last six words in paragraph: acting "under lawful authority" are exempted.[59]

¶30; Note 62: Add: United States v. Testa, 548 F.2d 847, 855-56 (9th Cir. 1977) (reviewing prior Ninth Circuit decisions, and concluding that evidence is admissible in federal court if it is legal under federal law, even though its acquisition is inconsistent with a more restrictive state law). Cf. United States v. Sotomayor, 592 F.2d 1219 (2d Cir. 1979), in which the Second Circuit said a state's more stringent standards would apply in federal court if they protected individual privacy. In Sotomayor, the court approved admission of state wiretap tapes that were sealed contrary to state requirements as interpreted by state courts during the time the case was pending. The court said sealing requirements were evidentiary and did not protect privacy. Id. at 1225-1227. Where state agents arrest a suspect pursuant to a legal federal wiretap (not authorized under the state's law), the DiRe doctrine (United States v. DiRe, 332 U.S. 581 (1948)) does not mandate suppression in federal court of evidence seized after the arrest. United States v. Hall, 543 F.2d 1279, 1282-83 (9th Cir. 1976) For a discussion of DiRe, Turner (note 66 infra), and the interrelation of state and federal law on the question of search seizure, see Doppelt

and Karaczynski, Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power, 62 Cornell L. Rev. 364 (1977).

¶30; Note 63: Correction: United States v. Armocida, 515 F.2d 49, 52 (3d Cir. 1975), cert. denied, 423 U.S. 858 (1976).

¶30; Note 66: Omit and substitute: Mass. Gen. Laws Ann. ch. 272, § 99(D)(1)(c) (Michie/Law. Co-op 1978). Other states have statutes that are somewhat ambiguous. Maryland, for example, has dropped the explicit exclusion of federal officers from its statute and has instead applied prohibitions to all "persons." The definition of "persons" supplied by the legislature makes no mention of federal officers, thus leaving some doubt as to whether the statute applies to them. The prohibition does not apply to state and municipal law enforcement officers and persons acting under their direction and supervision. Md. Cts. and Jud. Proc. Code Ann. §§ 10-401(5), 10-401(6), 10-402(a), 10-402(c)(2). (Supp. 1978).

¶30; Note 66: Add: While federal officers are not specifically exempted under Cal. Penal Code § 631 (West 1979), the Ninth Circuit has held that conversations are nevertheless not to be excluded under 18 U.S.C. § 2514(4) (1976) (exclusion of

privileged communications). United States v. Feldman, 535 F.2d 1175 (9th Cir.), cert. denied, 429 U.S. 440 (1976). See also United States v. Turner, 528 F.2d 143 (9th Cir.) cert. denied, 423 U.S. 996 (1975), 429 U.S. 837 (1976).

¶32; Note 70: Add: People v. Smith, 58 App. Div.2d 1005, 396 N.Y.S.2d 949 (4th Dep't 1977); People v. Hochberg, 62 App. Div.2d 239, 404 N.Y.S.2d 239 (3d Dep't 1978); People v. Hopkins, 93 Misc.2d 501, 402 N.Y.S.2d 914 (Sup. Ct. New York County 1978) (participant in conversation was not cooperating with government when he taped conversations. Court said 18 U.S.C. 2511(2)(d) and 18 U.S.C. 2515 (1970) did not bar admission of tapes, even if purpose of conversation was criminal, as long as purpose of recording was not.)

¶33; Note 72: Correction: Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975).

¶35; Note 77: Omit and substitute: It shall not be unlawful under this act for:

c. Any person acting at the direction of an investigative or law enforcement officer to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception; provided, however, that no such interception

shall be made unless the Attorney General or his designee or a county prosecutor within his authority determines that there exists a reasonable suspicion that evidence of criminal conduct will be derived from such interception . . . .

N.J. Stat. Ann. § 2A:156A - 4(c) (Supp. 1978), as amended by Act of June 23, 1978, ch. 51, § 2 (102 N.J.L.J. N.L.-42, 43 (1978)).

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Appendix

Electronic Surveillance, Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, 11-12, 113-17 (footnotes omitted).

B. EFFECTIVENESS OF CONSENSUAL ELECTRONIC SURVEILLANCE IN CRIMINAL INVESTIGATIONS

1. The Commission finds that:

Consensual electronic surveillance by law enforcement authorities is especially vital for the investigation of certain criminal activities, particularly official corruption, extortion, and loan-sharking. It also serves to protect police officers, informants, and complainants, or whoever is the consenting participant to the conversation.

Court authorization for such surveillance is unnecessary for the protection of privacy because it is not a "search" within the meaning of the Fourth Amendment of the Constitution, i.e., it serves not to intercept conversations, but merely to corroborate them, thereby improving the accuracy of evidence for use in court.

Further, court authorization would be impractical because many "consensuals" are done under circumstances requiring immediate action.

In some cases, inadequate record keeping, not the absence of court authorization, has provided the opportunity for misuse and theft of electronic surveillance equipment.

Recent reports by the Attorney General indicate a sharp increase in the number of consensual electronic surveillances conducted by Federal agents. Conversely, the annual report of the Administrative Office of the United States Courts indicates a trend toward declining use of Title III, non-consensual surveillance.

[A substantial minority of the Commission believes that these trends raise the possibility that Federal law enforcement authorities may be shifting from court-authorized to consensual surveillances for the purpose of avoiding the legal safeguards inherent in Title III. This shift from court approved to unregulated consensual surveillance is alarming.]

Commentary

I. B. 1. The distinction between non-consensual electronic surveillance and one-party consensual electronic surveillance, as used by law enforcement, should be clearly understood. Consensual electronic surveillance is not a search for criminal conversations; its basic use is to corroborate such conversations and to protect the consenting participant. It is a vital investigative means when an undercover police officer has been able to penetrate a criminal conspiracy, or when a cooperative citizen or informant wishes to expose criminality in which he has become involved. For example, if a citizen reports that a bribe has been demanded of him, or an informant reports that he is buying narcotics from a particular source, recording his conversations with the suspect is the best and most certain means of proving exactly what was said. Further, insofar as an undercover police officer or an informant must deal with dangerous suspects, allowing him to transmit his conversations with them to nearby officers will protect him. We have taken testimony on the harmful effects on law enforcement (especially in corruption investigations) of Pennsylvania's recent legislation which bars the use of court-authorized consensual electronic surveillance recordings as evidence, even if the recording contained the only evidence of the identity of the murderer of a law enforcement officer who was wearing the recorder at the time of his death.

Some critics propose that a court order be required for police use of consensual electronic surveillance. This is impractical. In many situations, criminal conspirators move quickly; there is no time to obtain a court order for the agent or informant who must promptly consummate a bribe or a narcotics sale or any other criminal transaction. Moreover, the evidence to support many consensual surveillances cannot meet the probable cause requirements of a court order. The very purpose of the recording, in these cases, is to corroborate the story of a person accusing a respectable public official of a bribe attempt, or to corroborate a disreputable narcotic addict in his claims as to who is selling him dope.

Recording incoming police emergency calls is also widely and appropriately practiced. Yet it is doubtful that it is a practice that could be successfully meshed with a court-order system.

2. The Commission recommends that:

To prevent loss or misuse of consensual electronic-surveillance equipment, law enforcement authorities should subject such equipment to careful administrative controls, such as check-out--check-in records, authorizing officer signatures, and inventories reflecting the location and use of equipment. Title III should not be amended to make a court order a pre-requisite to the use of consensual electronic equipment by law enforcement agents in criminal investigations, but Congress should examine the increasing use of consensual electronic surveillance by Federal law enforcement authorities to determine whether legislative safeguards should be provided.

[A substantial minority of the Commission opposes all of this recommendation except the last clause of the last sentence, starting with "Congress should . . ."]

* * * *

B. SURVEILLANCE WITH THE CONSENT OF A PARTY TO THE CONVERSATION

Title III expressly excludes from its coverage surveillance by private citizens and public officers where one of the parties to the conversation has consented to the overhearing. Section 2511(2)(c) allows persons acting under color of law to participate in such consensual interception without restriction. Private citizens can use consensual surveillance under § 2511(2)(d), with the proviso that such surveillance not be used "for the purpose of committing any criminal or tortious act . . . or for the purpose of committing any other injurious act."

Prior to enactment of Title III, the issue of consensual surveillance had been before the Supreme Court on a number of occasions. In *Rathbun* v. *United States,* the Court held that it was not improper for a law enforcement officer to listen to a telephone conversation on an extension line with the consent of one party. In *On Lee* v. *United States,* transmission by a wired informant was upheld, as was recording by an Internal Revenue Service agent in *Lopez* v. *United States.*

Since the enactment of Title III, the issue of whether consensual recording could be conducted by law enforcement officers without a warrant has been before the Supreme Court in *United States* v. *White.* In a plurality decision, with four justices dissenting, the Supreme Court reversed a lower court's ruling that a court order should have been obtained prior to the consensual overhearing. Justice Black, who believed that electronic surveillance did not constitute a search in Fourth Amendment terms, provided the fifth vote for the majority.

The legality of consensual surveillance by law enforcement officers as authorized by § 2511(2)(c) was not before the Supreme Court in *White,* because the overhearing occurred before enactment of Title III. Nonetheless, it is clear that the effect of *White,* coupled with *Rathbun, On Lee,* and *Lopez,* which have never been overruled, is to apply the imprimatur of constitutionality to consensual surveillance without a prior court order.

Despite the generally accepted position that warrantless consensual surveillance by officers and private citizens is constitutional, the issues involved were vigorously debated during the Commission's hearings. One of the recurrent questions addressed by the Commissioners to witnesses was whether the Commission should recommend legislative enactment of a warrant requirement or other controls over either public or private consensual eavesdropping. The Commission developed considerable information about the purpose and amount of such surveillance, the ways in which it is used, and the potential effects of various controls.

1. The Purposes, Extent, and Impact of Consensual Surveillance

Consensual surveillance serves a variety of law enforcement purposes. This variety contributes to the high rate of use in many jurisdictions, and it is not surprising that such an easy to use, versatile, and effective device is popular. Extensive use of consensual surveillance, however, may create increased risks to conversational privacy.

In consensual surveillance, the consenting party is often an informant of somewhat dubious character. Quite often the informant's consent to interception is obtained to establish his veracity and credibility, which might otherwise be impossible. Wiring the informant is thus related to establishing sufficient probable cause, once his credibility is established, for a surveillance order or an arrest or search warrant. As one prosecutor stated, this is frequently the "first step" in an investigation. Also, when informants' conversations are overheard or recorded, they themselves are kept honest, later impeachment becomes impossible, and informants' covers can be preserved. Furthermore, by recording an informant's conversation, the government obtains a form of insurance against later recantation.

As a result of consensual surveillance, officers generally believe, the best possible evidence is acquired, and no better means of corroborating an informant's information or a witness's testimony is available. This is particularly important in corruption cases and similar situations involving the word of one person against another.

Furthermore, wiring a person who is alleging official impropriety can benefit the official involved. Not infrequently, persons making such charges withdraw them when asked to be wired. In such circumstances, the official is protected, and it has been suggested that elimination of consensual surveillance would adversely affect innocent people and potential defendants as much as it would harm law enforcement. In any event, where consensual surveillance is not available, satisfactory resolution of corruption allegations may be difficult, if not impossible.

Another very important use of consensual surveillance is to protect the agent or informant. Particularly in narcotics cases, where acts of violence against agents have increased substantially in recent years, wiring the officer can add a measure of protection not otherwise available. On the other hand, if the officer is discovered wearing the device, he is likely to be more endangered. Where such danger is anticipated, bugging the room or area where the conversation will take place is a better solution.

Consensual surveillance gives officers mobility and flexibility. Not only can immediate protective action be taken if the officer is assaulted, but raids and

related activities can be more efficiently coordinated. Finally, consensual surveillance can also play an important part in gathering intelligence.

Consensual surveillance has, however, some inherent limitations. Technical problems can reduce the range and audibility of devices, particularly in areas with large buildings. One critic of consensual surveillance doubted whether a consent recording created under adverse conditions was in fact more accurate than the individual's memory. Additionally, law enforcement officers indicated that informants are not always told the truth or the complete facts. The most damaging conversations sometimes occur after the informant leaves. Not infrequently, informants are used in a counterintelligence role by being given information that requires a police response, which in turn discloses the informant's role.

Despite these limitations, and in view of the diversity of purposes, consensual surveillance is a frequently used tactic. It is "a daily tool, as indispensable as the cop on the beat." Figures supplied by the Justice Department show that consensual surveillance by Federal officers is increasing.

Furthermore, consensual surveillance substantially exceeds the use of court-ordered electronic surveillance. The Federal government reported that 6,698 telephone and nontelephone (bugs) consensual surveillances had been conducted from 1969–1974. During the same period, 957 court orders authorized Title III electronic surveillance by Federal officers. In only one jurisdiction with substantial surveillance activity does a reverse ratio appear.

Attorney General Edward Levi gave three reasons for the increase in Federal consensual surveillance. The number of investigations suited to such eavesdropping technique has been increasing. Second, Federal agencies have adopted a policy of encouraging such use. Finally, technical factors, including improvement in the quality of equipment, have contributed to the increase.

At the State level, figures on the amount of such activity are generally unavailable, because many offices do not keep records. Recordkeeping is especially difficult where officers own or have unlimited access to consensual surveillance equipment. Where statistics are available, they show that the amount of State consensual surveillance is also increasing. In Miami, State officials used consensual surveillance on 25 occasions in 1973 and 124 times in 1974. There are indications that more State consensual surveillance would occur if the equipment was available to State officials.

In the opinion of one critic of electronic surveillance, Professor Herman Schwartz, consensual surveillance "can be limited to very specific targets, and time periods, and does not strike at speech and association the way third-party surveillance does." Another critic of electronic surveillance, Professor R. Kent Greenawalt, stated that the impact of consensual surveillance depends on three variables: who is overhearing or recording the conversation, what the purposes of the surveillance are, and what means and devices are used for making the interception. In Professor Greenawalt's view, recording cuts more deeply into the unaware speaker's expectations of privacy than merely allowing another person to overhear the conversation.

Other factors pertinent to the issue of the impact on privacy of consensual surveillance were suggested to the Commission. One was the degree to which a consenting party can control the direction and substance of the conversation. In one instance a consenting party "was in control of what would be said in this conversation and would naturally have steered it along the lines of probable cause." In such circumstances, control over the conversation's direction by the consenting party may be transformed into indirect control by the monitoring officers. In this case, according to the official, "we controlled exactly what she said [and] how she would say it."

Such control by either the consenting party directly or the officers indirectly appears to be quite unusual. In most situations, the consenting party is often involved in the criminal enterprise and reluctant to acknowledge his own role or make self-incriminating statements that could be overheard by the officers. Also, law enforcement officers can coerce unwilling persons to provide consent to overhearing, which can reduce the consenting party's willingness to steer the conversation or further implicate himself. On the other hand, it was suggested that the use of an informant after applying pressure "really becomes a search . . . and interrogation."

2. Regulation of the Use of Consensual Surveillance

Title III specifies no procedures for the use of consensual surveillance. This permits absolute discretion to individual jurisdictions and agencies to develop their own regulatory methods. At the Federal level, guidelines require prior upper-level authorization of nontelephone consensual surveillance and impose on agency heads a general duty to oversee consensual surveillance involving telephones. At the State level, the decision to use consensual surveillance is generally decentralized and often left to police officers.

A second method by which the use of consensual surveillance is controlled is through restrictions on

access to equipment. Practices in this regard vary, however, and often appear to be most loose in State jurisdictions that impose little or no centralized prosecutorial control over the decision to use consent techniques.

a. The Decision to Use Consensual Surveillance: Justice Department regulations require all Federal departments and agencies, except in emergencies, to obtain advance approval from the Assistant Attorney General in charge of the Criminal Division or the Deputy Assistant Attorney General before using nontelephone consensual surveillance without the consent of all parties to the conversation. To obtain such approval, the officer must submit a written request, stating his reasons for desiring authority to use nontelephonic consensual surveillance and identifying the persons to be overheard.

These regulations define an emergency as a threat to safety or imminent loss of essential evidence. Even in such circumstances, an informant cannot be wired, nor can other use be made of nontelephonic consensual surveillance, without prior approval of the head of the agency or department or his designee. Thereafter the Assistant Attorney General in charge of the Criminal Division must be promptly notified of the surveillance.

Justice Department regulations charge each department head with the responsibility for controlling telephonic consensual surveillance and assisting in adoption of agency guidelines on the subject. Agency chiefs are required to exercise responsibility over the inventory of surveillance devices used by their officers.

In the official opinion of the Justice Department, "present regulations . . . are both flexible enough to allow our investigative agents to used this technique effectively, and yet restrictive enough to assure that abuses do not occur." Requests for authorization to use "body bugs" have been turned down on the basis that the proposed use would be too intrusive upon privacy, the particular case was not sufficiently significant or had proceeded beyond the stage when such devices should be used, or the anticipated use was deemed inappropriate.

Approximately 50 percent of the occasions in which nontelephonic consensual surveillance is used fall within the emergency category. In such circumstances, prior upper-echelon review and approval does not occur. This statistic and fact were troublesome to one critic of the Justice Department's policies and use of consensual bugs. He suggested that the high percentage of emergency consensuals showed a lack of adequate control, rather than the need for warrantless consensual surveillance.

With reference to Federal agencies, however, emergency consensual surveillance involving bugs must be approved at lower levels regardless of the circumstances. In the FBI this procedure requires a call from the field office to the Section Chief at Bureau headquarters, who in turn obtains approval from the Assistant Director. If there is no time to obtain further oral approval from the Justice Department, either FBI Director Clarence Kelley or the Assistant Director in Charge of Special Operations can give approval, pursuant to special authorization by the Department.

With reference to consensual surveillance involving the telephone, FBI regulations require written consent from the consenting party plus the approval of an Assistant United States Attorney or a Federal Strike Force attorney and the FBI Special Agent in Charge. An FBI field officer testified that the Bureau's regulations on consensual surveillance have not caused delay, and that if he could not reach one official in the hierarchy another would be available. He had no objections to centralized control over the decision to use consensual surveillance.

Procedures in the Drug Enforcement Administration are similar to those used in the FBI, though somewhat less elaborate. The DEA Manual requires an agent to obtain the approval of his Regional Director for emergency nontelephonic consensual surveillance. Approval even in nonemergency situations takes very few hours. When such approval is made it may authorize a series of uses in the particular case, which can last for up to 30 days without renewed approval being required. In at least some DEA regions, approval of the Regional Chief is also required for consensual surveillance involving use of a telephone.

The Treasury Department and its divisions have adopted guidelines based on the Justice Department regulations. For consensual surveillance using a telephone, Treasury Department guidelines require approval at the level of the Special Agent in Charge, who must also submit a report to the Department.

The New York City Joint Federal-State Strike Force follows Federal requirements for the consensual use of bugs. Some criticism of this procedure was made, with the suggestion that the United States Attorney should have full authority to authorize consensual surveillance.

At the State level practices vary substantially from jurisdiction to jurisdiction. In some, prosecutors are heavily involved in the decision to use consensual surveillance, while there is no such involvement in other areas. A formalized approach is taken in Essex County, New Jersey, where requests for consensual surveillance are processed in the same manner as requests for court-ordered surveillance. Both heads of the Joint City-County Strike Force must approve the

request, and the surveillance must be conducted by members of the force's Electronic Surveillance Unit. These controls are not deemed to be too burdensome, and this careful treatment of consensual surveillance extends to recordkeeping. Files similar to those for court-ordered surveillance are maintained for each consensual surveillance.

Prosecutorial control is mandated by statute in Illinois, where approval of the State's Attorney is required before any form of consensual surveillance can occur. In Cook County, which includes Chicago, the State's Attorney himself personally approves each request, a practice not followed in some of the other counties of the State. In Chicago, the investigating officer contacts a deputy of the Special Prosecutor's Bureau, who checks with the State's Attorney. The State's Attorney, whose approval can be given orally, is informed of the facts, persons involved, and other details. Among the criteria used by the deputy to go forward with a request are apparent probable cause, potential effectiveness of the consensual surveillance, and character of the person to be wired. If the officers appear to be making the request to avoid legwork, it may be rejected. The limit on authority to conduct consensual surveillance is three days.

Consensual surveillance practices vary among the offices in the New York City area, as they do for other kinds of electronic surveillance generally. In two counties, where the District Attorney's office is conducting an investigation, the Bureau Chief's approval is required, whereas, in a third county, any Assistant District Attorney can authorize consensual surveillance in such circumstances. In the office of the Special Corruption Prosecutor, approval must be obtained from the Assistant Special Prosecutor in charge of the investigation, the Bureau Chief, and the Chief Counsel.

Where investigations are being conducted by the police without prosecutorial involvement, the decision to use any form of consensual surveillance is viewed in New York City as a police decision. The only exception is in the office of the Special Corruption Prosecutor, where the Prosecutor participates in all investigations. Additionally, a recent amendment to the New Jersey Surveillance Statute requires prosecutorial control over the use of consensual surveillance.

Elsewhere, if there is no prosecutorial involvement, there nonetheless appears to be some internal control within the police department. In Miami, the decision to use consensual surveillance is made by an investigatory section supervisor and reviewed by a commanding officer. In Phoenix, there are no procedures for consensual telephone surveillance, though consensual bugs must be approved by the head of the intelligence section as to necessity and choice of equipment. Prosecutorial control over the decision was believed by some State prosecutors to be quite important.

b. Control over Equipment: Federal practices with reference to control exercised over consensual surveillance equipment appear to be generally standardized. Each agency head is required to exercise control over such devices, and submit an annual inventory and statement of results obtained. Several agencies have adopted regulations concerning custody over all surveillance equipment.

The Drug Enforcement Administration keeps its equipment in its regional offices, with the exception of two KEL-SETS (popular name of a widely used body transmitter) kept in district offices. FBI equipment is signed out to an agent individually, and an inventory card is maintained on each item by equipment number.

At the State level, some prosecutor's offices and police departments have developed inventory and sign-out procedures to control equipment. In many jurisdictions, however, it seems that no prosecutorial control is exercised over police access to equipment.

3. The Effect of Requiring a Warrant or Imposing Title III Procedures on Consensual Surveillance

Although it is clear, under the cases beginning with *On Lee* v. *United States* and continuing through *United States* v. *White,* that no prior court order, much less an order as complex as a Title III order, is constitutionally required before consensual surveillance can occur, several witnesses recommended that some form of court-order procedure be adopted for consensual surveillance. Law enforcement personnel were almost unanimous in their opposition to this proposal.

This opposition was not diminished by the fact that court orders have been obtained in individual cases. Prior judicial approval has been solicited by a few prosecutors in the hope of avoiding later allegations of impropriety, as in the *Osborn* case, and in a recent investigation of Illinois State legislators. Occasional use of a court order by a prosecutor does not constitute endorsement of a warrant requirement, as noted by the testimony of United States Attorney James Thompson, who obtained an *ad hoc* order for an investigation involving Illinois legislators.

There is nearly unanimous opposition to the suggestion of imposing the procedures of § 2518, dealing with nonconsensual electronic surveillance, on consensual surveillance. Even most defense attorneys who testified before the Commission stated that § 2518 procedures were not necessary in the consensual situation, and they proposed only an order process similar to that for a conventional warrant. Nor did the several academic proponents of a warrant requirement for consensual surveillance argue that the procedures of § 2518 would be essential or even desirable components of a consensual surveillance warrant. In sum, there were few supporters of any proposal to incorporate § 2518 procedures into consensual surveillance warrants.

Law enforcement opposition to requiring a conventional search warrant procedure is, however, almost as vigorous as it is to a procedure that would incorporate the detailed requirements of § 2518. The predictions about the consequences to law enforcement of a warrant requirement ranged from statements that a warrant requirement would end the use of consent devices, destroy their usefulness, and cause the loss of a very important tool, to concerns about reduced efficiency and a reduction in use by about 50 percent. One prosecutor asserted that law enforcement could live without court-ordered surveillance but not without consensual surveillance. Another stated that a warrant requirement would be an unwise impediment.

Several other reasons were given in support of opposition to imposing a warrant requirement on the use of consensual surveillance. Probable cause to support such a warrant, it was argued, would often be difficult if not impossible to obtain, particularly if unreliable informants were the only source of information to support an application to conduct consensual surveillance.

If consensual surveillance were to be used to obtain probable cause for a surveillance order or an arrest or search warrant, as is often the case, a warrant procedure, if it had a probable cause requirement, would be impossible to obtain. It would require officers to have probable cause to use a device for obtaining probable cause. In other situations, such as drug transactions, two meetings instead of one would be required: the first to acquire probable cause, the second to record the conversation. Questions were also raised about the time limit on a consensual surveillance order if it were based on a single showing of probable cause.

Furthermore, opponents of a warrant requirement asserted that such a requirement would limit the use of informants. One participant at the Law Enforcement Effectiveness Conference stated that an informant would run out of the office if he were told he would have to appear before a judge.

Proponents of a warrant requirement responded that probable cause would be relatively easy to establish, as when the device is to be worn to protect an agent or informant from danger or when a purchase of narcotics had been arranged. For the limited purpose of obtaining a consensual surveillance order, it was suggested, cause to wear the device could be established without verification of the informant's reliability, and a reduced showing, such as that approved for a stop and frisk by *Terry* v. *Ohio,* might be acceptable.

A second major objection to a warrant requirement was the time required to prepare a consensual surveillance application and order, find a judge, and have the order issued. Several law enforcement officers asserted that this process would cause significant and adverse delays in a situation in which officers needed to react quickly. One official suggested that one result of a warrant requirement would be that every situation calling for its use would be considered an emergency, and the requirement would be simply bypassed by using the emergency exception.

A third objection was that the administrative burdens would be "enormous," especially with reference to manpower needed to draft and process applications. As stated by representatives of one prosecutor's office, time spent on paperwork is time lost from investigation. Other prosecutors described a warrant requirement as impractical and unworkable.

Finally, one prosecutor argued that the interest advanced by the use of consensual surveillance is accuracy, rather than trespass. The proponents of a prior warrant for consensual surveillance, on the other hand, would define the interest protected as conversational privacy.

Some prosecutors' offices must already obtain prior warrants, and, although the use of consensual surveillance is infrequent, prosecutors in those jurisdictions did not appear to feel particularly hindered by this requirement. The police did not necessarily agree, however. Other prosecutors indicated that they would have no objection to a warrant requirement, and that they would not be "aghast at the thought of putting consensual devices under court order." Their views, however, were clearly in the minority. The strongest support for a warrant requirement came from defense attorneys and professors. The same defense attorneys indicated that a showing short of probable cause would be acceptable, and a broader range of cases in which such surveillance could be used was also endorsed. The main concern appeared to be to establish a procedure

whereby officers would be required to appear before a judge and describe the reasons, the proposed supervision, and the unavailability of alternatives.

Proponents of a warrant requirement also indicated a willingness to accept less formal procedures in the event of an emergency. Telephone approval was considered acceptable in such circumstances. The important consideration in an emergency was to make a record before using the device if a judge could not be found.

Pennsylvania officials described the adverse effects of a warrant requirement where the only basis for approval in the statute is danger to the officers. In one case, officers could not show potential danger and were frustrated in their efforts to apprehend participants in an interstate operation. If a warrant requirement were imposed, the statute should permit the investigation of a reasonably broad range of activities.

APPENDIX B

Specialized Forms of Electronic Surveillance

Specialized Forms of Electronic Surveillance

1

Electronic Tracking Devices

Outline

Summary

¶1 Recent decisions have held that the use of electronic tracking devices is subject to Fourth Amendment limitations. A convincing argument can be made, however, that the warrantless installation of such devices does not constitute an unreasonable search within the Fourth Amendment. A "bumper beeper" monitors only the physical location of a motor vehicle that is knowingly exposed to the public. Moreover, physical location of a motor vehicle is observable from public areas. Consequently no reasonable expectation of privacy exists against the use of such tracking devices.

¶2 An electronic tracking device is a means of visual, not aural, surveillance; it provides information concerning the physical characteristic of an individual (location); it does not intercept communications. A "bumper beeper" is a mechanical aid used to augment visual surveillance analogous to binoculars or flashlights. Because it is electronic, it should not be confused with wiretaps.

I. Introduction

¶3 Electronic tracking devices (ETD), commonly known as "bumper beepers," are small transmitters which emit periodic radio signals. Directional finders are used by police to determine the location of the object to which an ETD is attached. Law enforcement officials often use ETD's to enhance visual surveillance of a motor vehicle. The use of this investigatory technique dramatically reduces both the expense and the number of police officers needed to conduct effective visual surveillance of an automobile. Moreover, electronic tracking devices minimize the chance of detection by a suspect and render any evasive action ineffective.

¶4 Although visual surveillance of a motor vehicle on a public street does not constitute a search within the meaning of the Fourth Amendment,[1] two recent decisions hold that visual surveillance augmented by electronic tracking devices is subject to Fourth Amendment limitations. These materials will analyze the constitutionality of using ETD's without obtaining prior judicial approval in light of the Fourth Amendment. They conclude that such surveillance ought not be held subject to Fourth Amendment limitation.

[1] See discussion in text, infra, at ¶32.

II. Scope of the Fourth Amendment

A. Reasonable Expectation of Privacy

¶5 The constitutional parameters of the Fourth Amendment's protection against unreasonable searches and seizures were reformulated by the Supreme Court in Katz v. United States.[2] In Katz, government agents attached an electronic listening device to the outside of a public telephone booth without obtaining prior judicial approval. Observing that the Fourth Amendment protects persons rather than places, the Court concluded that the warrantless eavesdropping violates an individual's justifiable expectation of privacy. It constitutes, therefore, a search and seizure within the Fourth Amendment.[3] The majority explained that although a person was not entitled to Fourth Amendment protection if he knowingly exposed something to the public, whatever he sought to preserve as private, even in an area accessible to the public, may be constitutionally protected.[4] Two tests must be met if the courts are to find a reasonable expectation of privacy:

1. the person must have "exhibited an actual (subjective) expectation of privacy," and
2. the expectation must be one that society is

[2] 389 U.S. 347 (1967).

[3] Id. at 351, 353.

[4] Id. at 351-52.

willing to recognize as "reasonable."[5]

Since the reasonableness of an expectation of privacy will most likely influence the determination of whether the defendant actually entertained such an expectation, the prosecutor's primary task is to demonstrate that such an expectation of privacy was unreasonable in light of the surrounding circumstances.

¶6 Katz indicated, in dictum, that the "reasonableness" of an individual's expectation of privacy from police surveillance varies according to the type of surveillance involved. For example, while the defendant in Katz could have had a reasonable belief that his conversation would not be overheard after entering the glass-enclosed telephone booth, i.e., reasonable in an "auditory" sense, he could not have entertained a reasonable expectation of privacy in a "visual" sense, since he was as visible after entering the booth as he would have been if he had remained outside. The Court observed: "[W]hat he sought to exclude when he entered

[5] Id. at 361 (Harlan, J. concurring). The Katz notion of a "reasonable" expectation of privacy was subsequently reiterated by the Court in U.S. v. White, 401 U.S. 745 (1971), a plurality decision:

> Our problem is not what the privacy expectations of particular defendants in particular situations may be. . . . Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally "justifiable"--what expectations, the Fourth Amendment will protect in absence of a warrant.

Id. at 751-52.

the booth was not the intruding eye--it was the uninvited ear."[6]

¶7 Katz may be cited, therefore, as recognizing a valid constitutional distinction between audio and visual surveillance. This belief that certain types of visual surveillance do not constitute searches within the Fourth Amendment is embodied in the "plain view" and the "open fields" doctrines.

B. The "Plain View" and "Open Fields" Doctrines

¶8 Traditionally, courts hold that the observation of an object or activity in "plain view" does not constitute a search within the Fourth Amendment. In Harris v. United States,[7] the Supreme Court observed: "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence." Consequently, a search within the Fourth Amendment is not conducted when police officers maintain visual surveillance of a motor vehicle on a public road.[8]

[6] 389 U.S. at 352.

[7] 390 U.S. 234, 236 (1968) (where routine search of an impounded automobile produced automobile registration which, revealing the car to be stolen, was admitted into evidence).

[8] United States v. Holmes, 521 F.2d 859, 866 (5th Cir. 1975), reh. granted, 525 F.2d 1364 (5th Cir. 1976); United States v. Martyniuk, 395 F. Supp. 42, 44 (D. Ore. 1975). See discussion in text, infra, ¶¶34-44.

¶9 Nevertheless, the "plain view" doctrine is subject to limitations. It is applicable only if the officer has a right to be in the position from which the object or activity is observed.[9] Further, the evidence must be discovered inadvertently. Mr. Justice Stewart, in his plurality opinion in Coolidge v. New Hampshire, observed:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification--whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused--and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.[10] (emphasis added)

¶10 Courts also consistently hold under the "open fields" doctrine that the Fourth Amendment does not prohibit the warrantless search of an individual's property which lies beyond the dwelling house and immediately adjacent area. In Hester v. United States,[11]

[9] Harris v. United States, supra, note 7. See also Ker v. California, 374 U.S. 23, 42-43 (1963)(plurality opinion).

[10] 403 U.S. 443, 466 (1971) (plurality opinion). See also United States v. Holsey, 414 F.2d 458 (10th Cir. 1969).

[11] 265 U.S. 57, 59 (1924).

Justice Holmes stated: "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields."

¶11 Nevertheless, the Court's decision in Katz was followed by uncertainty concerning the continued validity of the "open fields" doctrine. In light of Katz's rejection of the "physical trespass" rule and the possibility that a person might entertain a reasonable expectation of privacy concerning property situated outside the curtilage, commentators advocated the abandonment of the "open fields" doctrine.[12] Despite these suggestions, the Supreme Court reaffirmed the validity of the "open fields" doctrine.[13] In Air Pollution Variance Board of Colorado v. Western Alfalfa Corp., the Court concluded that conducting an air quality test without consent or warrant[14] was not an unreasonable search and seizure. Although the inspection took place on the defendant's property, there was no indication the premises were closed to the public; the Court observed that any alleged invasion of privacy

[12] See 1 Antieau, Modern Constitutional Law §2:8(1969); Mascolo,"The Role of Abandonment in the Law of Search and Seizure: An Application of Misdirected Emphasis," 20 Buf. L. Rev. 399, 409-13 (1971).

[13] 416 U.S. 861, 865 (1974).

[14] At the time of the test, no state statute existed requiring a warrant. Colorado later adopted a search warrant requirement for the investigation of air pollution violations. 416 U.S. at 863.

was "abstract and theoretical."[15] As the investigator only observed what was visible to anyone near the site, the "open field" exception to the Fourth Amendment was applied to uphold the inspector's conduct.[16]

C. Constitutionality of Various Surveillance Techniques Augmented by Mechanical Aids

1. Aural Amplification and Recording Devices

¶12 Katz, on the other hand, did not prohibit all forms of warrantless aural surveillance. In Katz, government agents used an electronic listening device to amplify the substance of a conversation that the defendant sought to keep private. Thus, the warrantless eavesdropping intruded upon an expectation of privacy that society was willing to recognize as "reasonable." In United States v. Fisch,[17] however, the Ninth Circuit held that conversations overheard without any electronic listening devices did not constitute an unreasonable search and seizure. In Fisch, police agents situated "just a few inches away from the crack below the door connecting. . . two adjoining [motel] rooms"[18] listened to the defendant's incriminating conversation; they did not use any electronic equipment. The court concluded that even if the defendant actually sought to keep his conversations private, his subjective expectation was not one society was prepared to recognize as reasonable:

> Listening at the door to conversations in the next room is not a neighborly or nice thing to do. It is not genteel. But so conceding we do not forget that we are dealing here with the "competitive enterprise of ferreting out crime."
>
> . . . .
>
> . . . The type of information received from the aural surveillance is a factor to be considered in attempted delineation of the limits "of what society can accept given its interest in law enforcement," whether society can "reasonably be required to honor that expectation [of privacy] in all cases."
>
> . . . .
>
> Upon balance, appraising the public and the private interests here involved, we are satisfied that the expectations of the defendants as to their privacy, even were such expectations to be considered reasonable despite their audible disclosures, must be subordinated to the public interest in law enforcement. In sum, there has been no justifiable reliance, the expectation of privacy not being "one that society is prepared to recognize as reasonable."[19]

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[15] Id. at 865.

[16] Cf. In Gedko v. Heer (18 Crim. L. Rptr. 2006 (W.D. Wisc. Aug. 27, 1975), the court held that police eavesdropping and observation of marijuana, conducted on defendant's fenced "open field" bearing a no trespassing sign, violated his reasonable expectation of privacy. The court asserted that the effect of the Katz decision:

> . . . was to make the area in which the intrusion took place one of several factors to be considered in evaluating the reasonableness of an expectation of privacy as to activities carried on in that place; that Hester no longer has any independent meaning except insofar as it indicated that "open fields" were not areas in which one traditionally could have expected privacy, so that the court might view more strictly an assertion of privacy in an open area; but that the final determination of the issue requires a close examination of all the facts.

Id. at 2006.

[17] 474 F.2d 1071 (9th Cir. 1971), cert. denied, 412 U.S. 921 (1973).

[18] Id. at 1076.

[19] Id. at 1077-79 (footnotes omitted).

Thus, one of the factors that will determine the reasonableness of an expectation of privacy is the type of information obtained by the surveillance.[20]

¶13 In United States v. Dionisio,[21] the Supreme Court also recognized the permissibility of obtaining certain types of aural information with electronic recording equipment without prior judicial approval. In Dionisio, the defendant, when subpoenaed by a grand jury to make voice exemplars by reading a prepared transcript into a recording device, argued that such voice exemplars constituted a search and seizure violative of the Fourth Amendment. Rejecting the defendant's argument, the Supreme Court observed that the shape of an individual's voice, as opposed to the substantive content of his words, is one of the physical characteristics that is constantly exposed to the general public:

> No person can have a reasonable expectation [of privacy] that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.[22]

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[20] See also U.S. v. McLeod, 493 F.2d 1186 (7th Cir. 1974).

[21] 410 U.S. 1 (1972).

[22] Id. at 14. See also Davis v. Mississippi, 394 U.S. 721, 727 (1969)(fingerprinting of an individual, i.e., a physical characteristic, did not involve the "probing into an individual's private life and thoughts that marks an interrogation or search").

¶14 An examination of several other cases dealing with various types of visual surveillance reveals that the use of a mechanical aid to augment visual surveillance of a suspect will generally not render otherwise lawful surveillance violative of the Fourth Amendment.

2. Binocular Observation

¶15 Generally, binocular observation by law enforcement officials does not constitute an unreasonable search within the Fourth Amendment. Although it has not directly addressed the issue, the Supreme Court indicated in dictum, at least, that warrantless binocular "searches" do not violate an individual's constitutional rights.

¶16 In United States v. Lee,[23] the Coast Guard discovered contraband on the defendant's boat by shining a searchlight upon its deck. Concluding that the use of a searchlight was not an unreasonable search, Mr. Justice Brandeis observed: "Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution."[24]

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[23] 274 U.S. 559 (1927).

[24] Id. at 563. Mr. Justice Brandeis apparently relied upon the "open fields" doctrine to support his statement that binocular observation did not constitute an unreasonable search. The Supreme Court also recognized the constitutionality of binocular observation in On Lee v. United States, 343 U.S.747 (1952). In On Lee, a narcotics prosecution, the defendant sought to suppress two incriminating conversations which were transmitted to federal agents by a government informant wired for

¶17 Despite the uncertainty caused by Katz,[25] lower federal courts in the post-Katz era continue to hold that binocular observation without judicial approval is not a violation of the Fourth Amendment. The position of the observer is of critical importance. Most courts considering the legality of binocular observation approach the issue by determining whether the surveillance would have been constitutionally proper had binoculars not been used. For example, in Fullbright v. United States,[26] the Tenth Circuit observed that any warrantless surveillance within the area immediately surrounding a dwelling house, i.e., the curtilage, constituted a per se intrusion upon the individual's reasonable expectation of privacy. But since the police were outside the curtilage, the mere use of high powered binoculars to

24 (continued)

sound. Concluding that the warrantless eavesdropping did not violate the defendant's Fourth Amendment rights, the Court, in dictum, compared the electronic surveillance to the use of binoculars:

> The use of bifocals, field glasses or the telescope to magnify the object of a witness' vision is not a forbidden search or seizure, even if they focus without his knowledge or consent upon what one supposes to be private indiscretions. Id. at 754 (dictum).

[25]The Supreme Court, in United States v. White, 401 U.S. 745 (1971), a plurality opinion, was unable to agree whether On Lee remained good law in light of the principles enunciated in Katz. This uncertainty, however, related to the validity of one party consent surveillance rather than to the dictum concerning binocular observation.

[26]392 F.2d 432 (10th Cir.), cert. denied, 393 U.S. 830 (1968).

observe the defendant operating a still within the curtilage, did not render illegal the otherwise lawful observations:[27]

> If the investigators had physically breached the curtilage there would be little doubt that any observations made therein would have been proscribed. But observations from outside the curtilage of activities within are not generally interdicted by the Constitution.
>
> . . . .
>
> By this we do not mean to say that surveillance from outside a curtilage under no circumstances could constitute an illegal search in view of the teachings of Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). It is our opinion, however, that on the record before us in light of Hester the observations in question may not be deemed an unreasonable search if they were made from outside the curtilage of the [defendant's] farm.[28]

¶18 Other decisions uniformly uphold the warrantless use of binoculars. In United States v. Minton,[29] for example, binocular observation of the defendant unloading illicit liquor approximately 80 to 90 feet away was held not to constitute an unreasonable search and seizure. The court explicitly found that the defendant lacked

[27]The court relied upon an earlier decision, United States v. McCall, 243 F.2d 858 (10th Cir. 1957), to support the proposition that the mere use of binoculars did not alter the character or admissibility of evidence. In McCall, the court held that an agent's observation through binoculars specially made for night vision furnished sufficient probable cause for him to conduct a warrantless search.

[28]392 F.2d at 434-35 (footnotes omitted).

[29]488 F.2d 37 (4th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

CONTINUED

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a "reasonable" expectation of privacy, since he could not justifiably believe that he would not be observed unloading the illicit whiskey.[30]

¶19 The impact of Katz upon the constitutionality of binocular observation was also directly addressed by the Pennsylvania Superior Court in Commonwealth v. Hernley.[31] In Hernley, a federal agent stood on a four foot ladder situated on public property approximately 35 feet from the defendant's print shop. The agent used binoculars to observe the defendant printing illegal football parley sheets. The Pennsylvania court concluded that the use of the ladder and binoculars did not constitute an unreasonable search. In determining whether Katz rendered warrantless binocular observation illegal, the court observed that the defendant manifested no concern for or expectation of privacy:

> [A]lthough Katz does eliminate the physical intrusion requirement in electronic eavesdropping situations, it also emphasizes the need for a justifiable expectation on the part of the suspect that he is conducting his activity outside the sphere of possible governmental intrusion.
> . . . .

[30] Id. at 38. Similarly, in United States v. Grimes, 426 F.2d 706 (5th Cir. 1970), the court, relying upon the "open fields" doctrine, held that binocular observation made from a field belonging to another person, about 50 yards from the defendant's house, did not constitute an illegal search.

[31] 216 Pa. Super. 177, 263 A.2d 904 (1970), cert. denied, 401 U.S. 914 (1971).

> Our case presents the situation in which it was incumbent on the suspect to preserve his privacy from visual observation. To do that the appellees had only to curtain the windows. Absent such obvious action we cannot find that their expectation of privacy was justifiable or reasonable. The law will not shield criminal activity from visual observation when the actor shows such little regard for his privacy.[32]

3. Airborne Observation

¶20 The general proposition that the mere use of a visual aid does not render an otherwise constitutional search unlawful is further supported by the police helicopter cases. In one of the earlier helicopter decisions, People v. Sneed,[33] the court concluded that the use of a helicopter to view marijuana in a yard, not otherwise visible from a public road, constituted an unlawful search. In Sneed, the helicopter was specifically directed by a deputy to search for marijuana plants growing on the defendant's premises. Moreover, at one point in the search, the helicopter hovered as low as 20-25 feet above the defendant's premises. In concluding that the defendant had a reasonable expectation of privacy to be "free from noisy police observation by helicopter from the air at 20-25 feet," the court emphasized that the police

[32] Id. at 181-82, 263 A.2d at 907 (footnote omitted).

[33] 32 Cal. App.3d 535, 108 Cal. Rptr. 146 (5th Dist. 1973).

officers did not have the right to be in such a position for observation:

> In the case at bench, the officers were at the Fowler ranch for the purpose of exploring the premises for the marijuana plants. They had no other legitimate purpose for flying over the property. The marijuana plants were not discovered by happenstance as an incident to other lawful activity [citations omitted]. The helicopter activity was a seeking out, manifestly exploratory in nature.[34]

In Dean v. Superior Court,[35] however, another California court rejected the Sneed approach; it concluded, under similar circumstances, that there could be no "reasonable expectation" of privacy from aerial surveillance. In Dean, police directed an airplane to make a special search for a marijuana farm believed to be located in an isolated area of the Sierra foothills. Although the court conceded 1) that a person's reasonable expectations of privacy could ascend into the airspace over his property, and 2) that the defendant had such an actual expectation of privacy, it concluded that this expectation of privacy was not recognized by society as "reasonable," and hence, not within the sphere of the protections of the Fourth Amendment:

> When the police have a plain view of contraband from a portion of the premises as to which the occupant has exhibited no reasonable expectation of privacy, there is not search in a

[34] Id. at 542, 108 Cal. Rptr. at 150-51 (emphasis added).

[35] 35 Cal. App.3d 112, 110 Cal. Rptr. 585 (3d Dist. 1973).

> constitutional sense; the evidence so displayed is admissible [citations omitted]. One who establishes a three-quarter-acre tract of cultivation surrounded by forests exhibits no reasonable expectation of immunity from overflight. The contraband character of his crop doubtless arouses an internal, uncommunicated need for secrecy; the need is not exhibited, entirely subjective, highly personalized, and not consistent with the common habits of mankind in the use of agricultural and woodland areas. Aside from an uncommunicated need to hide his clandestine activity, the occupant exhibits no reasonable expectation of privacy consistent with the common habits of persons engaged in agriculture. The aerial overflights which revealed petitioner's open marijuana field did not violate Fourth Amendment restrictions.[36]

Since other farmers could not reasonably expect their crops to be concealed from aerial observation, the defendant's expectation of privacy concerning his marijuana patch was unreasonable.

¶21 Similarly, in People v. Superior Court ex rel. Stroud,[37] a police helicopter on routine patrol was requested to look for automobile parts that were recently stripped from a stolen car. Using gyrostabilized binoculars, the officer in the helicopter, hovering at an altitude of 500 feet, observed the missing auto parts in the defendant's backyard. The backyard was fenced in and its contents were not visible from the public street, although they could be seen from a neighbor's yard. The court concluded

[36] Id. at 117-18, 110 Cal. Rptr. at 589-90 (footnotes omitted).

[37] 37 Cal. App.3d 836, 112 Cal. Rptr. 764 ___P.2d___ (2d Dist. 1974).

that the defendant lacked a "reasonable" expectation of privacy concerning the storage of stolen goods in his backyard:

> Patrol by police helicopter has been a part of the protection afforded the citizens of the Los Angeles metropolitan area for some time. The observations made from the air in this case must be regarded as routine. An article as conspicuous and readily identifiable as an automobile hood in a residential yard hardly can be regarded as hidden from such a view.[38]

Moreover, the court concluded that Sneed was inapposite, since the defendant's property in Sneed was not customarily subject to aerial observation from either crop-dusting airplanes or routine police helicopter patrols.

4. Flashlight Decisions

¶22 The flashlight search decisions also support the general proposition that the use of certain visual aids does not render an otherwise lawful search unconstitutional. For example, in Lee, as noted above, the Supreme Court held that an examination of a boat with a searchlight did not constitute an unreasonable search within the meaning of the Fourth Amendment.[39]

¶23 Despite the uncertainty caused by Katz, lower federal courts continue to hold that flashlight illumination does not render an otherwise legal search

[38] Id. at 839, 112 Cal. Rptr. at 765.

[39] See discussion in text, supra, at ¶16.

violative of the Fourth Amendment. In United States v. Hood,[40] for example, the Ninth Circuit concluded that the use of a flashlight to look into a car at night did not constitute a search under the Fourth Amendment. Similarly, in Cobb v. Wyrick,[41] the court observed that the nighttime use of a flashlight to locate spent shell casings did not constitute a search:

> [T]he use of a light to notice that which would also be in plain view in the daytime does not transform that which would not be a search in the daytime into a search at an hour when the sun is not fully exposed.

5. Mail Covers

¶24 A mail cover is a fourth type of visual surveillance technique used by police to secure information comparable to the type of information obtained from electronic tracking devices. The post office conducts a "mail cover" by furnishing the government with information that appears on the outside of all mail addressed to a specific address. The mail, which is never opened, is subsequently delivered to the addressee, and only the name and address of both the addressee and the sender, the postmark, class of mail, etc. are sent to the police.[42]

[40] 493 F.2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974).

[41] 379 F. Supp. 1287, 1292 note 3 (W.D. Mo. 1974).

[42] 403 F.2d 472, 475 note 2 (7th Cir. 1968), cert. denied, 402 U.S. 953 (1971).

This means of visual surveillance enables the police to learn the names, addresses, or approximate geographical location of the people corresponding with a person. ¶25 No court has held that the Fourth Amendment prevents the post office from conveying such information to law enforcement officials. The Ninth Circuit, in Lustiger v. United States,[43] for example, recognized that an individual's mail is protected by the Fourth Amendment, but it concluded that a mail cover was permissible, provided no substantial delay occurs in the delivery of the mail:

> The protection against unreasonable search and seizure of one's papers or other effects, guaranteed by the Fourth Amendment extends to their presence in the mails [citations omitted]. Thus, first class mail cannot be seized and retained, nor opened and searched, without the authority of a search warrant. See Weeks v. United States, 232 U.S. 383, 34 S. Ct. 341, 58 L.ed 652. . . . However, the Fourth Amendment does not preclude postal inspectors from copying information contained on the outside of sealed envelopes in the mail, where no substantial delay in the delivery of the mail is involved.[44]

¶26 Other circuit courts similarly uphold the constitutionality of mail covers.[45] In addition,

[43] 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

[44] Id. at 139.

[45] United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 44 U.S.L.W. 3624 (May 3, 1976); United States v. Van Leeuwen, 397 U.S. 249 (1970); Canaday v. United States, 354 F.2d 849, 856 (8th Cir. 1966); United States v. Costello, 255 F.2d 876, 881-82 (2d Cir.), cert. denied, 357 U. S. 937 (1958). Moreover, in United States v. Isaacs, 347 F. Supp. 743, 750 (N.D. Ill. 1972), a federal district court explicitly concluded that Katz did not render mail cover operations unconstitutional.

mechanical mail covers are upheld. In United States v. Leonard, the mail cover investigation received the benefit of mechanical assistance and high speed copiers. Photostats were made of the faces of all suspect envelopes. The machine did nothing that investigators themselves could not do by hand; it simply did it with greater efficiency. The comparison with the electronic tracking device is obvious. Mechanical surveillance should be upheld in either case.

D. Unreasonable Searches of Automobiles: A Significant Constitutional Distinction

¶27 Although Katz stated that the Fourth Amendment protects persons rather than places from unreasonable searches and seizures, the Supreme Court has also recognized over the years a significant constitutional distinction between the search of an automobile and the search of a dwelling. In Carroll v. United States,[46] federal agents sought to introduce evidence of contraband liquor seized in the warrantless search of an automobile. After surveying the historical development of the Fourth Amendment, the Court concluded that a car might be searched without a warrant in circumstances which would not otherwise justify a warrantless search of an individual's home:

> We have made a somewhat extended reference to these statutes to show that the guaranty of

[46] 267 U.S. 132 (1925).

> freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.[47]

An automobile's mobility does not, however, justify the warrantless search of every vehicle driven on a public road:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . .[48]

The court in Carroll justified the warrantless search, on the existence of probable cause:

> The measure of legality of such a seizure is, therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported.[49]

¶28 Carroll remains good law. It was reaffirmed in Brinegar v. United States,[50] Dyke v. Taylor Implement Mfg. Co.,[51] and most recently, in Chambers v. Maroney.[52]

[47] Id. at 153.

[48] 267 U.S. at 153-54.

[49] 267 U.S. at 155-56.

[50] 388 U.S. 160 (1949).

[51] 391 U.S. 216, 221 (1968).

[52] 399 U.S. 42 (1970).

In Chambers, the occupants of an automobile were arrested and the vehicle taken to the police station, where it was searched without a warrant, producing incriminating evidence. Although the police had sufficient time to obtain a warrant for the search of the car following the defendant's arrest, the court found that the vehicle,

> could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of a car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. The same consequences may not follow where there is unforeseeable cause to search a house.[53]

The court added in a footnote:

> It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house.[54]

The court observed that,

> if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[55]

[53] Id. at 52; accord, Texas v. White, 96 S. Ct. 304 (1975) (per curiam), reh. denied, 96 S. Ct. 869 (1976).

[54] Id. at 52 note 10.

[55] Id. at 51.

The court then added in a footnote:

> Following the car until a warrant can be obtained seems an impractical alternative since, among other things, the car may be taken out of the jurisdiction. Tracing the car and searching it hours or days later would of course permit instruments or fruits of crime to be removed from the car before the search.[56]

If an automobile is being used in the perpetration of a crime (e.g., getaway car or transportation for contraband, etc.) and if police have probable cause to search it, Chambers authorizes law enforcement officials to conduct an immediate search of the vehicle without obtaining judicial approval, even though the car could be effectively immobilized until a search warrant was procured.

¶29 A warrantless search is, however, permissible only if the police have probable cause to search and the vehicle is a "fleeting target." For example, in Coolidge v. New Hampshire, the defendant was arrested at his home for a murder. Two vehicles parked in his driveway were subsequently searched without a valid warrant. Asserting that the mere existence of probable cause did not furnish a sufficient basis for the warrantless search, the Court concluded that the Carroll-Chambers "automobile exception" was inapplicable:

> As we said in Chambers,. . . "exigent circumstances" justify the warrantless search of "an automobile stopped on the highway," where there is probable cause, because the car is "movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." "[T]he opportunity to search is fleeting. . . " (emphasis supplied).

[56] Id. at 51 note 9.

> . . . .
> When the police arrived at the [defendant's] house to arrest him, two officers were sent to guard the back door while the main party approached from the front. [The defendant] was arrested inside the house, without resistance of any kind on his part, after he had voluntarily admitted the officers at both front and back doors. There was no way in which he could conceivably have gained access to the automobile after the police arrived on his property. . .
>
> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of Carroll v. United States--no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant," Carroll, . . . and the "automobile exception," despite its label, is simply irrelevant.[57]

¶30 Finally the Supreme Court, in Cardwell v. Lewis,[58] acknowledges a distinction between the substantive invasion of an individual's privacy and the mere identification of an automobile's physical characteristics. In a plurality opinion, the Court held that the testing of paint scrapings and tire tread was not a search subject to the warrant requirement. The Court did refer to the existence of probable cause for the examination, which may not always be present in a "bumper beeper" investigation. Nevertheless, the

[57] 403 U.S. at 460-62 (footnote omitted).

[58] 417 U.S. 583 (1974)(plurality opinion).

Court's conclusion that the physical identification of a motor vehicle is not a search removes such an investigation from the Fourth Amendment. Pointing up privacy as opposed to property interests, the plurality noted that a motor vehicle is not usually a residence, but rather a means of transportation and its occupants and contents are exposed to plain view.[59]

E. Suggested Fourth Amendment Analysis of Electronic Tracking Devices: A Summary

¶31 As noted above, the Fourth Amendment protects an individual from unreasonable searches and seizures when the person has an actual expectation of privacy which is recognized by society as reasonable.[60] An analysis of electronic tracking devices in light of this twofold test reveals that the warrantless installation of an electronic tracking device should not be

[59]The Supreme Court in Cady v. Dombrowski, 413 U.S. 433 (1973) also noted the greater degree of routine police-citizen contact involving automobiles, i.e., the broad regulation of motor vehicles, traffic, and the frequency of automobile disability and accidents. This extensive, non-criminal contact with automobiles brings police in "plain view" of contraband, evidence, and fruits and instrumentalities of crime and under such circumstances renders warrantless searches appropriate. In United States v. Ware, 457 F.2d 828 (7th Cir.), cert. denied, 409 U.S. 888 (1972) the police checked the confidential vehicle identification number stamped on the frame of an automobile thought to be stolen. Even though the examination requires some degree of physical intrusion into the car, i.e., opening the door or lifting the hood, the court asserted "that this was not actually a search, but a mere check on the identification of an automobile . . . " Id. at 830. Similarly, location on a public way should not receive special protection.

[60]389 U.S. 347, 361 (1967)(Harlan, J., concurring).

considered an unreasonable search within the scope of the Fourth Amendment.

¶32 Law enforcement officials use electronic tracking devices to enhance visual surveillance of a motor vehicle. It is well established that surveillance of an automobile using a sufficient number of skilled police officers does not violate the suspect's constitutional rights. A person who knowingly exposes his movements upon a public road lacks a reasonable expectation of privacy.[61] Society is generally not willing to subordinate the public interest in law enforcement to the individual's subjective expectation of privacy concerning visual surveillance augmented by mechanical aids. It is only when electronic devices are used to intercept the substance of a conversation that society is willing to give recognition to the individual's expectation of privacy.

¶33 Electronic tracking devices do not, however, reveal the substantive content of conversations. There is no need to place them under special rules. Congress, for example, did not subject the "bumper beeper" to the strict limitations of Title III.[62] Electronic tracking

[61]Id. at 351-52.

[62] Paragraph (4) defines 'intercept' to include the aural acquisition of the contents of any wire or oral communication by an electronic, mechanical, or other device. Other forms of surveillance are not within the proposed legislation.

S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968).

devices monitor only a physical characteristic of the individual, i.e., motion and location. United States v. Dionisio indicates that if only a physical characteristic of an individual, rather than the substantive contents of a conversation, are obtained through the use of electronic devices, the Supreme Court would be unwilling to recognize as reasonable an expectation of privacy. Electronic tracking devices, voice exemplars, and mail covers are all evidence-gathering devices, but since none of these investigatory tools reveals the substantive contents of an individual's communications, their use should not be deemed searches within the Fourth Amendment. Such tracking devices are no more intrusive than the use of high powered binoculars, searchlights, airplanes, or helicopters. Since electronic tracking devices merely augment constitutionally acceptable surveillance techniques, there is no apparent rationale for concluding that the use of such devices renders otherwise permissible searches unconstitutional:

> If such surveillance without such technology is not a "search" within the Fourth Amendment, there is no reason to hold otherwise, where such technology is present, unless civil liberties are somehow seen to call for inherently inefficient police work; inefficiency itself ought not be the goal of limitations in this field. Such a proposition would, for example, if pressed to limits of its logic, argue that a blind policeman would be better for civil liberties than a sighted policeman, not because he could not see where he ought not look, but because he could not see at all. Freedom rests in measured police power, not hobbled police work.[63]

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[63] Electronic Surveillance, Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 205-06 (concurring remarks).

III. Recent Decisions Analyzing Electronic Tracking Devices

¶34 Two recent decisions directly address the question of whether the warrantless installation of an electronic tracking device (ETD) in motor vehicles constitutes an unreasonable search within the Fourth Amendment. The Fifth Circuit, in United States v. Holmes, has initially held that the warrantless use of a "bumper beeper" violates the Fourth Amendment, but a rehearing en banc is pending and the decision may be reversed.

¶35 In Holmes, state police attached an electronic tracking device to a van owned by a person who had agreed to sell an undercover agent 300 pounds of marijuana. The agents did not secure a search warrant. Two days later, airborne narcotic agents followed the transmitting signal to a shed which housed 1,200 pounds of marijuana and arrested several people. At trial, the defendants argued, inter alia, that the installation of the "bumper beeper" constituted an unlawful search. The district judge concluded that the use of the beeper constituted an illegal search because the agents failed to obtain a search warrant prior to installing the electronic tracking device.

¶36 The Fifth Circuit affirmed the decision, stating that the installation of the electronic tracking device constituted a search within the Fourth Amendment since the purpose of the beeper was "to unearth evidence of crime and the identity of associates in crime for

criminal prosecution. . . ."[64]

¶37 The court also asserted that the warrantless use of the "bumper beeper" violated the defendant's reasonable expectation of privacy. Nevertheless, a more recent Fifth Circuit decision, United States v. Perez,[65] indicates a possible shift in the court's attitude. In Perez, a tracking device was installed in a television set bartered for drugs. The Fourth Amendment issue was not presented on appeal and the court indicated that it "need not at this time solve the riddle of whether an electronic 'bug' installed in the television found in [defendant's] car at the time of his arrest. . . constituted a search within the strictures of the Fourth Amendment."[66] The court, however, took the opportunity to hold that the defendant had no reasonable expectation that the television would be "cleansed of any device designed to uncover the tainted transaction or identify the parties."[67]

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64 521 F.2d at 864.

65 526 F.2d 859 (5th Cir. 1976).

66 Id. at 862-63.

67 Id. at 863. The court did, however, distinguish the case from Holmes. It noted the lack of probable cause in Holmes which was present in Perez.

> Additionally, unlike Holmes where the bug was put on the defendant's vehicle then in the constructive possession of the defendant, the "bug" here was installed while the TV was in the rightful possession of the government agents. Id. at 863.

¶38 In United States v. Martyniuk, a suspected drug dealer ordered two large drums of caffeine from a chemical company. Government agents learned of the order and placed an electronic tracking device in one of the drums without securing a prior court order. Although the defendant drove "circuitously" after picking the order up, federal agents in an airplane were able to follow him to a garage. Pursuant to a court order, a second electronic tracking device was installed in a pickup truck parked in the garage. When this second "beeper" malfunctioned, the agents obtained another court order to repair or replace the device. The defendant, who was subsequently prosecuted for possession of narcotics, argued that the warrantless installation of the electronic tracking device in the drum of caffeine constituted a search in derogation of his reasonable expectation of privacy. The government maintained, inter alia, 1) that the installation of the "beeper" did not constitute either a search or seizure, and 2) that the defendant had no reasonable expectation of privacy while traveling on a public road. The court summarily concluded that the installation of the electronic tracking device constituted a search since it aided the agents in discovering "evidence and instrumentalities of crime which would incriminate [the defendant]."[68]

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68 395 F. Supp. at 44.

The court did recognize that the "beeper" merely augmented visual surveillance, "which is not proscribed by the Fourth Amendment" and that the use of the electronic tracking device was not comparable to the electronic eavesdropping in Katz.[69] Nevertheless, it concluded that a person could entertain a reasonable expectation of privacy concerning his movement and location:

> Not only criminals take steps to ensure that they are not followed. People conceal the location of their personal property for legitimate purposes. The beeper makes this impossible. While [the defendant's] expectation of privacy may seem minimal when compared to that expected in private conversations, it is nevertheless real. I will not allow the government to ride roughshod over that right. The implanting of the beeper infringed an expectation of privacy protected by the Fourth Amendment.[70]

¶39 The court identified three significant factors:

1. the Fourth Amendment's protection against unreasonable searches and seizures should be liberally construed;[71]

2. the government's admittedly contradictory position that a warrant was not necessary for the initial electronic tracking device notwithstanding the fact that judicial approval was sought for the other two "beepers"; and

[69]The court stated:

> I do not equate the uninvited shadower in this instance with the "uninvited ear" described in wiretapping and "bugging" cases. The Supreme Court decisions dealing with the use of electronic surveillance have all involved the interception of conversations. Any surreptitious listening to the privately spoken word invades an area in which we have an extraordinary expectation of privacy. Id. at 44.

[70]Id.

[71]Citing Boyd v. United States, 116 U.S. 616 (1886).

3. the absence of any "exigent circumstances" that would have prevented the agents from obtaining a search warrant.[72]

¶40 Both Holmes and Martyniuk concluded that the agents would not have been able to obtain the same evidence without the tracking device. It can be argued, however, that several hundred skilled agents reinforced by air-borne patrols might have been able to maintain constant visual surveillance without the "bumper beeper," albeit at a prohibitively high cost. It is difficult to see how the suspect's constitutional right to privacy would be no less intruded upon if one hundred skilled officers trailed him instead of one agent equipped with electronic tracking equipment.

¶41 Both Holmes and Martyniuk recognize that unaided visual surveillance is not proscribed by the Fourth Amendment.[73] There are two differences between the use of an electronic tracking device and unaided visual surveillance:

1. a suspect is much less likely to detect surveillance which utilizes a "bumper beeper";

2. the electronic tracking device is considerably more efficient given the limited resources of most police forces.

¶42 The Holmes decision is partially attributable to its reliance upon the "trespass doctrine." Instead of comparing the use of an electronic tracking device

[72]395 F. Supp. at 43.

[73]521 F.2d at 866; 395 F. Supp. at 44.

to police surveillance by several experienced officers, the Holmes court decided that:

> [t]here appears to be slight if any difference between installing a beacon on the underside of a car and hiding an agent in the trunk who signals the location of the car by radio.[74]

As discussed earlier, Katz abandoned the "physical trespass" doctrine in favor of a "reasonable expectation of privacy" test for determining whether a search was within the parameters of the Fourth Amendment.

¶43 Holmes's equating the electronic tracking device with an unauthorized wiretap was rejected in Martyniuk. An electronic tracking device conveys information comparable to that obtained by voice exemplars. If an individual's location and movement are not deemed constitutionally protected when hundreds of skilled agents and airborne patrols equipped with gyrostabilized binoculars and searchlights follow an individual, why should the rule be different for electronic tracking device surveillance?

¶44 Both Holmes and Martyniuk also failed to consider the worthlessness of any procured search warrants if the van or drum were to be driven out of the local court's jurisdiction. Neither case looked to the Supreme Court's resolution of a similar problem in Carroll and Chambers. Neither Holmes nor Martyniuk directed attention toward the demonstrably lower constitutional protection

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[74] 521 F.2d at 865 note 11.

[illegible] earlier vehicles and other movable objects. Consequently, it is suggested that a more complete analysis might have yielded different results.

IV. Court Order to Install Electronic Tracking Devices

¶45 Some materials argue that the use of electronic tracking devices does not constitute a search within the meaning of the Fourth Amendment. There is no requirement, therefore, that law enforcement officials obtain a warrant, for example, under Rule 41 of the Federal Rules of Criminal Procedure.[75] An investigating officer may, however, secure a judicial order[76] sanctioning the use of a "beeper," authorized under Rule 57(b).[77] Although such a sanction is not constitutionally mandated, it may be a useful defense should the party under surveillance institute a civil suit against the investigating officer.[78]

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[75] Fed. R. Crim. P. 41.

[76] See Osborn v. United States, 385 U.S. 323 (1966).

[77] Fed. R. Crim. P. 57(b):

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

[78] W. Prosser, Law of Torts §25 (4th ed. 1971). For cases dealing with good faith defenses see Bivens v. Six Unknown Agents, 456 F.2d 1339, 1347 (2d Cir. 1972); Jones v. Parrigan, 459 F.2d 81 (6th Cir. 1972); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973).

¶46 If the analysis of these materials is accepted, the court order would not have to be based on a showing of probable cause. Nevertheless, such an order, issued by a detached and independent magistrate, would lend greater legitimacy to the investigatory technique.

¶47 Although a court order might be desirable for these reasons, it should not, as discussed above, be necessary. It must be emphasized, too, that a danger exists that, should investigating officers establish a policy of obtaining prior judicial approval, the courts may then hold them to that policy.[79] The officer might effectively circumvent this pitfall by asserting, when called upon to justify this investigatory technique, that no prior judicial authorization was required, but that he took the additional precaution of securing the court order to protect himself from tort liability.

¶48 Finally, the extra-jurisdictional effect of a court order authorizing the installation of an electronic tracking device must be considered since it is likely that the monitored motor vehicle will occasionally be driven out of the issuing court's jurisdiction. Since

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[79] In United States v. Martyniuk, the court asserted:

> The government advances contradictory positions. They contend that placing the beeper in the drum was not a search, nor did it invade any expectation of privacy. However, the government sought court approval to install the second and third beepers.

395 F. Supp. at 44.

the issuing court will probably be a court of limited jurisdiction, the electronic tracking device order will have no effect outside of the court's jurisdiction. The monitoring agents will be required, absent special circumstances, to obtain a new court order in each jurisdiction through which the vehicle passes. It could be argued that removal of the electronic tracking device from the local jurisdiction, in which an order had been issued, constitutes "exigent circumstances" in which it would not be necessary to obtain a court order. For example, driving the monitored vehicle out of the jurisdiction is comparable to police officers chasing a fleeing felon out of the jurisdiction of their commission as officers.[80] Moreover, since the basic constitutional purpose of securing a warrant, i.e., a determination of probable cause made by a neutral and detached magistrate, would have been satisfied in the jurisdiction which initially issued the court order, no constitutional infirmities can be perceived in such an "exigent circumstances" analysis.

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[80] Cf. United States v. Bishop, 19 Crim. L. Rptr. 2134 (5th Cir. April 28, 1976).

Electronic Tracking Devices

Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶8; Note 8: Correction: United States v. Holmes, 521 F.2d 859, 866 (5th Cir. 1975), aff'd en banc by an equally divided court, 537 F.2d 227 (5th Cir. 1976); United States v. Martyniuk, 395 F. Supp. 42, 45 (D. Or. 1975), rev'd in part sub nom. United States v. Hufford, 539 F.2d 32 (9th Cir.), cert. denied, 429 U.S. 1002 (1976).

¶9; Note 10: But cf. United States v. Worthington, 544 F.2d 1275, 1280 n. 4 (5th Cir.), cert. denied, 434 U.S. 817 (1977) (under the "plain view" doctrine the officers must discover the evidence by inadvertence while they have a legitimate reason for being present; however, the fact that the agents expected to find marijuana does not destroy the necessary inadvertence.)

¶11; Note 16: Add: Accord, United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976) (after Katz, the Hester "open field" doctrine means that an individual has no reasonable expectation of privacy with respect to open fields), cert. denied, 430 U.S. 966 (1977).

¶11; Note 16: Correction: Cf. in Gedko v. Heer, 406 F. Supp. 609 (W.D.Wisc. 1975), cert. denied, 558 F.2d 840 (7th Cir. 1978) . . . Id. at 615.

¶19A: Doubts have recently been expressed about the warrantless use of binoculars and telescopes as aids to visual surveillance. See United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976). The court held that the use of artificial aids to observe activity in a person's home intrudes on privacy and constitutes a search. Id. at 1256. The court felt that where government agents have probable cause to suspect criminal activity and feel the need for telescopic surveillance, they can apply for a search warrant. "Plain view" means "unaided plain view"; under Katz the defendant's subjective expectation of privacy is irrelevant. Id. at 1256.

¶19B: Kim raises legitimate concerns, but the precise holding in the case is not as broad as the language above would indicate. The court ruled that there is no reasonable expectation of privacy regarding shared public areas in apartments, condominiums, or open balconies. Id. at 1258. The court found objectionable the use of high-powered telescopes to view the interior of the apartment. Id. at 1257.

The court noted that the apartment, located high above street level, was open to visual surveillance only by telescopic means. Id. at 1256.

¶19C: See also People v. Arno, 25 Crim. L. Rptr. 2084 (Cal. Ct. App. April 7, 1979). Police use of binoculars to peer into an eighth floor office from a hilltop vantage point two hundred to three hundred yards away was specifically disapproved of. Citing both Katz and Kim, the court held that both the Fourth Amendment and the state constitution's right of privacy created a reasonable expectation of privacy with respect to activities which cannot be seen by the naked eye. Id. at 2085. The court warned, however, that the evidence might not be suppressed "where the observed activity involves a 'substantial risk of life,' rather than the pornographic business activity observed here." Id. at 2085.

¶19D: Contra Commonwealth v. Williams, ___ Pa. Super. Ct. ___, 396 A.2d 1286 (1978) Police observed defendants in their third floor apartment from the third floor of a building thirty to forty feet away using binoculars and a startron (a device permitting the observer to see into areas which would appear dark to the naked eye or

or through conventional binoculars). The court admitted the evidence, finding no violation of the Fourth Amendment.

¶20: Correction: In Dean v. Superior Court,[35] . . . not within the sphere of protection of the Fourth Amendment:

> When the police have a plain view of contraband from a portion of the premises as to which the occupant has exhibited no reasonable expectation of privacy, there is no search in a . . .

¶21; Note 37: Correction: 37 Cal. App.3d 836, 112 Cal. Rptr. 764 (2d Dist. 1974).

¶23A: Recent cases continue to uphold the warrantless use of flashlights and other lights. United States v. Coplen, 541 F.2d 211 (9th Cir. 1976) (agent shined flashlight into the back of private plane parked in hanger area), cert. denied, 429 U.S. 1073 (1977); Baledge v. State, 554 P.2d 1388 (Okla. Crim. App. 1976) (shining flashlight into car to view what is in plain sight is not a search); People v. Rudasil, 53 App. Div. 2d 541, 386 N.Y.S.2d 408 (1st Dep't 1976) (shining flashlight into front seat of car is not a search); People v. Wesley, 88 Misc.2d 177, 387 N.Y.S.2d 34 (App. Term 1976)

(shining ultraviolet light on defendant's hands to check for type of paste placed on fire alarm box handles was not a search).

¶24; Note 42: Correction: United States v. Balistrieri, 403 F.2d 472 (7th Cir. 1968), cert. denied, 394 U.S. 985, vacated and remanded, 395 U.S. 710 (1969), aff'd 436 F.2d 1212 (7th Cir.), cert. denied, 402 U.S. 953 (1971).

¶26; Note 45: Correction: United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976) . . .

¶28; Note 50: Correction: 338 U.S. 160 (1949).

¶28; Note 53: Correction: Id. at 52; accord, Texas v. White, 423 U.S. 67 (1975).

¶29; Note 57: Correction: 403 U.S 443, 460-62 (1971) (footnote omitted).

¶30; Note 59: Add at end: United States v. Sherriff, 546 F.2d 604 (5th Cir. 1977).

¶30A: Recently, the Eighth Circuit in United States v. Bruneau, 594 F.2d 1190 (8th Cir. 1979), has held that tracking an airplane in flight with a transponder is not a search within the Fourth Amendment. In that case Federal agents had

probable cause to believe the defendant was about to purchase a particular plane for use in his marijuana smuggling operation. At the consent of the owner of the plane, but without a warrant, officers planted a beeper on the plane just prior to the sale. The court engaged in a bifurcated analysis to determine whether the use of the transponder constituted a search by separately analyzing the Fourth Amendment implications of both the installment and the monitoring of the beeper. Id. at 1194. The court held there was no violation of the Fourth Amendment due to the installation because the owner consented. It held the monitoring did not violate the Fourth Amendment because, due to the extensive monitoring of planes to avoid collisions, there is no reasonable expectation of privacy in the airborne location of an airplane. Id. at 1197.

¶31; Note 60: Correction: Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

¶32; Note 61: Cf. Johnson v. United States, 367 A.2d 1316, 1318 (D.C. Ct. App. 1977) (decision to place car under surveillance does not present Fourth Amendment problems, since there is no invasion of constitutionally protected privacy in observing what is visible for all to see).

¶33; Note 63: Correction: Electronic Surveillance, Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, pp. 205-06 (1976) . . .

¶34; Note 63A: United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), aff'd per curiam in part on rehearing, 537 F.2d 227 (5th Cir. 1976).

¶37; Note 65: Correction: 526 F.2d 859 (5th Cir.), cert. denied, 429 U.S. 846 (1976).

¶38; Note 68: Correction: 395 F. Supp. 42, 44 (D. Or. 1975), aff'd in part and rev'd in part sub nom., United States v. Hufford, 539 F.2d 32 (9th Cir.), cert. denied, 429 U.S 1002 (1976).

¶38; Note 69: Correction: Martyniuk, supra note 68 at 44.

¶38; Note 70: Correction: Martyniuk, supra note 68 at 44.

¶39; Note 71: Correction: Martyniuk, supra note 68 at 44, citing Boyd v. United States, 116 U.S. 616 (1886).

¶39; Note 72: Correction: Martyniuk, supra note 68 at 43.

¶41; Note 73: Correction: United States v. Holmes, 521 F.2d 859, 866 (5th Cir. 1975), aff'd per curiam in part on rehearing, 537 F.2d 227 (5th Cir. 1976); Martyniuk, supra note 68 at 44.

¶41; Note 73: Correction: Holmes, supra note 73 at 865 n. 11.

¶45; Note 78: Correction: . . . Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) . . .

¶47; Note 79: Correction: 395 F. Supp. 42, 44 (D. Or. 1975), aff'd in part and rev'd in part sub nom., United States v. Hufford, 539 F.2d 32 (9th Cir.), cert. denied, 429 U.S. 1002 (1976).

¶48; Note 80: Correction: Cf. United States v. Bishop, 530 F.2d 1156 (5th Cir.), cert. denied, 429 U.S. 848 (1976).

¶48A: As indicated by several recent cases, the law concerning ETD's remains uncertain. Some courts continue to hold that attaching a beeper to the exterior of a car or plane constitutes a search under the Fourth Amendment. United States v. Holmes, 521 F.2d 859, 865-66 (5th Cir. 1975), aff'd per curiam in part on rehearing, 537 F.2d 227 (5th Cir. 1976). Others reject the view that mere exterior attachment constitutes a "search." United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976); United States v. Frazier, 538 F.2d 1322, 1326 (8th Cir. 1976), cert. denied, 429 U.S. 1046 (1977). These courts rely on the Supreme Court's holding in

Cardwell v. Lewis, 417 U.S. 583, 592 (1974) (warrantless examination of a car's exterior not unreasonable) (see ¶30, supra). There is general agreement, however, that placing a beeper inside a vehicle or opening a closed package in the suspect's constructive or actual possession does constitute a "search." United States v. Hufford, 539 F.2d 32,34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976). In United States v. Moore, 562 F.2d 106 (1st Cir. 1977) the court distinguished between attaching warrantless beepers to contraband and stolen goods on the one hand and non-contraband objects on the other. Since the owner of the non-contraband goods enjoys an expectation of privacy, the courts will suppress evidence obtained through the use of warrantless beepers, even where the legally possessed substance will, in all likelihood, be used to manufacture an illegal drug. Id. at 111.

¶48B: Warrantless use of beepers has been sustained by applying the traditional exceptions to the Fourth Amendment warrant requirement. More use could be made of the "exigent circumstances" exceptions; "hot pursuit," United States v. Frazier, 538 F.2d 1322, 1324-25 (8th Cir. 1976), and "fleeting opportunity,"

Coolidge v. New Hamphshire, 403 U.S. 443, 460 (1971) (automobile search permitted when justified by "fleeting opportunity"); See also Chambers v. Maroney, 399 U.S. 42, 51 (1970) (warrantless search justified where the contents of the automobile might be lost if a warrant were required). Frazier is a "beeper" decision decided expressly on a finding of exigent circumstances. See also United States v. Shovea, 580 F.2d 1382 (19th Cir. 1978), cert. denied, ___ U.S. ___, 99 S. Ct. 1216 (1979); United States v. French, 414 F. Supp. 800, 804-06 (W.D. Okla. 1976) (also invoking the "open fields" exception"). In Emery, 541 F.2d 887, 888-89 (1st Cir. 1976), the "border search" exception excused the warrantless insertion of a beeper in a package. Some courts apply the "consent" exception where a beeper is installed in an object prior to delivery to the defendant. United States v. Hufford, 539 F.2d 32, 35 (9th Cir., cert. denied, 429 U.S. 1002 (1976); United States v. Bruneau, 594 F.2d 1190 (8th Cir. 1979); Houlihan v. Texas, 551 S.W.2d 719, 722 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 955 (1977) (no violation of defendant's Fourth Amendment rights where beeper was installed in a van owned by the Houston Police Department prior to its

delivery to defendant to be used in transporting marijuana); United States v. Abel, 548 F.2d 591 (5th Cir.), cert. denied, 437 U.S. 956 (1977) (no violation of defendant's Fourth Amendment rights where agents obtained prior approval of owner to install beeper on aircraft used in smuggling marijuana). But see United States v. Bobisink, 415 F. Supp. 1334, 1338 n. 5 (D. Mass.), aff'd sub nom., United States v. Moore, 562 F.2d 106 (1st Cir. 1976) (defendant's Fourth Amendment rights violated when agents placed beeper inside packages of non-contraband chemicals commonly used to manufacture a controlled substance).

¶48C: In Hufford, the court upheld the warrantless monitoring of beepers attached to cars, concluding that an individual has no reasonable expectation of privacy while driving on public roads, 539 F.2d 32, 33-34 (9th Cir.), cert. denied, 429 U.S. 1002 (1976). The Frazier court reached the same conclusion, 538 F.2d 1322, 1324 (8th Cir. 1976). See also Fotianos v. State, 329 So.2d 397 (Fla. Dist. Ct. App. 1976) (no violation of defendant's Fourth Amendment rights where police implanted an electronic beeper on defendant's van and

maintained independent visual surveillance continuously from trailing police cars).

¶48D: There is a divergence of opinion regarding the installation and monitoring of beepers in packages or other objects. Some cases hold that a citizen may reasonably assume that what he buys will not contain an "electronic spy," and that a seller of an item cannot waive the purchaser's rights by consenting to the beeper's installation. United States v. Bobisink, 415 F. Supp. 1334, 1338 n. 5 (D. Mass.), aff'd sub nom., United States v. Moore, 562 F.2d 106 (1st Cir. 1976). Other cases hold that a purchaser or recipient of contraband, or items used in criminal activity, does not have the right to expect that his activities could remain concealed from electronic detection. United States v. French, 414 F. Supp. 800, 803-04 (W.D. Okla. 1976). See also United States v. Perez, 526 F.2d 859, 863 (5th Cir. 1976); Carr, "Electronic Beepers," 4 Search and Seizure Law Report, no. 4, 1-4 (April 1977).

¶48E: Two recent cases involved the use of a device somewhat different from a beeper. One device, known as a transponder or "blipper," generates a specially coded radar signal that appears distinctly different from ordinary

radar blips. Unlike beepers, its signal will show up on a radar screen even when the monitored plane is flying below radar cover. In People v. Smith, 67 Cal. App.3d 638, 136 Cal. Rptr. 764 (Dist. Ct. App. 1977), police, with the owner's permission, installed the device without the defendant's knowledge after the plane had been rented to the defendant. The court held that the warrantless installation of the transponder violated the defendant's Fourth Amendment rights. The court stated:

> While the owner of the Cessna unlocked the aircraft and installed the transponder for the police, the fact remains that the airplane was rented to [the defendant] . . . [and] was under [his] possession and control when the tracking equipment was installed. Clearly [the owner] did not have authority to install the [device] for the police. Moreover, [since the officer] was aware of the rental agreement, the 'good faith mistake' rule does not apply here.

67 Cal. App.3d 638, 647, 136 Cal. Rptr. 764, 768 (Dist. Ct. App. 1977). In United States v. Kilgus, 571 F.2d 508, 510 (9th Cir. 1978), customs officials used a remote sensing device

(FLIR - Forward-Looking Infrared System), which uses infrared light rays to detect and track targets, to link defendants with a marijuana smuggling operation by tracking their DC-3 from California to Las Vegas. Concluding that FLIR has not yet attained general acceptance in the scientific community, the Ninth Circuit barred the evidence.

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Pen Registers (and In-Progress Traces)

Outline

Summary

A pen register logs outgoing numbers dialed from a particular telephone; an in-progress trace identifies the numbers from which incoming calls originate. The use of the pen register or the in-progress trace does not appear to be constrained by either the First, Fourth, or Fifth Amendments. Litigation has dealt almost exclusively with the pen register. The pen register is not subject to Title III. Similarly, the trend of recent cases is to find 47 U.S.C. §605 inapplicable to pen registers. Judicial authorities for these investigative devices may be obtained in one of three ways:

1. an order, analogous to a search warrant, supported by probable cause (possibly accompanied by an order compelling telephone company cooperation);
2. an order not based on probable cause (probably not accompanied by an order compelling telephone cooperation), even though a search-warrant-like order is not required;
3. a grand jury subpoena, not based on probable cause, even if a search-warrant-like order is required.

I. The Device

¶2 A pen register logs numbers dialed from a particular telephone.[1] Attached to a given telephone line, usually at a central office, the pen register records on a paper tape dashes equal in number to the number dialed. The numbers from which incoming calls originate are not identified. The pen register does not indicate whether the call is completed or the receiver answered and neither records nor monitors conversations. A Touch Tone decoder, a device analogous to the pen register, is used for touch telephones and prints out the number in arabic numerals, rather than as a series of dashes.[2] In the normal course of telephone company business, the pen register is employed to determine whether a home phone is being used to conduct a business,[3] to check for a defective dial,[4] to check for overbilling,[5] or to document wire fraud violations.[6] The pen register is also used within the context of an ongoing criminal surveillance, in which the monitoring is performed without the consent or knowledge of either the telephone subscriber or the intended recipient of the telephone call. In this context, however, the use of the pen register has engendered considerable controversy and, unfortunately, needless confusion.[7] Questions concerning the pen register are answered in different ways by different courts or are often not answered at all.

¶3 An in-progress trace complements the pen register and identifies the number from which incoming calls originate.[8] The trace is often used in tracking down the source of annoying or obscene telephone calls.[9] The device, however, like the pen register, is also useful in electronic surveillance.[10] Litigation over the use of in-progress traces, unlike the pen register, is scant. Reflecting the similarity of the intrusions, the devices will, however, probably be treated similarly.

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[1] United States v. Giordano, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring in part, dissenting in part).

[2] United States v. Focarile, 340 F. Supp. 1033, 1039-40 (D. Md. 1972), aff'd sub nom. United States v. Giordano, 469 F.2d 522, 473 F.2d 906 (4th Cir. 1973), aff'd, 416 U.S. 505 (1974) (description of TR-12 Touch Tone Decoder).

[3] Schmukler v. Ohio-Bell Tel. Co., 66 Ohio L. Abs. 213, 116 N.E.2d 819 (Common Pleas, Cuyahoga Co. 1953).

[4] United States v. Dote, 371 F.2d 176, 181 (7th Cir. 1966).

[5] Id.

[6] United States v. Clegg, 509 F.2d 605 (5th Cir. 1975) (use of "blue box").

[7] National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Report on Electronic Surveillance 120 (1976).

[8] State v. Hibbs, 123 N.J. Super. 152, 301 A.2d 789 (Mercer Co. 1972), aff'd, 123 N.J. Super. 124, 301 A.2d 775 (App. Div. 1973).

[9] Id.; see also State v. Vogt, 130 N.J. Super. 465, 327 A.2d 672 (App. Div. 1974).

[10] See In re In-Progress Trace, 138 N.J. Super. 404, 351 A.2d 356 (App. Div. 1975).

II. Is a court order necessary to authorize a pen register?

A. Federal Constitutional Constraints

¶4 The relation of the pen register to search and seizure within the Fourth Amendment is unsettled in the courts.[11] For the most part, courts only state that the pen register is not a general search and seizure.[12]

¶5 An analysis of existing precedent supports the conclusion, however, that the use of a pen register does not constitute a "search and seizure" of which the phone subscriber may complain. The following arguments may be made in support of this proposition:

¶6 First, as a threshold matter, it is necessary to show standing to raise the Fourth Amendment issues. The rights guaranteed by the Amendment are personal and a defendant must show that his rights were invaded before a court will permit him to present the question for decision.[13] By analogy to the recent cases involving

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[11] See United States v. Giordano, 416 U.S. 505, 554 n.4 (1974) (dissenting opinion of four Justices).

[12] See, e.g., In re Alperen, 355 F. Supp. 372, 374-75 (D. Mass.), aff'd, 478 F.2d 194 (1st Cir. 1973); United States v. Lanza, 341 F. Supp. 405, 433 (D. Fla. 1972).

[13] See Wong Sun v. United States, 371 U.S. 471 (1962).

bank records,[14] the pen register tapes appear to be the property of the telephone company and not of the subscriber. A typical defendant, therefore, would be without standing to complain.[15]

¶7 Second, the Fourth Amendment protects the information that a reasonable and prudent man would consider to be hidden from the public. The proper standard with which to measure the pen register under the Fourth Amendment requires, not only that there be an actual expectation of privacy on the part of the telephone subscriber, but also a showing that the expectation is one which is recognized by society as reasonable.[16]

¶8 A strong argument can be made that there is no reasonable expectation of privacy with respect to the dial pulses detected and recorded by the telephone company. In placing a call, a telephone subscriber uses equipment owned by the telephone company and voluntarily exposes the dial pulses to the company and its employees. Consequently, it is unreasonable for a subscriber to assume that his call, passing through the telephone

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[14] United States v. Miller, 44 U.S.L.W. 4528, 4529 (Sup. Ct., April 21, 1976); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

[15] But cf. Mancusi v. Deforte, 392 U.S. 364 (1968).

[16] United States v. White, 401 U.S. 745 (1971) (plurality opinion); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

system, will remain a secret from the telephone company.[17] Once this is accepted, it is clear that based on the concept concept of "shared privacy " there can be no further reasonable expectation that law enforcement authorities will not learn of the call from the telephone company.

> [The Supreme] Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. 18

Thus, under a "shared privacy analysis," if the telephone company reveals the information, with or without legal process, the subscriber cannot complain.[19]

¶9 It is also well settled that toll call records

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[17] See United States v. Baxter, 492 F.2d 150, 167 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974); United States v. Gallo, 123 F.2d 229, 231 (2d Cir. 1941); cf. United States v. Miller, 44 U.S.L.W. 4528, 4530 (Sup. Ct., April 21, 1976); DiPiazza v. United States, 415 F.2d 99, 103-04 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971).

[18] United States v. Miller, 44 U.S.L.W. 4528, 4530 (Sup. Ct., April 21, 1976); see Hoffa v. United States, 385 U.S. 293, 302-03 (1966); Lopez v. United States, 373 U.S. 427, 438-39 (1963). But see Burrows v. Superior Court, 13 Cal. 3d 238, 118 Cal. Rptr. 166, 529 P.2d 590 (1974) (bank voluntarily relinquishing deposit records violates privacy).

[19] In United States v. Matlock, 415 U.S. 164, 171 n.7 (1974), the Supreme Court explained that the relationship or authority required to justify a third-party consent search is a "mutual use of the property by persons generally having joint access or control for most purposes. . . ." See also Frazier v. Cupp, 394 U.S. 731, 740 (1969).

are not within the scope of reasonable expectation of privacy.[20] There seems to be no valid distinction between the expectations associated with local calls and those calls that cross the local billing zone. The majority of subscribers probably do not know the boundaries of their "local call" zone. Consequently, there should be no more privacy associated with long distance than with local calls.

¶10 It is, moreover, not clear whether the dial pulses are "seized" by the pen register. The Fourth Amendment is held not to bar the operation of a mail cover when no substantial delay in delivery is involved.[21] By analogy, just as mail passes through the postman's hands as he copies the information written on the envelopes, the pen register and in-progress trace have no delaying effect on the dial pulses as they pass through the device.

¶11 Other commonly encountered constitutional objections are not present with respect to the pen register. There is no violation of the Fifth Amendment privilege

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[20] See Baxter and DiPiazza cases in note 17 supra.

[21] Lustiger v. United States, 386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968); United States v. Leonard, 524 F.2d 1076 (2nd Cir. 1975) (mechanically assisted mail cover upheld).

against compulsory self-incrimination because there is no compulsion upon a subscriber to dial.[22] Similarly, a claim that the pen register has a "chilling effect" upon the exercise of First Amendment freedom of speech is insufficient to bar the use of the device. A proper First Amendment examination entails a balancing of interests that must necessarily by performed on a case by case basis, and it is only partly dependant upon the investigative technique involved. It is doubtful, therefore, that the pen register would be held to constitute a restraint per se on First Amendment freedoms.[23] Moreover, in a criminal law enforcement context, the pen register is used without the actual knowledge of the telephone subscriber. The only "chilling effect" possible would be attributable to a concern that there may be a pen register on the telephone.

B. Statutory Constraints

1. Title III

¶12 It is well-settled that Title III[24] is not applicable

[22] See Olmstead v. United States, 277 U.S. 438, 462 (1928); State v. Holliday, 169 N.W.2d 768, 772 (Iowa 1969); Fisher v. United States, 44 U.S.L.W. 4514 (Sup. Ct., April 21, 1976); Hoffa v. United States, 385 U.S. 293, 303-04 (1966).

[23] See Laird v. Tatum, 408 U.S. 1 (1971); Donohue v. Duling, 330 F. Supp. 308 (E.D. Va. 1971), aff'd, 405 F.2d 196 (4th Cir. 1972).

[24] Public Law 90-351, 82 Stat. 197, 18 U.S.C. §§ 2510-20 (1970).

to pen registers.[25] The reason most often given is that the device does not "intercept" communications as that term is defined in the statute because there is no "aural acquisition of [the] contents of any wire or oral communication."[26] The legislative history supports this conclusion: "The proposed legislation is not designed to prevent the tracing of phone calls. The use of a 'pen register,' for example would be permissible."[27]

¶13 A pen register used concurrently with a wiretap, however, is subject to Title III.[28] In this situation judicial authorization for the pen register is necessary. Nevertheless, at least the Third Circuit holds that "an order permitting interception under Title III for a wiretap provides sufficient authorization for the use of a pen register, and no separate

[25] See, e.g., United States v. Giordano, 416 U.S. 505, 553 (1974) (dissenting opinion of four Justices); United States v. Illinois Bell Telephone Co., 531 F.2d 809, 811-12 (7th Cir. 1976); United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975); United States v. Brick, 502 F.2d 219, 223 (8th Cir. 1974).

[26] 18 U.S.C. §2510(4) (1970).

[27] S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968).

[28] See, e.g., Korman v. United States, 486 F.2d 926 (7th Cir. 1973); In re Alperen, 355 F. Supp. 372 (D. Mass.), aff'd, 478 F.2d 194 (1st Cir. 1973); United States v. Lanza, 341 F. Supp. 405, 422 (M.D. Fla. 1972); see also United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972), aff'd sub nom. United States v. Giordano, 469 F.2d 522, 473 F.2d 906 (4th Cir. 1973), aff'd, 416 U.S. 505 (1974) (TR-12 Touch Tone decoder governed by Title III if used contemporaneously or subsequently with a sound transducer which converts the dial pulses into audible clicks).

order for the latter is necessary."[29] It should be easy enough to incorporate a request for authorization of the pen register into the application for the accompanying wiretap.

2. Section 605

¶14 In essence, section 605[30] provides that, except as authorized by Title III, "no person" involved in receiving or transmitting interstate or foreign communications by wire or radio may reveal the "existence" or "substance" of that communication except upon "demand of. . .lawful authority" or in certain other limited instances. The confusion in the case law on the pen register under section 605 may be briefly summarized:

1. Supreme Court---United States v. Giordano:[31] "Because a pen register device is not subject to the provisions of Title III, the permissibility of its use by law enforcement authorities depends entirely on compliance with the constitutional requirements of the Fourth Amendment." The opinion went on to indicate in a footnote:

> The Government suggests that the use of a pen register may not constitute a search within the meaning of the Fourth Amendment. I need not address this question, for in my view the constitutional guarantee, assuming its applicability, was satisfied in this case. 32

2. Third Circuit---United States v. Falcone:[33] pen registers are not within section 605 after 1968.

3. Fifth Circuit---cf. United States v. Clegg:[34] pen register probably not within section 605; United States v. Lanza,[35] (dictum): pen register probably not within section 605 after 1968.

4. Sixth Circuit---United States v. Caplan:[36] pen register violates section 605; I.R.S. summons also held insufficient for disclosure of pen register tapes and would require a search warrant or grand jury subpoena. But see DiPiazza v. United States,[37] Internal Revenue Service investigative summons held sufficient for disclosure of toll records if involved with potential civil liability.

5. Seventh Circuit---United States v. Finn:[38] pen register violates section 605; search warrant is sufficient "lawful authority." See also Korman v. United States;[39] United States v. Dote.[40]

6. Eighth Circuit---United States v. Brick:[41] pen register not controlled by section 605.

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[29] United States v. Falcone, 505 F.2d 478, 482 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975). Accord, Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 850 (1975).

[30] 47 U.S.C. §605 (1970).

[31] 416 U.S. 505, 553-54 (1974) (dissenting opinion).

[32] Id. at 554 n.4.

[33] 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

[34] 509 F.2d 605, 611 (5th Cir. 1975).

[35] 341 F. Supp. 405, 422 (M.D. Fla. 1972) (dictum).

[36] 255 F. Supp. 805 (E.D. Mich. 1966).

[37] 415 F.2d 99 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971).

[38] 502 F.2d 938 (7th Cir. 1974).

[39] 486 F.2d 926 (7th Cir. 1973).

[40] 371 F.2d 176 (7th Cir. 1966). Note that Dote was overruled in part by Korman, supra n. 39, at 931-32 n. 11.

[41] 502 F.2d 219, 224 (8th Cir. 1974).

7. Ninth Circuit---United States v. King:[42] pen register violates section 605; a search warrant under Rule 41 is sufficient. (Request by special agent of United States Customs Agency Service also held insufficient for disclosure of toll records under section 605.)

8. State Law---(a) Commonwealth v. Coviello,[43] pen register violates section 605 without warrant; (b) People v. Fusco,[44] pen register along with wiretap permissible; (c) Commonwealth v. Stehley,[45] use of pen register not prohibited by state wiretap statute; (d) Bixler v. Hille,[46] (id.).

¶15 The inconsistency in these holdings is readily apparent. A close examination of the statute and its legislative history permits, however, the conclusion that the use of the pen register should not be constrained by section 605.

¶16 The pen register, unlike conventional electronic surveillance, does not divulge the existence of a communication. It records only a subscriber's efforts to establish a communication.[47] Its use should not, therefore, be governed by section 605,

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[42] 335 F. Supp. 523 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973).

[43] ____ Mass. ____, 291 N.E.2d 416 (1973).

[44] 75 Misc.2d 981, 348 N.Y.S.2d 858 (Nassau Co. Ct. 1973).

[45] 235 Pa. Super. 150, 338 A.2d 686 (1975).

[46] 80 Wash.2d 668, 497 P.2d 594 (1972).

[47] Compare United States v. Dote, 371 F.2d 176 (7th Cir. 1966), with Bixler v. Hille, 80 Wash. 2d 668, 497 P.2d 594 (1972). See Note, "The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool," 60 Cornell L. Rev. 1028, 1039-41 (1975); In re In-Progress Trace, 138 N.J. Super. 404, 412, 351 A.2d 356, 364 (App. Div. 1975).

which limits the interception of "communications."

¶17 The legislative history of the 1968 amendment of section 605 clearly indicates, moreover, a congressional intent to eliminate the influence of pre-1968 case law on wiretaps and pen registers under section 605:

> This [new] section is not intended merely to be a reenactment of section 605. The new provision is intended as a substitute. The regulation of the interception of wire or oral communications in the future is to be governed by proposed [Title III]....[48]

Thus, as amended in 1968, the sole subject of section 605 is radio communication.

¶18 Finally, the section was to regulate the conduct of communications personnel only: "'Person' [within section 605] does not include a law enforcement officer acting in the normal course of his duties."[49] It should not, therefore, include a telephone company employee acting as an agent of the government.

¶19 Even assuming that the pen register is within section 605, the "demand of lawful authority" exception need not necessarily be limited to subpoenas, summonses, or search warrants. There is no reason

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[48] S. Rep. No. 1097, 90th Cong., 2d Sess. 107 (1968). See also United States v. Hall, 488 F.2d 193, 195 (9th Cir. 1973).

[49] S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). Compare Nardone v. United States, 302 U.S. 379, 381 (1937).

to exclude an official request of a police officer involved in a legitimate criminal investigation.[50]

III. Can a court order be obtained to authorize a pen register?

¶20 A law enforcement officer may seek an order authorizing the pen register either because he believes the law (Fourth Amendment, statute, etc.,) requires it or because he desires to reduce the likelihood of success of a subsequent challenge (civilly or on a motion to suppress) to his use of the device.

A. Jurisdiction of the Court

¶21 To issue an order, the court must have jurisdiction. The Seventh Circuit recently stated that the federal district courts, despite the absence of express statutory authority, have inherent power to issue an order authorizing the pen register.[51] (A

[50] See United States v. King, 335 F. Supp. 523, 534 (S.D. Cal. 1971), aff'd in part, rev'd in part on other grounds, 478 F.2d 494 (9th Cir. 1973).

[51] United States v. Illinois Bell Telephone Co., 531 F.2d 809, 813, 814 (7th Cir. 1976). But see Application of United States, 407 F. Supp. 398 (W.D. Mo. 1976) (Oliver, J.). There is a fatal flaw in a key element of the court's opinion in In Re Application in reference to Title III and the pen register. The court's position is apparently based, in major part, on the assumption that a law review article, Blakey and Hancock, "A Proposed Electronic Surveillance Control Act," 43 Notre Dame Law. 657, 662 n.10 (1968), was the origin of a particularly crucial passage in S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968), dealing with congressional intent. The Committee

contrary holding would, if such an order were required, effectively eliminate the use of the pen register outside of Title III, which does provide for orders authorizing pen registers accompanying wiretaps.)

¶22 The court's inherent power with respect to pen register orders may be supported by an analogy to the inherent powers of a court, recognized for centuries, to issue search warrants[52] or contempt orders.[53] Similarly, the United States Supreme Court has not hesitated in upholding the power of a court to fashion orders authorizing the seizure of evidence in other than traditional ways.[54]

51 (continued)
Report, however, was ordered to be printed in April 1968, while the article was not published until June 1968. The explanation of the "but see" footnote appearing in 60 Cornell L. Rev. at 1035 n. 44 to which the court refers, is correct. For other examples of the same citation technique, see S. Rep. No. 1097, 90th Cong., 2d Sess. 100, 108 (1967), indicating that the common-law rule of State v. Wallace, 162 N.C. 622, 78 S.E. 1 (1913) (conversation) overheard by surveillance loses privilege), was set aside by 18 U.S.C. §2517(4) (privilege retained even if overheard) and that the statutory construction of United States v. Sugden, 226 F.2d 281 (9th Cir. 1955), aff'd per curiam, 351 U.S. 916 (1956) (law enforcement officer "person" within §605), of 47 U.S.C. §605 was not to obtain under the substitute section 605 (law enforcement officer not a person within §605).

[52] Cf. Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765) (dicta).

[53] See Fisher v. Pace, 336 U.S. 155, 159 (1949).

[54] See, e.g., United States v. Dionisio, 410 U.S. 1 (1973) (identifying physical characteristic obtained by grand jury subpoena); Osborn v. United States, 385 U.S. 323 (1966) (warrant for one-party-consent surveillance sustained).

B. Procedural Mechanism

¶23 Once the court's jurisdiction is recognized, the problem of fitting the pen register order within established procedural mechanisms, however, still remains. Rule 41 of the Federal Rules of Criminal Procedure, for example, which describes the federal procedure of issuing search warrants, is limited to a search for and seizure of "tangible" property.

¶24 Further, a traditional search warrant as authorization of a pen register may be of doubtful utility. Rule 41(d) requires prompt return of the search warrant accompanied by a written inventory of any property taken, and Rule 41(c) establishes a ten-day time limit for execution of the warrant itself. Although several cases indicate that the return and inventory requirements are ministerial and that any inadvertent failure does not invalidate the warrant,[55] at least one court has held that the proper sanction for a conscious disregard of a similar inventory requirement in Title III is suppression of evidence so obtained.[56] Thus, by analogy to the wiretap statute, the effective lifetime of a pen register operated pursuant to a search warrant appears to be ten days, after which the surveillance must be disclosed.

[55] See, e.g., United States v. Hooper, 320 F. Supp. 507 (D. Tenn. 1969), aff'd, 438 F.2d 968 (6th Cir.), cert. denied, 400 U.S. 929 (1970).

[56] United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972).

Unlike Title III, Rule 41 on its face makes no provision for an order of postponement of the inventory requirement. Such an order might be within the court's discretion under Federal Rule of Criminal Procedure 57(b), which allows the court to fashion new rules not inconsistent with the other rules. A question then arises as to whether postponement is truly consistent with Rule 41. Similar problems would, no doubt, arise under state legislation dealing with traditional forms of search and seizure.

¶25 Alternatively, Rule 57(b) may allow the court to fashion an order in its entirety, analogous to the search warrant, thereby avoiding the problems of Rule 41.

¶26 If the Fourth Amendment is held applicable to pen registers, contrary to the analysis of these materials, a judicial order under either Rule 41 or 57(b) based upon probable cause will be required. If the Amendment is not applicable, such an order should still be available (if the government wishes voluntarily to accept the more restrictive requirements of probable cause).[57]

¶27 If the pen register is not subject to the Fourth Amendment, however, the government should be able to obtain an order under Rule 57(b) authorizing the device without establishing probable cause. The

[57] See In re In-Progress Trace, 138 N.J. Super. 404, 413, 351 A.2d 356, 366 (App. Div. 1975).

court, in effect, is merely determining the legitimacy of the government's intended use of the pen register. Such an order would undoubtedly be of benefit to law enforcement authorities in subsequent civil litigation should it arise by according the officer a per se good faith defense.[58]

IV. Is a collateral order available to compel telephone company cooperation?

¶28 Even if a court order authorizing the pen register is obtained, the telephone company may still refuse to cooperate. AT&T apparently "recommended" to its subsidiaries that they refrain from participation in pen register installation "effected outside the safeguards of the federal wiretap statutes."[59] This attitude may reflect a fear of civil liability (possibly based upon a breach of a telephone subscriber's contract) or criminal liability (possibly based upon 47 U.S.C. §§501, 605 [1970]). Thus, as a result of the specialized knowledge and skills required to connect

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[58] W. Prosser, Law of Torts §25 (4th ed. 1971). See also Bivens v. Six Unknown Agents, 456 F.2d 1339 (2d Cir. 1972) (good faith defense), on remand from, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); accord, Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973).

[59] In re Joyce, 506 F.2d 373, 375 (5th Cir. 1975).

and operate the device, an order compelling the company to assist is usually helpful.

¶29 According to a recent Seventh Circuit decision, the Federal All Writs Act, 28 U.S.C. §1651 (1970), authorizes a district court to issue an order directing the telephone company to provide facilities, services, and technical assistance.[60] The court stated that "[t]he authority to compel the cooperation of the telephone company is in a sense concomitant of the power to authorize the installation of a pen register, for without the former, the latter would be worthless."[61] The court noted that such an order would be a complete defense in any criminal or civil suit.[62]

¶30 An order to compel the telephone company to cooperate may be, however, ancillary only to an order authorizing the pen register that is based on probable cause. Requiring compliance with an order based on less than probable cause would accord law enforcement authorities a power, in effect, to subpoena the telephone company. Traditionally, the prosecutor, acting alone, has no such power in conducting investigations, and it is probable that the courts would refuse to create such power through case law.

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[60] United States v. Illinois Bell Telephone Co., 531 F.2d 809, 814 (7th Cir. 1976).

[61] Id.

[62] Id. at 814-15.

¶31 In place of an order authorizing the pen register and an order compelling cooperation, the prosecution, when assisting a grand jury investigation, may be able to use a grand jury subpoena to require the telephone company to install and maintain a pen register.[63] The standards for the issuance of a grand jury subpoena are well established, requiring only "the court's determination that the investigation is authorized by Congress, is for a purpose Congress can order, and the documents sought are relevant to the inquiry."[64]

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[63] In re In-Progress Trace, 138 N.J. Super. 404, 407-08, 351 A.2d 356, 359-60 (App. Div. 1975).

[64] Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 209 (1946). See Hale v. Henkel, 201 U.S. 43 (1906).

This memorandum is based on a more complete discussion in Note, "The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool," 60 Cornell Law Rev. 1028 (1975).

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Addenda and Errata

(Double underlining indicates corrected material)

¶4, Note 12: Correction: United States v. Lanza, 341 F. Supp. 405, 421 (D. Fla. 1972).

¶6, Note 13: Correction: Wong Sun v. United States, 371 U.S. 471 (1963).

¶6, Note 14: Correction: United States v. Miller, 425 U.S. 435 (1976).

(Also at ¶8, Note 18)

¶10, Note 21: Correction: United States v. Leonard, . . . cert. denied, 426 U.S. 922 (1976).

¶11: Correction: A proper First Amendment examination entails a balancing of interests that must necessarily be performed on a case by case basis . . . .

¶11, Note 22: Correction: Fisher v. United States, 425 U.S. 391 (1976).

¶11, Note 23: Correction: Donohue v. Duling, . . . aff'd, 465 F.2d 196 (4th Cir. 1972).

¶14: Correction: Following United States v. King: (Request by special agent of United States Customs Agency Service also held sufficient for disclosure of toll records under section 605).

¶29: Note 60: Accord, Southwestern Bell Tel. Co. v. United

States, 546 F.2d 243 (8th Cir. 1976); Contra, In re Application of the United States, 538 F.2d 956 (2d Cir. 1976). The issue is now before the Supreme Court of the United States. In re Application of the United States, 538 F.2d 956 (2d Cir. 1976), cert. granted sub nom. United States v. New York Tel. Co., 45 U.S.L.W. 3508 (Jan. 25, 1977).

Cite checked and shepardized through volume dated April, 1977. Crim. L. Rptr. examined through issue dated April 6, 1977.

APPENDIX C

Court Order Electronic Surveillance

Electronic Surveillance:

Authorization for Court Order

Outline

Summary

¶1 Law enforcement agencies may obtain a warrant allowing the use of electronic surveillance[1] to intercept certain conversations. This exception to the general prohibition against wiretapping and eavesdropping was designed to aid law enforcement agencies in the investigation of organized crime. The federal statute (Title III) sets minimum standards for state statutes to meet. These statutes incorporate basic limitations on who can apply for a surveillance order, on what can be investigated, on when and for what reasons approval can be granted, and on who can grant approval. Title III requires applications to be authorized by highly-placed, politically responsible officials; failure to obtain such approval may result in suppression of evidence. Proper approval in fact is required; misidentification of the proper official is only a clerical matter if proper approval in fact exists. The federal statute's strict limitations on who may authorize applications do not pertain to the states. A

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1 As used in these materials, the term electronic surveillance generally includes wiretapping and bugging. Wiretapping generally refers to the interception (and recording) of a communication transmitted over a wire from a telephone, without the consent of any of the participants. Bugging generally refers to the interception (and recording) of a communication transmitted orally, without the consent of any of the participants. The term consensual surveillance refers to the overhearing, and usually the recording, of a wire or oral communication with the consent of one of the parties to the conversation.

See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance xiii(1976).

state statute may authorize the principal prosecuting attorney of the state or of any political subdivision to authorize applications.

¶2 Title III is explicit in describing the requirements for a valid application for, and an order authorizing, electronic surveillance. The application and order must describe the specific crime under investigation; electronic surveillance is authorized only for those crimes listed in the statute. They must also describe with "particularity" the conversations sought and the place or location of the facilities where the communications are to be intercepted. The persons whose communications are to be intercepted must also be identified. The application must state that other investigative techniques have been tried and failed, or will fail, or be too dangerous, and the judge must determine the validity of this statement before authorizing the interception. The application and order must state the duration for which the interception is authorized, in no case to exceed thirty days without an extension. The order must also include a statement as to whether or not the interception will automatically terminate upon first obtaining the described communication. Finally, the application must include a description of all previous applications for electronic surveillance authorization involving the same persons, facilities, or places. Absence of any of the information requirements, as well as a failure to comply with the formalities of swearing, signing, and dating, can lead to the suppression of evidence resulting from the electronic surveillance order.

I. Introduction

¶3 The United States Supreme Court redefined the constitutional premises for electronic surveillance in two 1967 cases, Katz v. United States[1a] and Berger v. New York.[2] Katz placed electronic surveillance within the limits of the Fourth Amendment; the government could accordingly no longer use electronic surveillance to intrude upon a person's reasonable expectation of privacy without a warrant. Berger outlined the standards of particularity which such a warrant must meet under the Fourth Amendment. Modern electronic surveillance statutes must, therefore, comply with these constitutional guidelines.[3]

¶4 The federal electronic surveillance statute prohibits all willful interception or use of wire or oral communications,[4]

[1a] 389 U.S. 347 (1967).

[2] 388 U.S. 40 (1967).

[3] The courts hold electronic eavesdropping constitutional under federal and state constitutions. See, e.g., Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819 (1975); United States v. Cirillo, 499 F.2d 872 (2d Cir.), cert. denied, 419 U.S. 1056 (1974); State v. Christy, 112 N.J. Super. 48, 270 A.2d 306 (Essex County Crim. Ct. 1970); Wilson v. State, 343 A.2d 613 (Del. 1975).

[4] 18 U.S.C.A. §§2510-20, as amended (Supp. 1976). Adopted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See specifically §2511. (The statute shall be referred to as Title III in these materials.)

with certain designated exceptions.[5] Exceptions relevant to law enforcement include interception made with the consent of one of the parties to the conversation[6] and interception made pursuant to a valid electronic surveillance warrant. These materials will focus on the law governing warrants.

¶5 The procedures outlined in Title III are designed to aid law enforcement agencies in combating organized crime. Sections 2516(1) and 2518 set out the procedures

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[5]Exceptions not relevant to law enforcement are the communications carrier exception (18 U.S.C.A. §2511(2)(a)(i), as amended [Supp. 1976]) and the Federal Communications Commission exception (§2511(2)(b), as amended [Supp. 1976]). Another exception may exist in cases involving national security matters. The Supreme Court held that wiretapping of a domestic organization without prior judicial warrant was unconstitutional in United States v. United States District Court, 407 U.S. 297, 309 (1972). The Court specifically left open, however, the question of whether warrantless surveillance of agents of foreign powers, both within the United States and abroad, is permitted by Title III.

[6]18 U.S.C.A. §2511, as amended (Supp. 1976):

> (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.
>
> (d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication and has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act.

for obtaining court orders authorizing the electronic surveillance of persons committing certain designated offenses. Sections 2516(2) and 2518 establish minimum standards which all state statutes permitting court-ordered electronic surveillance must meet. The states may, however, establish more restrictive standards. These sections further specify that state law enforcement agencies may use court-ordered electronic surveillance only in those states enacting such legislation. Twenty-two states and the District of Columbia have approved statutory provisions in accordance with these federal standards.[7] A law enforcement agency's failure to meet the federal

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[7]The 23 jurisdictions and their respective statutes are:

Ariz. Rev. Stat. Ann. §§13-1051 to -1061 (Supp. 1973); Colo. Rev. Stat. Ann. §§16-15-101 to -104, 18-9-301 to -310 (1973); Conn. Gen. Stat. Ann. §§53a-187 to -189, 54-41a to 41s (Supp. 1975); Del. Code Ann. tit. 11, §§1335-36 (1974); D.C. Code Ann. §§23-541 to -556 (1973); Fla. Stat. Ann. §§934.01-.10 (Supp. 1975); Ga. Code Ann. §§26-3001 to -3010 (1972); Kan. Stat. Ann. §§22-2514 to -2519 (1974); Md. Ann. Code C.J. §§10-401 to -408 (1974); Mass. Gen. Laws Ann. ch. 272, §99 (Supp. 1974); Minn. Stat. Ann. §§626A.01-.23 (Supp. 1975); Neb. Rev. Stat. §§86-701 to -707 (1971); Nev. Rev. Stat. §§179.410-.515, 200.610-.690 (1973); N.H. Rev. Stat. Ann. §§570-A:1 to A:11 (1974); N.J. Stat. Ann. §§2A:156A-1 to -26 (1971); N.M. Stat. Ann. §§40A-12-1.1 to 1.10 (Supp. 1973); N.Y. Crim. Pro. Law §§700.05-.70 (McKinney 1971); Ore. Rev. Stat. §§141.720-.990 (1974); R.I. Gen. Laws Ann. §§12-5.1-1 to -16 (Supp. 1974); S.D. Compiled Laws Ann. §23-13A-1 to -11 (Supp. 1974); Va. Code Ann. §§19.1 to 89.10 (Supp. 1975); Wash. Rev. Code Ann. §§9.73.030-.100 (Supp. 1974); Wis. Stat. Ann. §§968.27-.33 (Supp. 1975).

(List compiled in Comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing and Inventories," 61 Cornell L. Rev. 92, 94 note 9 [1975]).

and state standards enables the aggrieved person to suppress evidence obtained through the faulty surveillance.[8]

¶6 Title III and the state statutes provide certain basic safeguards against an unreasonable search and seizure by electronic surveillance:

1. Only a court of competent jurisdiction may issue the warrants, and then only for certain designated crimes.
2. The warrant must state with particularity the conversation sought, the persons involved, the crimes being investigated, and the places or telephone involved. The application must also show probable cause, the inadequacy of conventional investigative techniques, and the feasibility of electronic surveillance under the circumstances.
3. Only certain officers of selected law enforcement agencies may apply for such warrants.
4. The warrants remain in effect only for limited periods of time.

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[8] 18 U.S.C.A. §§2515, 2518 (10)(1970).

II. Agents Authorized to Obtain Warrants

A. Giordano and Chavez

¶7 Congress restricted the power to obtain warrants to certain highly placed, politically responsible officials.[9] Section 2516 of Title III provides:

> The Attorney General [of the United States] or any Assistant Attorney General [of the United States] specially designated by the Attorney General may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense to which the application is made, ... [10]

Similarly:

> The principal prosecuting attorney of any state or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that state to make application to a State court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for . . . an order authorizing . . . such interception . . . . [11]

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[9] This intent is clear in the legislative history. See S. Rep. No. 1097, 90th Cong., 2d Sess. 98-99 (1968). This limitation on the scope of the power to apply for an electronic surveillance warrant "centralizes in a publicly responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques." Id. at 97. See also United States v. Giordano, 416 U.S. 505 (1974).

[10] 18 U.S.C.A. §2516(1), as amended (Supp. 1976).

[11] 18 U.S.C.A. §2516(2) (1970). N.Y. Crim. Pro. Law §700.10(1) (Supp. 1976) provides that:

> a justice may issue an eavesdropping warrant upon ex parte application of an applicant who is authorized by law to investigate, prosecute, or participate in the prosecution of the particular designated offense which is the subject of the application.

The questions of what officer must actually authorize the application, and what officer must in fact appear before

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11 continued.

An "applicant" is defined as a:

> district attorney or the attorney general [of the State of New York] or if authorized by the attorney general, the deputy attorney general in charge of the organized crime task force. If a district attorney or the attorney general is actually absent or disabled, the term "applicant" includes that person designated to act for him and perform his official function in and during his actual absence or disability. Id. at 700.05(5).

Mass. Gen. Laws Ann. ch. 272, §99 (Supp. 1976) grants the power to apply to:

> The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communication.

This grant of power is wider than that mandated by 18 U.S.C.A. §2516(2). The Supreme Judicial Court upheld the constitutionality of the provision in Commonwealth v. Vitello, ___Mass.___, 327 N.E.2d 819, 838-39 (1975). The court cited a statement in S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968) that the issue of delegation would be a question of state law.

N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8(1975) provides:

> The Attorney General, a county prosecutor or the chairman of the State Commission of Investigation when authorized by a majority of the members of that commission or a person designated to act for such an official and to perform his duties in and during his actual absence or disability may authorize, in writing, an ex parte application to a judge designated to receive the same for an order authorizing the interception of a wire or oral communication by the investigative or law enforcement officers or agency having responsibility for an investigation . . . .

the court to make the application have been widely litigated.[12] The Supreme Court took up these questions in United States v. Giordano.[13]

¶8 In Giordano, the defendant moved to suppress evidence obtained under a wiretap order on the grounds that the Attorney General's executive assistant signed the order rather than the "Assistant Attorney General specially designated by the Attorney General"[14] named in the application. Neither the Attorney General nor any specially designated Assistant Attorney General reviewed the application. The district court held that section 2516(1) meant what it said; applications were to be made by the designated individuals only, and authority to approve applications could not be delegated.[15] The Fourth Circuit affirmed,[16] and the Supreme Court granted certiorari.

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[12] See, e.g., United States v. Tortorello, 40 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973); United States v. Ianelli, 339 F. Supp. 171 (W.D.Pa.1972), aff'd, 477 F.2d 999, aff'd, 480 F.2d 918 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975), rehearing denied, 18 Crim. L. Rptr. 2428 (3d Cir. Jan. 26, 1976); United States v. King, 478 F.2d 494 (9th Cir.), cert. denied, 414 U.S. 846 (1973); State v. Cocuzza, 123 N.J. Super. 14, 301 A.2d 204 (Essex County Crim. Ct. 1973); People v. Fusco, 75 Misc.2d 981, 348 N.Y.S.2d 858 (Nassau County Ct. 1973).

[13] 416 U.S. 505 (1974).

[14] 18 U.S.C.A. §2516(1), as amended (Supp. 1976).

[15] 340 F. Supp. 1033 (D.Md. 1972).

[16] 469 F.2d 522 (4th Cir. 1972).

¶9 The government contended in Giordano that this procedure did comply with Title III, and that even if the procedure was inconsistent with the statute, suppression was not required since there had been no constitutional violation. The first contention rested on 28 U.S.C. §509, which provides, inter alia, for delegation of the duties of the Attorney General to his staff.[17] The Court, however, found that Congress intended to make Title III an exception to section 509;[18] Title III's enumeration of empowered officials was thus exhaustive. The Court rejected the second contention also, holding that "Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extra-ordinary investigative device."[19] Applying this rule, the Court found approval by the proper senior official in the Justice Department to be such an essential requirement,[20] and held that its violation required suppression of the wiretap evidence.

[17] United States v. Giordano, 416 U.S. 505, 513-14 (1974).

[18] "Hearing on Wiretapping and Eavesdropping Legislation before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary," 87th Cong., 1st Sess. 356 (1961).

[19] United States v. Giordano, 416 U.S. 505, 527 (1974).

[20] Id. at 527-28.

¶10 In a companion case to Giordano, United States v. Chavez,[21] an application recited approval by an Assistant Attorney General, but was, in fact, approved by the Attorney General himself. The Court held that Title III merely required approval by a proper official, and that since the Attorney General was such an official the requisite approval was obtained. The error was a clerical matter and did not effect the validity of the order.[22] Chavez, in short, holds that proper approval in fact must exist, but that failure to state precisely such approval does not necessarily destroy the validity of the order.[23] Proper authorization on the face of the order, however, presents clear evidence of the actual approval procedure. The prosecutor should, therefore, secure such on-the-face authorization, or he will be forced to use affidavits and other evidence to establish the propriety of his application.

[21] 416 U.S. 562 (1974).

[22] Id. at 570.

[23] The official approving an application may even be able to communicate his approval orally. See United States v. Falcone, 505 F.2d 478, 481 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975) (the United States Attorney General was allowed to orally direct his Executive Assistant to sign the Attorney General's name to the wiretap authorization). But see State v. Cocuzzo, 123 N.J. Super. 14, 18, 301 A.2d 204, 206 (Essex County Crim. Ct. 1973) (proper authorization must be in writing); Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819, 825 (1975) (authority to apply for each wiretap must be specifically granted in writing by the Attorney General or the District Attorney).

B. Vacancy in the Attorney General's Office

¶11 Authorization problems develop when the office of the Attorney General is vacant. When an Attorney General leaves office his power, obviously, terminates. The person nominated by the President as his successor has no power until confirmation.[24] Statutory authority exists, however, for the Deputy Attorney General or other high Justice Department official to assume the duties of Attorney General during a vacancy.[25] An

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[24] United States v. Swanson, 399 F. Supp. 441 (D.Nevada 1975) (Acting Assistant Attorney General whose appointment had not been confirmed by Senate did not have authority to authorize application for electronic surveillance).

[25] 5 U.S.C.A. §3345 (1967):

> When the head of an Executive department or military department dies, resigns, or is sick or absent, his first assistant, unless otherwise directed by the President under section 3347 of this title, shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

28 U.S.C.A. §508 (1968):

> (a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office, and for the purpose of section 3345 of title 5 the Deputy Attorney General is the first assistant to the Attorney General.
>
> (b) When, by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor General, in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

See United States v. McCoy, 515 F.2d 962 (5th Cir. 1975) (the Solicitor General, as acting Attorney General, had authority to give authorization under 18 U.S.C.A. §2516 for application for approval of electronic surveillance).

Acting Attorney General may thus authorize applications during the vacancy while an Attorney General may not until he is confirmed.[26]

C. State Authorization Procedures

¶12 The strict limitations on the number of high officials who may authorize warrant application do not apply to the states. Section 2516(2) provides:

> The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, if such attorney is authorized by a statute of that State to make application to a state court judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications may apply to such judge for, and such judge may grant in conformity with section 2518 of this chapter and with the applicable state statute an order authorizing or approving the interception . . . .[27]

Accordingly, a state statute may authorize the principal prosecuting attorney of the state, of any county, and of a city or other municipality to apply for an electronic

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[26] The courts are split, however, over whether an Acting Assistant Attorney General may be a specially designated Assistant Attorney General within the meaning of §§2516, 2518. See United States v. Acon, 377 F. Supp. 649, 651 (W.D.Pa. 1974), rev'd on other grounds, 513 F.2d 513, 516 (3d Cir. 1975) (Acting Assistant Attorney General is not a "publicly responsible official subject to the political process" and thus may not authorize wiretap applications). But see, United States v. Vigi, 350 F. Supp. 1008, 1009 (E.D.Mich. 1972) (specially designated Acting Assistant Attorney General may authorize wiretap applications).

[27] 18 U.S.C.A. §2516(2) (1971).

surveillance order.[28] The state statutes in Massachusetts,[29] New Jersey,[30] and New York[31] authorize the principal prosecuting attorneys of both the state and the political subdivisions to apply for warrants. The New Jersey statute also authorizes the State Commission of Investigation to apply for a warrant.[32] Section 2516(2) of Title III makes no explicit provision for grants of authority to such an agency. This portion of the New Jersey statute may be, if used, vulnerable to a challenge on that basis.[33]

¶13 The New Jersey statute contains another seeming anomaly. Section 2516(2) allows designated state officials to "make" applications; the New Jersey statute refers to their "authorization" of applications.[34] Under the provision an agent in New Jersey may authorize an application which can actually be made by another.[35]

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[28]The legislative history of Title III suggests that city attorneys would not have the authority to apply for orders. S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968). The wording of section 2516(2), however, does not seem to require this limitation. See also Price v. Goldman, 525 P.2d 598 (Nev. 1974) (term "district attorney" may not be construed to include his deputies).

[29]Mass. Gen. Laws Ann. ch. 272, §99(F)(1) (Supp. 1976):

> Application. The attorney general, any assistant attorney general specially designated by the attorney general, any district attorney, or any assistant district attorney specially designated by the district attorney may apply ex parte to a judge of competent jurisdiction for a warrant to intercept wire or oral communications.

[30]N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8(1975):

> The Attorney General, a county prosecutor or the chairman of the State Commission of Investigation when authorized by a majority of the members of that commisssion, or a person designated to act for such an official and to perform his duties in and during his actual absence or disability, may authorize, in writing, an ex parte application to a judge designated to receive the same for an order authorizing the interception of a wire or oral communication . . . .

[31]N.Y. Crim. Pro. Law §700.05(5) (Supp. 1976):

> . . . [A] district attorney or the attorney general or if authorized by the attorney general, the deputy attorney general in charge of the organized crime task force . . . [may approve an application for an eavesdropping warrant, or] [i]f a district attorney or the attorney general is actually absent or disabled . . . that person designated to act for him and perform his official function in and during his actual absence or disability [may so apply].

[32]N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8 (1975). This provision survived the 1975 revision.

[33]See Note, "New Jersey Electronic Surveillance Act," 26 Rutgers L. Rev. 617, 622 (1974) which argues that the provision is invalid. The author cites In re Zicarelli, 55 N.J. 249, 262-64, 261 A.2d 129, 135-36 (1970), aff'd sub nom., Zicarelli v. New Jersey State Commission, 406 U.S. 472 (1972) as holding that the State Commission of Investigation is primarily a legislative agency, although it may aid law enforcement agencies in the investigation of crime. This holding may be interpreted as implying that the Commission's chairman cannot qualify as a principal prosecuting attorney under §2A:156A-8.

[34]Cf. 18 U.S.C.A. §2516(2) (1971) with N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8 (1975).

[35]See Note, "New Jersey Electronic Surveillance Act," 26 Rutgers L. Rev. 617, 622 (1974) which suggests that Title III requires the designated state officials to apply personally for the order. A comment in S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968), however, casts doubt on this interpretation:

> Paragraph (2) [of §2516] provides that the principal prosecuting attorney of any state or the principal prosecuting attorney of any political subdivision of a state may authorize an application . . . (emphasis added).

This incongruity has not, however, affected the validity of the statute. The New Jersey Supreme Court has sustained applications approved by the proper official, but actually made in court by another agent.[36]

¶14 Section 2516(2) of Title III does not provide explicitly for substitution of designated state officials in case of absence or disability. Nevertheless, state provisions for such substitution have been sustained as consistent with the purposes of Title III. The prosecutor should take care, however, that the delegation of authority be in writing.[38] He should also provide a statement in detail of why the delegation is necessary.[39]

[36] State v. Dye, 60 N.J. 518, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972).

[37] See e.g., Commonwealth v. Vitello, ___Mass.___, 327 N.E.2d 819, 837-38 (1975); State v. Travis, 125 N.J. Super. 1, 6, 308 A.2d 78, 81 (Essex County Crim. Ct. 1973), aff'd,133 N.J. Super. 326, 336 A.2d 489, 491 (App. Div. 1975); People v. Fusco, 75 Misc.2d 981, 984-85, 348 N.Y.S.2d 858, 863-64 (Nassau County Ct. 1973).

[38] Commonwealth v. Vitello, ___Mass.___, 327 N.E.2d 819, 837-38 (1975).

[39] State v. Travis, 125 N.J. Super. 1, 6, 10, 308 A.2d 78, 81, 83 (Essex County Crim. Ct. 1973), aff'd,133 N.J. Super. 326, 336 A.2d 489 (App. Div. 1975); but see People v. Fusco, 75 Misc.2d 981, 984-85, 348 N.Y.S.2d 858, 863-64 (Nassau County Ct. 1973) where such a showing was not required.

III. Information Requirements

A. Crimes

¶15 Title III allows the use of electronic surveillance in the investigation of certain crimes. Section 2516(1)[40] describes the federal offenses which are included, and section 2516(2)[41] lists those crimes for which the states may authorize electronic surveillance.

¶16 The federal crimes included under section 2516(1) are described by specific reference to the various sections of the United States Code.[42] On the other hand, the state offenses listed in section 2516(2) are described in generic terms and have been construed broadly.[43] The New York electronic surveillance statute is much more specific, enumerating a long list of crimes by reference

[40] 18 U.S.C.A. §2516(1) (1970), as amended (Supp. 1976); the federal offenses can be divided into three categories:

1. national security offenses;
2. intrinsically dangerous crimes;
3. activities characteristic of organized crime.

[41] 18 U.S.C.A. §2516(2) (1970). Under this system, the "principal prosecuting attorney . . ." can apply for a warrant authorizing electronic surveillance only if there is a state statute authorizing such an application.

[42] 18 U.S.C.A. §2516(1) (1970), as amended (Supp. 1976).

[43] 18 U.S.C.A. §2516(2) (1970). For example, lottery and bookmaking offenses may be included under "gambling." United States v. Pacheco, 489 F.2d 554, 563-64 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975) (lottery offenses as gambling); People v. Fusco, 75 Misc.2d 981, 985-86, 385 N.Y.S.2d 858, 864-65 (Nassau County Ct. 1973) (bookmaking offenses under N.Y. Penal Law §§225.05-225.20 [McKinney 1967] as gambling).

to sections of the penal law.[44] In contrast, the Massachusetts[45] and New Jersey[46] statutes make almost no reference to statutory crimes, but rather use the generic descriptions. The Florida electronic surveillance statute[47] also uses the generic descriptions, and it has been interpreted by the Florida Supreme Court as allowing the use of wiretap evidence only when directly or indirectly related to the enumerated offenses.[48] The court, however, did not give any examples of a crime directly or indirectly related to an enumerated offense; thus, it is not clear whether it intended to limit the broad construction of the generic terms.

¶17 There is some controversy at the state level over the question of whether the phrase "punishable by imprisonment for more than one year" in section 2516(2) identifies the entire list of crimes against which states may authorize electronic surveillance, or only

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[44] N.Y. Crim. Pro. Law §700.05(8) (McKinney 1971), as amended (Supp. 1976).

[45] Mass. Gen. Laws Ann. ch. 272, §99(A)(7) (Supp. 1976).

[46] N.J. Stat. Ann. §2A:156A-8 (1971), as amended New Jersey Statutes §2A:156A-8 (1975).

[47] Fla. Stat. Ann. §934.07 (1973), as amended (Supp. 1976).

[48] In re Grand Jury Investigation, 287 So.2d 43, 48 (Fla. 1973). The petitioner, not yet indicted, moved for suppression of recordings intended for use by the grand jury. The recordings dealt with crimes which were not specified in the case and apparently were not included under the statute.

the preceding phrase, "other crime[s] dangerous to life, limb, or property."[49] Two New York courts, among others, recently came out on opposite sides of the question.[50] A federal district court in Florida also analyzed this issue.[51] The court concluded, in dicta, that states could use wiretaps only if the interception would provide evidence of an enumerated offense and that offense was punishable by imprisonment for more than one year. The court felt, however, that other offenses discovered during a proper intercept could be prosecuted, "regardless of the nature of the offense or the prescribed punishment."[52] The legislative history of Title III indicates that the congressional intent was to allow electronic surveillance against all of the specified crimes, whether or not they were punishable by one year in prison. The phrase "punishable by imprisonment for more than one year" was intended only

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[49] 18 U.S.C.A. §2516(2) (1970).

[50] People v. Amsden, 82 Misc.2d 91, 93-94, 368 N.Y.S.2d 433, 436-37 (Sup. Ct. Erie County 1975) (wiretaps can be authorized only for those crimes punishable by imprisonment for a year or more). Contra, People v. Nicoletti, 84 Misc.2d 385, 390-93, 375 N.Y.S.2d 720, 725-28 (Niagara County Ct. 1975) (wiretaps may be authorized for the enumerated offenses whether or not they are punishable by imprisonment for one year or more); accord, United States v. Carubia, 377 F. Supp. 1099, 1104-05 (E.D.N.Y. 1974).

[51] United States v. Lanza, 341 F. Supp. 405 (M.D.Fla. 1972).

[52] Id. at 413.

to modify "other crime[s] dangerous to life, limb, or property."[53]

¶18 A warrant for electronic surveillance may issue when on the basis of facts submitted in the application, a judge finds there to be probable cause that an offense included under the statute has been or is about to be committed.[54] The application must state the "details as to the particular offense that has been, is being, or is about to be committed,"[55] and the order itself must specify "a particular description of the type of communication sought to be intercepted, and a statement

53 The interception of wire or oral communications by State law-enforcement officers could only be authorized when it might provide, or has provided evidence of designated offenses . . . . Specifically designated offenses include murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana, or other dangerous drugs. All other crimes designated in the State statute would have to be "dangerous to life, limb, or property, and punishable by imprisonment for more than 1 year." (emphasis added).

S. Rep. No. 1097, 90th Cong., 2d Sess. 99 (1968).

54 18 U.S.C.A. §2518(3)(a) (1970). The Third Circuit in United States v. Armocida, 515 F.2d 29, 35 (3d Cir. 1975), cert. denied, ___ U.S. ___ (1976) discussed the three different contexts in which a surveillance application must show probable cause:

> The first is that an individual has or is about to commit one of several enumerated offenses, . . . ; the second: that particular communications relating to the charged offense will be obtained through the interception [see ¶19 of text]; third: the premises where the interception will be made are being used in connection with the charged offense [see ¶20 of text].

See 18 U.S.C.A. §§2518(3)(b), (d) (1970).

55 18 U.S.C.A. §2518(1)(b)(i) (1970).

of the particular offense to which it relates."[56] Generally, a reference to the statute allegedly violated, in conjunction with a description of the facts giving rise to probable cause, is sufficient to satisfy these requirements.[57]

B. Particularity as to Conversations Sought

¶19 An application for an electronic surveillance order, and the order itself, must include "a particular description of the type of communication sought to be intercepted."[58] Most courts, conscious of the difficulty of particularizing a future conversation, take a pragmatic approach in their examination of the sufficiency of applications and

56 18 U.S.C.A. §2518(4)(c) (1970).

57 See, e.g., United States v. Mainello, 345 F. Supp. 863, 872 (E.D.N.Y. 1972); United States v. King, 335 F. Supp. 523, 537 (S.D.Cal. 1971), modified on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974); State v. Braeunig, 122 N.J. Super. 319, 325, 300 A.2d 346, 349 (App. Div. 1973); People v. Holder, 69 Misc.2d 863, 868, 331 N.Y.S.2d 557, 563 (Sup. Ct. Nassau County 1972).

58 18 U.S.C.A. §2518(1)(b)(iii) (1970); 18 U.S.C.A. §2518(4)(c) (1970). New York, New Jersey, and Massachusetts have each adopted similar formulations, though New Jersey has recently added an additional requirement of probable cause:

> The application must contain:
>
> * * * *
>
> (iii) a particular description of the type of communications sought to be intercepted . . . .

N.Y. Crim. Pro. Law §700.20(2)(b)(iii) (McKinney 1971). See also N.Y. Crim. Pro. Law §700.30(4) (McKinney 1971).

orders in meeting this requirement.[59]

C. Particularity as to Place

¶20 The application and order must also describe the location of the facilities or the place where the communications are to be intercepted.[60]

¶21 There is a special concern shown in some statutes where the surveillance involves public facilities or where

58 continued.
Each application . . . shall state:

* * * *

(3) The particular type of communication to be intercepted; and a showing that there is probable cause to believe that such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be intercepted.

N.J. Stat. Ann. §2A:156A-9(c)(3) (1971), as amended New Jersey Statutes §2A:156A-9(c)(3) (1975). See also N.J. Stat. Ann. §2A:156A-12(d) (1971).

The application must contain the following:

* * * *

d. A particular description of the nature of the oral or wire communications sought to be overheard.

Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(d) (Supp. 1976). See also Mass. Gen. Laws Ann. ch. 272, §99(I)(4) (Supp. 1976).

[59] See, e.g., United States v. Tortorello, 480 F.2d 764, 780 (2d Cir.), cert. denied, 414 U.S. 866 (1973); United States v. Mainello, supra note 57, at 871-72; People v. Holder, supra note 57, at 868, 331 N.Y.S.2d at 563.

60 Each application shall include the following information:

* * * *

(ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted . . . .

the interception of the communications.[61] No similar

60 continued.
A warrant must contain the following:

* * * *

3. A particular description of the person and the place, premises or telephone or telegraph line upon which the interception may be conducted.

Mass. Gen. Laws Ann. ch. 272, §99 (I)(3) (Supp. 1976).

61 If the facilities from which a wire communication is to be intercepted are public, no order shall be issued unless the court, in addition to the matters provided in section 10 above, determines that there is a special need to intercept wire communications over such facilities.

If the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, or are leased to, listed in the name of, or commonly used by, a licensed physician, a licensed practicing psychologist, an attorney at law, a practicing clergyman, or a newspaperman, or is a place used primarily for habitation by a husband or wife, no order shall be issued unless the court, in addition to the matters provided in section 10 above, determines that there is a special need to intercept wire or oral communications over such facilities or in such places. Special need as used in this section shall require in addition to the matters required by section 10 of this act, a showing that the licensed physician, licensed practicing psychologist, attorney-at-law, practicing clergyman or newspaperman is personally engaging in or was engaged in over a period of time as part of a continuing criminal activity or is committing, has or had committed or is about to commit an offense as provided in section 8 of the act or that the public facilities are being regularly used by someone who is personally engaging in or was engaged in over a period of time as part of a continuing criminal activity or is committing, has or had committed or is about to commit such an offense. No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this act, shall lose its privileged character.

N.J. Stat. Ann. §2A:156A-11(1971), as amended New Jersey Statutes §2A:156A-11 (1975).

it threatens privileged communications. New Jersey requires that the court determine there to be a "special need" for

61 continued.

18 U.S.C.A. §2518(1)(b)(ii) (1970).

> Each order . . . shall specify --
>
> * * * *
>
> (b) the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted.

18 U.S.C.A. §2518(4)(b) (1970).

N.Y. Crim. Pro. Law §§700.20(2) (ii) and 700.30(3) (McKinney 1971) are identical to the federal provisions.

> Each application . . . shall state:
>
> * * * *
>
> (4) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be intercepted.

N.J. Stat. Ann. §2A:156A-9(c)(4) (1971).

> Each order . . . shall state:
>
> * * * *
>
> c. The character and location of the particular communication facilities as to which, or the particular place of the communication as to which, authority to intercept is granted.

N.J. Stat. Ann. §2A:156A-12(c) (1971).

> The application must contain the following:
>
> * * * *
>
> c. That the oral or wire communications of the particularly described person or persons will occur in a particularly described place and premises or over particularly described telephone or telegraph lines.

Mass. Gen. Laws Ann. ch. 272, §99 (F)(2)(c)(Supp. 1976).

federal requirement exists,[62] although New York and Massachusetts require a statement in the application that the communications to be intercepted are not legally privileged.[63]

D. Particularity as to Persons

¶22 Title III requires that applications and orders identify the person, if known, whose communications are to be intercepted.[64] These provisions have not been read, however, to require the government to name every participant in communications to be monitored.

[62] See United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944 (1974).

[63] N.Y. Crim. Pro. Law §700.20(2)(c) (McKinney 1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(e) (Supp. 1976).

[64]
> Each application shall include the following information:
>
> * * * *
>
> (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted.

18 U.S.C.A. §2518(1)(b)(iv) (1970).

> Each order . . . shall specify --
>
> a. the identity of the person, if known, whose communications are to be intercepted.

18 U.S.C.A. §2518(4)(a) (1970).

¶23 The leading Supreme Court case in this area is United States v. Kahn.[65] There, the warrant authorized interception of communications of Mr. Kahn, suspected of gambling violations, and "other persons as yet unknown." Conversations involving Mrs. Kahn and her husband, and Mrs. Kahn and a third party were intercepted and introduced in evidence against the Kahns. The Court denied a motion to suppress these conversations. It found that although the government lacked probable

64 continued.

The New York and New Jersey statutes are almost identical to their federal counterparts. N.Y. Crim. Pro. Law §§700.20(2)(b)(iv) (McKinney 1971) (modifying "offenses" in the requirements for the application by replacing "the" with "such designated") and 700.30(2) (McKinney 1971); N.J. Stat. Ann. §§2A:156A-9(c)(1) (1971) (adding "particular" in front of "person" in the requirements for the application) and 2A:156A-12(b) (1971) (allowing the order to state "a particular description of" the person or his identity). The Massachusetts statute requires the application to include a statement of probable cause:

> The application must contain the following:
>
> * * * *
>
> b. A statement of facts establishing probable cause to believe that oral or wire communications of a particularly described person will constitute evidence of such designated offense or will aid in the apprehension of a person who the applicant has probable cause to believe has committed, is committing, or is about to commit a designated offense.

Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(b) (Supp. 1976). The warrant in Massachusetts need only contain "[a] particular description of the person . . . ." Mass. Gen. Laws Ann. ch. 272, §99 (I)(3) (Supp. 1976); see note 60.

[65] 415 U.S. 143 (1974).

cause to name Mrs. Kahn in the application for the warrant, she fell within the category of "other persons as yet unknown."[66] The Court held that:

> . . . Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that that individual is "committing the offense" for which the wiretap is sought. 67

¶24 The circuit courts of appeal are currently split over the issue of whether the government must name a known person where it has probable cause to believe that the individual is committing the specified offense. The Sixth Circuit in United States v. Donovan,[68] the Fourth Circuit in United States v. Bernstein,[69] and the District of Columbia Circuit in United States v. Moore[70] read Kahn to require the government to name in the application for a wiretap order all persons that it believes to be involved in the criminal activity under investigation and whose conversations may be intercepted. Where such persons are known under a probable cause standard, these courts hold that the persons must be identified and failure to do so requires suppression of recordings made under the warrant for use against them.

[66] Id. at 155.

[67] Id.

[68] 513 F.2d 337 (6th Cir. 1975), cert. granted, 18 Crim. L. Rptr. 4161 (Feb. 24, 1976).

[69] 509 F.2d 996 (4th Cir. 1975), cert. pending.

[70] 513 F.2d 485 (D.C.Cir. 1975).

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¶25 The Fifth Circuit reached a different result in United States v. Doolittle.[71] There the court held that the government was not absolutely required to name all persons whom it had probable cause to believe were involved in the criminal activity under investigation. The court noted that the defendants did not allege or demonstrate any prejudice in not being named in the order. All defendants received an inventory of the overheard conversations, were allowed to listen to the tapes, and received transcripts prior to the trial. There was no indication of bad faith or subterfuge on the part of the government. These factors combined to convince the court that the essential purposes of the statute had been met, and that failure to name the defendants in the application and order did not require suppression of the wiretap evidence. The Eighth Circuit recently followed Doolittle in United States v. Civella.[72] In that case, the named defendant was adequately identified, and the unnamed defendants were notified of the interception soon after its termination. The court concluded that sections 2518(1)(b)(iv) and (4)(a) of Title III[73] were substantially complied with and their

[71] 507 F.2d 1368 (5th Cir.), aff'd en banc, 518 F.2d 500 (1975), cert. pending.

[72] 19 Crim. L. Rptr. 2136 (8th Cir. Apr. 16, 1976).

[73] 18 U.S.C.A. §§2518 (1)(b)(iv), (4)(a) (1970) (requiring in the application and the order the identification of persons whose communications are to be intercepted); see note 64.

purpose was achieved. It suggested, however, that a showing of bad faith on the part of the government in the omission of the names, or a demonstration that the issuing judge would have acted differently had he seen the omitted names might lead to a different result.

E. Inadequacy of Investigative Alternatives

¶26 Section 2518(1)(c) of Title III requires that:

> Each application . . . shall include the following information:
>
> * * * *
>
> (c) a full and complete 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.[74]

New York, New Jersey, and Massachusetts all have similar provisions in their statutes.[75]

[74] 18 U.S.C.A. §2518(1)(c) (1970); see also 18 U.S.C.A. §2518(3)(c) (1970) which requires ~~the~~ judge, before authorizing interception, to determine that:

> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

[75] The application must contain:

> * * * *
>
> (d) A full and complete statement of facts establishing 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, [sic] to obtain the evidence sought.

¶27 The Senate Report accompanying Title III discusses the intent of this provision:

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75 continued.

N.Y. Crim. Pro. Law §700.20 (2)(d) (McKinney 1971).

> An eavesdropping warrant may issue only:
>
> * * * *
>
> 4. Upon 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.

N.Y. Crim. Pro. Law §700.15 (4) (McKinney 1971).

> Each application . . . shall state:
>
> * * * *
>
> (6) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

N.J. Stat. Ann. §2A: 156A-9(c)(6) (1971).

> Upon consideration of an application, the judge may enter an ex parte order . . . if the court determines . . . that there is or was probable cause for belief that:
>
> * * * *
>
> c. Normal investigative procedures with respect to such offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ.

N.J. Stat. Ann. §2A:156A-10(c) (1971), as amended New Jersey Statutes §2A:156A-10(c) (1975).

> A warrant may issue only:
>
> * * * *
>
> 3. Upon a showing by the applicant that normal investigative procedures have been tried and have failed or reasonably appear unlikely to succeed if tried.

Mass. Gen. Laws Ann. ch. 272, §99(E)(3) (Supp. 1976).

> The judgment would involve a consideration of all the facts and circumstances. Normal investigative procedure would include, for example, standard visual or aural surveillance techniques by law enforcement officers, general questioning or interrogation under an immunity grant, use of regular search warrants, and the infiltration of conspiratorial groups by undercover agents or informants. Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely . . . .What the provision envisions is that the showing be tested in a practical and commonsense fashion. 76

¶28 Most courts, based on the language of the Senate Report, require little more than a showing by the applicant that other investigative techniques are infeasible. They do not interpret these sections of Title III to require a full in-depth examination of the investigative alternatives.[77] The Ninth Circuit, on the other hand, in United States v. Kerrigan,[78] showed a greater degree of willingness to examine the application's statements that other investigative techniques have not or will not work. There, the court warned the government that ". . . the boilerplate recitation of the difficulties of gathering usable evidence . . . is not sufficient basis for granting a

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[76] S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968).

[77] See United States v. Armocida, 515 F.2d 29, 37-38 (3d Cir. 1975), cert. denied, ___U.S.___ (1976); In re Dunn, 507 F.2d 195, 196-97 (1st Cir. 1974); United States v. James, 494 F.2d 1007, 1015-16 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974).

[78] 514 F.2d 35, 38 (9th Cir. 1975), cert. denied, ___U.S. ___ (1976).

wiretap order." More recently, in United States v. Kalustian,[79] the Ninth Circuit granted a motion to suppress wiretap evidence because the application did not include a "full and complete statement of underlying circumstances" explaining why other investigative techniques would not work. The application included statements by the investigating officers that other methods of investigation would not work, based on their "knowledge and experience."[80]

¶29 The purpose of section 2518(1)(c)[81] is to ensure that electronic surveillance is not used "casually or with indifference to its risks."[82] In preparing an application, it is important to recognize two considerations:

> The first is that other investigative options must be evaluated closely. The second is that those options and their insufficiency must be detailed in the application, so that the judge can independently determine the necessity for surveillance. 83

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[79] 17 Crim. L. Rptr. 2428 (9th Cir. Aug. 4, 1975), modified, 18 Crim. L. Rptr. 2411 (Feb. 11, 1976).

[80] Id. Accord, United States v. Curreri, 388 F. Supp. 607 (D.Md. 1974).

[81] 18 U.S.C.A. §2518(1)(c) (1970).

[82] Electronic Surveillance; Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 67 (1976).

[83] Id.

F. Period of Time Surveillance is to be Authorized

¶30 An application for an electronic surveillance order must include "a statement of the period of time for which the interception is required to be maintained."[84] The order itself must specify "the period of time during which such interception is authorized . . . ."[85] In no case can an order authorize an interception for a period in excess of thirty days, unless an extension is granted.[86] The thirty-day period, is an absolute maximum, however, and the intent of Title III is to limit interception to

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[84] 18 U.S.C.A. §2518(1)(d) (1970). The New York, New Jersey, and Massachusetts sections are identical. N.Y. Crim. Pro. Law §700.20(2)(e) (McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c)(5) (1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(f) (Supp. 1976) (Masssachusetts requires the application, if practicable, to designate hours of the day or night during which interception may reasonably be expected to occur).

[85] 18 U.S.C.A. §2518(4)(e) (1970). The New York and New Jersey sections are again identical. N.Y. Crim. Pro. Law §700.30(6) (McKinney 1971); N.J. Stat. Ann. §2A:156A-12(f) (1971). Massachusetts requires that the warrant contain "[t]he date of issuance, the date of effect, and termination date . . . ." Mass. Gen. Laws Ann. ch. 272, §99 (I)(2) (Supp. 1976).

[86] 18 U.S.C.A. §2518(5) (1970); N.Y. Crim. Pro. Law §700.10(2) (McKinney 1971). New Jersey limits the duration of electronic surveillance to a maximum of twenty days. N.J. Stat. Ann. §2A:156A-12(f) (1971), as amended New Jersey Statutes §2A:156A-12(f) (1975). Massachusetts allows a device to be installed for a period of thirty days, but authorizes interception only for a maximum of fifteen days within that period. Mass. Gen. Laws Ann. ch. 272, §99 (I)(2) (Supp. 1976).

a period no "longer than is necessary to achieve the objective of the authorization. . . ."[87]

¶31 In cases where the investigation requires that an interception continue to be authorized beyond the time when the described type of communication has been first obtained, the application must include "a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter."[88] The order in all cases must include "a statement as to whether or not the interception shall automatically terminate when the described conversation has been first obtained."[89] The

[87] 18 U.S.C.A. §2518(5) (1970). See N.Y. Crim. Pro. Law §700.10(2) (McKinney 1971); N.J. Stat. Ann. §2A:156A-12(f) (1971), as amended New Jersey Statutes §2A:156A-12(f) (1975). The Massachusetts statute has no comparable language; see Commonwealth v. Vitello, ___Mass.___, 327 N.E.2d 819, 841-44 (1975).

[88] 18 U.S.C.A. §2518(1)(d) (1970). The New York section is identical. N.Y. Crim. Pro. Law §700.20(2)(e) (McKinney 1971). The New Jersey and Massachusetts sections have slight variances. N.J. Stat. Ann. §2A:156A-9(c)(5) (1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(f) (Supp. 1976).

[89] 18 U.S.C.A. §2518(4)(e) (1970). The New York and New Jersey sections are identical. N.Y. Crim. Pro. Law §700.30(6) (McKinney 1971); N.J. Stat. Ann. §2A:156A-12(f) (1971), as amended New Jersey Statutes §2A:156A-12(F) (1975). The Massachusetts section states that:

> If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide.

Mass. Gen. Laws Ann. ch. 272, §99(I)(2) (Supp. 1976).

actual period of authorization in a particular case depends on the facts of that case.[90] Several courts have suppressed evidence where the order authorized interception for the full thirty-day period without regard to whether the investigative objectives were reached, or where the order failed to include a statement as to whether or not the interception would automatically terminate when the desired communications were obtained.[91]

G. Prior Applications

¶32 Section 2518(1)(e) of Title III requires that each application include:

> a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interception of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application. [92]

[90] S. Rep. No. 1097, 90th Cong., 2d Sess. 101, 103 (1968).

[91] People v. Pieri, 69 Misc.2d 1085, 332 N.Y.S.2d 786 (Erie County Ct. 1972), aff'd, 41 App. Div. 2d 1031, 346 N.Y.S.2d 213 (4th Dept. 1973); Johnson v. State, 226 Ga. 805, 177 S.E.2d 699 (1970); State v. Siegel, 266 Md. 256, 272-74, 292 A.2d 86, 95-96 (1972); see also United States v. Cafero, 473 F.2d 489, 496 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974). But see People v. Palozzi, 44 App. Div. 2d 224, 227, 353 N.Y.S.2d 987, 990 (4th Dept. 1974); State v. Braeunig, 122 N.J. Super. 319, 325, 300 A.2d 346, 349 (App. Div. 1973); United States v. Baynes, 400 F. Supp. 282, 300-10 (E.D.Pa.), aff'd mem., 517 F.2d 1399 (3d Cir. 1975).

[92] 18 U.S.C.A. §2518(1)(e) (1970). The provisions for New York, New Jersey, and Massachusetts are substantially similar.

A court may suppress evidence obtained pursuant to a surveillance warrant where the application fails to disclose the existence of previous applications.[93]

92 continued.

The application must contain:

* * * *

(F) A full and complete statement of the facts concerning all previous applications, known to the applicant, for an eavesdropping warrant involving any of the same persons, facilities or places specified in the application, and the action taken by the justice on each such application.

N.Y. Crim. Pro. Law §700.20(2)(f) (McKinney 1971).

Each application . . . shall state:

* * * *

e. A complete statement of the facts concerning all previous applications, known to the individual authorizing and to the individual making the application, made to any court for authorization to intercept a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each such application.

N.J. Stat. Ann. §2A:156A-9(e) (1971).

The application must contain the following:

* * * *

h. If a prior application has been submitted or a warrant previously obtained for interception of oral or wire communications, a statement fully disclosing the date, court, applicant, execution, results, and present status thereof.

Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(h) (Supp. 1976).

93 United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974). There, a warrant was issued authorizing a wiretap of the defendant in a gambling investigation and the resulting evidence was suppressed because the application failed to indicate that the defendant was the subject of a wiretap in a previous unrelated narcotics investigation. But see United States v. Kilgore, 518 F.2d 496, 500 (5th Cir. 1975), cert. pending.

IV. Formal Requirements: Swearing, Signing, and Dating

¶33 Each application must be in writing and upon oath or affirmation.[94] Each order authorizing electronic surveillance must actually be signed by the judge, and failure to do so can lead to suppression of evidence.[95] Finally, each order must be dated, or again suppression can result.[96]

V. What Court May Issue a Warrant

¶34 Applications for electronic surveillance warrants must be presented to a "judge of competent jurisdiction."[97] This is defined as "a judge of a United States district court or a United States court of appeals"[98] on the federal level, and at the state level it is "a judge of any court of general criminal jurisdiction of a

94 18 U.S.C.A. §2518(1) (1970); N.Y. Crim. Pro. Law §700.20(1) (McKinney 1971); N.J. Stat. Ann. §2A:156-9(1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(1) (Supp. 1976). The oath or affirmation need not be before the issuing judge. United States v. Tortorello, 342 F. Supp. 1029, 1035 (S.D.N.Y. 1972), aff'd 480 F.2d 764 (2d Cir.) cert. denied, 414 U.S. 866 (1973).

95 United States v. Ceraso, 355 F. Supp. 126 (M.D.Pa. 1973).

96 United States v. Lamonge, 458 F.2d 197 (6th Cir.), cert. denied, 409 U.S. 863 (1972).

97 18 U.S.C.A. §2516(1) (1970), as amended (Supp. 1976); 18 U.S.C.A. §2516(2) (1970) imposes the same requirement on the states.

98 18 U.S.C.A. §2510(9)(a) (1970).

State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications."[99] The intent of this section is to limit the judges who could authorize electronic surveillance warrants, and "to guarantee responsible judicial participation in the decision to use these techniques."[100] New York permits all trial judges down to the county court level to issue warrants,[101] while Massachusetts permits any justice of the state superior court to do so.[102] New Jersey, on the other hand, permits warrants to be issued only by judges of the superior court who are specifically designated for that purpose.[103]

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[99] 18 U.S.C.A. §2510(9)(b) (1970).

[100] S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). Normal search warrant practice permits U.S. Commissioners and city mayors to issue federal warrants, a practice "too permissive for the interception of wire or oral communications."

[101] N.Y. Crim. Pro. Law §700.05(4) (McKinney 1971).

[102] Mass. Gen. Laws Ann. ch. 272, §99(B)(9) (Supp. 1976).

[103] N.J. Stat. Ann. §2A:156A-2(i) (1971).

VI. Surreptitious Entry

¶35 In United States v. Ford,[104] the court found that "bugging, unlike nontrespassory wiretapping, ordinarily involves two distinct aspects of the Fourth Amendment: protection of private premises and of conversational privacy from unwarranted governmental intrusion."[105] The court concluded that the fourth amendment required explicit authorization of each of these intrusions, reasoning that the "deliberate and impartial judgment of a judicial officer"[106] which the amendment places between the citizen and the police could best be implemented by requiring the police officer to justify each intrusion by citing "specific and articulable facts"[107] that warrant the particular intrusion in question.[108]

¶36 Justification for surreptitious entries is discussed in United States v. Agrusa[109] and Application of United States.[110] Both courts purport to apply the fourth amendment standard of

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[104] 553 F.2d 146 (D.C. Cir. 1977).

[105] Id. at 160.

[106] Id.

[107] Id. at 161.

[108] Accord, Application of United States, 563 F.2d 637, 644 (4th Cir. 1977); United States v. Finazzo, 429 F. Supp. 803, 807 (E.D. Mich. 1977).

[109] 541 F.2d 690 (8th Cir. 1976).

[110] 563 F.2d 637 (4th Cir. 1977).

"reasonableness," yet each appears to apply the standard in a different manner. In Agrusa, the Eighth Circuit noted that "the defendant here would have avoided any incriminating statements had he been told in advance that his conversations would be intercepted,"[111] and concluded that "the self-defeating nature of an announcement prior to electronic surveillance is a sufficiently exigent circumstance to render the unannounced search and seizure reasonable."[112] The court based its finding of reasonableness on the fact that the kind of electronic surveillance envisioned by the law enforcement agents would have been impossible without surreptitious entry. In Application, the Fourth Circuit emphasized a finding by the district court that the investigation by the law enforcement agents could proceed only by a surreptitious entry and installation. This demonstrated that the surreptitious entry reasonably accommodated the public interest in criminal investigation.[113]

¶37 Other courts have found authorization for surreptitious entry implied in a valid surveillance order. In United States v. Scafidi,[114] for example, the Second Circuit focused on the judge's

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[111] 541 F.2d at 697.

[112] Id. at 698.

[113] While recognizing the interest in criminal investigation, the court recognized that "the willingness of the Government to abide by detailed guidelines as to the time and manner of entry, its assurance that entry [would] be made only at a time when the premises [were] unoccupied, and its acknowledgment that the scope of any such entry should not exceed its limited purpose" showed a respect for the individual's expectation of privacy. 563 F.2d at 645.

[114] 564 F.2d 633 (2d Cir. 1977).

lack of experience in the installation of surveillance devices:

> It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning....It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. It is significant that the statute, generally so detailed in its supervisory requirements, makes no mention of any need for a separate entry order. That the statute requires general supervision by the courts over the bugging operation does not even impliedly impose on them the practical enforcement steps.[115]

The court concluded that the role of the judge is only to decide whether electronic surveillance is justified, and not to decide the "precise mechanical means" of accomplishing the surveillance.[116] A district court reached a similar result in United States v. Dalia,[117] asserting that "entry to install bugging devices is but a mere condition precedent that must necessarily be satisfied if the purpose behind an intercept order is to be effectuated. . . [and] is not another intrusion."[118]

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[115] Id. at 640.

[116] Id.

[117] 426 F. Supp. 862 (D.N.J. 1977).

[118] Id. at 866.

ES: Authorization

Addenda and Errata

Table of Contents

Addenda and Errata

(Double underlining indicates corrected material)

Outline: Add the following in section III after: "A. Crimes . . . ¶15": B. Probable Cause . . . ¶18. Re-letter the remaining subsections in section III after the new addition.

¶3, Note 2: Correction: 388 U.S. 41 (1967).

¶3, Note 3: Correction: Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819 (1975).

¶4, Note 4: Correction: 18 U.S.C.A. §§ 2510-2520 (1970 & Supp. 1979).

¶4, Note 5: Correction: . . . exception, 18 U.S.C.A. § 2511 (2)(a)(i) (Supp. 1979).

¶4, Note 5: Correction: Federal Communications Commission exception, § 2511(2)(b) (1970).

¶4, Note 5: Correction: United States v. United States District Court, 407 U.S. 297, 308 (1972).

¶4, Note 5: Add: In United States v. Butenko, 494 F.2d 593, 605 (3d Cir. 1974) (en banc), cert. denied, 419 U.S. 881 (1974), the court held that a warrantless electronic surveillance that was made with the primary purpose of obtaining foreign intelligence information was reasonable under the Fourteenth Amendment. The court in Forsyth v. Klein, 447 F. Supp. 192, 196 (E.D. Pa. 1978) found "there has been little doubt that a warrant

is also necessary in matters involving the national security interest, except for surveillances based on threats to the national security involving foreign powers."

¶4, Note 6: Correction: 18 U.S.C.A. § 2511(2)(c)(d) (1970).

¶5: Correction: Twenty-four states and the District of Columbia have approved statutory provisions . . . .

¶5, Note 7: Omit & Substitute: The 25 jurisdictions and their respective statutes are: Ariz. Rev. Stat. Ann. §§ 13-3004 to -3014 (1978); Colo. Rev. Stat. Ann. §§ 16-15-101 to -104, 18-9-301 to -310 (1978); Conn. Gen. Stat. Ann. §§ 53a-187 to -189, 54-41a to 41s (West 1972 & Supp. 1979); Del. Code Ann. tit. 11, § 1335-36 (1974 & Supp. 1979); D.C. Code Ann. §§ 23-541 to -556 (1973 & Supp. V 1978); Fla. Stat. Ann. §§ 934.01 to .10 (West 1973 & Supp. 1979); Ga. Code Ann. §§ 26-3001 to -3010 (1978); Ill. Rev. Stat. ch. 38 §§ 108A-1 to 11 (Supp. 1979); Kan. Stat. §§ 22-2514 to -2519 (1974 & Supp. 1978); Md. Cts. & Jud. Proc. Ann. Code art. C.J. §§ 10-401 to -412 (1974 & Supp. 1978); Mass. Gen. Laws Ann. ch. 272, § 99 (West Supp. 1979); Minn. Stat. Ann. §§ 626A.01-.23 (West Supp. 1979); Neb. Rev. Stat. §§ 86-701 to -712 (1976); Nev. Rev. Stat. §§ 179.401-.515, 200.610-.690 (1973, 1975); N.H. Rev. Stat. Ann. §§ 570-A:1 to A:11 (1974 & Supp. 1977); N.J. Stat. Ann. §§ 2A:156A-1 to -26 (West 1971 & Supp. 1978-1979), as amended

by Act of June 23, 1978, ch. 51, 102 N.J.L.J. NL-42 (1978); N.M. Stat. Ann. §§ 30-12-1 to 11 (1978); N.Y. Crim. Proc. Law §§ 700.05-.70 (McKinney 1971 & Supp. 1978-1979); Or. Rev. Stat. §§ 133.723, 133.725, 133.727, 133.992, 165.535, 165.540, 165.545 (1977); 18 Pa. Cons. Stat. Ann. §§ 5701-5726 as amended by Act of _____, Pub. L. No. ____, ____ Pa. Laws ____ (1978) (Senate Bill No. 191, 1977 Session); R.I. Gen. Laws Ann. §§ 12-5.1-1 to -16 (Supp. 1978); S.D. Compiled Laws Ann. §§ 23-13A-1 to -11 (Supp. 1978); S.D. Compiled Laws Ann. §§ 23-13A-1 to -11 (Supp. 1978); Va. Code §§ 19.2-61 to -70 (1975 & Supp. 1978); Wash. Rev. Code Ann. §§ 9.73.030-.100 (1977 & Supp. 1978); Wis. Stat. Ann. §§ 968.27-.33 (West 1971 & Supp. 1978-79). Part of this list was compiled in Comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing and Inventories," 61 Cornell L. Rev. 92, 94 note 9 (1975).

¶5, Note 8: Correction: 18 U.S.C.A. §§ 2515, 2518(10) (1970 & Supp. 1979).

¶7, Note 11: Correction: Mass. Gen. Laws Ann. ch. 272, § 99(F)(1) (West Supp. 1979) . . . Commonwealth v. Vitello, 367 Mass. 224, 327 N.E. 2d 819 (1975).

¶7, Note 11: Delete "N.J. Stat. Ann. § 2A:156A-8, as amended New Jersey Statutes § 2A:156A-8 (1975) provides:" and substitute: N.J. Stat. Ann. § 2A:156A-8 (West 1971) as amended by Act of June 23, 1978, ch. 5., 102 N.J.L.J. NL-42 (1978) provides: . . .

¶7, Note 11: Insert the following in the quotation from the New Jersey statute after "the attorney general, a county prosecutor, or" and before "the chairman of the state commission": with the approval of the Attorney General, except in those investigations directly involving possible misconduct by officials and employees of the Department of Law and Public Safety, . . .

¶7, Note 12: Correction & Addition: United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973), . . . United States v. Ianelli, 339 F. Supp. 177 (W.D. Pa. 1972), aff'd 447 F.2d 999 (3d Cir. 1973) aff'd, 480 F.2d 918 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975), rehearing denied, 528 F.2d 1290 (3d Cir. 1976).

¶10 Add, to the sentence that ends with footnote number 22 the following, and place the footnote number at the end of the addition:

because the identification requirement does not

play a "substantial role" in the statutory framework.[22]

¶10, Note 23: Correction: Commonwealth v. Vitello, 367 Mass. 224,

¶10, Note 23: Insert the following before "But see State v. Cocuzzo" and after "wiretap authorization)." But, first change the period after "authorization)." to a semicolon:

United States ex rel. Machi v. Department of Probation and Parole, 536 F.2d 179 (7th Cir. 1976) (assistant placed Attorney General's signature on memorandum of approval after telephone approval was received).

¶10, Note 23: Add: The official must be properly designated at the time he authorizes the application; subsequent expiration of his authority before trial has no effect on the validity of the order. United States v. Florea, 541 F.2d 568, 574 (6th Cir. 1976), cert. denied, 430 U.S. 945, rehearing denied, 431 U.S. 925 (1977). Where words "specially delegated" were used instead of "specially designated," transfer of authority was nevertheless valid. United States v. DiMuro, 540 F.2d 503, 509 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977).

¶11, Note 25: Correction: 28 U.S.C.A. § 508(b) (West Supp. 1979): When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Associate Attorney General shall act as Attorney General. The Attorney General may designate the Solicitor General and the Assistant Attorneys General, in further order of succession, to act as Attorney General.

¶12: Add the following to the sentence after footnote number 28 between "and New York[31]" and "authorize" and delete "and" before "New York": "Arizona,[31a] Colorado,[31b] Florida,[31c] Nevada,[31d] Pennsylvania,[31e] Rhode Island,[31f] and Wisconsin[31g].

¶12, Note 30: Delete and Substitute: N.J. Stat. Ann. § 2A:156A-8 (West 1971) as amended by Act of June 23, 1978, ch. 51, 102 N.J.L.J. NL-42 (1978):

> . . . the Attorney General, a county prosecutor, or with the approval of the Attorney General, except in those investigations directly involving possible misconduct by officials and employees of the Department of Law and Public Safety, the chairman of the State Commission of Investigation when authorized by a majority of the

members of that Commission or a person designated to act for such an official in writing, an ex parte application to a judge designated to receive the same for an order authorizing the interception of a wire or oral communication . . . .

See also Alexander v. Harris, No. 78-2036 (2d Cir. March 1, 1979) (New Jersey has no law requiring personal appearance of person seeking warrant. Therefore, prosecutor may apply for warrant himself or authorize in writing applications by investigating agents).

¶12, Note 31: Add to end of footnote: See also United States v. Manfredi, 488 F.2d 588, 601 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974) (Application for wiretap order need not be made by the district attorney in person before the judge).

¶12, Note 31a: Ariz. Rev. Stat. Ann. § 13-3010(A)(1978) ("a county attorney or the attorney general along with the supporting oath or affirmation of the investigating peace officer of any police department of the state or of any political subdivision thereof.").

¶12, Note 31b: Colo. Rev. Stat. Ann. § 16-15-102 (1)(a) (1978) ("the attorney general or a district attorney.").

¶12, Note 31c: Fla. Stat. Ann. § 934.07 (West Supp. 1979) ("the Governor, the Attorney General, or any State Attorney"). See also State v. Angel,

261 So. 2d 198, 200 (Fla. 3d Dist. Ct. App. 1972), aff'd, 270 So. 2d 715 (Fla. 1972) (delegation of authority to apply for wiretap order to Assistant State Attorney permissible under Fla. Stat. Ann. § 934.07 (West Supp. 1979)); State v. McGillicuddy, 342 So. 2d 567 (Fla. 2d Dist. Ct. App. 1977) (state attorney need not apply for wiretap, his written authorization for application sufficed); Daniels v. State, ___ So. 2d ___ (Fla. 1st Dist. Ct. App. Feb. 1, 1979) (No. FF-474) (principal prosecuting attorney authorized by 18 U.S.C. § 2516(2) to make application for an order authorizing or approving the interception of oral or wire communication cannot be construed to include an assistant state attorney).

¶12, Note 31d: Nev. Rev. Stat. § 179.460(1) (1975) ("the attorney general or the district attorney of any county"). See also Price v. Goldman, 90 Nev. 299, 302, 525 P.2d 598, 599-600 (1974) (the statute cannot be construed to include other deputies).

¶12, Note 31e: 18 Pa. Const. Stat. Ann. § 5708 as amended by Act of _____, Pub. L. No., ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 session)

("The attorney general, or, during the absence or incapacity of the attorney general, a deputy attorney general designated in writing by the attorney general or the district attorney or, during the absence or incapacity of the district attorney, an assistant district attorney designated in writing by the district attorney of the county wherein the interception is to be made.").

¶12, note 31f: R.I. Gen. Laws § 12-5.1-2(a) (Supp. 1978) ("the attorney general or an assistant attorney general specially designated by the attorney general").

¶12, Note 31g: Wis. Stat. Ann. § 968.28(West Supp. 1978-1979) ("the attorney general together with the district attorney of any county may approve a request of an investigative or law enforcement officer.").

¶12, Note 32: Correction: N.J. Stat. Ann. § 2A:156A-8 (1971) as amended by Act of June 23, 1978, ch. 51, 102 N.J.L.J. NL-42 (1978).

¶12: Delete footnote number 33 from the end of the paragraph and insert it at the end of the second to the last sentence of the paragraph: to such an agency.[33]

¶12: Delete the last sentence of the paragraph and substitute: This portion of the New Jersey statute has been amended so that the Chairman of the State Commission of Investigation must have approval by the Attorney General, except for

investigations "directly involving possible misconduct by officials and employees of the Department of Law and Public Safety."[33a]

¶12, Note 33a: N.J. Stat. Ann. § 2A:156A-8 (West 1971) as amended by Act of June 23, 1978, ch. 51, 102 N.J.L.J. NL-42 (1978).

¶13, Note 36: Delete and Substitute: State v. Dye, 60 N.J. 518, 291 A.2d 825, application for bail denied, 409 U.S. 1004 (1972) (dissenting opinion at 409 U.S. 1090).

¶14: Insert footnote number 37 at the end of the second sentence: consistent with the purposes of Title III.[37]

¶14, Note 37: Correction: Commonwealth v. Vitello, 367 Mass. 224, . . .

¶14, Note 38: Correction: Commonwealth v. Vitello, 367 Mass. 224, . . .

¶14, Note 38: Add: See also 18 Pa. Cons. Stat. Ann. § 5708, as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 session).

¶16: Delete the sentence in the text following footnote 43 and substitute the following: the New York electronic surveillance statute,[44] the Colorado wiretapping and eavesdropping statute,[44a] and the Pennsylvania wiretapping and electronic surveillance statute are much more specific, enumerating a long list of crimes by reference

to sections of their penal laws or code.

¶16, Note 44: Delete & Substitute: N.Y. Crim. Proc. Law § 700.05(8) (McKinney 1971 & Supp. 1978-1979) (amended version of 700.05(8), which took effect September 1, 1978, adds certain violations of the cigarette tax laws to the list of enumerated crimes).

¶16, Note 44a: Colo. Rev. Stat. Ann. § 16-15-102(1)(a) (1973 & Supp. 1978). See also People v. Martin, 176 Colo. 332, 336-339, 490 P.2d 924, 931-932 (1971).

¶16, Note 44b: 18 Pa. Cons. Stat. Ann. § 5708, as amended by Act of _____ Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 session).

¶16, Note 45: Correction: Mass. Gen. Laws Ann. ch. 272, § 99(B)(1) (West Supp. 1979).

¶16: Delete "and" before "New Jersey[46]" and substitute a comma. Add a comma after "New Jersey.[46]": In contrast, the Massachusetts,[45] New Jersey,[46] . . . Add the following after "New Jersey,[46]": Arizona,[46a] Nevada,[46b] Rhode Island,[46c] and Wisconsin.[46d]

¶16, Note 46a: Ariz. Rev. Stat. Ann. § 13-3010(A) (1978).

¶16, Note 46b: Nev. Rev. Stat. § 179.460(9) (1978).

¶16, Note 46c: R.I. Gen. Laws § 12-5.1-1(g) (Supp. 1978).

¶16, Note 46d: Wis. Stat. Ann. § 968.28 (West Supp. 1978-1979).

¶16, Note 47: Omit & substitute: Fla. Stat. Ann. § 934.07 (West Supp. 1979). In 1977 the legislature

modified the list of crimes by deleting grand larceny and abortion, and adding theft, dealing in stolen property, and violating the provisions of the Florida Anti-Fencing Act. It also gave the state broader powers to investigate gambling, by eliminating the previous requirement that the gambling be of an organized nature or carried on as a conspiracy.

¶17, Note 50: Delete period at end of footnote and substitute a semicolon. Add: People v. DeFiglia, 50 A.D.2d 709, 374 N.Y.S.2d 891 (App. Div. 1975) (enumerated offenses need not be felonies, since phrase "punishable by imprisonment for more than one year" in § 2516(2) modifies only the preceding catch-all phrase).

¶17: Add to end of paragraph: Pennsylvania has followed the Congressional intent by dividing the crimes within the scope of the statute into three categories; the second category outlines those offenses which are "dangerous to life, limb, or property and punishable by imprisonment for more than one year."[53a]

¶17, Note 53a: 18 Pa. Cons. Stat. Ann. § 5708(2)(3), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 session). The first category, section 5708(1)(4)(5), is an enumeration of various offenses with no required minimum imprisonment. The third

category, section 5708(6), is comprised of any conspiracy to commit any offense designated in categories one or two.

¶18: Add the heading: B. Probable Cause.

¶18: Delete the period at the end of the first sentence and delete footnote number 54. Add the following to the end of the first sentence: by particular individuals at particular facilities.[54]

¶18, Note 54: Correction: the first sentence should read: 18 U.S.C.A. § 2518(3)(a), (b), (d) (1970).

¶18, Note 54: Insert the following after the first sentence and before the second sentence: The following state statutes are identical, or almost identical, to the federal statute: Fla. Stat. Ann. § 934.09 (3)(a),(b),(d) (West 1973); R.I. Gen. Laws § 12-5.1-4(a)(1),(2),(4) (Supp. 1977); Wis. Stat. Ann. § 968.30(3)(a),(b),(d) (West 1973); Ariz. Rev. Stat. Ann. § 13-3010(c)(1),(2),(4) (1978); Nev. Rev. Stat. § 179.470 (3)(a),(b),(d) (1973); N.Y. Crim. Proc. Law § 700.15(2) (McKinney 1971); N.J. Stat. Ann. § 2A:156A-9(c)(2) (West Supp. 1979-1980); Mass. Gen. Laws Ann. ch. 272, § 99(E)(2) (Supp. 1979); 18 Pa. Cons. Stat. Ann. §§ 5709(3)(iv), 5710, as amended by Act of _____ Pub. L. No. ___, ___ Pa. Laws (1978) (Senate Bill No. 191, 1977 session). Cf. Colo. Rev. Stat. Ann. § 16-15-102(4)(a),(b),(d) (1973) (subsection (d) differs in that it does not use the words

"such persons" as is used in other state statutes, "[t]here is probable cause for belief that the facilities . . . are. . . commonly used by such person," but rather uses the words "commonly used by the person alleged to be involved in the commission of the offense").

¶18, Note 54: Correction: United States v. Armocida, 515 F.2d 29, 35 (3d Cir. 1975), cert. denied, 423 U.S. 858 (1975).

¶18, Note 54: Delete: "See 18 U.S.C.A. §§ 2518(3)(b),(d) (1970)."

¶18, Note 54: Add the following to the end of the entire footnote: For a more recent case discussing the probable cause standard when the supporting affadavit for the order comes from a confidential informant and when no tangible evidence can be found see United States v. Hyde, 874 F.2d 856, 862-864, 868 (5th Cir. 1978). See also, United States v. Cohen, 530 F.2d 43, 45-46 (5th Cir. 1976), cert. denied, 429 U.S. 855 (1978); United States v. Aloi, 449 F. Supp. 698, 731 (E.D.N.Y. 1977) (incoming calls cannot be used to establish probable cause that defendant's telephone will be used for criminal activity, but does establish probable cause to believe the defendant was involved in the alleged criminal activities); People v. Milnes, 186 Colo. 407, 414, 527 P.2d 1163, 1165-1166 (1974); State ex rel. Hussing v. Froelich, 62 Wis. 2d 577, 601-602, 215 N.W.2d 390, 404 (1973).

¶18A: A specific provision in the Pennsylvania statute authorizes the issuing judge to make a finding of probable cause, where there is no corroboration in the application, on information received in ex parte in camera proceedings.[57a] The identity of the informant is an additional factor that may be considered. The comparable federal provision does not specifically address the informant issue.[57b] The substance of the in camera proceedings should be preserved in writing and should include the fact of identification without the actual informant identity.

¶18A, Note 57a: 18 Pa. Cons. Stat. Ann. § 5710(B), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 session). See also N.J. Stat. Ann. § 2A:156A-10(f) (West Supp. 1978-1979).

¶18A, Note 57b: 18 U.S.C.A. § 2518(2) (1970). The following states have provisions similar to the federal provision: Colo. Rev. Stat. Ann. § 16-15-102(3) (1978); Fla. Stat. Ann. § 934.09(2) (West 1973); Nev. Rev. Stat. § 179.475(2) (1975) (the provision also requires "oral testimony shall be reduced to writing"); N.J. Stat. Ann. § 2A:156A-9(6)(F) (West 1971); R.I. Gen. Laws Ann. § 12-5.1-2(c) (Supp. 1976); Wis. Stat. Ann. § 968.30(2) (West 1971) ("under oath or affirmation" is also required). Massachusetts, New York, and

Wisconsin have an additional provision regarding information "based either upon the personal knowledge of the applicant or upon information and belief." Mass. Gen. Laws Ann. ch. 272, § 99 (F)(3) (West Supp. 1979); N.Y. Crim. Proc. Law § 700.20(3) (McKinney 1971); Wis. Stat. Ann. § 12-5.1-2(d) (West 1971).

¶19: Re-letter "B." in heading to "C."

¶19: Insert after the first sentence and before the second sentence: The order must contain "a particular description of the type of the communication to be intercepted and a statement of the particular offense to which it relates."[58a]

¶19, Note 58: Add the following after "New York, New Jersey, and Massachusetts" and before "have each adopted," but first delete "and" after "Massachusetts" and substitute a comma: Arizona, Colorado, Florida, Nevada, Pennsylvania, Rhode Island, and Wisconsin.

¶19, Note 58: Add at the end of the footnote: Ariz. Rev. Stat. Ann. § 13-3010(B)(2)(c), (D)(3) (1978); Colo. Rev. Stat. Ann. § 16-15-102(2)(b), (5)(c) (1978); Fla. Stat. Ann. § 934.09(1)(b), (4)(c) (1973); Nev. Rev. Stat. § 179.470(1)(b)(3) (1973), § 179.475 (1)(c) (1975); 18 Pa. Cons. Stat. Ann. §§ 5709 (3)(iii), 5712(A)(4), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws

___ (1978) (Senate Bill No. 191, 1977 Session); R.I. Gen. Laws §§ 12-5.1-2(b)(2)(iii), 12-5.1-5 (a)(3) (Supp. 1978); Wis. Stat. Ann. § 968.30 (1)(b)(3), (4)(c) (West 1971).

¶19, Note 58a: Id.

¶20: Re-letter "C." in heading to "D."

¶20, Note 60 and ¶21, Note 61: Correction: Reverse the two pages following the page on which ¶21 begins so that the page which begins "it threatens privileged" comes before the page that begins with "the interception of the communications.[61]"

Correction: The page that begins with "it threatens privileged" contains a misnumbered footnote - "61 continued" should read "60 continued."

¶20, Note 60: Add the following after "18 U.S.C.A § 2518 (4)(b) (1970).": The following state statutes are identical to or almost identical to the federal provisions: N.Y. Crim. Proc. Law §§ 700.20 (2)(ii), 700.30(3) (McKinney 1971); Fla. Stat. Ann. § 934.09(1)(b), (4)(b) (West Supp. 1979); R.I. Gen. Laws §§ 12-5.1-2(b)(2)(ii), 12-5.1-5 (2) (Supp. 1977); 18 Pa. Cons. Stat. Ann. §§ 5709 (V), 5712(A)(3), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); Wis. Stat. Ann.

§ 968.30(1)(b)(2), (4)(b) (1971); Colo. Rev. Stat. Ann. § 16-15-102(2)(b), (5)(b) (1978); Ariz. Rev. Stat. Ann. § 13-3010(B)(2)(d), (D)(2) (1978) (note § 13-3010(B)(2)(e) requires the identification of the telephone number or telegraph line involved in the case of a telegraphic or telephonic communication). Nev. Rev. Stat. §§ 179.470(1)(b)(2), 179.475 (1)(b) (1973) is identical to the federal provision, but it also adds "the facilities to be used and the means by which such interception is to be made."

¶20, Note 60: Delete: "N.Y. Crim. Proc. Law §§ 700.20(2)(ii) and 700.30(3) (McKinney 1971) are identical to the federal provisions."

¶21: Omit and substitute: Some statutes reflect a special concern with surveillance involving public facilities or threatening privileged communications.[60a] New Jersey[61] and Rhode Island[61a] require that the court find a "special need" for the interception of the communications. No similar federal requirement exists.[62] New York and Massachusetts require only a statement in the application that the communications to be intercepted are not legally privileged.[63] Colorado, Florida, Nevada, and Wisconsin have general provisions for privileged communications.[63a]

¶21, Note 60a: For further discussion see generally Electronic Surveillance: Execution of the Order, infra at ¶¶ 9-11.

¶21, Note 61: Add the following to the second to last sentence of the quotation after "provided in section 8 of the act or that the public facilities" and before "are being regularly used by": or the place used primarily for habitation by a husband and wife . . .

¶21, Note 61: Replace the New Jersey citation, "N.J. Stat. Ann. § 2A:156A-11 (1971), as amended New Jersey Statutes § 2A:156A-11 (1975)" with the following: N.J. Stat. Ann. § 2A:156A-11 (West 1971) as amended by Act of June 23, 1978, ch. 61, 102 N.J.L.J. NL-42 (1978).

¶21, NOte 61a: R.I. Gen. Laws § 12-5.1-4(b) (Supp. 1978) is identical to the New Jersey statutory provision for public facilities. R.I. Gen. Laws § 12-5.1-4 (c) (Supp. 1977) differs from the New Jersey provision for privileged communications in that it does not explain what is meant by "special need" and it does not specify the same people. The Rhode Island statute specifies the following people: "a licensed attorney-at-law, or an ordained minister of the gospel, priest, or rabbi of any denomination, or is a place used primarily for habitation by a husband and wife."

¶21, Note 63a: Fla. Stat. Ann. § 934.08(4) (West 1973) ("No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of the provisions of this chapter shall lose its privileged character.") Colo. Rev. Stat. § 16-15-102(5) (1973) and Nev. Rev. Stat. § 179.465(3) (1973) are substantially similar. Wis. Stat. Ann. § 968.30(10) (West 1971) differs in that it mentions only attorney/client communications.

¶22: Re-letter "D." in heading to "E."

¶22, Note 64: Delete the section that follows after "18 U.S.C.A § 2518(4)(a) (1970)." and that comes before the quotation which begins with "The application must contain the following:" and substitute: The following statutes are identical to their federal counterparts: Fla. Stat. Ann. § 934.09(1)(b), (4)(a) (West Supp. 1979); Wis. Stat. Ann. § 968.30(1)(b)(4), (4)(a) (West 1971); Ariz. Rev. Stat. Ann. § 13-3010(B)(2)(b), (D)(1) (1978); Colo. Rev. Stat. Ann. § 16-15-102 (2)(b), (5) (1978). The New York, Pennsylvania, New Jersey, Rhode Island, and Nevada statutes are almost identical. N.Y. Crim. Proc. Law § 700.20(2)(b)(iv) (McKinney 1971) (modifying "offenses" in the requirements for the application by replacing "the" with "such designated") and

§ 700.30(2) (McKinney 1971); N.J. Stat. Ann. § 2A:156A-9(c)(1) (1971) (adding "particular" in front of "person" in the requirements for the application) and § 2A:156A-12(b) (1971) (allowing the order to state "a particular description of" the person or his identity); R.I. Gen. Laws § 12-5.1-2(b)(2)(iv) (Supp. 1977) and R.I. Gen. Laws § 12-5.1-5(1) (Supp. 1977) (adding "or a particular description of the person" after "the identity" to the specification for the form and content of orders); Nev. Rev. Stat. § 179.470(1)(b)(4) (1973) (allowing "has committed or is about to commit an offense" to the general requirement "who is committing" the offense); 18 Pa. Cons. Stat. Ann. § 5709(3)(I) and § 5712(A)(2) (adding "or a particular description of," after "the identity"), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session). The Massachusetts statute requires the application to include a statement of probable cause . . .

¶24: Omit and substitute: In United States v. Donovan,[68] the Supreme Court faced the issue of whether the government must name a known person where it has probable cause to believe the individual is committing a specified offense. During the course of a properly authorized wiretap of

suspected gambling operations, Government agents learned that respondents Donovan, Robbins, and Buzzaco were discussing gambling with individuals named in the warrant. An authorized extension identified five additional individuals and "others as yet unknown," but did not mention respondents. Donovan, Robbins, and Buzzaco were subsequently served with proper inventory notice, but moved for suppression of their intercepted conversations for failure to comply with 18 U.S.C § 2518 (1)(b)(iv), (4)(a) (1970).[69]

¶24, Note 68: Delete and substitute: 429 U.S. 413 (1977).

¶24, Note 69: Delete and substitute: Id. at 421.

¶24, Note 70: Delete and substitute: Id. at 428.

¶25: Omit and substitute: The court held in relevant part:

1. that § 2518(1)(b)(iv) requires the government to name all individuals it has probable cause to believe are involved in the suspect activities and whose conversation it expects will be intercepted,[70] and

2. that failure to notify the issuing judge of respondents' identities did not warrant suppression under § 2518(10)(a)(i) since the application provided sufficient information for the judge to determine that the statutory preconditions were satisfied, and because no

legislative history suggests that the statute's identification requirement plays a "central or functional role" in guarding against abusive use of wiretapping or electronic surveillance.[71]

¶25A: Although refusing to suppress the electronically seized evidence, the court in Donovan followed the Eighth Circuit's approach,[72] allowing suppression if government agents deliberately withheld information that would lead the court to the conclusion that probable cause was lacking.[73] The court further emphasized that strict compliance with Title III requirements is "more in keeping" with congressionally imposed duties.[73a]

¶25B: Where failure to name a known person in an application for wiretap authorization results in a failure to give inventory notice as required by 18 U.S.C. § 2518(8)(d), some courts have held that a showing of prejudice by the defendant justifies suppression of the wiretap evidence.[73b] The Fifth Circuit, on the other hand, concluded that Donovan rejects prejudice as a ground for suppression.[73c] This does not appear to be the most plausible reading of Donovan. Although the Court in Donovan found that the defendants in that case were not prejudiced, there seems to be little basis for an inference that the Court meant to exclude showings of prejudice in general from a determination of whether evidence should be suppressed.

¶25, Note 71: Delete and substitute: Id. at 435-37. See also United States v. Santarpio, 560 F.2d 448 (1st Cir. 1977), cert. denied, 434 U.S. 984 (1977).

¶25A, Note 72: Omit and substitute: United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), vacated on other grounds sub nom., United States v. Barletta, 430 U.S. 902 (1977), cert. denied, 430 U.S. 905 (1977).

¶25A, Note 73: Omit and substitute: 429 U.S. at 436. The court in Civella found that in absence of literal compliance with the statutory requirements and where substantial violations of "central and significant" provisions are found, suppression may still be required even though there was no prejudice to the defendant and there was good faith on the part of the Government. Civella at 1401.

¶25, Note 73a: 429 U.S. at 440.

¶25B, Note 73b: See, e.g., United States v. DiGirlomo, 550 F.2d 404 (8th Cir. 1977); United States v. Harrigan, 557 F.2d 879 (1st Cir. 1977). See also State v. Murphy, 148 N.J. Super. 542, 546-49, 372 A.2d 1315, 1317-18 (Super. Ct. App. Div. 1977) (suppression was not appropriate even though the individual was not named in the order where the affidavit did identify him).

¶25B, Note 73c: United States v. Sklaroff, 552 F.2d 1156, 1158 n.4 (5th Cir. 1977).

¶26: Re-letter "E." in heading to "F."

¶26: Add after the quote and just before "New York, New Jersey, and Massachusetts" the following: the statutory provisions of Arizona, Colorado, Florida, Nevada, Rhode Island, and Wisconsin are identical to section 2518(1)(c) of Title III.[74a]

¶26, Note 74a: Ariz. Rev. Stat. Ann. § 13-3010(B)(3) (1978); Colo. Rev. Stat. Ann. § 16-15-102(2)(c) (1978); Fla. Stat. Ann. § 934.09(1)(c) (West 1973); Nev. Rev. Stat. § 179.470(1)(c) (1973); R.I. Gen. Laws § 12-5.1-2(b)(3) (Supp. 1977); Wis. Stat. Ann. § 968.30(1)(c) (West 1971).

¶26: Insert after "New York, New Jersey," and before "and Massachusetts": Pennsylvania, . . .

¶26, Note 75: Add the following after "N.J. Stat. Ann. § 2A:156A-9 (c)(6) (1971)," but first delete the period at the end of the sentence and substitute a semicolon: 18 Pa. Cons. Stat. Ann. § 5709(3) (vii) as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶26, Note 75: Delete "N.J. Stat. Ann. § 2A:156A-10(c) (1971), as amended by New Jersey Statutes § 2A:156A-10(c) 1975)" and substitute: N.J. Stat. Ann. § 2A:156A-10 (c) (Supp. 1978-1979); 18 Pa. Cons. Stat. Ann. § 5710(A)(3), as amended by Act of _____,

¶28: Insert after the sentence ending with "the investigative alternatives.[77]" and before the sentence beginning with "the Ninth Circuit, on the other hand," the following: The Fifth Circuit held that "it is enough if the affidavit explains the prospective or retrospective failure of several investigative techniques that reasonably suggest themselves.[77a]"

¶28, Note 77a: United States v. Hyde, 574 F.2d 856, 867 (5th Cir. 1978). See also State v. Barnett, 354 So.2d 422, 424 (Fla.2d Dist. Ct. App. 1978) (all possible techniques need not be exhausted; "the act requires that they be reasonably exhausted only with respect to those individuals known (though perhaps their names are not known) to be criminally involved."); Cuba v. State, 362 So.2d 29, 32 (Fla.3d Dist. Ct. App. 1978) (the absence of a "complete statement" as to the failure of alternative investigative techniques for the investigation of criminal lottery activities did not render the affidavit insufficient); People v. Milnes, 186 Colo. 409, 417, 527 P.2d 1163, 1167 (1974) (the lower court held that wiretapping should be used as a "last resort" and used "only after reasonable attempts at pursuing all reasonable leads" were exhausted; the state supreme court held that this view was too strict).

Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶28, Note 77: Correction and insertion: 515 F.2d 29, 37-38 (3d Cir. 1978), cert. denied, 423 U.S. 858 (1976) (a simple factual precedent in the affidavit is sufficient); . . . United States v. James, 494 F.2d 1007, 1015-16 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1974).

¶28, Note 77: Add: United States v. Cifarelli, 589 F.2d 180, (5th Cir. 1979) (purpose of statute is to inform judge of the difficulties involved in using conventional techinques); United States v. Fury, 554 F.2d 522, 529 (2d Cir. 1977) (detectives stated that the suspects "were difficult to tail . . . very careful . . . constantly changing routes;" they had been successfully "bugged" before, and were consequently wary); United States v. Landmesser, 553 F.2d 17, 20 (6th Cir. 1977), cert. denied, 434 U.S. 855 (1977) (while investigating officers' conclusions based on prior experience are relevant, an affidavit based solely on such conclusions, without relation to the facts of the particular situation, would be invalid); United States v. Anderson, 542 F.2d 428, 431-32 (7th Cir. 1976).

¶28, Note 78: Correction: 514 F.2d 35, 38 (9th Cir. 1975), cert. denied, 423 U.S. 924 (1975).

¶28, Note 79: Correction: 529 F.2d 585 (9th Cir. 1975).

¶28A: In United States v. Spagnuolo,[80a] the Ninth Circuit attempted "once more to promulgate a manageable standard"[80b] between the Kerrigan and Kalustian decisions. It held:

1. To show "other investigative procedures have failed or will fail" the affidavit must reveal "that normal investigative techniques have been employed in a good faith effort . . . ."

2. Where they were not tried, an "adequate factual history," sufficient to enable the reviewing judge to determine such techniques would be unsuccessful or dangerous, must be presented.

3. "The district judge, not the agents, must determine whether the command of Congress has been obeyed.[80c]"

¶28A, Note 80a: 549 F.2d 705 (9th Cir. 1977).

¶28A, Note 80b: Id. at 710.

¶28A, Note 80c: Id. at 711. A recent New York case displays a similar attitude. In People v. Brenes, 53 A.D.2d 78, 385 N.Y.S.2d 530 (App. Div. 1st Dep't 1976), aff'd 42 N.Y.2d 41, 364 N.E.2d 1322, 396 N.Y.S.2d 629 (1977) the court observed that "[t]he police officers as well as the informers gained access

to the building and actually observed alleged couriers entering and exiting from both apartments. A "buy" was even arranged . . . . In sum, it appears from the record that normal investigative procedures were or could have been successful and the use of the wiretap was merely a useful additional tool. Accordingly, it should never have been authorized." 53 A.D.2d at 80, 385 N.Y.S.2d at 531-32.

¶28B: On January 18, 1979 in United States v. Baker,[80d] the Ninth Circuit declared that particularity as to each principle was required citing United States v. Abascal,[80e] but that the statute does not require "the indiscriminate pursuit to the bitter end of every non-electronic device as to every telephone and principal in question to a point where the investigation becomes redundant or impractical or the subjects may be alerted and the entire investigation aborted by unreasonable insistence upon forlorn hope."

¶28B, Note 80d: 589 F.2d 1008 (9th Cir. Jan. 18, 1979). Cf. United States v. Kilgore, 524 F.2d 957, 960 (5th Cir. 1975), cert. denied, 430 U.S. 905, rehearing denied (1976) (requirement that electronic surveillance be necessary refers not to the person whose conversation will be intercepted, but to the facts which make wiretapping necessary because of the nature of the particular crime

¶28B, Note 80e: 564 F.2d 821, 826 (9th Cir. 1977).

¶30: Re-letter "F." in heading to "G."

¶30, Note 84: Delete period at end of footnote and substitute a semicolon. Add: Fla. Stat. Ann. § 934.09(1)(d) (West 1973); R.I. Gen. Laws § 12-5.1-2(b)(4) (Supp. 1978); Wis. Stat. Ann. § 968.30(1)(d) (West 1971); Ariz. Rev. Stat. Ann. § 13-3010 (B)(4) (1978); Nev. Rev. Stat. § 179.470(1)(d) (1973); Colo. Rev. Stat. Ann. § 16-15-102(2) (d) (1978); 18 Pa. Cons. Stat. Ann. § 5709 (3)(vi), as amended by Act of _____, Pub. L. No. ____, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶30, Note 85: Delete the second and third sentence and substitute: The following state sections are again identical: N.Y. Crim. Proc. Law § 700.30(6) (McKinney 1971); N.J. Stat. Ann. § 2A:156A-12(f) (1971); Fla. Stat. Ann. § 934.09(4)(e) (West Supp. 1979); R.I. Gen. Laws § 12-5.1-5(a)(5) (Supp. 1977); Wis. Stat. Ann. § 968.30(4)(e) (West 1971); Ariz. Rev. Stat. Ann. § 13-3010(D)(5) (1978); Nev. Rev. Stat. § 179.475(1)(e) (1975); Colo. Rev. Stat. Ann. § 16-15-102(5)(e) (1973); 18 Pa. Cons. Stat. Ann. § 5712(A)(5), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill no. 191, 1977 Session).

¶30, Note 86: Delete the period at the end of the first sentence and substitute a semicolon: (McKinney 1971); . .

¶30, Note 86: Add after the semicolon: Fla. Stat. Ann. § 934.09(5) (West 1973); R.I. Gen. Laws § 12-5.1-5(b) (Supp. 1978); Wis. Stat. Ann. § 968.30(5) (West 1971); Ariz. Rev. Stat. Ann. § 13-3010(E) (1978); Nev. Rev. Stat. § 179.475(3) (1975); Colo. Rev. Stat. Ann. § 16-15-102(6) (1978).

¶30, Note 86: Add to the end of the footnote: Pennsylvania limits the initial authorization period to a maximum of twenty days with only one possible extension or renewal period which also has a twenty day maximum. 18 Pa. Cons. Stat. Ann. § 5712(B), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session) (note that § 5710 (a)(6) may lessen the burden of this limitation).

¶30, Note 87: Add the following at the end of the second sentence which ends with "New Jersey statutes § 2A:156A-12(f) (1975)," but first delete the period at the end of the sentence and substitute a semicolon: Ariz. Rev. Stat. Ann. § 13-3010(E) (1978); Colo. Rev. Stat. Ann. § 16-15-102(6) (1978); Fla. Stat. Ann. § 934.09(5) (West 1973) (see United States v. Cohen, 530 F.2d 43, 45-46 (5th Cir. 1976), cert. denied, 429 U.S. 855 (1978));

Nev. Rev. Stat. § 179.475(3) (1975); R.I. Gen. Laws § 12-5.1-5(b) (Supp. 1978); Wis. Stat. Ann. § 968.30(5) (West 1971).

¶30, Note 87: Correction: Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819, 841-844 (1975).

¶30, Note 87: Add to end of entire footnote: 18 Pa. Cons. Stat. Ann. § 5712(B) (uses the phrase "necessary under the circumstances"), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶31, Note 88: Delete and susbstitute: 18 U.S.C.A § 2518(1)(d) (1970); N.Y. Crim. Proc. Law § 700.20 (2)(e) (McKinney 1971); Fla. Stat. Ann. § 934.09 (1)(d) (West 1973); R.I. Gen. Laws § 12-5.1-2 (b)(4) (Supp. 1977); Wis. Stat. Ann. § 968.30 (1)(d) (West 1971); Ariz. Rev. Stat. Ann. § 13-3010(B)(4) (1978); Nev. Rev. Stat. § 179.470 (1)(d) (1973); Colo. Rev. Stat. § 16-15-102 (2)(d) (1978). The Massachusetts, Pennsylvania, and New Jersey sections have slight variants. Mass. Gen. Laws Ann. ch. 272, § 99(F)(2)(f) (West Supp. 1976); 18 Pa. Cons. Stat. Ann. § 5709(3)(vi), as amended by Act of _____, Publ. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session);N.J. Stat. Ann. § 2A:156A-9(c)(5) (1971).

¶31, Note 89: Delete all of the footnote that follows the first sentence. Substitute: The following statutes are identical: N.Y. Crim. Proc. Law § 700.30(6) (McKinney 1971); N.J. Stat. Ann. § 2A:156A-12(f) (West Supp. 1979-1980); Fla. Stat. Ann. § 934.09(4)(e) (West Supp. 1979); R.I. Gen. Laws § 12-5.1-5(a)(5) (Supp. 1978); Ariz. Rev. Stat. Ann. § 13-3010(D)(5) (1978); Nev. Rev. Stat. § 179.475(1)(e) (1975); Colo. Rev. Stat. Ann. § 16-15-102(5)(e) (1978); Wis. Stat. Ann. § 968.30(4)(e) (West 1971); 18 Pa. Cons. Stat. Ann. § 5712(A)(5), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session). Compare Mass. Gen. Laws Ann. ch. 272, § 99(I)(2) (Supp. 1976) ("If the effective period of the warrant is to terminate upon the acquisition of particular evidence or information or oral or wire communication, the warrant shall so provide.") See also State ex rel. Hussing v. Froelich, 62 Wis.2d 577, 600, 215 N.W.2d 390, 403 (1974) (The court found nothing wrong with an interception that "ceased after slightly more than a week upon realization of its objectives"; State v. Maloof, 114 R.I. 380, 388-91, 333 A.2d 676, 679-80 (1975) (The authorization for the telephone tap was defective in that it omitted

the "statute command" to stop the interception if the purpose of the order had been realized within thirty days); State v. Luther, 116 R.I. 28, 351 A.2d 594, 595 (1976) ("substantial compliance" is insufficient when three provisions which are required in the order were left out of both the original order and the extension).

¶31, Note 91: Omit and substitute: United States v. Calero, 473 F.2d 489, 496 (3d Cir. 1973), cert. denied 417 U.S. 918 (1974); Johnson v. State, 226 Ga. 805, 177 S.E.2d 699 (1970); State v. Siegel, 266 Md 256, 272-74, 292 A.2d 86, 95-96 (1972); People v. Pieri, 69 Misc.2d 1085, 332 N.Y.S.2d 786 (Erie County Ct. 1972), aff'd 41 A.D.2d 1031, 346 N.Y.S.2d 213 (4th Dep't 1973). But see United States v. Ventu, 533 F.2d 838, 861 (3d Cir. 1976) (failure to include minimization language does not make order fatal where basic guidelines were given and when there is a means to measure compliance with the minimization requirement); United States v. Cirvillo, 499 F.2d 872, 879 (2d Cir. 1974) (lack of minimization language in order did not make the order fatal when there was "other convincing evidence that the officers conducting the wiretap were aware of the minimization requirement and abided by it."); United States v. Baynes,

400 F. Supp. 285, 300-10 (E.D. Pa. 1975), aff'd mem., 517 F.2d 1399 (3d Cir. 1975) (lack of minimization language and lack of the provision requiring execution as soon as practicable were deemed a technical insufficiency, but were correctable by affidavit or testimony; Vitello v. Gaughan, 544 F.2d 17 (1st Cir. 1976), cert. denied, 431 U.S. 904 (1976) (every error does not warrant a writ of habeas corpus).

¶32: Re-letter "G." in heading to "H."

¶32, Note 92: Delete the second sentence only, "[t]he provisions for New York, New Jersey, and Massachusetts are substantially similar," and substitute for the sentence: The provisions for Florida, Arizona, and Nevada are identical to section 2518(1)(e) of Title III: Fla. Stat. Ann. 934.09 (1)(e) (West 1973) (Ariz. Rev. Stat. Ann. § 13-3010(B)(5) (1978); Nev. Rev. Stat. § 179.470 (1)(e) (1973). The provisions for Rhode Island, Wisconsin, Colorado, Pennsylvania, New York, New Jersey, and Massachusetts are substantially similar: R.I. Gen. Laws § 12-5.1-2(b)(5) (Supp. 1977) (substitutes "made to the presiding justice of the superior court" and "the action taken by the presiding justice of the superior court" in place of "made to any judge" and "the action taken by the judge"); Wis. Stat. Ann. § 968.30(1)(e) (West 1971) (substitutes "made

to any court" and "action taken by the court" for "made to any judge" and "action taken by the judge"); Colo. Rev. Stat. Ann. § 16-15-102 (2)(e) (1973) (begins with "A complete statement" instead of "a full and complete statement").

¶32, Note 92: Add at the end of the entire footnote: the application . . . shall contain:

* * * *

> A complete statement of the facts concerning all previous applications, known to the applicant made to any court for authorization to intercept a wire or oral communication involving any of the same facilities or places specified in the application or involving any person whose communication is to be intercepted, and the action taken by the court on each such application.

18 Pa. Cons. Stat. Ann. § 5709(5), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶32, Note 93: Delete and substitute: United States v. Bellosi, 501 F.2d 833, 836-40 (D.C. Cir. 1974). There, a warrant was issued authorizing a wiretap of the defendant in a gambling investigation and the resulting evidence was suppressed because the application failed to indicate that the defendant was named in a previous wiretap application which was made for an unrelated narcotics investigation. Compare United States v. Abramson, 553 F.2d 1164, 1169-70 (8th Cir. 1977), cert. denied, 433 U.S. 911 (1977)

(disclosure of 1970 wiretap in support of 1973 application without disclosure of the suppression of the 1970 application, which was pending appeal, did not satisfy the duty of disclosure, but did not require suppression; non-disclosure did not hinder judge's authorization and so suppression was not functional or central to guarding against abusive wiretapping). See also United States v. Kilgore, 518 F.2d 496, 500 (5th Cir. 1975) (statute requiring application to state facts concerning previous applications does not require a fully detailed statement about the contents of the interception, but a judge may so require), cert. denied, 425 U.S. 290 (1975).

¶33, Note 94: Delete and substitute: 18 U.S.C.A. § 2518(1) (1970); N.Y. Crim. Proc. Law § 700.20(1) (McKinney 1971); N.J. Stat. Ann. § 2A:156-9 (West 1971); Mass. Gen. Laws Ann. ch. 272, § 99(F)(1) (West Supp. 1976); Fla. Stat. Ann. § 934.09(1) (West 1973); R.I. Gen. Laws § 12-5.1-2(a) (Supp. 1978) (requires that the application also be subscribed); Wis. Stat. Ann. § 968.30(1) (West Supp. 1978-1979); Ariz. Rev. Stat. Ann. § 13-3010 (B)(2) (1978); Nev. Rev. Stat. § 179.470(1) (1973); Colo. Rev. Stat. Ann. § 16-15-102(2) (1978). The oath or affirmation need not be before the issuing judge. United States v.

Tortorello, 342 F. Supp. 1029, 1035 (S.D.N.Y. 1972), aff'd, 480 F.2d 764 (2d Cir. 1973), cert. denied, 414 U.S. 866 (1973).

¶33, Note 96: Add: But see United States v. Diadone, 558 F.2d 775, 777-78 (5th Cir. 1977), cert. denied, 434 U.S. 1064 (1978). Failure to date the order until shortly after the judge signed it was a clerical mistake which did not warrant suppression. The court declared that "[t]o the extent which this result departs from that reached by the Sixth Circuit in Lamonge, we decline to follow the Sixth Circuit's path."

¶34, Note 101: See also Ariz. Rev. Stat. Ann. § 13-3010A (1978) (any justice of the Supreme Court, judge of the court of appeals, or judge of the superior court); Colo. Rev. Stat. Ann. § 16-15-101(7) (1978) (any justice of the Supreme Court of Colorado and a judge of any district court of the state of Colorado); Fla. Stat. Ann. § 934.02(8) (West 1973) (justice of the supreme court, judge of a district court of appeal, circuit judge, or judge of any court of record having felony jurisdiction of the state) (United States v. Pacheco, 489 F.2d 554, 563 (5th Cir. 1974), cert. denied, 421 U.S 909 (1975) (State ex rel. Kennedy v. Lee, 274 So.2d 881 (Fla. 1973)).

¶34, Note 102: Add: See also 18 Pa. Cons. Stat. Ann. § 5702 as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session) (any judge of the Supreme Court may receive applications for, and enter orders authorizing interceptions of wire and oral communications); R.I. Gen. Laws § 12-5.1-3 (Supp. 1977) (the pending justice of the supreior court).

¶34: Add to end of paragraph: Wisconsin requires the application to be made to the Circuit Court in the county where the interception is to take place.[103a]

¶34, Note 103a: Wis. Stat. Ann. § 968.28 (West Supp. 1978-1979). The statute also provides that "[i]n the counties having more than one branch of the circuit court the application shall be made only to the lowest numbered branch having criminal jurisdiction." See also Nev. Rev. Stat. § 179.460 (1) ("to a Supreme Court justice or to a district judge in the county where the interception is to take place").

¶¶35,36,37: Delete and substitute:

¶35 The Supreme Court in Dalia v. United States[104] resolved the split among the lower courts regarding the constitutionality of, and requirements for, surreptitious entries to install

electronic surveillance equipment and/or maintain the equipment.[105] The Court held:

1. A covert entry for the purpose of installing an otherwise legal electronic bugging device is not per se prohibited by the Fourth Amendment.

2. Courts are given statutory authority to approve covert entries for the purpose of installing electronic surveillance equipment. The language, structure, purpose, and history of Title IV demonstrate that Congress meant to authorize courts to approve the use of electronic surveillance without limiting the means so long as they are reasonable under the circumstances.

3. Special authorization of covert entries on the premises described in the electronic surveillance order is not required by the Fourth Amendment.

¶36 Several states have enacted statutory provisions regarding requirements for surreptitious entries for installing, maintaining, or removing surveillance devices.[106]

¶35, Note 104: Delete and substitute: Dalia v. United States, 74 U.S.L.W. 4423 (1979).

¶35, Note 105: Delete and substitute: Some courts held or discussed in dicta that court authorization was required before a surreptitious entry was made to install an electronic surveillance device: United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977); Application of United States, 563 F.2d 637 (4th Cir. 1977); United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977). Other courts found authorization for surreptitious entry implied in a valid electronic surveillance order. United States v. Dalia, 575 F.2d 1344 (3d Cir. 1978); United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), cert. denied, 436 U.S. 903 (1978). The Sixth Circuit found that a judge has no authority to authorize a break-in in an electronic surveillance order in the absence of a specific statute authorizing such an entry and that Congress did not provide such a provision. United States v. Finazzo, 583 F.2d 837, 841 (6th Cir. 1978), cert. granted, 47 U.S.L.W. 3533 (1979) (No. 78-1051, 1979 Term).

¶35, Notes 106 to 108: Delete.

¶36, Notes 109 to 118: Delete.

¶36, Note 106: Substitute: Mass. Gen. Laws Ann. ch. 272, § 99(F)(2)(g), (I)(5), (K)(3) (Supp. 1979); Nev. Rev. Stat. § 200.650 (1975); N.Y. Crim. Proc. Law § 700.30(8) (McKinney 1971); 18 Pa. Cons. Stat. Ann. § 5712(G), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); R.I. Gen. Laws Ann. § 12-5.1-7(c) (Supp. 1978).

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Electronic Surveillance: Execution of the Order

Outline

Summary

¶1 Law enforcement officers engaged in electronic surveillance[1] must carry out four major post-authorization duties; failure in any one of them may result in suppression of part or all of wiretap evidence. The officers must:

1. minimize interception of nonpertinent conversations;
2. amend the surveillance order under appropriate circumstances;
3. seal the tapes upon termination of the tap; and
4. cause service of a notice of surveillance upon certain individuals.

The courts generally hold that the minimization requirement means that agents must make a reasonable good faith effort to minimize interception of nonpertinent and privileged conversations. Reasonableness is evaluated on a case-by-case basis. Agents must also obtain a prospective amendment, i.e., a new order, when they intercept evidence of a new crime where they have probable cause to believe that similar conversations will recur. A retroactive amendment is required when incidentally intercepted evidence of new crimes is to be used in either a grand jury or trial. Violations of the sealing and notice requirements have been treated in different fashions by the courts. Serious violations may cause suppression of all wiretap evidence and leads derived therefrom.

I. Minimization

¶2 Since electronic surveillance is a search and seizure, a wiretap must be conducted in strict compliance with the Fourth Amendment. Both the United States Constitution and applicable federal and state statutes thus require that the monitoring agents minimize intrusion on the suspect's privacy.[1a] The federal statute, for instance, provides:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be . . . conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter. [2]

¶3 The federal statute does not define the term "interception." The most prudent and logical definition is that a communication is intercepted when it is either overheard by a human ear or recorded by a mechanical device.[3] The New York statute adopts this definition.[4] A conversation can only be intercepted through the use of an electronic or mechanical device; simple overhearing by the naked ear does not constitute interception.[5]

A. What May Be Intercepted?

¶4 A communication is properly subject to interception under the federal scheme if it provides "evidence of" a violation of any of a designated list of offenses.[6] Under the New York statute, monitors must minimize interception of communications that were "not otherwise subject to eavesdropping under this article."[7] A communication is subject to interception if it "concern(s)" a designated list of offenses.[8] Under the New Jersey

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[1] As used in these materials the term electronic surveillance generally includes wiretapping and bugging, although the terms electronic surveillance and wiretapping are sometimes used interchangeably. Wiretapping generally refers to the interception (and recording) of a communication transmitted over a wire from a telephone, without the consent of any of the participants. Bugging generally refers to the interception (and recording) of a communication transmitted orally, without the consent of any of the participants. The term consensual surveillance refers to the overhearing, and usually the recording, of a wire or oral communication with the consent of one of the parties to the conversation. See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance xiii(1976).

[1a] See generally Comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories," 61 Cornell L. Rev. 92, 94-106 (1975). These materials are based largely on this Comment.

[2] 18 U.S.C. §2518(5) (1970).

[3] See, Comment, supra note 1a, at 99-105; Note, "Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies," 26 Stan. L. Rev. 1411, 1415-17 (1974).

[4] N.Y. Crim. Pro. Law §700.05(3) (McKinney 1971). N.J. Stat. Ann. §2A:156A-2(c) (West 1971) defines interception as "the aural acquisition of the contents of any wire or oral communications through the use of any electronic, mechanical or other device . . .," thus following 18 U.S.C. §2510(4) (1970) exactly. Mass. Gen. Laws Ann. ch. 272, §99.B(4) (1976), however, follows the New York rule.

[5] 18 U.S.C. §2510(4) (1970). See, e.g., United States v. McLeod, 493 F.2d 1186 (7th Cir. 1974) (overhearing one-half of phone conversation without device not "interception").

[6] Id. §2516(1).

[7] N.Y. Crim. Pro. Law §700.30(7) (McKinney 1971).

[8] Id. §700.15(3).

statute, monitors must "minimize or eliminate" interceptions of communications "not otherwise subject to interception under this act."[9] The basic thrust of all three statutes is that conversations that are irrelevant to the investigation and that do not provide evidence of commission of a crime are not to be intercepted.

¶5 A conversation providing information useful and relevant to the investigation probably may be intercepted even if it does not provide direct evidence of the commission of a crime. For instance, one federal court allowed interception of a call to the telephone company

[9] N.J. Stat. Ann. §2A:156A-12(f) (as amended, New Jersey Statutes §2A:156A-12(f) [1976]). The Massachusetts statute contains no explicit minimization language. The absence of such language formed the basis of an attack on that statute in Commonwealth v. Vitello, ___Mass.___, 327 N.E.2d 819 (1975). The defendants there argued that the failure to include such language caused the statute to fall short of meeting the minimum requirements of the federal statute. In rejecting this argument the Supreme Judicial Court held that as long as the state procedures fully and effectively achieve the results sought through minimization the absence of express language would not render the statute invalid. The court cited Mass. Gen. Laws Ann. ch. 272, §99.F(2)(b) (1976) (designation of specific listening periods), §99.F(2)(d) (particular description in the authorization order of communications to be intercepted), and §99.M(c) (monitor returning warrant must describe conversations overheard but not recorded) as indicating that the state procedures demonstrated a high regard for privacy interests and that reasonable efforts would be made to avoid unnecessary intrusions. The Massachusetts court thus emphasized the importance of minimization while rejecting the attribution of any talismanic significance to the use of the term. Federal precedents played a part in this decision; the court cited United States v. Manfredi, 488 F.2d 588, 598 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974), as holding that the absence of an express minimization directive in an order does not necessarily render the order invalid. By analogy, the court held that a similar absence of minimization language in a statute would not render the statute invalid if minimization purposes are otherwise met.

(to find out whether telephone service was about to be discontinued), calls to travel agencies and airlines (to keep track of the movements of what was described as an international heroin ring), calls to a bank to procure money (because money was needed to buy narcotics), and calls to persons who were not identified (because one purpose of the tap was to develop the extent and identity of the conspiracy).[10] No totally reliable formula exists for identifying calls that are not subject to interception. Clearly, conversations between known conspirators about the conspiracy should be intercepted. Conversations about the conspiracy between a conspirator and an unidentified party are nearly always subject to interception. Just as clearly, conversations between two known innocent parties about an innocent subject should not be intercepted. Between these two extremes, however, lies a gray area which must be determined anew in each case. The following discussion should help to make this determination easier.

B. The Permissible Scope of Interception

¶6 Because the monitors never know exactly what they are about to hear until they hear it, their efforts at minimization are usually not completely successful. Interception of a single irrelevant portion of a conversation, however, is

[10] United States v. Falcone, 364 F. Supp. 877, 882 (D.N.J. 1973), aff'd, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

usually not grounds for suppression. The standard applied is a rule of reason. The monitors must make a reasonable effort to "minimize out" the greatest possible number of irrelevant conversations.[11] Each case is evaluated on its own facts, using the perspective of the agent on the spot. A court may thus find that a reasonable effort in one case could be completely unreasonable in another.[12] The reasonableness of the minimization effort is judged by using up to six variables. Which of these variables applies will depend on the circumstances of each case.

1. Objective of the investigation: When the aim of the electronic surveillance is to explore a complex, far-flung conspiracy, the courts generally will find a wider range of calls to be relevant and allow the monitors a wider margin of error.[13] When the objective is more modest, such as conviction of a known individual, the courts enforce minimization much more literally. 14

2. Location of the telephone: When the telephone is located in a known criminal headquarters, the courts allow interception of almost any conversation. 15

[11] See United States v. Armocida, 515 F.2d 29, 42-43 (3d Cir. 1975), cert. denied, U.S. (1976); United States v. Bynum, 360 F. Supp. 400, 409-10 (S.D. N.Y.), aff'd, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974). But see United States v. Scott, 516 F.2d 751, 756 (D.C. Cir. 1975) (holding that agents need not make any minimization effort at all as long as one-hundred percent interception is ultimately found to be reasonable under the circumstances).

[12] See United States v. Bynum, 360 F. Supp. 400, 412-13 (S.D.N.Y. 1973).

[13] See, e.g., United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

[14] See, e.g., United States v. George, 465 F.2d 772 (6th Cir. 1972).

[15] See, e.g., United States v. James, 494 F.2d 1007, 1021-23 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975).

When the telephone is in a family residence or public place, however, the monitors must expect that a high percentage of the calls will not be relevant, and the courts allow a smaller margin of error. 16

3. Nature of the criminal enterprise: Where the subject-matter of the conspiracy is complex, such as in many large narcotics cases, the courts allow a greater margin of error. 17 Where the subject is simpler, such as in a low-level gambling case, the courts allow fewer improper interceptions. 18

4. Use of code: When the suspects use code or guarded and ambiguous language, the courts allow a wider margin of error. 19

5. Length of time surveillance has run: The monitors and supervising attorney are expected to try to work out any codes and improve their screening plans, so that minimization results should improve over the duration of the tap. Interception of nearly all communications might, therefore, be permissible at the beginning of a complex wiretap, but the supervising attorney must thereafter try to devise a set of screening rules to guide the monitors in their minimization efforts. 20

[16] See, e.g., United States v. Sisca, 361 F. Supp. 735 (S.D.N.Y. 1973), aff'd, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974).

[17] See, e.g., United States v. Quintana, 508 F.2d 867, 873 (7th Cir. 1975); United States v. Scott, 516 F.2d 751, 753-54 (D.C. Cir. 1975).

[18] See, e.g., United States v. George, 465 F.2d 772 (6th Cir. 1972).

[19] See, e.g., United States v. Bynum, 360 F. Supp. 400, 412-13 (S.D.N.Y. 1973).

[20] See, e.g., United States v. Falcone, 364 F. Supp. 877, 880-81 (D.N.J. 1973). See also, United States v. Chavez, 19 Crim. L. Rptr. 2101 (9th Cir. March 31, 1976) (limiting of tap to nine and one-half days sufficient minimization; supervising attorney showed good faith in instructing monitors in a screening method).

6. Judicial supervision: If the authorizing judge plays an active role in the ongoing surveillance, later courts ruling on the minimization question usually give special deference to the original judge's conclusions. 21 The prosecutor who secures the judge's approval of an ongoing minimization plan has a powerful defense at a subsequent suppression hearing.

¶7 When the defendant moves to suppress for failure to minimize, therefore, the intercepted materials are judged on a case-by-case basis. The minimization effort must have been reasonable under the circumstances at the time of interception. The best defense at the hearing is usually to call the monitoring agents and elicit from them a point-by-point explanation of the minimization plan, in impressive detail.

¶8 In a complicated investigation the supervising attorney or law enforcement supervisor typically should visit the interception site (plant) on a regular basis. On these visits, he should discuss the tap's output with the monitors, helping them distinguish calls that are pertinent from ones that are not. He should review the plant reports daily and try to discern certain categories of calls that can be immediately minimized out. When he finds such a category--such as calls by the children from a family-dwelling telephone--he should have signs posted at the interception site instructing the monitors to shut off on all such calls. These instructions should constantly be re-evaluated and revised throughout the duration of the tap. Regular written reports to the

[21] See, e.g., United States v. Bynum, 360 F. Supp. 414-15 (S.D.N.Y. 1973).

judge on the progress of the investigation and the relative success of minimization are also helpful. The judge may even be invited to observe the interception station in operation. Each step helps show diligent application of the minimization rule; the more concrete steps to point to, the easier it will be to defeat a defense motion for suppression.

C. Privileges and Immunities

¶9 The supervising attorney must carefully ensure that the monitors minimize out calls protected by the lawyer-client privilege. Any call to a lawyer is privileged (and therefore not subject to interception) when the lawyer is acting in his professional, advisory capacity.[22] Calls concerning ongoing criminal activity are not privileged, but a call requesting advice concerning past criminal activity is privileged.[23] The lawyer may not claim the privilege to shield his incriminating statements, for the privilege is for the client's benefit only.[24] Where the lawyer is a conspirator, his incriminating calls may be intercepted. Any calls

[22] Id. at 417.

[23] See generally 8 J. Wigmore, A Treatise on the Anglo-American System of Evidence, (McNaughton rev. 1961) §§2290, 2291, 2298, 2310, 2321, 2326; Note, "Government Interceptions of Attorney-Client Communications," 49 N.Y.U. L. Rev. 87 (1974).

[24] United States v. King, 335 F. Supp. 523, 545-46 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974).

giving legitimate advice to a client must be screened out, however, even if the client volunteers highly incriminating information about past criminal activity. Under no circumstances may a call between an indicted person and his lawyer be intercepted; mere interception of such a call may result in a mistrial.[25] Unless the lawyer is a conspirator, the most prudent course is to instruct the monitors not to intercept any conversation involving a lawyer.

¶10 Use of a police informant to entice an indicted person into making incriminating statements over a wiretapped line is prohibited by the Supreme Court's holding in Massiah v. United States.[26] It is unclear how far this holding might be extended to protect conversations involving indicted persons. Unless there is a compelling reason to intercept such a conversation, therefore, the most prudent policy is to minimize out persons under indictment.

¶11 In one case, husband and wife defendants contended that conversations between them were protected by the marital privilege.[27] The Seventh Circuit disagreed

[25] See, e.g., Coplon v. United States, 191 F.2d 749, 757, 759 (D.C. Cir. 1951), cert. denied, 342 U.S. 926 (1952). Interception of a conversation between an indicted person and his lawyer that concerned inconsequential events might not offer grounds for a mistrial. Such a conversation would doubtless be irrelevant, and should as a matter of course be minimized out.

[26] 377 U.S. 201 (1964).

[27] United States v. Kahn, 471 F.2d 191, 194-95 (7th Cir. 1972), rev'd on other grounds, 415 U.S. 143 (1974).

and applied the privilege only to conversations that were truly private and non-criminal. Any incriminating husband-wife conversations were properly intercepted, the court ruled. This interpretation adds nothing to the basic minimization rule, since private, non-criminal conversations should be minimized out even in the absence of a privilege.

D. Techniques

¶12 There are three ways to minimize: extrinsic, intrinsic, and a combination of the two. Extrinsic minimization means using methods not based on the content of individual calls. These include visual surveillance of the telephone to determine when the suspect is making a call,[28] and limiting interception to certain periods of the day.[29] Extrinsic minimization can be highly effective if visual surveillance is feasible and the suspects are identified. It is also useful when the suspect uses the telephone at a set time each day, or only uses it during specific hours. If neither condition obtains, extrinsic methods will be almost useless. New Jersey has adopted extrinsic minimization by statute.[30]

[28] See, e.g., Katz v. United States, 389 U.S. 347, 354 n. 14 (1967).

[29] See, e.g., State v. Dye, 60 N.J. 518, 527, 291 A.2d 825, 829, cert. denied, 409 U.S. 1090 (1972).

[30] N.J. Stat. Ann. §2A:156A-12(f) (as amended, New Jersey Statutes §2A:156A-12(f) [1976]). Amended to add the extrinsic minimization rule.

¶13 Intrinsic minimization bases its screening method on the content of each call as it is intercepted. The monitor listens to the first 30 seconds or so, and if it is nonpertinent he discontinues interception. If the call is one that could become pertinent, the monitor may sample the call at regular intervals to ensure that neither the subject matter nor the parties have changed.[31] If the conversation becomes pertinent, the monitor resumes continuous interception.

¶14 In order for intrinsic minimization to work properly it is essential that all interception be by simultaneous recording and overhearing. If the agent overhears without recording, he has no solid proof of what he heard. Such a procedure is also expressly discouraged in the federal and New York statutes.[32] If the agent records without overhearing, he is intercepting without minimizing and so leaves the surveillance vulnerable to motions for suppression.[33]

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[31] Sampling is necessary to thwart wary criminals who slip a short, incriminating segment into a long, chatty personal call. See a classic example of this stratagem in United States v. King, 335 F. Supp. 523, 541 (S.D. Cal. 1971).

[32] 18 U.S.C. §2518(8)(a) (1970); N.Y. Crim. Pro. Law §700.35(3) (McKinney 1971). Commonwealth v. Vitello, ___Mass.___, 327 N.E.2d 819, 842 (1975) does not specify a favored means of minimization, but the discussion of how the statute requires minimization without any express language seems to suggest that a combination of extrinsic and intrinsic minimization should be used.

[33] People v. Castania, 73 Misc.2d 166, 172, 340 N.Y.S. 2d 829, 835 (Moore County Ct. 1973).

¶15 The intrinsic method is usually the most effective, and is accordingly the rule in New York and federal courts.[34] In some cases this method may be further refined by adding extrinsic techniques. If the telephone is a pay phone on the street, for instance, one agent can maintain visual surveillance, informing the interception site when the suspect enters the booth. If the monitors then apply intrinsic minimization, the results are likely to be irreproachably legal, and there would be no risk of suppression.

II. Amendment

¶16 The authorization order sets out the names of the persons, if known, whose communications are to be intercepted, and specifies the crime that is being investigated.[35] Quite frequently, the intercepted communications provide evidence of a crime not mentioned

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[34] See, e.g., United States v. Askins, 351 F. Supp. 408, 415 (D. Md. 1972). But see a recent development in the Chavez case, United States v. Chavez, 19 Crim. L. Rptr. 2101 (9th Cir. March 31, 1976). The court approved a kind of extrinsic minimization, holding that a tap limited to nine and one-half days was sufficiently minimized despite the interception of all calls except those between attorney-client and priest-penitent. The court cited approvingly the supervising attorney's instructions to the monitors regarding the importance of minimization. The difficulty of establishing a pattern of innocent/culpable calls appeared to the court as justification for the failure to use intrinsic minimization.

[35] 18 U.S.C. §§2518(4)(a), (c)(1970); N.Y. Crim. Pro. Law §§700.30(2), (4) (McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c) (as amended, New Jersey Statutes §2A:156A-9(c) [1976]). See also Mass. Gen. Laws Ann. ch. 272, §99.F(2) (1976).

in the order (a "new crime"), or incriminate a person not named in the order (a "new person"). While the tap is in progress the supervising attorney or law enforcement supervisor must constantly watch for new crimes or new persons, for in either event he may have to move swiftly to amend the authorization order. The statutory provisions are disarmingly simple, but the practical problems are subtle and confusing. Note, too, that interceptions of conversations relating to new crimes may be used in different ways. Different uses have different limitations. Disclosure for "law enforcement" purposes or use as the basis of application for search warrants or wiretaps may be made without a retroactive amendment of the original order.[36] Disclosure or use as evidence at trial or before a grand jury requires that a retroactive amendment be sought as soon as practicable.

A. New Crime

¶17 Use of intercepted communications that provide evidence of a new crime is specifically permissible under the federal, New York, and New Jersey statutes. The federal statute allows use of "communications relating to offenses other than those specified in

[36] See United States v. Vento, 19 Crim. L. Rptr. 2102 (3d Cir. March 16, 1976) (failure of agents to obtain a disclosure order for narcotics information overheard on a fencing tap before using it to obtain another tap held not to require suppression).

the order of authorization."[37] The New York and New Jersey statutes similarly allow use of intercepted communications which were not otherwise sought.[38] As noted above, in both statutes such a communication may be used in evidence before a grand jury or at trial only when, upon subsequent application, a judge finds that the communication was lawfully intercepted. This application to the judge must, under all three statutes, be made "as soon as practicable."[39]

¶18 This set of requirements, in effect, establishes a procedure for use of conversations that were not the object of the investigation but were found in "plain view." This procedure flows from the common law exception to the strict warrant requirements of the Fourth Amendment. At common law, if a search warrant specifies that a gun is to be seized and the searching officer finds heroin, the heroin is admissible in evidence if it was found inadvertently in a lawful search for guns.[40] The heroin

[37] 18 U.S.C. §2517(5) (1970).

[38] N.Y. Crim. Pro. Law §700.65(4) (McKinney 1971); N.J. Stat. Ann. §2A:156A-18 (West 1971).

[39] Id. Throughout these materials this statutory procedure is referred to as a "special application." The term "amendment" refers to a different concept and process. A special application requests retrospective permission to use a conversation that has already been intercepted. An amendment alters the wording of the order prospectively to permit future interception of some kind of conversation, in effect a new order. Most courts have unfortunately used the term "amendment" to refer to both concepts and so have confused the two.

[40] Cady v. Dombrowski, 413 U.S. 433 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

is, however, inadmissible if the officers had expected to find it from the beginning but had not applied for a warrant covering it.[41] The heroin is also inadmissible if found in a place where the officers could not possibly have been searching for guns (e.g., inside a slim sealed envelope).[42]

¶19 These hornbook principles constitute the background against which the interpretation of the wiretap statute should go forward. The central question is whether the new material intercepted relates to a "new crime." This question, moreover, takes on tortuous complexity in joint state-federal investigations. In such investigations, the authorization order, the offense being investigated, and the offense finally charged may be either state or federal in origin or they may overlap. When is a retroactive amendment needed in such a situation? Unfortunately the courts have not resolved this issue. In Moore v. United States,[43] the District of Columbia Circuit interpreted a provision in the District of Columbia Code identical to 18 U.S.C. §2517(5). In that case, evidence which was obtained from wiretaps authorized for the investigation of D.C. gambling

[41] People v. Spinelli, 35 N.Y.2d 77, 80-81, 315 N.E.2d 792, 794, 358 N.Y.S.2d 793, 746-47 (1974).

[42] In such a case, the search would have gone further than authorized by the warrant. The heroin could only have been found during the unauthorized search, and so is suppressible as a direct "fruit" of a violation of the Fourth Amendment.

[43] 513 F.2d 485, 500-03 (D.C. Cir. 1975).

offenses was disclosed to federal agents and used as the basis for prosecution of federal gambling offenses involving additional essential elements. The defendant contended that judicial approval was required to use the wiretap results as evidence in the federal prosecution. The Court of Appeals rejected this contention, holding that it did not "believe that there was any interception 'relating . . . to offenses other than those specified in the order of authorization' within the meaning of the D.C. wiretap law."[44] The court held that since the intercepted conversation did relate to the specified D.C. gambling offenses, it was immaterial that they also "constituted evidence of federal offenses."[45]

¶20 The Seventh Circuit, in United States v. Brodson,[46] however, took a different position regarding a case in which there was even less disparity in authorized crime and intercepted evidence than in Moore. There, the government was authorized to investigate the operation of an illegal gambling business in violation of 18 U.S.C. §1955. The defendant was finally charged with the transmission of wagers and wagering information in violation of 18 U.S.C. §1084. The government's application section 2517(5) came eight months after the indictment was returned by the grand jury that considered the

[44] Id. at 501.

[45] Id. at 503.

[46] 528 F.2d 214 (7th Cir. 1975).

intercepted conversations. The Court of Appeals held that the application was untimely. The court's decision rests on two grounds; first, it ruled that the two offenses were separate and distinct, despite a certain overlapping. Second, and most important, it held that the government's assumption that the offenses were identical should have been tested by a neutral judge through an amendment proceeding. In fact, it is questionable that an amendment need have been obtained at all since the evidence overheard relates to the crime specified.

¶21 The Second Circuit recently followed Brodson. In United States v. Marion,[47] the court held that subsequent judicial approval was required by section 2517(5) before communications intercepted pursuant to state court authorized wiretaps could be used in federal grand jury and criminal proceedings. In this case, a wiretap was used in the investigation of, inter alia, the state crime of illegal possession of a dangerous weapon. The order was never renewed, extended, or amended, but the intercepted communication was used to question Marion before a grand jury about possible violation of 18 U.S.C. §§371, 922, which concern the transportation and transfer of an unregistered firearm through interstate commerce. The court held that the federal offense was separate and distinct from the

[47] Docket No. 75-1408 (2d Cir. May 7, 1976).

alleged state offense, which formed the basis of the original wiretap order, and that it thus fell within section 2517(5), citing Brodson.[48] Again, it is doubtful that an amendment was needed.

¶22 The law on this issue remains in doubt. Brodson and Marion may point to a trend but Moore and Justice Anderson's dissent in Marion show that other opinions persist. The prosecutor should, however, understand that he may face a "new crime" issue even if the underlying transaction falls within the original order. Prompt application for amendment may be the safest course to follow until the split in the circuits is resolved.

¶23 A single conversation providing evidence of a new crime (a "new conversation") is easily handled. If the supervising attorney or officer is certain that the conversation will never be used in evidence in any

[48] Judge Anderson dissented strongly to this holding. He cited Moore in opposition and argued that two earlier Second Circuit cases, United States v. Grant, 462 F.2d 28 (2d Cir. 1972) and United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973) demanded a more flexible reading of section 2517(5). Chief Judge Kaufmann, for the majority, distinguished these two cases from Marion. He argued that Grant did not hold that a state crime and a federal crime were, for purposes of section 2517(5), so closely related as to eliminate the need for subsequent judicial approval. According to Judge Anderson, in Tortorello the Second Circuit merely held that the requirement of subsequent approval was satisfied by the procedures observed (amendment by reference to affidavits on an extension). In light of the plain view background of section 2517, Anderson had the better of the argument, but Kaufmann had the votes.

grand jury or at any trial, he may disregard it.[49] If he wants to preserve his ability to use the conversation at any trial, however, he must follow the statutory procedure. As soon as practicable (that is, usually immediately) he must make a special application to any judge of competent jurisdiction. The application should show simply that the conversation was in plain view--that it was intercepted inadvertently while the surveillance was being lawfully conducted.

¶24 When the judge signs the application the prosecutor has satisfied the conditions for later use of the conversation in evidence. The decision is reviewable, however, for the defendant may always move to suppress the conversation later on any of several grounds.[50]

¶25 The most common error in the use of this procedure

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[49]This is because the statutes mandate an application to the judge as a precondition only to use of the specific new conversations in evidence. If the application is not made, those particular conversations cannot be used in evidence, but the rest of the wiretap evidence is unaffected. When the supervising attorney wishes to use the new conversation in evidence, he must make his application to the judge "as soon as practicable." Tardy prosecutors have made the applications on the eve of trial; see, e.g., United States v. Cox, 449 F.2d 679 (10th Cir. 1973), cert. denied, 406 U.S. 984 (1974); United States v. Denisio, 360 F. Supp. 715, 719 (D.Md. 1973).

[50]He may, for instance, allege that the application was not timely. He might also argue that the surveillance was not properly minimized and that the conversation would not have been overheard under a valid minimization procedure. Finally, he might argue that the monitors knew the conversation was going to occur, and so did not intercept it inadvertently. This last argument is discussed in detail infra.

is delay in applying to the judge. Although most courts so far have declined to suppress when the application was not made "as soon as practicable,"[51] any delay at all invites a motion to suppress. It is most prudent, therefore, to make the application to the judge on the same day as the interception, if possible, and certainly within 24 to 48 hours. This procedure will be burdensome if a number of new conversations show up at regular intervals, but an application to the judge will be necessary for each one.

¶26 The problems begin to arise when one considers a real-life wiretap. Many conversations are ambiguous; their relationship to a new crime may not become clear until long afterward. Other conversations may provide evidence of two crimes, one of which is specified in the authorization order and one of which is not. The supervising attorney's or officer's duties in these situations are not entirely clear. Much depends on the particular sequence of events. If the agent overhears conversations pertaining to a new crime on the first day of a lengthy wiretap an amendment should be secured immediately. If the tap is short term, the new conversation ambiguous, and the judge informally kept aware of any new developments, the government may be able to wait until the time of applying for an extension to request an amendment. The

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[51]See, e.g., United States v. Denisio, 360 F. Supp. 715 (D.Md. 1973); People v. Ruffino, 62 Misc.2d 653, 309 N.Y.S.2d 805 (Sup. Ct. Queens County 1970).

safest course, however, is to apply for an amendment as soon as the conversation appears to pertain to a new crime.

¶27 The most serious problem by far arises due to the interception of unanticipated conversations, as the investigation branches out to encompass the new crime. At a certain point, the monitors begin to expect to hear such conversations and include them in their search. Where probable cause to believe they will occur exists, interception is thus no longer inadvertent and the conversations are not in plain view. In short, the monitors are now searching for communications not specified in the order. This violates the Fourth Amendment's requirement of particularity. The order must therefore be amended to include the new crime.[52]

¶28 This amendment differs completely from the special application to the judge described in the statute. The special application retrospectively legitimizes use of an already intercepted conversation. The amendment opens up the scope of the order prospectively to permit future interception of the new conversations. Because this prospective amendment is actually an addition to the authorization order, it must be supported by the usual showings of probable cause and must satisfy all the statutory requirements for an application. The

[52] See, e.g., People v. DiLorenzo, 69 Misc. 2d 645, 652, 330 N.Y.S.2d 720, 727 (Rockland County Ct. 1971).

statutes nowhere mention this procedure for a prospective amendment, but it is clearly a constitutional requirement where the supervising attorney or officer seeks to continue intercepting new conversations.[53]

¶29 For example, the monitors may intercept a new conversation halfway through a gambling wiretap. The supervising attorney dutifully makes a special application for use and the judge signs it. The conversation was cryptic and not easily decipherable although it probably referred to an incipient robbery of some sort. The investigators may suspect that a robbery is being planned, and guess that more of these conversations will occur, but cannot show it under a probable cause standard. Now the investigators are in a dilemma. Further conversations are arguably not in plain view, because they are expected. If they are thus "otherwise sought" in the language of the New York statute, the judge might not sign the special applications. But because the first conversation was so cryptic the investigators cannot establish probable cause based on it alone, and so cannot obtain a prospective amendment either.

¶30 The prosecution faced this dilemma in People v. DiStephano.[54] Eleven days after the first cryptic

[53] Id. Note, however, that if surveillance terminates upon interception of a new crime, there is no need for a prospective amendment. All that is required is a special application for the one new conversation already intercepted. People v. Ruffino, 62 Misc.2d 653, 659, 309 N.Y.S.2d 805, 811 (Sup. Ct. Queens County 1970).

[54] People v. DiStefano, 38 N.Y.2d 640, 345 N.E.2d 548, 382 N.Y.S.2d 5 (1976).

conversation the monitors intercepted four similar, detailed calls in a single day. The investigators had not obtained a prospective amendment in the interim because the first conversation did not supply probable cause. The defendants argued for suppression of the second group of conversations, and the New York Appellate Division agreed, reasoning that the conversations were expected, and so were "otherwise sought."[55]

¶31 The Court of Appeals reversed, but did so without laying down guidelines for how to deal with this ambiguous situation. The court ruled:

> [The inadvertence] requirement is intended to protect citizens against anticipated discoveries, such as occurred in Spinelli,[56] where, knowing the location of certain tangible evidence and with ample time to obtain a warrant, enforcement officers intruded into the privacy of the accused without obtaining a prior judicial determination of probable cause to enter upon the premises. Here, in contrast, neither the [first] nor the [second] conversations could have been foreseen and, thus, were not proscribed anticipated discoveries. While it may be true that after [the first conversation] the authorities knew of defendant and his plans, nevertheless, on the basis of the [first] conversation alone, the authorities lacked probable cause to seek amendment of the warrant to include [the new crimes] . . . . Indeed, the police had no grounds upon which they could reasonably have asserted that defendant would use Jimmy's Lounge telephone again. We conclude, therefore, that the [second] conversations were inadvertantly overheard and, thus, were discovered in "plain view." 57

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[55] 45 App. Div. 2d 56, 60-61, 356 N.Y.S.2d 316, 320-21 (1st Dept. 1974).

[56] People v. Spinelli, 35 N.Y.2d 77, 315 N.E.2d 792, 358 N.Y.S.2d 743 (1974).

[57] People v. DiStefano, 38 N.Y.2d 640, 649, 345 N.E.2d 548, 553, 382 N.Y.S.2d 5, 10 (1976).

¶32 In most cases this holding will solve the problem by defining the first new conversations as being overheard inadvertently and thus "found" in plain view. The supervising attorney or officer should thus make special applications for use of each new conversation, until he decides that he has accumulated probable cause. At this point he should immediately submit an application for an amendment of the wiretap in the usual form, supported by affidavits and a showing of probable cause, opening up the original order to include the new crime. Thereafter the new conversations will be properly intercepted under the amended order, and no further special applications are necessary.

B. New Person

¶33 There appears to be no constitutional requirement that the authorization order name the persons whose communications are to be intercepted.[58] The federal and New York statutes therefore require only specification of persons "if known."[59] The interception of communications

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[58] See Comment supra note 1a at 137-38, for a discussion of this point.

[59] 18 U.S.C. §2518(b)(iv) (1970); N.Y. Crim. Pro. Law §700.30(2) (McKinney 1971). N.J. Stat. Ann. §2A:156A-12 (as amended, New Jersey Statutes §2A:156A-12 [1976]) also requires specifications of persons "if known." Cf. Mass. Gen. Laws Ann. ch. 272, §99.F(2)(b) (1976) which requires a particular description of the individual whose communications will be intercepted, and a statement of facts indicating that those communications will constitute evidence of a designated offense.

by persons not named in the order thus does not raise a constitutional question. The only problem is whether the statute requires the supervising attorney or officer to make a special application for use or to amend the order to add new names.

¶34 Under federal law, so far, the answer is clearly "no." Unless the authorization order specifically restricts interception to certain persons, the monitors are free to intercept and use relevant conversations involving anyone.[60] The federal special application procedure applies to "offenses other than those specified in the order," but makes no mention of persons not named in the order.[61]

¶35 The state of New York law on this point is somewhat less clear. New York requires a special application for use when the monitors intercept a communication "which was not otherwise sought."[62] The New York Court of Appeals has ruled that "[w]here the communication intercepted involves the crime specified in the warrant, the named suspect, and an unknown outside party, . . . the communication is 'sought' and no amendment is required . . . . Thus, the legislative intent was to require amendments where

[60] See United States v. Cox, 449 F.2d 679, 686-87 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972); United States v. Ianelli, 339 F. Supp. 171, 177 (W.D. Pa. 1972); United States v. LaGorga, 336 F. Supp. 190, 192-93 (W.D.Pa. 1971).

[61] 18 U.S.C. §2517(5) (1970).

[62] N.Y. Crim. Pro. Law §700.65(4) (McKinney 1971).

different crimes are disclosed."[63]

¶36 The last sentence of this quotation indicates that the court probably would never require a special application or amendment of the warrant for a conversation involving a new person. Note, however, that the precise holding applies only to a conversation involving the named crime, the named person, and an unidentified third party. The court did not spell out what to do when the third party is identified but unnamed, or when the conversation is between two unnamed persons about the named crime. Special applications should not be required in these situations, but there are as yet no New York cases so holding.

¶37 The New York picture is somewhat complicated by the Second Circuit's interpretation of New York law in United States v. Capra.[64] The order in that case authorized interception of "communications of Joseph DellaValle with co-conspirators."[65] The monitors inadvertently confused DellaValle's voice with that of one DellaCava, but failed to amend the warrant to include DellaCava's name until 17 days after they realized their error. Because the order restricted

[63] People v. Gnozzo, 31 N.Y.2d 134, 143-44, 286 N.E.2d 706, 710, 335 N.Y.S.2d 257, 263 (1972), cert. denied, 410 U.S. 943 (1973) (emphasis added).

[64] 501 F.2d 267 (2d Cir. 1924), cert. denied, 420 U.S. 990 (1975).

[65] Id. at 273 (emphasis added).

interception to calls of DellaValle "with" co-conspirators, the Second Circuit ruled that the monitors had no authority to intercept calls of DellaCava during the 17 day period preceding the amendment. The court therefore ordered suppression of these calls.[66] Presumably this entire problem could have been avoided if the original order had authorized interception of "communications of DellaValle and others as yet unknown."[67]

¶38 In New York, then, the rule is probably that amendment of the order prior to a renewal to add a name of a newly identified conspirator is unnecessary unless the language of the order specifically precludes interception of the new person.

III. Sealing

¶39 Once electronic surveillance ends, the government must present the tapes to the issuing judge "immediately upon the expiration of the period of the order," so that they may be "sealed under his directions."[68] The presence of the seal, "or a satisfactory explanation for the absence thereof," is a prerequisite to the use of the tapes in evidence.[69] Applications and orders must also

[66] Id. at 276-77.

[67] United States v. Kahn, 415 U.S. 143 (1974). An authorization order covering "persons as yet unknown" was approved in United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972), cert. denied, 417 U.S. 917 (1974).

[68] 18 U.S.C. §2518(8)(a) (1970).

[69] Id.

be "sealed by the judge."[70]

¶40 Delays in sealing have been permitted in several cases.[71] The Third Circuit has ruled, moreover, that improper sealing procedures may not result in suppression because the sealing process cannot affect the legality of the original interception.[72]

¶41 The New York State Court of Appeals has reached a contrary conclusion in two cases dealing with the sealing requirement. Where the monitoring agents completely failed to seal the tapes, the court held ten intercepted conversations to have been improperly admitted into evidence.[73] In a more recent case,[74] it was emphasized that section 2518(8) would be strictly construed so that conversations and evidence should be

[70] Id. Although the judge should personally seal the tapes and documents, one court declined to suppress when the tapes were sealed by an agent out of the judge's presence. United States v. Cantor, 470 F.2d 890, 892-93 (3d Cir. 1972).

[71] United States v. Sklaroff, 506 F.2d 837, 840 (5th Cir. 1975) (delay of 14 days permitted); United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972) (delay of 13 days permitted); People v. Blanda, 80 Misc.2d 79, 362 N.Y.S.2d 735 (Sup. Ct. Monroe County 1974) (delay of two days permitted). See also Commonwealth v. Vitello, ___Mass.___, 327 N.E.2d 819, 849-50 (1975).

[72] United States v. Falcone, 505 F.2d 478, 483-84 (3d Cir. 1974).

[73] People v. Nicoletti, 34 N.Y.2d 249, 313 N.E.2d 336, 356 N.Y.S.2d 855 (1974).

[74] People v. Sher, 38 N.Y.2d 600, 345 N.E.2d 314, 381 N.Y.S.2d 843 (1976).

suppressed, when, in preparation for trial, officers unseal tapes in the absence of a judicial order.

IV. Inventories

A. In General

¶42 After surveillance is over and the tapes sealed, the issuing judge must order service of an "inventory" on the persons named in the surveillance order. The inventory is a notice that must include the fact that the surveillance order was issued, the date it was issued, the period for which interception was authorized, and a statement of whether or not the individual's conversations were intercepted. Inventories are probably also required for any person whose name was added to the order by an amendment. The issuing judge may, in his discretion, order inventories for additional persons not named in the order. The inventory must be served within 90 days after termination of the tap, but any judge of competent jurisdiction may, upon an ex parte showing of good cause, postpone service of any inventory.[75]

[75]The federal inventory section is 18 U.S.C. §2518(8)(d) (1970). In New York it is N.Y. Crim. Pro. Law §700.50 (3),(4) (McKinney 1971). The New Jersey inventory section is N.J. Stat. Ann. §2A:156A-16 (1971). Mass. Gen. Laws Ann. ch. 272, §99.L (1976) requires service of an attested copy of the warrant on the person whose communications were intercepted prior to the execution of the warrant or within 30 days after termination with continuous secrecy limited to three years. The Supreme Judicial Court of Massachusetts ruled in Commonwealth v. Vitello, ____Mass.____, 327 N.E. 2d 819, 844 (1975) that this procedure provided adequate access to the information prescribed by 18 U.S.C. §2518(8)(d) and that the secrecy requirements of §99.L were in fact more stringent than those imposed by §2518(8)(d).

¶43 Although the statute instructs the judge to order service, the burden in fact falls upon the prosecutor to see that it is done. Noncompliance with the letter of the law has in some cases resulted in suppression of the wiretap evidence, so the prosecutor may not relax his attention to this detail once the tap is complete and the tapes have been sealed.

¶44 A preliminary issue is whether defendants have a constitutional right to post-wiretap notice. The early inventory cases ignored this possiblity, but language from a Supreme Court opinion seems to make notice a constitutional necessity.[76] A recent Ninth Circuit case, moreover, has held squarely that the Constitution does require post-wiretap notice.[77] The notice will be sufficient under the Constitution if "the individual has been afforded a reasonable opportunity to prepare an adequate response to the evidence which has been derived from the interception."[78] Note, however, that while the Constitution demands only a certain attention to due process, the statutes require the notice to be in a particular form and within particular time limits. An inventory served one day too late might therefore violate the applicable statute without violating the Constitution.

[76]Berger v. New York, 388 U.S. 41, 60 (1967).

[77]United States v. Chun, 503 F.2d 533, 536-37 (9th Cir. 1974).

[78]Id. at 538.

B. Problems with the Service of Inventories

1. Lengthy Postponements

¶45 In some cases defendants have requested suppression on the ground that the judge unjustifiably exercised his discretion to repeatedly postpone the deadline for serving the inventory.[79] So far, however, the appellate courts have refused to find an abuse of discretion and have agreed that the delay was justified.[80] The reason for lengthy delays most frequently cited is that an ongoing investigation necessitates continued secrecy.

¶46 Excessive postponement for no good cause, however, might well warrant a court to find an abuse of discretion and order suppression. The Third Circuit in United States v. Cafero[81] warned that judges "should exercise great care" in granting extensions beyond the 90-day period.[82]

2. Late Service

¶47 Frequently the inventory is served beyond the 90-day limit or the eventual limit established by judicial

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[79] See, e.g., United States v. Manfredi, 488 F.2d 588, 601 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

[80] See, e.g., United States v. Cafero, 473 F.2d 489, 500 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); United States v. Curreri, 363 F. Supp. 430, 436 (D.Md. 1973); United States v. Lawson, 334 F. Supp. 612, 616 (E.D.Pa. 1971).

[81] 473 F.2d 489 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974).

[82] Id. at 500.

postponements. This clearly violates the statute, but unless the defendant is prejudiced it probably does not violate the Constitution.

¶48 All the cases on late service so far have declined to suppress, but on the whole the reasoning has been weak. The early cases simply called the inventory a ministerial duty that could not affect substantial rights.[83] A recent Ninth Circuit case found, however, that the inventory satisfies a constitutional requirement, and gave the problem a more complete analysis. The court in United States v. Chun[84] applied an analysis developed by the United States Supreme Court in a pair of cases dealing with a suppression remedy.[85] When dealing with a suppression problem, the Supreme Court ruled, one should ask two questions. First, does the statutory section violated "directly and substantially"[86] implement the legislative scheme to prevent abuse of wiretaps? If not, then suppression is never an appropriate remedy. The Chun court ruled that the inventory provisions are a

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[83] See, e.g., United States v. Cafero, 473 F.2d 489, 499-500 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); United States v. Lawson, 334 F. Supp. 612, 616 (E.D.Pa. 1971). Note that special problems arise with respect to wiretaps. The traditional search is not done covertly, and is usually preceded by notice to the occupant of the premises. Inventory notice, in contrast, is the first time a wiretap target learns of the search and so is much more important.

[84] 503 F.2d 533 (9th Cir. 1974).

[85] United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974).

[86] United States v. Giordano, 416 U.S. at 527.

central safeguard.[87] This answer renders suppression possible and leads to the second question. Has the purpose of the section been satisfied despite the violation?[88] In case of late service, the answer is usually "yes." Even though the inventory was late, it was served and so fulfilled the purpose of the statute by giving actual notice. Suppression is therefore usually inappropriate. If notice is substantially late, and the defendant can show prejudice, then the statutory purpose has not been fulfilled, and suppression would be appropriate.

3. No Service

¶49 When no inventories at all are served, the defendant has received no actual notice, and the statutory purpose has not been met. Suppression will follow unless the government can show that the defendant had actual notice from some other source.[89] Actual notice, even from a source other than the formal inventory, satisfies the statutory purpose and should prevent suppression.[90]

¶50 No formal inventories were ever served in Chun. The Ninth Circuit remanded to the district court to determine whether the defendants had actual notice.[91] The district court found that they did, but not within the 90-day limit, and so ordered suppression.[92] The conclusion of the district court seems plainly wrong. Actual notice is a substitute for an inventory. If the inventory is late, the evidence is not suppressed unless the defendant has been prejudiced. The district court should not have suppressed in Chun because of late actual notice without a showing of prejudice, yet the court found explicitly that the defendants had not been prejudiced.[93] The lesson is nevertheless clear: inventories should be served and on time.

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[87] 503 F.2d at 542.

[88] United States v. Chavez, 416 U.S. at 574-75. See also United States v. Civella, 19 Crim. L. Rptr. 2136 (8th Cir. April 16, 1976). Two persons named in a court order to receive inventories were not served within the 90-day statutory period. The period of delay was short. The court found that the government did not deliberately ignore the notice provision and that the defendants did not demonstrate any prejudice arising from the delay. The court thus ruled that the government had substantially complied with the statute and that its essential purposes were met. The court found no such substantial compliance, however, with respect to two other defendants who had never been named in an inventory order and who did not receive notice of the interception until their indictments, nearly two years after the termination of the wiretap. The court found that there had been no effort to comply with section 2818(8)(d) and that the wiretap evidence pertaining to those defendants should have been suppressed. Civella thus suggests that a good faith effort to comply with the statute will compensate for minor delays, but that the absence of such effort may lead to suppression when the violation is substantial.

[89] See United States v. Wolk, 466 F.2d 1143, 1144 (8th Cir. 1972).

[90] Id. at 445-46.

[91] 503 F.2d at 536, 542.

[92] 386 F. Supp. 91, 85 (D.Hawaii 1974).

[93] Id. at 94.

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4. Deliberate Failure to Serve

¶51 In two cases that arose from the same New York wiretap, the courts considered the problem of an authorization order that purported to waive the inventory requirement completely.[94] The two courts disagreed over whether to suppress the wiretap evidence when the defendants in fact were never served. The problem is probably moot, since no other judges are likely to add a clause waiving the statute, and any prosecutor can easily overcome any objection by serving a timely inventory despite the wording of the order.

5. Persons Not Named in the Order

¶52 Under the federal and New York statutes inventories are mandatory only as to persons named in the authorization order.[95] Until recently this provision has been upheld as constitutional and has barred motions for suppression on the ground of lack of notice when made by persons not named in the order.[96]

¶53 The Ninth Circuit's opinion in Chun raises the possibility that all prospective defendants may have a constitutional right to notice, regardless of whether they are named in the order. Chun held that the government must furnish the judge with accurate information on who was intercepted and who is to be indicted, so that the judge may exercise his discretion in an informed manner.[97] The prosecutor must revise and update this information in order to keep the judge correctly informed.

¶54 The opinion also raises the possibility that a future case will hold notice mandatory for all defendants, regardless of whether they were named in the order.[98] The safest and easiest practice for prosecutors in the interim is obviously to give all possible defendants an inventory notice. If the decision to indict is made after the 90-day limit, and the person was not named in the order and did not receive an inventory, he should simply be served as soon as possible.

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[94] United States v. Eastman, 465 F.2d 1057 (3d Cir. 1972); People v. Hueston, 34 N.Y.2d 116, 312 N.E.2d 462, 356 N.Y.S.2d 272 (1974), cert. denied, 421 U.S. 947 (1975).

[95] 18 U.S.C. §2518(8)(d)(1970); N.Y. Crim. Pro. Law §700.50(3) (McKinney 1971). See also N.J. Stat. Ann. §2A:156A-16 (1971) (same rule); Mass. Gen. Laws Ann. ch. 272, §99.L(1) (1976) requires an attested copy of the warrant to be served upon a person whose communications are to be intercepted. Section 99.L(2) allows postponement of that service in "exigent circumstances" until thirty days after the expiration of the warrant or a renewal. Service thus appears mandatory only with respect to persons named in the warrant.

[96] See, e.g., United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944 (1974); United States v. Curreri, 363 F. Supp. 430, 435 (D.Md. 1973). The government may not evade the notice requirement by purposely omitting names from the authorization order. United States v. Bernstein, 509 F.2d 996, 1003-04 (4th Cir. 1975), cert. pending.

[97] 503 F.2d at 540. Accord, United States v. Donovan, 513 F.2d 337, 342-43 (6th Cir. 1975), cert. granted, 18 Crim. L. Rptr. 4161 (Feb. 24, 1976).

[98] 503 F.2d at 537.

ES: Execution of the Order

Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶1: Add the following to the list of duties after "3. seal the tapes upon termination of the tap; and": 4. file a final report with the court composed of a written list of names of participants and evidences discovered; and

¶1: Re-number "4. cause service of a notice . . . ." to: 5. cause service . . . .

¶1: Delete the first two sentences after the list of duties and add: To comply with the minimization requirement the agent's actions must be reasonable under the circumstances. Reasonableness in minimizing the interception of nonpertinent and privileged conversations is determined objectively without regard to the agent's underlying intent or motive.

¶2: Insert footnote number 1 in the first sentence after "surveillance": Since electronic surveillance[1] . . . .

¶2: Correction: . . . federal statute, for instance, provides: Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . .[2]

¶2; Note 2: Add: The state provisions relating to the minimization requirement can be found in ¶Electronic Surveillance: Authorization, 30, note 86.

¶3; Delete and substitute: In most state statutes, the definition of "intercept" is identical, or nearly so, to the federal statute:[3]

> "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of an electronic, mechanical, or other device.

The New York and Massachusetts provisions state that "interception" means the intentional or secret overhearing or recording of communications by persons other than the receiver or sender of the communications.[4] A conversation can only be intercepted through the use of an electronic or mechanical device. Simple overhearing by the naked ear does not constitute an interception.[5]

¶3; Note 3: Delete and substitute: 18 U.S.C. § 2510(4) (1970); Colo. Rev. Stat. Ann. § 16-15-101(5) (1978); Fla. Stat. Ann. § 934.02(3) (West 1973); Nev. Rev. Stat. § 179.430 (1975); N.J. Stat. Ann. § 2A:156A-2(c) (West 1971); R.I. Gen. Laws §§ 12-5.1-1 (d) (Supp. 1978); Wis. Stat. Ann. § 968.27 (West 1971) The Arizona statute does not formally define "intercept," but parts of Ariz. Rev. Stat. § 13-3005 (1978) read "by means of an instrument or device overhears or records."

¶3; Note 4: Delete and substitute: N.Y. Crim. Proc. Law § 700.05(3) (McKinney 1971); Mass. Gen. Laws Ann. ch. 272, §§ 99.B(4) (1979).

¶3; Note 5: Delete and substitute: See, e.g., United States v. McLeod, 493 F.2d 1186, 1188 (7th Cir. 1974) (one-half of phone conversation overheard without a device was not an "interception"); State v. Mankel, 27 Ariz. App. 436, 439, 555 P.2d 1124, 1127 (1977) (officers' answering telephone while in residence after an "emergency entry" was not an interception where "there was no channeling into the lines of communication nor use of tapping or eavesdropping equipment"); United States v. Turk, 526 F.2d 654, 658 (5th Cir. 1976), cert. denied, 429 U.S. 823 (1976) (interception requires the use of a device, contemporaneous with the communication intercepted, to transmit or to preserve the communication). Compare the following two cases: the defendants in State v. Bonds, 92 Nev. 307, 309, 550 P.2d 409, 410 (1976) argued that the interception was unlawful because there was no order authorizing the police to intercept the conversation through the use of a transmitter on an informant. The court found that the conversation was not transmitted "by the aid of wire, cable, or other like connection between

point of origin and point of reception and so not within the coverage of Nev. Rev. Stat. § 179.455 (1978) (definition of "Wire Communication"). But Rupley v. State, 93 Nev. 60, 61-62, 560 P.2d 146, 147 (1977) looked to the definition of "intercept" given by section 179.430: "'Intercept' means the aural acquisition of the contents of any wire or oral communication through the use of any electric, mechanical, or other device or of any sending or receiving equipment." (The underlined clause is not found in other state statutes.) The court found that the attachment of a suction cup to the receiver of informant's telephone was a piece of "proscribed receiving equipment" as defined by the statute and therefore authorization was required prior to its use.

¶4; Note 6: Delete and substitute: 18 U.S.C. § 2516(1) (1970).

¶4: Add before the last sentence and after the sentence ending with footnote number 9: The Pennsylvania statute permits interception when it may provide either "evidence of the commission of the crime" or "evidence aiding in the apprehension of the perpetrator[s]."[9a] Most state statutes have language similar to these provisions.[9b]

¶4: Delete "all three" in the last sentence of the paragraph and substitute: these.

¶4; Note 8: Correction: Id. § 700.15(2).

¶4; Note 9: Correction: Mass. Gen. Laws Ann. ch. 272, § 99.F(2)(f); . . . and § 99.M(e).

¶4; Note 9a: 18 Pa. Cons. Stat. Ann. § 5708, as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 session).

¶4; Note 9b: Ariz. Rev. Stat. Ann. § 13-3010(D)(6) (1978); Colo. Rev. Stat. Ann. § 16-15-102(6) (1978); Fla. Stat. Ann. § 934.09(5) (West 1973); Nev. Rev. Stat. § 179.475(3) (1975); R.I. Gen. Laws § 12-5.1-5(b) (Supp. 1978); Wis. Stat. Ann. § 168.30(5) (West 1971).

¶6: Delete sentences 4, 5, 6, 7 and substitute: An objective standard is applied to determine the reasonableness of the actual interceptions.[11] The monitor's actions must be reasonable under the circumstances regardless of his underlying intent or motive.[11a] Each case is evaluated on its own facts. A court may thus find that reasonable actions in one case may be completely unreasonable in another.[12] The reasonableness of the actions is judged by using up to six variables.

¶6; Note 11: Delete and substitute: Scott v. United States, 516 F.2d 751 (D.C. Cir. 1975), aff'd, 436 U.S. 128, 137 (1978).

¶6; Note 11a: 436 U.S. at 138-139.

¶6; Note 12: Delete period at end of sentence and substitute a comma. Add: aff'd, 485 F.2d 490 (2d Cir. 1973).

¶6; Note 13: Add after "See, e.g.," and before "United States v. Manfredi,": United States v. Sandeval, 550 F.2d 427, 430 (9th Cir. 1976), cert. denied, 434 U.S. 879 (1979); . . .

¶6; Note 16: Correction: See, e.g., United States v. Sisca, 361 F. Supp. 735, 745 (S.D.N.Y. 1973), . . .

¶6; Note 17: Delete and substitute: See, e.g., Scott v. United States, 516 F.2d 751, 753-754 (D.C. Cir. 1975), aff'd, 436 U.S. 128, 140 (1978); United States v. Hyde, 574 F.2d 856, 869 (5th Cir. 1978) ("We think that the monitoring of every call made until its character was determined was reasonable."); United States v. Daly, 535 F.2d 434, 441 (8th Cir. 1976); People v. Floyd, 41 N.Y.2d 245, 360 N.E.2d 935, 392 N.Y.S.2d 257 (1976).

¶6; Note 19: Add after "See, e.g.," and before "United States v. Bynum,": Scott v. United States, 516 F.2d 751 (D.C. Cir. 1975), aff'd, 436 U.S. 128, 140 (1978); . . .

¶6; Note 19: Delete period at end of footnote and substitute a comma. Add: aff'd, 485 F.2d 490 (2d Cir. 1973).

¶6; Note 20: Correction: See also United States v. Chavez, 533 F.2d 491, 493-494 (9th Cir. 1976), cert. denied, 426 U.S. 911 (1976) (limiting of tap . . . .

¶6; Note 21: Delete and substitute: See, e.g., United States v. Hyde, 574 F.2d 856, 869 (5th Cir. 1978); United States v. Daly, 535 F.2d 434, 442 (8th Cir. 1976); United States v. Bynum, 360 F. Supp. 400, 414-415 (S.D.N.Y. 1973), aff'd, 485 F.2d 490 (2d Cir. 1973).

¶8: Insert footnote number 21a in first sentence of ¶8: In a complicated investigation the supervising attorney or law enforcement supervisor[21a] . . .

¶8; Note 21a: See, e.g., 18 Pa. Cons. Stat. Ann. § 5712(c), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 session):

> Responsibility.--The order shall require the attorney general or the district attorney, or their designess, to be responsible for the supervision of their interception.

¶8: Insert footnote number 21b in the third sentence: He should review the plant reports[21b] . . .

¶8; Note 21b: 18 Pa. Cons. Stat. Ann. § 5714(A) as amended by _____ (1978) requires the maintenance of signed written records containing:

(1) date and hours of surveillance.

(2) the time and duration of each intercepted communication.

(3) the participant, if known, in each intercepted communication.

(4) a summary of the content of each intercepted communication.

Mass. Gen. Laws Ann. ch. 272, § 99(M) (Supp. 1979) has somewhat similar requirements to be included on the warrant which is to be returned within seven days after its termination or last renewal. See also People v. Floyd, 41 N.Y.2d 245, 392 N.Y.S.2d 257, 360 N.E.2d 935 (1976).

¶8: Delete the third to last sentence and substitute: Regular written reports to the judge on the progress of the investigation and the relative success of minimization may be required[21c] and in any event are helpful.

¶8, Note 21c:

> Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

18 U.S.C.A. § 2518(b) (1970). Several state statutes have progress report provisions: Ariz. Rev. Stat. Ann. § 13-3010(k) (1978); Colo. Rev. Stat. Ann. § 16-15-102(7) (1978); Fla. Stat. Ann. § 934.09(6) (1973); Nev. Rev. Stat. § 179.480 (1975); N.J. Stat. Ann. § 2A:156-12 (f) as amended by Act of June 23, 1978, ch. 51, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700.50(1) (McKinney 1971); 18 Pa. Cons. Stat. Ann. § 5712(D) as amended by _____

(1978); R.I. Gen. Laws Ann. § 12-5.1-5(c) (Supp. 1978); Wis. Stat. Ann. § 12-5.1-5(c) (1971).

¶9: Insert footnote number 21d after: C. Privileges and Immunities[21d] . . .

¶9; Note 21d: 18 U.S.C.A. § 2517(4) (1970) ("No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character"). State statutes are similar to the federal provision: Colo. Rev. Stat. Ann. § 16-15-102(15) (1978); Fla. Stat. Ann. § 934.08(4) (1973); Mass. Gen. Laws Ann. ch. 272, § 99(D)(2)(e) (Supp. 1979); Nev. Rev. Stat. § 179.465(3) (1973); R.I. Gen. Laws Ann. § 12-5.1-10(d) (Supp. 1978); Wis. Stat. Ann. § 968.29(4) (1971); 18 Pa. Cons. Stat. Ann. § 2711, as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶9; Note 22: Delete and substitute: United States v. Bynum, 360 F. Supp. 400, 417-419 (S.D.N.Y. 1973), aff'd, 485 F.2d 490 (2d Cir. 1973). See also Wis. Stat. Ann. § 968.30(10) (1971) which specifically prohibits the interception of wire and oral communication between an attorney and his client.

¶9: Add footnote number 25a at the end of the paragraph . . . any conversation involving a lawyer.[25a]

¶9; Note 25a: But see United States v. Hyde, 574 F.2d 856, 870 (5th Cir. 1978). The court determined that listening to calls between the defendant and his doctor and lawyer until the agents determined that the doctor and lawyer were not participating in the conspiracy was not a violation of the minimization requirements. "It would be unreasonable to expect agents to ignore completely any call to an attorney or doctor; . . . ."

¶10; Note 26: Add: But see United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), cert. denied, 429 U.S. 1066 (1977). Agents intercepted communications between a government informer and defendant who was under indictment and represented by counsel in an unrelated state prosecution. The court held that wiretap evidence was admissible in the later federal prosecution that resulted from the wiretap. The court stated that Massiah applied only where, in the absence of counsel, statements are deliberately elicited from a defendant in connection with a crime for which he has already been indicted.

¶10; Note 27: Add: See also United States v. Mendoza, 574 F.2d 1373, 1381 (5th Cir. 1978) (conversations between husband and wife about crimes they are jointly participating in at the time of the conversations are not marital conversations for the purpose of the marital privilege and therefore are not protected).

¶12; Note 29: Delete period at end of footnote and substitute a semicolon. Add: State v. Murphy, 137 N.J. Super. 404, 414, 349 A.2d 122, 127-128 (Super. Ct. Law Div. 1975), rev'd on other grounds, 148 N.J. Super. 542, 372 A.2d 1315 (Super. Ct. App. Div. 1977).

¶12: Delete last sentence and substitute: New Jersey and Pennsylvania specifically contemplate the use of at least one type of extrinsic minimization by requiring that, whenever possible, reasonable efforts be made to reduce the hours of interception.[30]

¶12; Note 30: Omit and substitute: N.J. Stat. Ann. § 2A:156A-12 (f), as amended by Act of June 23, 1978, ch. 51, 102 N.J.L.J. NL-42 (1978) ("such interception . . . be conducted . . . to reduce the hours of interception authorized"); 18 Pa. Cons. Stat. Ann. § 5712(B) (same as New Jersey), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶13: Insert footnote number 30a in the second sentence. Delete "30 seconds" and substitute: 1 1/2 - 2 minutes[30a] . . .

¶13; Note 30a: United States v. Armocida, 515 F.2d 29, 45 (3d Cir. 1975), cert. denied, 423 U.S. 858 (1975).

¶13; Note 31: Delete period at end of footnote and substitute a comma. Add: modified, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974). See also United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), cert. denied, 429 U.S. 1066 (1977); People v. Floyd, 41 N.Y.2d 245, 392 N.Y.S.2d 257, 360 N.E.2d 935 (1976).

¶14: Delete the third sentence and substitute: Such a procedure is also expressly discouraged in the federal statute and in several state statutes.[32]

¶14; Note 32: Delete period at end of first sentence and substitute a semicolon. Add the following before the second sentence: Ariz. Rev. Stat. Ann. § 13-3010(H) (1978); Colo. Rev. Stat. Ann. § 16-15-102(8)(a) (1978); Fla. Stat. Ann. § 934.09(7)(a) (West 1973); Nev. Rev. Stat. § 179.485 (1975); R.I. Gen. Laws § 12-5.1-8 (a) (Supp. 1978); Wis. Stat. Ann. § 968.30(7)(a) (West Supp. 1978-1979); 18 Pa. Cons. Stat. Ann. § 5714(A), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); N.J. Stat. Ann. § 2A:156-14 (1971).

¶14; Note 33: Delete period at end of footnote and substitute a semicolon. Add: People v. Brenes, 53 A.D.2d 78, 385 N.Y.S.2d 530 (App. Div., 1st Dep't 1976), aff'd, 42 N.Y.2d 41, 364 N.E. 1322, 396 N.Y.S.2d 629 (1977). But see United States v. Daly, 535 F.2d 434 (8th Cir. 1976). The Eighth Circuit held that section 2518(8)(c) did not require that agents simultaneously record when they make spot checks of innocent conversations. The defendant had shown no prejudice from the failure to record spot checks. Where one agent who monitored ten percent of the total number of calls listened to all conversations, but recorded only those which were incriminating, the court held that the deviation was de minimis. Id. at 442. The authorizing judge required and received five day reports of results and minimization procedures. The court noted that informal judicial supervision was strong support for a showing of good faith minimization efforts. Id.

¶15; Note 34: Correction: United States v. Chevez, 533 F.2d 491 (9th Cir. 1976), cert. denied, 426 U.S. 911 (1976

¶16; Note 35: Delete period at end of first sentence before "See also" and substitute a semicolon. Add before "See also": Ariz. Rev. Stat. Ann. § 13-3010(D)(1),(3) (1978); Colo. Rev. Stat. Ann. § 16-15-102(5)(a),(c) (1978); Fla. Stat. Ann. § 934.09(4)(a),(c) (West Supp. 1979); Nev. Rev. Stat. § 179.475(1)(a),(c) (1973, 1975); R.I. Gen. Laws Ann. § 12-5.1-5(a)(1),(3) (Supp. 1978); Wis. Stat. Ann. § 968.30(4)(a),(c) (West 1971); 18 Pa. Cons. Stat. Ann. § 5712(A)(2),(4), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶16: Insert footnote number 35a in the second to last sentence: Disclosure for "law enforcement" purposes or use[35a] . . .

¶16; Note 35a: Colo. Rev. Stat. Ann. § 16-15-102(12),(13) (1978); Fla. Stat. Ann. § 934.08(1),(2) (West 1979); Mass. Gen. Laws Ann. ch. 272, § 99(D)(2)(a),(b) (West Supp. 1979); Nev. Rev. Stat. § 179.465(1) (1975); N.J. Stat. Ann. § 2A:156A-17(a),(b) (West Supp. 1978-1979); N.Y. Crim. Proc. Law § 700.65(1),(2) (McKinney 1971); 18 Pa. Cons. Stat. Ann. § 5717(A), as amended by

Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); R.I. Gen. Laws § 12-5.1-10 (a),(b) (Supp. 1978); Wis. Stat. Ann. § 968.29 (1),(2) (West Supp. 1978-1979). See also Ariz. Rev. Stat. Ann. § 13-3011 (1978).

¶16; Note 36: Correction: United States v. Vento, 533 F.2d 838, 852-853 (3d Cir. 1976).

¶16; Note 36: Add: Several recent cases show the broad scope of law enforcement or investigative use of wiretap evidence. Such use does not require a retroactive amendment under 18 U.S.C. § 2517(5). See, e.g., United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976) (District of Columbia officials need not get judicial authorization to use information from federal wiretap to get new, local tap, even though such use of information derived from taps governed by D.C. wiretap statute (D.C. Code § 548(b) (1973)) requires judicial approval), cert. denied, 429 U.S. 1061 (1977); United States v. Hall, 543 F.2d 1229 (9th Cir. 1976) (where information supplied to state officers who searched car was derived from federal wiretap, the items seized were admissible

in federal prosecution even though the wiretap would not have been valid under more restrictive state law; California state officers were "investigative or law enforcement officer" within the meaning of sections 2510(7) and 2517(1), (2) of the federal wiretap law), cert. denied, 429 U.S. 1075 (1977); Fleming v. United States, 547 F.2d 872 (5th Cir.) (FBI disclosure to the IRS of information obtained from wiretap authorized for investigation of gambling offense is a legitimate law enforcement use of wiretap evidence, even where the IRS wants to base a civil or criminal tax suit on the information), cert. denied, 434 U.S. 831 (1977).

¶16: Insert footnote number 36a at end of paragraph: as soon as practicable.[36a]

¶16; Note 36a: See generally In re Grand Jury Proceedings, 534 F.2d 712 (1977), cert. denied, 434 U.S. 892 (1977); United States v. Aloi, 449 F. Supp. 698 (E.D.N.Y. 1977).

¶17: In the first sentence, delete "the federal, New York, and New Jersey statutes" and substitute: federal and state statutes . . .

¶17: In the third sentence, delete "The New York and New Jersey" and substitute: State . . .

¶17; Note 38: Delete the period at the end of the footnote and substitute semicolon. Add: Colo. Rev. Stat. Ann. § 16-15-102(16) (1978); Fla. Stat. Ann. § 934.08(5) (West 1973); 18 Pa. Cons. Stat. Ann. § 5718, as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); R.I. Gen. Laws § 12-5.1-6(a) (Supp. 1977); Wis. Stat. Ann. § 968.29(5) (West Supp. 1978-1979). Cf. Nev. Rev. Stat. § 179.465(4) (1973) ("direct evidence derived from such communication shall be inadmissible in a criminal proceeding, but any other evidence obtained as a result of knowledge obtained from such communication may be disclosed or used"). See also Mass Gen. Laws Ann. ch. 272, § 99(D)(2)(d) (West Supp. 1979).

¶17: Insert footnote number 38a in second to last sentence after "trial": . . . may be used in evidence before a grand jury or at trial[38a] only when, . . .

¶17; Note 38a: Colo. Rev. Stat. Ann. § 16-15-102(14) (1978); Fla. Stat. Ann. § 934.08(3) (West Supp. 1979); Mass. Gen. Laws Ann. ch. 272, § 99(D)(2)(c)

(West Supp. 1979); Nev. Rev. Stat. § 179.465 (2) (1973); N.J. Stat. Ann. § 2A:156A-17(b) (West Supp. 1978-1979); N.Y. Crim. Proc. Law § 700.65(3) (McKinney 1971); 18 Pa. Cons. Stat. Ann. § 5717(B), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); R.I. Gen. Laws § 12-5.1-10(c) (Supp. 1978); Wis. Stat. Ann. § 968.29(3) (West Supp. 1978-1979).

¶17: Insert footnote number 38b at the end of the second to last sentence: . . . the communication was lawfully intercepted.[38b]

¶17; Note 38b: But see United States v. Campagnuolo, 556 F.2d 1209, 1214-1215 (5th Cir. 1977). Discussed infra at ¶21C.

¶17: In the last sentence delete "under all three statutes," and substitute: under the federal and state statutes cited,[38c] . . .

¶17; Note 38c: Supra at notes 37 and 38. Note that the federal provision is more restrictive than the Pennsylvania provision in cases where it is "practicable" to make an application to the court prior to the final report. In such cases, Pennsylvania will probably require two retroactive amendments as soon as the conversation is intercepted, the second contemporaneously with,

or as soon as practicable after, the first order.

¶18; Note 40: Correction: See Cady v. Dombrowski, 413 U.S. 433.

¶18; Note 41: Add before the existing footnote material: Coolidge v. New Hampshire, 403 U.S. 443, 470-471 (1971); . . .

¶18; Note 41: Correction: People v. Spinelli, 35 N.Y.2d 77, 80-81, 315 N.E.2d 792, 794, 358 N.Y.S.2d 743, 746-747 (1974).

¶19: Insert footnote number 42a at the end of the fifth sentence: . . . amendment needed in such a situation?[42a]

¶19; Note 42a: See, e.g., People v. Schipani, 56 A.D.2d 126, 130, 391 N.Y.S.2d 875, 879 (App. Div., 2nd Dep't 1977) (warrant under federal statute cannot be amended retroactively to include crimes which would never appear in the warrant originally). But see, e.g., United States v. Pacheco, 489 F.2d 554, 564 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975) (additional crimes may be prosecuted regardless of the nature of the offense or prescribed punishment, notwithstanding the federal statute permitting states to use wiretaps only if the interception will provide evidence of one of the enumerated offenses and the offense is

punishable by imprisonment for more than one year); People v. Milnes, 186 Colo. 409, 416, 527 P.2d 1163, 1166 (1974) ("it would be unreasonable and unrealistic to suppress evidence of other crimes, which was obtained through the interception, simply because they are not designated originally in the statute"); Milnes at 416-417, 527 P.2d at 1166-1167 (although the district attorney must personally initiate the wire tap and must personally apply for an extension, there is no statutory provision requiring his signature on supplemental applications).

¶19: Correction: Delete quotation marks at the end of the second to last sentence and insert them after: within the meaning of" the D.C. wiretap law.[44]

¶19; Note 45: Correction: Id. at 502.

¶21; Note 47: Delete and substitute: 535 F.2d 697 (2d Cir. 1976).

¶21A: The Eighth Circuit recently took a more lenient position with regard to the new crime issue than did the courts in Brodson or Marion. In United States v. Daly,[48a] the court ruled that a wiretap order that explicitly permitted investigation of racketeering activities affecting interstate commerce (18 U.S.C. §§ 1962, 1963) could also be used to investigate mail fraud schemes under 18 U.S.C. § 1341.[48b] The court's rationale was that a related federal racketeering

provision, 18 U.S.C. § 1961(1)(B), specifically refers to the mail fraud statute. The mail fraud scheme involved sending bogus bills to major oil companies.

¶21A; Note 48a: 535 F.2d 434 (8th Cir. 1976).

¶21A; Note 48b: Id. at 439-440.

¶21B: The wiretap in Daly was also used to gather evidence of defendant's involvement in an insurance fraud scheme. Authorization to investigate insurance fraud was also not expressly granted in the wiretap order, nor was an amendment sought to include insurance fraud. Without seeking a disclosure order (under 18 U.S.C. § 2517(5)) the government introduced wiretap evidence relating to insurance fraud in a grand jury proceeding and an indictment was returned charging Daly with that offense. Daly made no objection to the introduction of this evidence and the issue was not preserved for appeal. In dicta, the court stated that even if the issue had been preserved, the indictment would have been sustained. Since it was proper to use the wiretap (without a prospective amendment) to investigate mail fraud, it was also proper to use it to investigate insurance fraud because use of the mail was an essential part of the insurance fraud scheme. Since the government discovered three instances

of such fraud, the scheme was a "pattern of racketeering" under 18 U.S.C. § 1961(5). Thus, insurance fraud fell within the scope of the offenses specified in the original wiretap order.[48c]

¶21B; Note 48c: Id. at 440.

¶21C: The Fifth Circuit in United States v. Campagnuolo[48d] addressed a slightly different problem. Distinguishing the facts of its case from those of Brodson and Marion, the court found that when evidence of an unnamed crime is used in questioning a grand jury witness for the purpose of obtaining an indictment solely for the crime specifically authorized, disclosure of evidence probative of both the named and an unnamed offense was valid under 2517(3).[48e] "We believe that when wiretap evidence is probative of both the offense named in authorization order and some other unnamed offense, the relation of the evidence to the unnamed offense becomes important in terms of 2517(5) only when the Government attempts to use it with respect to that offense."[48f]

¶21C; Note 48d: 556 F.2d 1209 (5th Cir. 1977).

¶21C; Note 48e: Id. at 1214.

¶21C; Note 48f: Id. at 1215.

¶23; Note 49: Correction: United States v. Cox, 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972); United States v. Denisio, 360 F. Supp. 715, 720 (D. Md. 1973).

¶23: Insert footnote number 49a at the end of the paragraph: ". . . was being lawfully conducted.[49a]"

¶23; Note 49a: In Pennsylvania, the application must also show that the controls were set forth in the final report. If the final report has not yet been filed, then a second application should be made contemporaneously with the final report.

¶25: Insert footnote number 51a at the end of the second to last sentence: ". . . within 24 to 48 hours.[51a]"

¶25; Note 51a: Wis Stat. Ann. § 968.29(5) (West Supp. 1978-1979) specifies that the application must be made "as soon as practicable, but no later than 48 hours."

¶28; Note 53: Correction: People v. Ruffino, 62 Misc.2d at 660, 309 N.Y.S.2d at 812.

¶30: Correction: The prosecution faced this dilemma in People v. DiStefano.[54]

¶33: Delete "and New York" in the second sentence and substitute: statute and many state . . .

¶33; Note 59: Delete the period at the end of the first sentence and substitute a semicolon: § 700.30(2) (McKinney 1971

¶33; Note 59: Delete the second sentence, "N.J. Stat. Ann. . . ."

¶33; Note 59: Substitute: Fla. Stat. Ann. § 934.09(1)(b), (4)(a) (West Supp. 1979); Wis. Stat. Ann. § 968.30 (1)(b)(4), (4)(a) (West 1971); Ariz. Rev. Stat. Ann. § 13-3010(B)(2)(b), (D)(1) (1978); Colo. Rev. Stat. Ann. § 16-15-102(2)(b), (5) (1978); R.I. Gen. Laws §§ 12-5.1-2(b)(2)(iv), 12-5.1-5 (1) (Supp. 1978); Nev. Rev. Stat. §§ 179.470(1)(b)(4) (1973), 179.475(1)(a) (1975); N.J. Stat. Ann. § 2A:156A-12(b) (West 1971), as amended by Act of June 23, 1978, ch. 51, 102 N.J.L.J. NL-42 (1978); 18 Pa. Cons. Stat. Ann. §§ 5709(3)(I), 5712(A)(2), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session).

¶34; Note 60: Correction: United States v. Ianelli, 339 F. Supp. 171, 177-179 (W.D.Pa. 1972); United States v. LaGorga, 336 F. Supp. 190, 195-197 (W.D.Pa. 1971).

¶34; Note 60: Delete period at end of footnote and substitute a semicolon. Add: United States v. Hyde, 574 F.2d 856, 862 (5th Cir. 1978).

¶34: Add to the end of paragraph: Similarly, the statutory provisions for special applications for Colorado, Florida, Nevada, New Jersey, Pennsylvania, Rhode Island, and Wisconsin specify offenses and do not mention the interception of conversations with persons not named in the order.[61a]

¶34; Note 6la: Colo. Rev. Stat. Ann. § 16-15-102(16) (1978); Fla. Stat. Ann. § 934.08(5) (West 1973); Nev. Rev. Stat. § 179.465(4) (1973); N.J. Stat. Ann. § 2A:156A-18 (West 1971); 18 Pa. Cons. Stat. Ann. § 5718, as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); R.I. Gen. Laws § 12-5.1-6(a) (Supp. 1977); Wis. Stat. Ann. § 968.29(5) (West Supp. 1978-1979).

¶37; Note 64: Correction: 501 F.2d 267 (2d Cir. 1974), cert.

¶38: Delete and substitute: The District Court in the Eastern District of New York attempted to clarify the New York law requiring amendments by distinguishing Capra and DiStefano from the cases before it. In United States v. Austin[67a] the defendant was not named in the original or amended warrant. Citing Gnozzo, the court found that when there is no claim that another crime was involved in the intercepted conversations of the unnamed defendant, then then intercepted conversations were not outside the scope of the warrant.[67b] The court distinguished Capra and DiStefano by finding that in those cases "either the defendant or the crime overheard were [sic] totally unrelated to the investigation initiated in the original order . . .

in neither of these cases was there probable cause for interception of the particular conversations since they did not relate to the authorized warrant."[67c] In United States v. Aloi, the same court again determined that New York law requires an amendment only when "either the defendant or the crime intercepted is outside the scope of the wiretap authorized."[67d]

¶38; Note 67a: 399 F. Supp. 698 (E.D.N.Y. 1975).

¶38; Note 67b: Id. at 702.

¶38; Note 67c: Id. at 703.

¶38; Note 67d: 449 F. Supp. 698, 730 n. 49 (E.D.N.Y. 1977).

¶38A: The Florida District Court in State v. Barnett[67e] held that the Florida wiretap law allows the interception of communications of unnamed persons provided that someone is violating the law, that he is named if his name is known, and that the wiretap appears to be the most reasonable investigative procedure under the circumstances to secure other and conclusive evidence of criminal involvement.

¶38A; Note 67e: 354 So.2d 422, 423 (Fla.2d Dist. Ct. App. 1978).

¶38B: The Colorado court in People v. Martin[67f] referred directly to their special applications provision and held that it extends to "offenses different from those named within the authorization order and not to persons other than those named."[67g]

Therefore, a special application for the interception of a new person is unnecessary in Colorado.

¶38B; Note 67f: 176 Colo. 322, 490 P.2d 924 (1971).

¶38B; Note 67g: Id. at 341, 490 P.2d at 934. See also United States v. Aloi, 449 F. Supp. 698, 729-731 (E.D.N.Y. 1977)

¶39; Note 68: Delete the period at the end of the footnote and substitute a semicolon. Add: Fla. Stat. Ann. § 934.09(7)(a) (West 1973); R.I. Gen. Laws § 12-5.1-8(a) (Supp. 1978); Ariz. Rev. Stat. Ann. § 13-3010(H) (1978); Nev. Rev. Stat. § 179.485 (1975); Colo. Rev. Stat. Ann. § 16-15-102(8)(a) (1973); 18 Pa. Cons. Stat. Ann. § 5714(B), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); N.Y. Crim. Proc. Law § 700.50(2) (McKinney 1971). Cf. Wis. Stat. Ann. § 968.30(7)(a) (West Supp. 1978-1979): "Immediately upon the expiration of the period of the order or extensions thereof all such recordings and records of an intercepted wire or oral communication shall be filed with the court issuing such order and the court shall order the same to be sealed." N.J. Stat. Ann. § 2A:156A-14 (West 1971) has language similar to the Wisconsin provision. Compare Mass. Gen. Laws Ann. ch. 272, § 99(N)(1) (Supp. 1979) which does not have specific sealing

language. See also Commonwealth v. Vitello, 367 Mass. 224, ___, 327 N.E.2d 819, 849-850 (1975).

¶39; Note 69: Delete and substitute: Fla. Stat. Ann. § 934.09 (7)(b) (West 1973); R.I. Gen. Laws § 12-5.1-8(a) (Supp. 1978); Nev. Rev. Stat. § 179.485 (1975); Colo. Rev. Stat. Ann. § 16-15-102(8)(a) (1978); Wis. Stat. Ann. § 968.30(7)(a) (West Supp. 1978-1979); N.J. Stat. Ann. § 2A:156A-14 (West 1971); 18 Pa. Cons. Stat. Ann. § 5714(B), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); N.Y. Crim. Proc. Law § 700.65(3) (McKinney 1971). The statutes for Arizona and Massachusetts do not contain this provision.

¶39; Note 70: Delete and substitute: 18 U.S.C. § 2518(8)(b) (1970); Fla. Stat. Ann. § 934.09(7)(c) (West 1973); R.I. Gen. Laws § 12-5.1-8(b) (Supp. 1977); Ariz. Rev. Stat. Ann. § 13-3010(G) (1978); Nev. Rev. Stat. § 179.490 (1975); Colo. Rev. Stat. § 16-15-102(8)(b) (1978). Compare Wis. Stat. Ann. § 968.30(7)(b) (West Supp. 1978-1979) ("together with all other papers and records in connection therewith shall be sealed by the court"); N.J. Stat. Ann. § 2A:156A-15 (West 1971) ("and supporting papers shall be sealed by the court"); N.Y. Crim. Proc. Law § 700.55 (McKinney 1971) ("sealed by the justice"); 18 Pa. Cons. Stat. Ann. §§ 5714(B), 5715, as amended by Act of

_____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill, No. 191, 1977 Session) ("applications made, final reports, and orders . . . and supporting papers and monitor's records"). Although the judge should personally seal the tapes and documents, one court declined to suppress when the tapes were sealed by an agent out of the judge's presence. United States v. Cantor, 470 F.2d 890, 892-893 (3d Cir. 1972). See also United States v. Abraham, 541 F.2d 624, 627-628 (6th Cir. 1976) (judge ordered tapes sealed and placed in personal control of FBI agent without requiring that tapes be broughtto him or reviewing them at FBI office); People v. Portanova, 56 A.D.2d 265, 268-269, 392 N.Y.2d 123, 126-127 (App. Div. 4th Dep't 1977).

¶40: Delete and substitute: Delays in sealing have been permitted in several cases when satisfactory explanation for delay was given.[71] The Third Circuit has ruled, moreover, that the sealing requirement is meant to insure "that the integrity of the tapes is pure" and is not meant "to limit the use of interception procedures."[72] Therefore, a delay in sealing, alone, does not require suppression under statute when it is found that the tapes have not been tampered wit

¶40; Note 71: Correction: United States v. Poeta, 455 F.2d 117, 122 (2d Cir. 1971).

¶40; Note 71: Correction: People v. Blanda, 80 Misc.2d 79, 362 N.Y.S.2d 735 (Super. Ct. Monroe County 1974) (delay of four days permitted).

¶40; Note 71: Correction: Commonwealth v. Vitello, 367 Mass. 224 . . .

¶40; Note 72: Add: See also State v. Cerbo, 152 N.J. Super. 30, 34-36, 377 A.2d 755, 757-758 (Super. Ct. App. Div. 1977) (suppression not required where there was no showing that the integrity of the tapes was violated nor that there was prejudice to the defendant).

¶41: Delete in the first sentence "reached a contrary conclusion" and substitute: required suppression.

¶41; Note 73. Delete and substitute: People v. Nicoletti, 34 N.Y.2d 249, 253, 313 N.E.2d 336, 339, 356 N.Y.S.2d 855, 858 (1974) (duplicates of the tapes should have been made for transcription so that the originals could be preserved under seal).

¶41: Add to end of paragraph: The Fifth Circuit in United States v. Hyde,[74a] held that the objection that the tapes were not unsealed in the manner required by the wiretapping order is without any substantive force in the absence of any governmental misconduct and because the attorneys for the defendants agreed that a proper chain of custody of the tapes had been maintained and that the tapes were not tampered with.

¶41; Note 74a: 574 F.2d 856, 870 (5th Cir. 1978).

¶41A: Courts have not treated sealing requirements consistently in recent cases and this area of wiretap law is still in flux. Some courts continue to require strict adherence to provisions under § 2518(8)(a). The Second Circuit held that unexplained delays in sealing ranging from eight to twelve months required suppression of wiretap evidence.[74b] That a district judge

[74b] United States v. Gigante, 538 F.2d 502 (2d Cir. 1976). See also People v. Saccia, 55 A.D.2d 444, 390 N.Y.S.2d 743 (App. Div. 4th Dep't 1977); United States v. Ricco, 421 F. Supp. 401, 405-411 (S.D.N.Y. 1976) (unexplained sealing delay of twelve days in wiretap under New York law required suppression) aff'd, 566 F.2d 433 (1977) cert. denied, 436 U.S. 926 (1978). For examples of cases where the explanation given was satisfactory see: United States v. Caruso, 415 F. Supp. 847, 850-851 (S.D.N.Y. 1976) (delays of twenty-four and forty-two days in sealing state wiretap tapes arising from police efforts to ready tapes for sealing and make duplicates was justified and satisfactorily explained and did not warrant suppression of wiretap evidence; state officials sought and gained no tactical advantage or investigative benefits and there was no indication of any tampering) aff'd, 553 F.2d 94 (1977); United States v. Angelini, 565 F.2d 469 (7th Cir. 1977) (twenty-six day delay for transcription of the tapes was made in good faith without the intent to circumvent the statute, without tampering of tapes, and with diligent haste in completing transcription); United States v. Cohen, 530 F.2d 43, 45-46 (5th Cir. 1976) (immediate return of tapes is a better procedure, but where no alterations were made in the tapes and there was a showing of an adequate chain of custody, a five-week delay made for the transcription of the tapes did not violate the statute), cert. denied, 429 U.S. 855 (1976).

eventually signed a sealing order did not end further inquiry into the adequacy of the sealing and custody of the tapes. The purpose of the sealing requirement is to insure that no subsequent alteration of the tapes can occur. The court declared that a satisfactory explanation is required not only for failure to seal the tapes, but for failure to seal them immediately upon expiration of the wiretap order. The court suggested that, although § 2518(8)(a) does not require it, the issuing judge should sign a formal court order directing sealing and custody of the tapes and should maintain a record of that proceeding.

¶41B: In United States v. Fury,[74c] the Second Circuit again dealt with the sealing requirement issue. Federal and New York law require that tapes be sealed immediately upon the expiration of an eavesdropping warrant (state law) or upon

[74c] 554 F.2d 522, 532-534 (2d Cir. 1977), cert. denied, 433 U.S. 910 (1977), cert. denied, 436 U.S. 931 (1978).

expiration of the period of the wiretap order, or extensions thereof (federal law.)[74d] State officials had obtained two thirty-day extensions for the original order. The court held that under federal or New York law sealing is proper where all the tapes were sealed at the end of the continuing period of the wiretap. The court explained that Gigante concerned separate orders by different judges. The case before the Fury court concerned back to back extensions that simply continued the same wiretap on the same telephone under the same warrant. Therefore, the government did not need to seal tapes upon expiration of the original order and again after each extension as long as the original order and extensions were consecutive so that they constituted a single period.[74e] The court did suggest that it would be more in keeping with the purpose of the sealing requirements to seal tapes at the end of the original period and again after extensions.

¶41C: The New York Court of Appeals in People v. Washington[74f] held to the contrary of most state and federal court decisions concerning the sealing issue. The court found that section 700.50(2) of the N.Y. Crim. Proc. Law requires

[74d] 18 U.S.C. § 2518(8)(a) (1970); N.Y. Crim. Proc. Law § 700.50 (2) (McKinney 1971).

[74e] Fury at 533.

[74f] People v. Washington, No. 505 (N.Y. Ct. of App. Dec. 7, 1978).

sealing at the termination of each order authorizing eavesdropping regardless of any extension of the period of authorized order or extension. This holding confirmed the reading given to the statute by the appellate division in People v. Glasser.[74g] The Second Circuit examined the holdings of these cases in United States v. Sotomayor[74h] and held that the police, who did not seal tapes until after the extensions terminated, need not be penalized for not sealing the tapes after the termination of each order when the state court decisions that declared such a requirement came subsequent to the wiretap. The court also found the sealing requirement is a post-interception procedure relating solely to the preservation of evidence and does not involve the protection of privacy.

¶41D: The Second Circuit in Alfano v. United States[74i]

[74g] 58 A.D.2d 448, 396 N.Y.S.2d 422 (2d Dep't App. Div. 1977).

[74h] 592 F.2d 1219 (2d Cir. Feb. 2, 1979).

[74i] 555 F.2d 1128 (2d Cir. 1977).

added a further requirement that must be met before suppression will be granted for post-conviction relief. The court held that "where extraordinary relief by writ of habeas corpus is sought, evidence of actual tampering is necessary."[74j] The district court of New Jersey in Cerbo v. Fauver[74k] followed Alfano. The petitioner did not challenge the authenticity of the tapes used against him, nor did he allege any tampering. The court found that the error was only technical and did not require a writ of habeas corpus.

¶41E: Failure to comply with sealing requirements may affect investigative or law enforcement use of information derived from wiretap. For example, where information derived from inadequately sealed tapes in one wiretap is used to establish probable cause for a second wiretap, defendants may be able to challenge the admissibility of evidence obtained through the second tap.[741] Most courts so far have rejected this view. The District of Columbia Circuit held that failure to properly seal tapes as required by § 2518(8)(a) does not affect further investigative use of the tapes.[74m]

[74j] Id. at 1129-1130 n.2.

[74k] Cerbo v. Fauver, No. 79-455 (D. N.J. May 1, 1979).

[741] See, e.g., United States v. Ricco, 421 F. Supp. 401 (S.D.N.Y. 1976), aff'd, 566 F.2d 433 (1977), cert. denied, 436 U.S. 926 (1978).

[74m] United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061 (1977).

In United States v. Fury,[74n] the Second Circuit dealt with this same issue with regard to sealing provisions under the New York wiretap law. The court ruled that failure to seal adequately under New York law does not bar disclosure of the contents of wiretap tapes for investigative purposes or to establish probable cause for additional warrants. Failure to meet sealing requirements in the first wiretap did not render interception under that tap illegal. Thus, the evidence from the second tap (based on the first) was not tainted.

¶41F: The Sixth Circuit dealt with two sealing requirement issues in United States v. Abraham:[74o] (1) whether § 2518(8)(a) requires that tapes be sealed by the judge or in his presence; and (2) what constitutes minimum standards for sealing and custody. Government attorneys promptly advised the district judge that the tapes of intercepted conversations were available for his inspection at the time the motion was made for an order directing sealing of the tapes. Without requiring that the tapes be brought to him or viewing them at the FBI office, the judge ordered that the tapes be

[74n] 554 F.2d 522 (2d Cir.) (interpreting N.Y. Crim. Proc. Law § 700.51(1), (2) (McKinney 1971)) cert. denied, 433 U.S. 910 (1977), cert. denied, 436 U.S. 931 (1978).

[74o] 541 F.2d 624 (6th Cir. 1976).

sealed and placed in the custody of the FBI within the personal control of an FBI agent. The drawers of the file cabinet containing the tapes were sealed with masking tape and red tape marked "evidence." Access to the room containing the files was limited. Ruling that the sealing requirements were met, the court set down minimum standards to govern sealing and custody in future cases:

> 1. The tape recordings from each authorization shall be placed in one or more cartons and securely closed with evidence tape or a similar adhesive tape. Each carton shall be clearly identified with a separate letter designation. The tape on each carton shall be initialed by the attorney who obtains the sealing order and the number of reels of tape in each carton shall be shown. The date of the order shall be placed on the tape.
>
> 2. The custodian shall maintain a separate inventory of recordings delivered to him under each court order. This inventory will show by letter designation and date each carton of recordings delivered to him and the number of separated reels of tape contained in each carton.
>
> 3. The sealed cartons of recordings shall be stored in a limited access area under the control of the court-designated custodian. This shall be a separate room used exclusively for the storage of such recordings or, if a separate room is not available, a secure space under control of the custodian and designated by the court. A log shall be maintained showing the name of each person entering the storage area together with the time of entering and leaving.

> 4. Within the limited storage area the cartons containing recordings shall be kept in locked metal file cabinets or similar locked metal containers.
>
> 5. The recordings so stored shall only be taken from the locked containers and removed from the restricted storage area pursuant to court order. When an order is issued for such removal, the custodian shall produce the sealed cartons and inventories of the contents of each in the court room or chambers of the judge issuing the order.[74p]

¶42: In the first sentence, delete "on the persons named in the surveillance order" and substitute: "on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion."[74q]

¶42: Note 74q: 18 U.S.C. § 2518(8)(d) (1970). The following inventory or notice provisions are identical or substantially similar: Ariz. Rev. Stat. Ann. § 13-3010(I) (1978); Colo. Rev. Stat. Ann. § 16-15-102(8)(d) (1978); Fla. Stat. Ann. § 934.09 (7)(e) (West 1973); N.Y. Crim. Proc. Law § 700.50 (3) (McKinney 1971); R.I. Gen. Laws § 12-5.1-9 (Supp. 1978); Wis. Stat. Ann. § 968.30(7)(d) (West 1971). The following statutes are substantially different: Nev. Rev. Stat. § 179.495 (1) (1975) ("the judge who issued the order shall cause to be served on the director of the commissions on crimes, delinquency, and corrections,

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[74p] Id. at 628-629.

persons named in the order and any other parties to intercepted communications"). Mass. Gen. Laws Ann. ch. 272, § 99(L) (West Supp. 1979) ("Prior to execution of a warrant" a "copy of the warrant or renewal must be served upon a person whose oral or wire communications are to be obtained" unless " the application alleges exigent circumstances requiring the postponement of service and the issuing judge finds that such circumstances exist" in which case service may be made within thirty days after termination with continuous secrecy limited to three years). The Supreme Judicial Court of Massachusetts ruled in Commonwealth v. Vitello, 367 Mass. 224, 327 N.E.2d 819, 844 (1975) that this procedure provided adequate access to the information prescribed by 18 U.S.C. § 2518(8)(d) and that the secrecy requirements of § 99.L were in fact more stringent than those imposed by § 2518(8)(d). 18 Pa. Cons. Stat. Ann. § 5716(A), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session) ("be served on the persons named in the order, application, or final report") (§ 5712(E) is about the final report); N.J. Stat. Ann. § 2A:156A-16 (West Supp. 1979-1980):

> the issuing or denying judge shall cause to be served on persons named in the order or application, persons arrested as a result of the interception of their conversations, persons indicted as a result of the interception of their conversations, persons whose conversations were intercepted and against whom indictments are likely to be returned, persons whose conversations were intercepted and who are potential witnesses to criminal activities, and such other parties to the intercepted communications as the judge may in his discretion determine . . . .

¶42: Add the underlined words in the appropriate places in the second sentence: that the surveillance order was issued (or denied), the date it was issued (or denied), the period for which the interception was authorized (or denied), . . .

¶42: Delete the third and fourth sentences.

¶42: Insert footnote number 74r after "tap" in the last sentence: after termination of the tap,[74r]

¶42; Note 74r: All the statute sections cited in note 74q supra have this provision, with the exception of the Massachusetts statute.

¶42; Note 75: Delete and substitute: 18 U.S.C. § 2518(8)(d) 1970); Ariz. Rev. Stat. Ann. § 13-3010(I) (1978); Colo. Rev. Stat. Ann. § 16-15-102(8)(d) (1978); Fla. Stat. Ann. § 934.09(7)(e) (West 1973); Mass. Gen. Laws Ann. ch. 272, § 99(L)(2) (West Supp. 1979); Nev. Rev. Stat. § 179.495(2) (1975); N.J. Stat. Ann. § 2A:156A-16 (West Supp. 1979-1980);

N.Y. Crim. Proc. Law § 700.50(4) (McKinney 1971); 18 Pa. Cons. Stat. § 5716(B), as amended by Act of _____, Pub. L. No. ___, ___ Pa. Laws ___ (1978) (Senate Bill No. 191, 1977 Session); R.I. Gen. Laws § 12-5.1-9 (Supp. 1978); Wis. Stat. Ann. § 968.30(7)(e) (West 1971) (qualifies its postponement provision by requiring the judge review "such postponement at the end of sixty days and good cause shall be shown prior to further postponement").

¶44; Note 77: Add: See also United States v. Donovan, 429 U.S. 413 (1977) (discussed infra ¶¶ 74-74C).

¶44; Note 78: Add: See also United States v. Johnson, 539 F.2d 181, 193 (D.C. Cir. 1976) (interpreting provisions of D.C. wiretap law (D.C. Code § 23-550 1973) corresponding to section 2518(8)(d): "notice provision requires no more than a reasonable effort to reach those whose communications have been intercepted;" if service is made within time limits, sending a registered letter to the above address where telephone was registered in defendant's name was sufficient inventory notice), cert. denied, 429 U.S. 1061 (1977).

¶45; Note 79: Delete period at end of footnote and substitute a semicolon. Add: Hicks v. State, 359 So.2d

475, 475-478 (Fla. 1st Dist. Ct. App. 1978) (the extension for serving inventories made by the lower court was based on good cause; the court did not abuse its discretion in denying the motion to suppress), cert. denied, 364 So.2d 886 (Fla. 1978).

¶46; Note 82: Add: See also State v. Berjah, 266 So.2d 696, 698 (Fla. 3d Dist. Ct. App. 1972) (suppression was granted because the need for the extension for any set period was not shown, and the ordered extension was used as a basis for delay of service of the inventory for more than ninety days following lapse of the first ninety days after the interception).

¶47: Insert footnote number 82a in the first sentence after "ninety-day limit": . . . ninety-day limit[82a] or the eventual limit . . .

¶47; Note 82a: Quintana v. State, 352 So.2d 587, 588 (Fla. 3d Dist. Ct. App. 1977) Although the inventory was not served within the ninety-day period, "the record showed that the inventory was served immediately after the determination by the investigating officers that the defendant's voice appeared in the conversations." Id.

¶48; Note 88: Correction: See also United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), cert. denied, 430 U.S. 905 (1977).

¶48; Note 88: Correction: no effort to comply with section 2518(8)(d) and . . . .

¶48: Insert footnote number 88a at end of paragraph: . . . suppression would be appropriate.[88a]

¶48; Note 88a: See e.g., State v. Murphy, 148 N.J. Super. 542, 547-549, 372 A.2d 1315, 1317-1318 (Super. Ct. App. Div. 1977) (no prejudice was shown so that late service of inventories did not require suppression).

¶49; Note 90: Correction: Id. at 1145-46.

¶49; Note 90: Add: See also United States v. Buschman, 386 F. Supp. 822 (E.D. Wis. 1975), aff'd, 527 F.2d 1082 (7th Cir. 1976).

¶50; Note 91: Correction: 503 F.2d at 536, 542-543.

¶50; Note 92: Correction: 386 F. Supp. 91, 95-96 (D. Hawaii 1974).

¶52; Note 95: Delete: "See also N.J. Stat. Ann. ch. 272, § 99.L(1) (1971) (same rule);" and substitute: The statutes for Arizona, Colorado, Florida, Rhode Island, and Wisconsin are like the federal and New York statutes.

¶52; Note 95: Add to the end of the footnote: Compare: Nevada requires that inventories be served on "persons named in the order and any other parties to intercepted communications." Besides persons named in the order or application, New Jersey requires that service be made on other persons also. See note 74q supra for the citations to the statutes of the states mentioned above.

¶52; Note 96: Delete: "United States v. Bernstein, 509 F.2d 996, 1003-04 (4th Cir. 1975) cert. pending."

¶53; Note 97: Delete and substitute: Chun at 540. See also United States v. Harrigan, 557 F.2d 879 (1st Cir. 1977).

¶54: Delete and substitute: The Supreme Court in United States v. Donovan agreed with the Ninth Circuit that the prosecution has the responsibility to inform the judge of all those whose communications have been intercepted.[98] The Court dealt with the inventory-notice provision, section 2518(8)(d), of the federal wiretap statute. In Donovan, the government had inadvertently failed to include two defendants' names in a list (submitted to the issuing judge) of persons whose communications were intercepted. These defendants were not served with inventory notice. They eventually received actual notice and were not prejudiced by the delay. The two sought to have the wiretap evidence suppressed. The government argued that inventory notice was not mandatory since the defendants were not named in the original wiretap order. The government asserted that since inventory notice was a matter of discretion for the district judge, there was no need to submit the names of persons overheard, but not named in the order.

¶54; Note 98: Delete and substitute: 429 U.S. 413, 430-431 (1977).

¶54A: The Supreme Court rejected the government's view and held that § 2518(8)(d) requires the government to submit either (a) a complete list of all identifiable persons whose communications were intercepted, or (b) a breakdown by category (prospective defendant, innocent party, etc.) of all such persons.[98a] The Department of Justice practice of providing only the names of persons with respect to whom there was a reasonable possibility of indictment was not sufficient.

¶54A; Note 98a: Id. at 429-432.

¶54B: The Court then considered the question of whether the wiretap statute required suppression for failure to include the defendants in the submitted list or serve them with inventory notice. The Court held that suppression was not appropriate.[98] The inadvertent government omissions did not make the interception of defendants' communications retroactively unlawful. Applying the test laid down in Giordano and Chavez (discussed at ¶48 supra), the Court found that § 2518(8)(d) was not intended by Congress to play a substantial role in limiting the abuse of wiretapping.[98c]

¶54B; Note 98b: Id. at 439.

¶54B; Note 98c: Id. at 439-440.

¶54C: The Court did suggest, however, that suppression might be required where:

(1) failure to submit names or delay in serving notice prejudiced defendants,

(2) government failure to name or serve persons was intentional, or

(3) agents knew before interception that no inventory would be served on defendants.[98d]

¶54C; Note 98d: Id. at 439, n. 26.

¶54D: Several circuits have recently followed Donovan. In United States v. Landmesser,[98e] the defendant was not served within the ninety-day period under § 2518(8)(d) because of a government error regarding his address. He did not receive actual notice until seventy-five days before trial. The Sixth Circuit held that suppression was not required as the defendant did not show prejudice due to the delay.[98f] Similarly, the Eighth Circuit, in United States v. DiGirlomo,[98g] ruled that suppression was not proper unless the government omissions were intentional or prejudiced the defendant. The Second Circuit reached the same result in United States v. Fury holding that where the defendant eventually received actual notice, the burden was on him to show that he was prejudiced.[98h]

¶54D; Note 98e: 553 F.2d 17 (6th Cir. 1977), cert. denied, 434 U.S. 855 (197).

¶54D; Note 98f: Id. at 22.

¶54D; Note 98g: 550 F.2d 404, 406-407 (8th Cir. 1977).

¶54D; Note 98h: 554 F.2d 522, 528 (2d Cir. 1977), cert. denied, 433 U.S. 910 (1977).

Cite checked and Shepardized through volume dated May, 1979.

Crim. L. Rptr. examined through issue dated May 30, 1979.

Shepardized by Lexis June 1-6, 1979.

Introduction

The following materials exemplify the electronic surveillance procedures followed by three leading agencies. They were originally collected in the Staff Studies and Surveys of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance (1976). Prosecutors planning to develop electronic surveillance programs in their jurisdictions may find these samples adaptable to their own needs.

I. New York County (Manhattan)

Rackets Bureau Manual
Electronic Eavesdropping[1]

While "[t]he requirements of the Fourth Amendment are not inflexible, or obtusely unyielding to the legitimate needs of law enforcement," . . . it is not asking too much that officers be required to comply with the basic command of the Fourth Amendment before the innermost secrets of one's home or office are invaded. Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices . . . . The Fourth Amendment does not make the "precincts of the home or office . . . sanctuaries where the law can never reach," . . . but it does proscribe a constitutional standard that must be met before official invasion is permissible.

Berger v. *New York*, 388 US 41,63-64

STATUTES

The New York Eavesdropping Law is contained in Article 700 of the Criminal Procedure Law. *Read it* That Article is based upon, and derives its authority from Title III of the Federal Omnibus Crime Control and Safe Streets Acts of 1968 (18 USC Ch. 119, Sections 2510 to 2520); and thus, any Order which authorizes the interception of oral or telephonic communications must conform in all respects to both statutes. By statute [CPL §700.05(4)], an intercepted communication is defined as a conversation or discussion, whether oral or telephonic, which is intentionally overheard or recorded by "instrument, device or equipment" without the consent of any party thereto.

Communications which are intercepted without proper authorization are inadmissible as evidence, may not be used as investigative leads, and subject the eavesdropper to both Federal and state criminal sanctions.

Eavesdropping warrants may be issued only upon probable cause to believe that evidence of a crime designated in Section 700.05(8), which is being, has been, or will be, committed by a particularly described individual, will be obtained through eavesdropping at the subject facilities and/or premises *and* 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." (Section 700.45)

The designated crimes include only felonies dangerous to life, limb or property and the offenses of drug dealing, gambling, bribery, and conspiracy to commit any of the foregoing. (Ch. 119 Section 2516[2])

Authorization to eavesdrop is limited to the period necessary to achieve the evidence desired, but in no event may it exceed thirty days. Renewals are permitted (see below).

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[1] National Wiretap Commission Staff Studies and Surveys, 311-20 (1976).

DECISION TO MAKE APPLICATION

The only individuals who have the authority to apply for an Eavesdropping Order in the State of New York under Article 700, are the Attorney General and the District Attorneys "who are authorized by law to prosecute or participate in the prosecution of the particular designated offense which is the subject of the application." This authority is non-delegable, except in the actual absence of the District Attorney, and must be exercised by him alone.

The Congress has made the following finding on the basis of its own investigations and studies: "Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." (Chapter 119, §301)

But eavesdropping is an extraordinary means of investigation. The decision to employ it must be based, not only upon an evaluation of the legal criteria, but upon the importance of the investigation, the seriousness of the criminal activity, the danger that the subjects pose to the community, and the investigative leads to be achieved.

It should be noted at this point, that in the application the Assistant must set forth a factual basis for showing that conventional means of investigation, have not, or could not succeed in obtaining the evidence required for successful prosecution.

Prior to the time the Assistant decides to draft an application for an eavesdropping warrant with its supporting affidavits, he must give full consideration to these factors and articulate his assessment of each in an addendum to the investigative plan section of the Rackets Bureau Investigation Memorandum.

DRAFTING THE APPLICATION

The Assistant should prepare the Orders, applications and supporting affidavits in writing.

The Order must comply with the provisions of §700.30. In addition, the Order should contain a direction prohibiting the Telephone Company from divulging the existence of the Order to its subscribers. This directive was added after the Office was advised that without it, the New York Telephone Company would follow a policy of truthfully answering subscribers who made inquiry as to whether their telephones were being subjected to electronic surveillance. (see Appendix A)

The application, which is made by the District Attorney, is based upon supporting affidavits of the Assistant District Attorney conducting the investigation, and of other persons (usually police officers) who have personal knowledge of the facts constituting the requisite probable cause.

The application and its incorporated affidavits must comply with the provisions of Section 700.20 (see Appendices B & C)

In drafting an application, the Assistant should keep in mind that in order to use the intercepted conversations as evidence, the Order and its supporting affidavits must be turned over to the defendant prior to trial. Thus, any information which is confidential and which is not required in order to make out probable cause (*e.g.*, the name of an informant) should be made known to the Court outside the application with notice in the application that this was done. However, if an informant has supplied part of the probable cause, his reliability and the basis of his information must be established in the affidavits.

Every paragraph in the affidavits should be consecutively numbered.

THE APPLICATION

After all drafts have been completed, they must be submitted for approval at least forty-eight hours prior to the proposed issuance date of the Order, to the following before submission to the District Attorney:

1. The Appeals Bureau—The Appeals Bureau Chief has designated two or three Assistants to review all applications for eavesdropping Orders. Their role is to analyze the form and content of the Affidavits for legal sufficiency. All questions that the supervising Assistant District Attorney has in his own mind regarding the legal basis of the application should be thoroughly researched prior to the Appeals Bureau review, in order to facilitate the conference. The supervising Assistant is an attorney, and should not rely on the Appeals Bureau Assistant to make the legal decisions.

2. Bureau Chief—Prior to the drafting of the application, suitable notice should have been given to the Bureau Chief in the form of an investigative memorandum and oral discussion. At this point, he must make a determination based upon the final draft, the Appeals Bureau's analysis, and manpower availability whether or not to approve the application as it stands.

The District Attorney must review the proposed application and be given the opportunity to question the supervising Assistant, and/or any of the police officers who supplied the probable cause. If he approves, he must subscribe and swear to the original and a copy of the application.

An Eavesdropping Warrant may be issued by a Justice of an appellate division of the Judicial Department in which the eavesdropping warrant is to be executed, or any Justice of the Supreme Court of the Judicial District in which the Warrant is to be executed, or any County Court Judge of the County in which the warrant is to be executed.

The supervising Assistant District Attorney must personally appear before the Justice with the application and must make available to the Justice any police officer who supplied probable cause if so requested. The Justice may question the Assistant or officer under oath, and if he does, must record or summarize the testimony. If the Justice issues the Order, he is to sign the original and copy of the Order, ke the copy of the Order and original of the application and supporting papers, and deliver the original Order and copy of the supporting papers to the Assistant.

EXECUTION

After the Justice has acted upon the application, whether or not the Order was issued, the ADA should receive an Order number from the Investigation Bureau. At the same time, the top half of the reporting form is to be filled out with the information requested (see Appendix D). If the Order has been issued, and information regarding the locations of pairs and cables is required from the telephone company in order to execute the warrant, a copy of the Order (*without* the supporting affidavits and application) should be sent by hand to the security office of the Company. Usually that will be done by the officer who is assigned the installation.

Prior to the execution of the Order, the ADA must arrange a meeting with the team of police officers assigned to the investigation. At that time, the ADA is to provide the officers with a copy of the Order and supporting affidavits and a copy of the following regulations regarding the execution of eavesdropping Orders:

EXECUTION OF ELECTRONIC EAVESDROPPING ORDERS
OFFICE OF THE DISTRICT ATTORNEY
COUNTY OF NEW YORK

" . . . a court should not admit evidence derived from an electronic surveillance order unless, after reviewing the monitoring log and hearing the testimony of the monitoring agents, it is left with the conviction that on the whole the agents have shown high regard for the right for privacy and have done all they reasonable could to avoid unnecessary intrusion."
U.S. v. Tortorello

INTRODUCTION

Before conducting any electronic surveillance read the authorizing Order and Supporting Affidavits especially noting the designated crimes and subjects.

The goal is to execute the Order, recording those conversations which are designated, and minimizing the interception of non-relevant or privileged communications.

No machine is to be left unattended on automatic. "Minimization" requires the police officer to determine whether or not each conversation is relevant and subject to interception.

Anytime a conversation or *any part thereof* is monitored it is to be recorded. If the machine has a separate monitor switch, such switch is not to be activated unless the machine is recording. However, if the machine malfunctions, or a tape has just run out, monitoring is permissable, while the situation is being remedied.

PROCEDURE

Listen to the beginning of each conversation only so long as is necessary to determine the parties thereto and the subjects thereof.

1. If the parties and subjects are covered by the Order, continue to listen and record as long the conversation remains pertinent.

2. If either the parties or subjects are not covered by the Order, turn off the machine. Check periodically by activating the monitor *and record* switches to determine if the parties or subjects have changed and fall within category No. 1 above. Note the length of time occurring between the periodic checks, and the time of each check.

3. If the conversation does not fall within category No. 1, but it is apparent at the outset that a crime is being discussed, record the conversation insofar as it is pertinent to said crime. Immediately notify the supervising ADA of the conversation for instructions.

Generally, the Order will authorize the interception of conversations of certain named persons, as well as the agents, co-conspirators, and accomplices. If a named person is a participant in the conversation, the statements of the other participants may be intercepted if pertinent to the investigation specified in the Order.

In determining the relevancy of the conversation, the executing officers may take into account the coded, guarded and cryptic manner in which persons engaged in criminal activity often converse. It is therefore imperative that the officers be familiar with the background of the investigation and the conversations already intercepted in order to properly evaluate the meaning of the language used by the subjects.

Conversations between a husband and wife, doctor and patient, attorney and client, and an individual and member of the clergy are privileged and are not to be intercepted and recorded. Such conversations lose the privileged status when the participants are co-conspirators in the criminal activity which is the subject of the conversation, but such decision must be made by the supervising ADA.

DAILY PLANT REPORT

Abstracts of each conversation are to be made at the time of interception and are to be included in the DPR (see Appendices H&I). If the conversation was not entirely recorded, an appropriate notation should be made as to why not (*e.g.*, non-pertinent, privileged). Where the exact words used by the participants are important, that portion of the conversation should be transcribed verbatim. The original of the DPR should be delivered to the supervising ADA at the beginning of the following day.

OBSERVATION REPORTS

Electronic surveillance is used as the last resort in any investigation. Conventional means of investigation are preferred and in any event should be used in conjunction with court ordered electronic surveillance. Whenever meaningful observations are feasible, they should be made and should be recorded on OR's, the originals of which should be submitted with the DPR's.

REELS

The intercepted conversations are to be recorded on pre-numbered Investigation Bureau reels. After each reel has been completed, it is to be rerecorded, and the original is to be returned to the Investigation Bureau vault. *Under no circumstances* should any portion of any tape be erased.

Each officer is to read the Order, affidavits and regulations. Since the Order incorporates the supporting affidavits, it is absolutely essential that each officer read the affidavits and pay particular notice to the designated crimes, subjects and described conversations. Thereafter, the Assistant District Attorney should satisfy himself that the Order and regulations are understood by the officers and they have no doubts as to the scope of the Order and the proper manner of execution.

The supervising officer should then designate a member of his team to pick up the pre-numbered Investigation Bureau reels and DPR forms which are to be used on the plant. Each reel is signed out to the officer and when returned is checked back in by an investigator. Tapes are kept in the locked technical room vault of the Investigation Bureau.

SUPERVISORY FUNCTION OF ADA

It is the duty of the ADA to supervise Court-ordered eavesdropping. This duty is statutory and non-delegable—police officers are not attorneys—it is the ADA's job to make legal decisions and to constantly monitor the performance of the police.

1. Read the Daily Plant Report each day—if there are any questions as to relevancy, question the officers immediately as to their theory of interception, and if incorrect, instruct them to alter their manner of execution.

2. Spot-check the tapes—listen to important conversations, compare them to the abstracts set forth in DPR. Also listen to the extent that non-pertinent conversations were recorded. Determine if the recording and abstracting are being done correctly.

3 Visit the plant—Although Assistants are not police officers and do not participate in "field work" proper supervision should include one or two inspections of the plant. At that time, the manner in which the conversations are being intercepted and recorded can be scrutinized first hand.

AMENDMENTS

During the proper execution of an eavesdropping Order, evidence of other crimes may be discovered. A conversation between the subjects concerning a designated crime might turn to a discussion of another non-specified offense; or, even prior to a determination of the identities of the parties, it may be clear that the conversation concerns the commission of a crime unrelated to the investigation. Section 700.65(4) of the Criminal Procedure Law provides that such evidence may be used provided the Order is amended to include the contents of the conversations. The amendment authorizing the use or interception of conversations involving other crimes or individuals should be applied for, as soon as practicable, which, in most cases, will be prior to the terminal date of the Order. The affidavit in support of the application should incorporate the Original Order and should set forth the circumstances under which the conversations were intercepted, the substance of those conversations, the identities of the parties, and any reasons for believing that similar conversations concerning the new crimes or individuals will occur over the subject telephone or in the subject premises in the future.

DECISION TO TERMINATE OR RENEW

The CPL authorizes eavesdropping only so long as it is necessary to accomplish the desired ends, which could not be accomplished by conventional means of investigation. Eavesdropping is not a legal method of gathering intelligence once sufficient evidence for full prosecution has been obtained. The ADA has an obligation to direct termination of eavesdropping at that point, whether or not the terminal date of the Order has been reached. If, however, the evidence sought has not been obtained by the terminal date, Section 700.40 provides for an Order of Extension. Both the Application and the Order must conform to the requirements of the Original. In addition, the affidavit in support of the Application "must contain a statement setting forth the results . . . obtained . . . or a reasonable explanation of the failure to obtain such results." In making the decision whether or not to renew, the Assistant must make a criical evaluation of the practical chances of obtaining evidence which had not been obtained during the previous period of authorization.

At the time that the application for an Order of Extension is made to the issuing Justice, the Daily Plant Reports should separately be presented for the Court's inspection as a progress report of the type referred to in CPL §700.50(1). If the Justice desires, this should be done at shorter intervals.

TERMINATION

A. Any device installed to intercept and record must be removed or permanently inactivated.

B. Reels

CPL §700.50(2) provides that the original recordings must be sealed by the issuing Justice immediately after the eavesdropping terminates. If the regulations set forth above have been followed, the original reels should have been rerecorded and maintained in the Technical Room Vault. They are preliminarily sealed by masking tape, which is then stamped or signed by the Justice who issues the sealing order (see Appendix E). The tapes are then to be returned to the Vault. Each time a tape, sealed or unsealed, leaves or is returned to the Vault, a notation to that effect is made on the sign out card. Any time it is necessary to open a sealed tape, it must be done pursuant to Court Order. The Assistant District Attorney should draft an Affidavit in support of that Order stating the need for use of the original. At the conclusion of that use, the tape must be resealed in the same manner as was done originally.

C. Notice

Upon the expiration of the Order, preprare a notice of eavesdropping in conformity with Section 700.50(3), (see Appendix F). Such notice "must be personally served upon the parties named in the warrant and such other parties to the intercepted communications as the Justice may determine . . . ." Such notice must be served within ninety (90) days. If serving it upon the parties at that time would be detrimental to the investigation, the Justice may order a postponement. The Assistant should prepare an affidavit setting forth the exigent circumstances in support of the Order of Postponement prior to the expiration of the ninety (90) day period. (See Appendix G)

In addition to the parties named in the Order, notice should be served upon parties who are potential defendants, potential grand jury witnesses, or individuals who may be adversely effected by the interception.

D. Completion of Reports

At the bottom of each cover page of the DPR's, there are spaces for the number of intercepted calls, the number of incriminating calls, and the number of persons intercepted who had not previously been intercepted. Those spaces should be filled in on a daily basis. At the expiration of the Order, the daily figures should be totalled and the Eavesdrop Reports completed.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

EAVESDROPPING
WARRANT

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number ——— located in ——— County, City and State of New York, and the interception of certain oral communications occurring at said premises.

It appearing from the affidavits of — - ——, District Attorney of the County of New York, ——— ——, Assistant District Attorney of the County of New York and Police Officer ———, said affidavits having been submitted in support of this eavesdropping warrant and incorporated herein as a part hereof, that there are reasonable grounds to believe that evidence of the crimes of ———, ———, ——— and Conspiracy to commit said crimes may be obtained by intercepting certain wire communications transmitted over the above-captioned telephone line and instrument and by intercepting certain oral communications occurring at the above-captioned premises, and the Court being satisfied that comparable evidence essential for the prosecution of said crimes could not be obtained by other means, it is hereby

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under the direction and supervision of said District Attorney, is hereby authorized to intercept and record the telephonic communications of the persons described in the supporting affidavits herein, their co-conspirators and agents as described and delineated in paragraph - – of the herein incorporated affidavit of [The ADA], transmitted over the above-captioned telephone line and instrument, and it is further

ORDERED, that the District Attorney of the County of New York or any police officer in the City of New York acting under the direction and control of said District Attorney is hereby authorized to intercept and record the oral communications as described and delineated in paragraph —- of the herein incorporated affidavit of [The ADA], of the persons described in the supporting affidavits herein, their co-conspirators and agents, as such communications occur at the above-captioned premises, and it is further

ORDERED, that the District Attorney of the County of New York, or any police officer of the City of New York acting under his direction and supervision is hereby authorized to make secret entry into the above-captioned premises to install and maintain the eavesdropping devices required to execute this warrant, and it is further

ORDERED, that nothing herein contained shall be construed as authorizing the District Attorney or his agents to overhear or intercept any communication which appears privileged or unrelated to the aforementioned crimes, and that this Order shall be executed in a manner designed to minimize the interception of non-relevant and privileged conversations, and it is further

ORDERED, that the agents and employees of the New York Telephone Company are directly constrained not to divulge the contents of this Order nor the existence of electronic eavesdropping over the above-captioned telephone line and instrument to any person including but not limited to the subscriber of the above-captioned telephone instrument whether or not the said subscribers request that the said telephone instrument be checked of the existence of said electronic eavesdropping equipment, and it is further

ORDERED, that this eavesdropping warrant shall be executed immediately and shall be effective the —- day of ——— and its authorization shall continue until the evidence described in paragraph —- of the aforementioned affidavit of [The ADA] shall have been obtained, [and said authorization shall not automatically terminate when the communications described in said paragraph —- have been first obtained], but in no event shall said authorization exceed (—) days from its effective date, to wit, the —- day of ———.

Dated: New York, New York

———
Justice of the Supreme Court

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

APPLICATION FOR
EAVESDROPPING
WARRANT

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number ——— located in ———, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

[The D.A.], being duly sworn, deposes and says:

I am the District Attorney of the County of New York, State of New York, and as such, make this application for an eavesdropping warrant authorizing the interception of certain wire and oral communications.

I have read the annexed affidavits of Assistant District Attorney. ——— and Police Officer ——— ———, which are incorporated herein and made a part of this application.

Based upon the facts set forth in said affidavits, I respectfully submit to the Court that there are reasonable grounds to believe that essential evidence of crimes may be obtained by the interception of the oral and wire communications described in paragraph —- and paragraph -- of Mr. ———'s affidavit.

Based upon said affidavits, it is my opinion that there are no practical alternative means of acquiring comparable evidence or information. I believe the nature of the criminal activity involved is of sufficient public importance to warrant the employment of electronic interception devices.

WHEREFORE, it is respectfully requested that an Eavesdropping Warrant in the form annexed be issued.

———

Sworn to before me this
—- day of ———

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AFFIDAVIT IN
SUPPORT OF
AN APPLICATION
FOR EAVESDROPPING
WARRANT

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number ——— located in ———, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

STATE OF NEW YORK

ss.:

COUNTY OF NEW YORK

[The ADA], being duly sworn, deposes and says:

1. I am an Assistant District Attorney in the Office of [The D.A.], District Attorney for New York County, assigned to the Rackets Bureau, one of the principal functions of which is the investigation and prosecution of cases involving organized criminal activity.

2. In this capacity, I am conducting an investigation into (nature of criminal conduct) conducted by (subjects) through the use of the above-captioned telephones and premises, in violation of Article —- of the New York State Penal Law, specifically those provisions entitled ——— and Conspiracy to commit those crimes.

3. This affidavit is submitted in support of District Attorney ———'s application for a Eavesdropping Warrant.

[The next set of paragraphs are to contain a full and complete statement of the facts constituting probable cause, including:

(I.) Probable cause to believe that a particular designated offense has been, is being, or is about to be committed.

(II.) Probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used in connection with the commission of such designated offense.

(III.) A particular description of the nature and location of the facilities from which, or the place where the communication is to be intercepted.

(IV.) The identity of the persons, or descriptions thereof, who are the subjects of the Order.

In addition, the goals of the investigation, the period of time necessary to achieve such goals and the reasons therefore, should be set forth in detail.

The office records must be checked to determine whether or not the subjects of this Order or any of the premises, were involved in previous applications. If so, a full statement of facts concerning such applications, and the results of those applications must be set forth.]

For purposes of this sample, it will be assumed that the above is contained in paragraphs 4–13.

14. For the following reasons, conventional means of investigation could not succeed in achieving the desired goals of this investigation. [set forth reasons supported by factual detail]

15. Based on the above, I believe that the criminal activities referred to in paragraph 2 are being engaged in by ————— [at the above-captioned premises] [using the above-captioned telephone] and that evidence essential to successful prosecution can be established only by Court authorized electronic-eavesdropping as described herein.

16. Wherefore, I respectfully request that an Order in the form annexed, entitled Eavesdropping Warrant, be issued by this Court.

17. Said Warrant is specifically limited to the telephonic conversations of ————— and ————, their agents and co-conspirators, (some of whom are as yet unknown), as they occur over the above-captioned telephone concerning (nature of criminal activity). Said conversations can be expected to involve (describe anticipated conversation).

18. Said Warrant is further limited to the oral conversations of ———— and ————, their agents and co-conspirators, (some of whom are as yet unknown) as they occur in the above-captioned premises concerning (nature of criminal activity). Said conversations can be expected to involve (describe anticipated conversation).

19. I am in possession of no information which would indicate that any of the conversations to be intercepted may be expected to come within any privilege under any applicable rule of law. The Eavesdropping Warrant will be executed in such a manner as to minimize the possibility of intercepting privileged or non-pertinent conversations. No conversations which appear privileged or unrelated to this investigation will be intercepted.

20. All appropriate investigating techniques will be used in conjunction with information obtained from the intercepted conversations and all leads will be followed with the purpose of insuring the successful prosecution of the conspirators.

21. The conversations to be intercepted will be recorded under my supervision on tapes which will be safeguarded and kept at all times in the custody of the Bureau of Investigation of the New York County District Attorney's Office, will be protected from editing or other alteration and will be used solely and appropriately in the lawful investigation and prosecution of the crimes referred to in paragraph 2 supra.

[22. In view of the continuing nature of the criminal activity described herein, it is further requested that should this Order be granted, its authorization for interception not automatically terminate when conversations of the type described in paragraph —— have been first obtained. For the reasons set forth above, it is my opinion that evidence sufficient to properly prosecute the appropriate persons committing the crimes referred to in paragraph 2 supra, can be obtained only by the interception of several conversations.] In no event, however, should said Order authorize interception for more than —— days.

23. No previous application for the same or similar relief has been made.

Sworn to before me this
—— day of ———

FORM 1

APPLICATION NO. _____

TO: DIRECTOR, ATTENTION OPERATIONS BRANCH, D.I.S.
ADMINISTRATIVE OFFICE OF U.S. COURTS, SUPREME COURT BLDG, WASHINGTON, D.C. 20544

REPORT OF APPLICATION &/OR ORDER AUTHORIZING INTERCEPTION OF COMMUNICATION

JUDGE'S NAME _____
COURT _____
ADDRESS _____

PERSON MAKING THIS REPORT

SOURCE OF APPLICATION

		A. THE OFFICIAL MAKING APPLICATION	B. OFFICIAL AUTHORIZING APPLICATION
PERSON	NAME		SHOW "SAME" IF SAME AS "A"
	TITLE		
AGENCY	NAME		
	ADDRESS		

OFFENSES

APPLICATION	ORDER OR EXTENSION		
OFFENSES SPECIFIED	DENIED	GRANTED	GRANTED WITH THESE CHANGES
	☐	☐	
Type of Intercept ☐ Phone Wiretap ☐ Other (Specify) ☐ Microphone/Eavesdrop	DATE OF APPLICATION		DATE OF ORDER

DURATION OF INTERCEPT

PERIOD ORIGINALLY REQUESTED ▶			☐	☐	
LENGTH OF EXTENSIONS REQUESTED	1st ▶		☐	☐	
	2nd ▶		☐	☐	
	3rd ▶		☐	☐	

PLACE

☐ SINGLE FAMILY DWELLING ☐ MULTIPLE DWELLING ☐ OTHER (Specify) _____
☐ APARTMENT ☐ BUSINESS LOCATION (Specify) _____

COMMENTS

DATE OF REPORT _____ SIGNATURE _____

FORM 2

TO DIRECTOR, ATTENTION OPERATIONS BRANCH, D.I.S.
ADMINISTRATIVE OFFICE OF U.S. COURTS, SUPREME COURT BLDG, WASHINGTON, D.C. 20544

APPLICATION NO. _____

REPORT OF POLICE & COURT ACTION RESULTING FROM INTERCEPTED COMMUNICATIONS

COURT AUTHORIZING THE INTERCEPTS
NAME OF JUDGE
COURT
ADDRESS

PERSON MAKING THIS REPORT AND WHO AUTHORIZED THE INTERCEPTION APPLICATION

NAME & AGENCY OF PERSON MAKING APPLICATION FOR INTERCEPTION (IF DIFFERENT FROM →)

NAME
TITLE
AGENCY
ADDRESS

	APPLICATION		ORDER OR EXTENSION		
	OFFENSES SPECIFIED	DATE OF APPLICATION	DENIED	GRANTED	GRANTED WITH THESE CHANGES	DATE OF ORDER
	Type of Intercept ☐ Phone Wiretap ☐ Other (Specify) ☐ Microphone/Eavesdrop					
PERIOD ORIGINALLY REQUESTED ▶			☐	☐		
LENGTH OF EXTENSIONS REQUESTED 1st ▶			☐	☐		
2nd ▶			☐	☐		
3rd ▶			☐	☐		

☐ SINGLE FAMILY DWELLING ☐ MULTIPLE DWELLING ☐ OTHER (Specify)_____
☐ APARTMENT ☐ BUSINESS LOCATION (Specify)_____

	TYPE OF INTERCEPTION	NUMBER OF DAYS IN ACTUAL USE	AVERAGE FREQUENCY OF INTERCEPT	NUMBER OF: PERSONS WHOSE COMMUNICATIONS WERE INTERCEPTED	COMMUNICATIONS INTERCEPTED	INCRIMINATING COMMUNICATIONS INTERCEPTED
DESCRIPTION OF INTERCEPTS						

	NATURE AND QUANTITY OF MANPOWER USED	Manpower Cost	TOTAL COST
COST		$	$
	NATURE OF OTHER RESOURCES	Resource Cost	
		$	

	NUMBER OF ACTIONS RESULTING FROM INTERCEPTIONS					
	NUMBER OF PERSONS ARRESTED BY TYPE OF OFFENSE	TRIALS COMPLETED	MOTIONS TO SUPPRESS: MADE	GRANTED	DENIED	NUMBER OF PERSONS CONVICTED BY TYPE OF OFFENSE
RESULTS						

AN ASSESSMENT OF THE IMPORTANCE OF THE INTERCEPTIONS IN OBTAINING SUCH CONVICTIONS

DATE OF REPORT_____ SIGNATURE _____

SUPPLEMENTARY REPORT FOR WIRETAPS

REPORTED FOR 1973

Form 3
Page___of___

Additional Costs, Arrests, Trials, and Convictions Reported by Prosecutors in Calendar Year 1974 as a Result of Orders for the Interception of Wire or Oral Communications Reported in the Above Year. (Report as of December 31, 1974)

INSTRUCTIONS

1. Indicate any additional activity which occurred during calendar year 1974 as a result of intercept orders, reported for the year of the accompanying excerpts of the Wiretap Report;
2. If there was no additional activity, enter "none" in each column 3 through 7;
3. Motions to suppress intercepts should be shown with "denied" or "granted" in column 6;
4. DO NOT REPORT ANY COSTS, ARRESTS, TRIALS, MOTIONS, OR CONVICTIONS, PREVIOUSLY REPORTED either on your original Form 2 or on a previous supplementary report, Form 3;
5. Please use the reporting number shown in the Wiretap Report for the above year.

Reporting Number 1973 Report (1)	Date of Application (2)	Additional Activity During Calendar Year 1974: Cost (3)	Number of Persons Arrested by Offense (4)	Number of Trials Completed (5)	Motions to Suppress Intercepts (6): Made	Granted	Denied	Number of Persons Convicted by Offense* (7)

*Indicate the offense for which each person was convicted, such as:
3 (convicted) burglary
1 (convicted) forged checks

Name, address and telephone number of person responsible for completion of this form.

NAME_____
ADDRESS_____
CITY, STATE_____, _____
ZIP_____
AREA CODE ___ TELEPHONE_____

JURISDICTION
_____
DATE_____

MAIL TO: Director - Attention Operations Branch
D.I.S. - Administrative Office of
the United States Courts
Supreme Court Building,
Washington, D.C. 20544

If you have any questions concerning this form, please call:
Mr. James A. McCafferty
Chief, Operations Branch,
Division of Information Systems
Area Code 202, 393-1640, Ext. 383

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ORDER

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number ————, located in ————, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

[No.] reels of magnetic recording tape bearing New York County District Attorney's Office Investigation Bureau numbers ————, having been made available to me this day by New York County Assistant District Attorney ———— and New York City Police Officer ———— and said reels having been sealed under my direction, it is hereby

ORDERED, that said [No.] reels of magnetic recording tape be kept in the locked Technical Room Vault of the New York County District Attorney's Office under seal and that said seal shall not be broken unless so ordered by a Justice of the Supreme Court of the State of New York.

_____
Justice of the Supreme Court

Dated: New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NOTICE

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number ————, located in ————, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

PLEASE TAKE NOTICE that on ————, the Honorable ————, Justice of the Supreme Court, issued an Eavesdropping Warrant [which he duly amended and renewed], authorizing the District Attorney of the County of New York to intercept and record certain conversations, as captioned above, transmitted from (date effective) through (terminal date), and that pursuant to said Eavesdropping Warrant certain of said conversations were in fact intercepted and recorded.

Yours, etc.

_____
District Attorney, New York City
By: _____
Assistant District Attorney

Dated: New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ORDER POSTPONING
NOTICE

In the Matter of

the interception of certain wire communications transmitted over telephone line and instrument presently assigned number ————, located in ————, County, City and State of New York, and the interception of certain oral communications occurring at said premises.

It appearing from the affidavit of ————, Assistant District Attorney of the County of New York, that there is sufficient cause to believe giving notice on or before ———— pursuant to Section 700.50(3) of the Criminal Procedure Law would seriously hamper an investigation into the crimes of ———————— it is hereby

ORDERED, that such notice, be postponed for a period of —— days, to wit, until ————.

Dated: New York, New York

_____
Justice of the Supreme Court

II. Office of the Special Narcotics Prosecutor, New York City

Sample Instructions Given to Police Officer Monitoring Plant[2]

The following instructions have been prepared by members of the Special Narcotics Courts to assist you in executing the eavesdropping warrant and in monitoring the conversations overheard and intercepted

All the work and effort put into getting the eavesdropping warrant, along with all the results which might be obtained, will have been wasted unless the police officers monitoring the conversations carefully follow the instructions prepared.

1. LISTENING AND RECORDING

The law makes no distinction between "listening" to a conversation and "recording" a conversation. When you remove property pursuant to a search warrant, that is called a seizure. When you *overhear* or *record* a conversation pursuant to an eavesdropping warrant, that also is called a seizure, but in our case we are seizing "conversations" rather than property.

Thus RULE ONE states that where the instructions below indicate that you must turn off the machine, stop recording, stop monitoring, stop listening, etc. STOP LISTENING to the conversation and TURN OFF the tape recorder.

2. Just as a search warrant permits or authorizes a "limited" search for "specified property", an eavesdropping or wiretap warrant authorizes you to "intercept OR record telephonic communications of [name omitted], with co-conspirators, accomplices, agents, deliverers, suppliers, and customers, over the above described telephone pertaining to the purchase, sale, transfer, shipment or possession of narcotic drugs."

RULE TWO—you can only intercept (meaning listen or record) conversations where our named subject is a party.

RULE THREE—you can only intercept conversations where [name omitted] is a party and where the subject of the conversation is NARCOTICS.

Thus you are authorized to listen to conversations over the captioned telephone instrument ONLY when [name omitted] is on the telephone. It is our opinion, that you may listen to the initial part of a conversation, but once you ascertain that our subject is not on the telephone, you MUST shut off the recorder and stop listening (Exception: see paragraph 7).

The phrase "co-conspirators, accomplices, agents, suppliers, deliverers, and customers" does NOT give us authority to listen to any and all conversations, of any and all persons, which occur over the telephone. What it does authorize, in our opinion, is the interception of conversations between our named subjects and other individuals IF THOSE CONVERSATIONS PERTAIN TO NARCOTICS.

Except as noted in paragraphs 6 and 7, if our named subject is not a participant in the conversation, YOU MUST TURN THE MACHINE OFF. STOP LISTENING. STOP RECORDING.

---

[2] Id. at 356-57.

3. PRIVILEGED COMMUNICATIONS

The eavesdropping warrant specifically states that we are not permitted to intercept any communications of [name omitted] "which are otherwise privileged." We may not listen to any conversation which would fall under any legal privilege: between attorney and client, between doctor and patient, between husband and wife, and between clergyman and parishoner.

ATTORNEY-CLIENT—consider this an absolute rule: Never knowingly listen to or record a conversation between a subject and his attorney. At present we are unaware of any such existing relationship, but if one is established notify me immediately, and post the name and number of the attorney at the plant so we do not intercept such calls.

PARISHIONER-CLERGYMAN—same as above.

DOCTOR-PATIENT—any conversations a patient has with a doctor relative to diagnosis, symptoms, treatment, or any other aspect of physical, mental or emotional disorder is privileged. If a conversation between a doctor and patient is not about a professional relationship, it is not privileged. However, as a general rule, do not listen to any conversations between a subject and a doctor.

HUSBAND-WIFE—In general, the same rules apply to conversations between a subject and his wife as with his attorney or his clergyman or his doctor. However, experience has demonstrated that a subject may utilize his wife to take messages from narcotic co-conspirators, etc., or to call, or to dial narcotic co-conspirators. Therefore, a limited degree of spot monitoring (see paragraph 7) may be maintained if subject calls wife.

4. OTHER CONVERSATIONS

Even if a conversation between our subject and another does not fall within an area privileged by law, that does not mean that you have the right to listen to or record the entire conversation; we are permitted to listen to and record ONLY those conversations PERTAINING TO NARCOTICS.

Because of the cryptic, guarded, coded nature of our subject's narcotic conversations, it may be necessary to listen to conversations which in fact do not relate to narcotics at all. In our opinion, the Courts will not suppress pertinent conversations simply because some non-pertinent conversations have been intercepted.

The standard which the Courts are likely to apply, in determining whether there was an overly broad listening to non-pertinent conversations, is simply: *Did the monitoring officers make a good faith effort to comply with the restrictions in the eavesdropping warrant?*

Keep in mind that each of you might be required to explain from the witness stand why a particular conversation was intercepted. Make a good-faith effort to comply with the central purpose of the warrant: the interception of conversations pertaining to narcotics.

5. SUBJECT NOT PARTY TO CONVERSATION

As a general rule, if neither the person who makes a phone call nor the person who receives the call is our named subject, that conversation is beyond the scope of our warrant and must not be listened to or recorded.

However, in executing the warrant we have the right to insure that our named subject does not get on the phone immediately after the initial part of the conversation.

Therefore, in our opinion, it is permissible to listen to a conversation which does not involve any named subject for a brief period of time, to ascertain whether our named subject is about to get on the phone. If our subject does not get on the phone within the first 15-30 seconds, you must stop listening and turn off the machine. Thereafter, you may do no more than *spot-monitor* the conversation (see paragraph 7).

6. OTHER CRIMES-OTHER SUBJECTS

We do not have authorization to overhear evidence of the commission or planning of other crimes, such as murder, etc. Conversations must be monitored with our sole legal purpose in mind: interception of conversations of our subject with others pertaining to NARCOTICS.

If while you are permissibly monitoring a narcotic conversation, the subject switches the topic of conversation to other crimes such as murder or robbery you are permitted to continue intercepting evidence of the "other crimes" but I must be notified IMMEDIATELY in order to seek the proper amendment to our eavesdropping warrant.

When spot-monitoring (see paragraph 7) a conversation where neither party is a named subject or when otherwise permissibly monitoring conversations, you overhear a NEW subject discussing drugs (possibly subject's wife) you are allowed to continue to overhear and to record such conversation but I must be notified *as soon as possible*, in order to amend the eavesdropping warrant to include the NEW subject.

One of our stated and authorized purposes in conducting this investigation is to *identify* our subjects "co-conspirators, accomplices, agents, suppliers, deliverers, and customers," in narcotics traffic. As soon as any such individual has been identified, I should be notified immediately.

If we know the name or nickname of a given "co-conspirator," etc. we can seek authority to add him to the named subjects whose conversations may be overheard.

Even if we do not have a name, if the same person's voice is heard discussing narcotics with our subject on several occasions, we can seek authority to add him to the order, for example as "JOHN DOE No. 1, who had telephonic conversations with SUBJECT No. 1 on June 21, 1972, at approximately 3 p m ; and with subject No. 2 on June 24, at approximately 8:30 p.m."

7. SPOT-MONITORING

References have been made in paragraphs 2, 3, 5, and 6 to "spot-monitoring."

Assuming a conversation does not, during the initial 15-30 seconds fall within the catagory specified in the warrant, the recording and listening devices must be turned off

However, it is possible that some time after this initial period, our subject might get on the phone. To guard against missing such a conversation, *spot-monitoring* is required. Every thirty to sixty seconds or so, turn the recording and listening devices back on; listen for a few seconds. If during those few seconds evidence of our subject discussing narcotics is intercepted, keep listening; if not, turn off the machine. Stop listening. Continue to spot-monitor as the circumstances indicate. Spot-monitoring means recording as well as listening.

You may spot-monitor a conversation between our subject and others when originally the interception was non-narcotic. You're spot-monitoring to ascertain if the nature of the conversation has switched to narcotics.

8. USE OF LISTENING AND RECORDING DEVICES

Whenever possible, anything that is recorded should be listened to. This rule should be followed while spot-monitoring as well as while hearing and recording full conversations.

Under *no* circumstances is the recording equipment to be left on "automatic" when the plant is not being manned. If the plant is not manned, the equipment must be turned off.

If there are any questions concerning any instructions or if you have questions while monitoring or if any emergency develops, I can be contacted at the Special Narcotics Courts Sergeant Frank Trefcer has my home telephone number if that becomes necessary.

GOOD LUCK.

ROBERT P LA RUSSO
ASSISTANT DISTRICT ATTORNEY

III. New Jersey

Instructions and Forms for Electronic Surveillance[3]

CRIMINAL INVESTIGATION SECTION

ELECTRONIC SURVEILLANCE REQUEST

UNIT:

DETECTIVE MAKING APPLICATION - (List individual detective affiant in Application)

CRIME: (List specific crime for which the order is sought)

SUBJECT: (Identify person involved and briefly outline his criminal history and significance if involved in organize crime)

PLANT LOCATION: (Identify specific telephone to be monitored, location of place and anticipated investigative telephone lines needed)

CO-OPERATING POLICE AGENCIES: (Identify any outside enforcement agency having access to wire information or plant location and any agency to whom disclosure must be authorized by court order)

MANPOWER COMMITMENT: (Outline anticipated State Police manpower needs and units from which same will be acquired)

[3] Id. at 127-69.

GOALS OF SURVEILLANCE REQUESTED:

a. Significance of crime:

b. What impact will this order have upon any specific criminal element. i.e., are we seeking an individual bookmaker or inroads into a far reaching organized group.

c. What do you have to achieve with this surveillance.

DURATION OF SURVEILLANCE REQUESTED:

WIRE ORDER NUMBER: _____

CRIMINAL INVESTIGATION SECTION

ELECTRONIC SURVELLANCE REQUEST

W.O. # _____

BUREAU/TROOP	APPROVED	DISAPPROVED	DATE
INVESTIGATIONS OFFICER			
INTELLIGENCE			
OCU			

UNIT

DETECTIVE

CRIME

TARGET AND ADDRESS

TELEPHONE TO BE INTERCEPTED AND LISTING

INVESTIGATION TO DATE

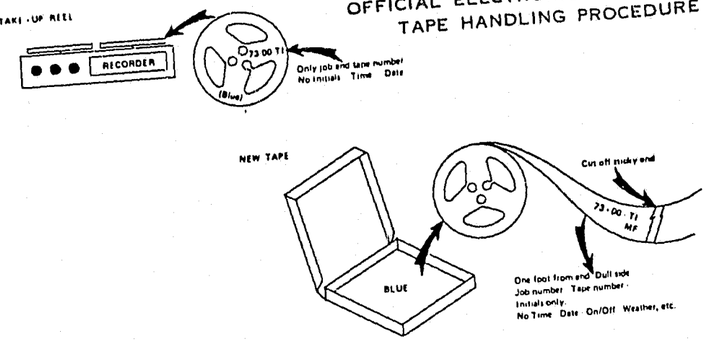
GOAL OF OPERATION

ANTICIPATED MANPOWER

ANTICIPATED LENGTH OF OPERATION

/S/_____

OFFICIAL ELECTRONIC SURVIELLANCE TAPE HANDLING PROCEDURE



TAPE ISSUED

DATE	7" BLUE	5" BLUE	7" CLEAR	5" CLEAR	OTHER	TAPE RETURNED

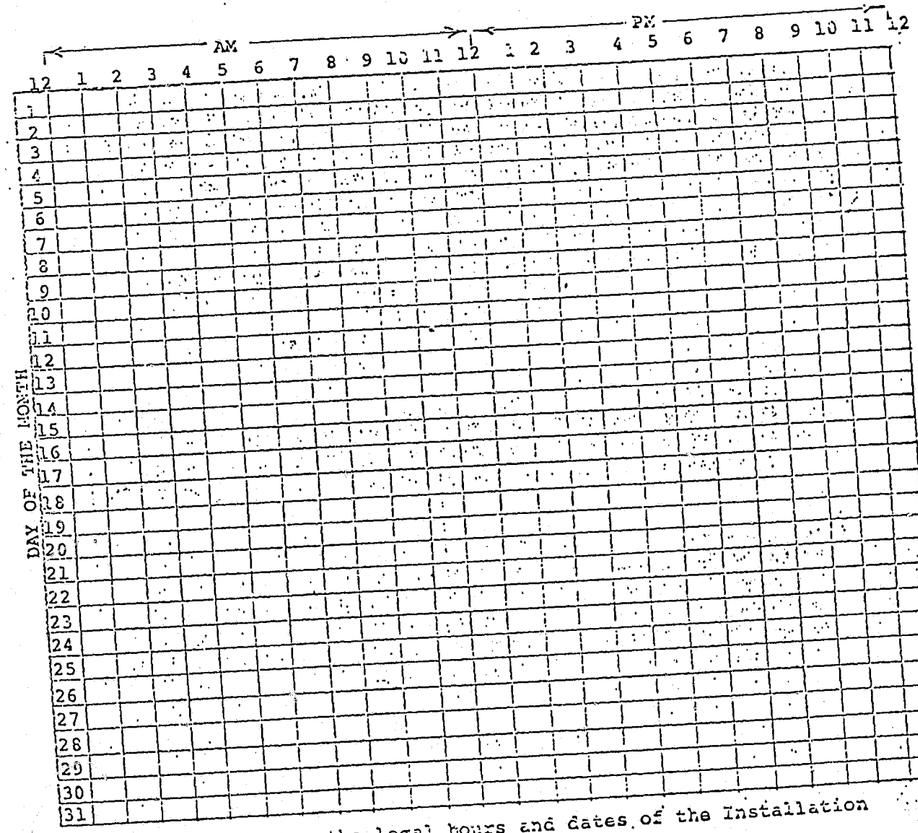
TAPE PROCESSED -EVIDENCE

DATE	TAPE #	PROCESSED BY	PICK-UP BY	DATE	TAPE #	PROCESSED BY	PICK-UP BY
	T-1				T-33		
	T-2				T-34		
	T-3				T-35		
	T-4				T-36		
	T-5				T-37		
	T-6				T-38		
	T-7				T-39		
	T-8				T-40		
	T-9				T-41		
	T-10				T-42		
	T-11				T-43		
	T-12				T-44		
	T-13				T-45		
	T-14				T-46		
	T-15				T-47		
	T-16				T-48		
	T-17				T-49		
	T-18				T-50		
	T-19				T-51		
	T-20				T-52		
	T-21				T-53		
	T-22				T-54		
	T-23				T-55		
	T-24				T-56		
	T-25				T-57		
	T-26				T-58		
	T-27				T-59		
	T-28				T-60		
	T-29				T-61		
	T-30				T-62		
	T-31				T-63		
	T-32				T-64		

NEW JERSEY STATE POLICE
ELECTRONIC SURVEILLANCE
INSTALLATION EVALUATION

INSTALLATION NO. _____ UNIT _____ APPLICANT _____

CRIME _____ ORDER DATE _____



LEGEND: ⌇ Indicates the legal hours and dates of the Installation
⌇ INDICATES NO MONITORING PERMITTED
O Indicates monitoring was conducted but no pertinent conv.
1,2,3,4,5 etc. indicates the number of pert. conv. during that ha

NOTE: ___ EVALUATE FOR REDUCTION OF MONITORING TIME

EXPLORATORY

SUBSCRIBER (NAME) _____ EXPLORATORY TAKEN BY _____

ADDRESS (STREET) _____ TELEPHONE COMPANY NOTIFIED

(CITY) _____ WHO ____ DATE ____ TIME ____

TELEPNONE NUMBER _____ MAIN ☐ AUX. ☐ UNKNOWN ☐

REQUESTING TROOPER _____ UNIT _____

LEAD INFO _____ CRIME _____ PAPER ANTICIPATED _____

RETURN CP

WHO _____ DATE _____ TIME _____

ROTARY ☐ TOUCH TONE ☐

UNDERGROUND CABLE NUMBER _____ PAIR _____

POLE #	STREET	BINDING POST	BINDER	COLORS

AERIAL CABLE NUMBER _____ PAIR _____

POLE #	STREET	BINDING POST	BINDER	COLORS

APPLYING AGENCY _____ JOB NUMBER _____

APPLICATION MADE BY _____

SLAVE ( ) HARDWARE ( ) ROTARY ( ) TOUCH TONE ( )

TELEPHONE # _____ COURT ORDER

SUBSCRIBER'S NAME _____ JUDGE _____

ADDRESS _____ DATE ISSUED _____

_____ DURATION ( ) DAYS BETWEEN _____

CRIME _____ RESTRICTIONS _____

EQUIPMENT USED

TAPE # 1 BEGAN-DATE _____ TIME _____

MONITORING ENDS-DATE _____ TIME _____

SEALED BY & DATE _____

RENEWALS

1. JUDGE _____

DATE ISSUED _____

DURATION _____

2. JUDGE _____

DATE ISSUED _____

DURATION _____

METHOD OF INSTALLATION

INSTALL. BY _____

INSTALL. DATE _____

INSTALL. MANHOURS TOTAL _____

(DATE) SERVICE CALLS (PROBLEMS)

PLANT LOCATION
& PHONE # _____

SLAVE # _____

PLANT # _____

INVEST.# _____

REMOVED BY & DATE _____

REMOVAL MANHOURS _____

ENTIRE JOB MANHOURS _____

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE

COLONEL D B KELLY
SUPERINTENDENT

POST OFFICE BOX 68
WEST TRENTON, NEW JERSEY 08625
(609) 882-2000

October 13, 1970

OPERATIONS ORDER)
)
NUMBER 270)

RE: S.O.P. 194,500

ELECTRONIC SURVEILLANCE UNIT

I. PURPOSE:

A. To establish guidelines and to achieve uniformity in the procedures for the administration, application and implementation of electronic surveillance court orders.

II. MECHANICS:

A. The Head of the Intelligence Bureau shall cooperate with Division personnel who are attempting to acquire a court order to implement an electronic surveillance device.

B. The Bureau Head shall establish and maintain liaison with the Organized Crime Unit in order to cover the legality of all operations involving electronic surveillance.

C. The Head of the Intelligence Bureau shall maintain files on the following:

1. All applications for the issuance of electronic eavesdropping court orders.

2. All applications for the issuance of wiretapping warrants.

3. All Court Orders issued for the implementation of electronic surveillance.

4. The approvals of the Attorney General for Court Orders to implement electronic surveillance.

5. All emergency requests for court approval of electronic surveillance use.

6. All other Court documents, such as inventories, orders to postpone service of inventory, sealing orders, etc.

D. All requests for use of electronic surveillance will be made in the manner prescribed.

E. The Electronic Surveillance Unit will utilize State Police specialists and technicians for the installation and maintenance of equipment necessary to implement Court Orders.

F. Attached to this order are addendums covering:

1. Application procedures for Electronic Surveillance Court Orders. (Addendum #1)

2. Electronic Surveillance Emergency Procedures (Addendum #2)

3. Operation procedures for Electronic Surveillance Plants (Addendum #3)

4. Electronic Surveillance Log (Form 465) and continuation page (Form 466) (Addendum #4)

5. Electronic Surveillance Final Plant Report (Form 467) (Addendum #5)

6. Court Results (Addendum #6)

BY ORDER OF THE SUPERINTENDENT

E. Olaff
Major
Deputy Superintendent

State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF STATE POLICE

COLONEL D B KELLY
SUPERINTENDENT

POST OFFICE BOX 68
WEST TRENTON, NEW JERSEY 08625
(609) 882-2000

February 4, 1971

OPER. INST. TO: Commanders, Troops A, B, C, D and E; All Stations; Section Supervisors, Bureau Chiefs and Units, Division Headquarters.

SUBJECT : Requests made to the Electronic Surveillance Unit.

1. All requests made to the Electronic Surveillance Unit for the installation of "consent" electronic eavesdropping or wire-tapping equipment shall be made in writing by the requesting Unit with the approval of their Bureau Chief and shall be directed to the Intelligence Bureau Chief.

2. All requests made to the Electronic Surveillance Unit for the use of electronic equipment, e.g. tape recorders, radios, receivers, etc. or the drawing of supplies, e. g. tapes, batteries, cassettes, etc. shall be made in writing by the requesting Unit with the approval of their Bureau Chief and shall be directed to the Intelligence Bureau Chief.

3. All requests made to the Electronic Surveillance Unit for copies of tapes, other than those which result from Court authorized wiretaps or bugs shall be made in writing by the requesting Unit with the approval of their Bureau Chief and shall be directed to the Intelligence Bureau Chief.

4. This Operations Instruction shall be attached to and made a part of O. O. 270.

BY ORDER OF THE SUPERINTENDENT

E. Olaff, Major
Deputy Superintendent

October 13, 1970
Addendum #1

APPLICATION FOR ELECTRONIC SURVEILLANCE COURT ORDERS

I. Members of this Division who have reason to believe they have probable cause to utilize the "New Jersey Wiretapping and Electronic Surveillance Control Act" shall be guided by the following procedures.

A. Wiretapping or electronic eavesdropping (bugging) may be used during the investigation of the following crimes:

1. Murder
2. Kidnapping
3. Extortion
4. Narcotic Traffic
5. Gambling
6. Bribery
7. Loan Sharking
8. Arson
9. Burglary
10. Forgery
11. Embezzlement
12. Escape
13. Receiving Stolen Property
14. Larceny punishable by imprisonment for more than one year.
15. Alteration of Motor Vehicle Identification Numbers.

16. Conspiracy to commit any of the foregoing offenses.

B. When an investigator has reason to believe that during the investigation into any of the preceding crimes, he has probable cause for the interception of oral communication by wiretapping or electronic eavesdropping (bugging), through his troop commander or Bureau supervisor, he shall:

1. Contact the supervisor of the Intelligence Bureau who will when necessary, consult a member of the Organized Crime Unit to determine the applicant's legal eligibility.
2. The following factors must be available:
   a. The identity of the particular person, if known, committing the offense and whose communications are to be intercepted.
   b. The details of the particular crime that has been, is being, or is about to be committed.
   c. If the communication is to be intercepted by wiretapping or by electronic eavesdropping (bugging).
   d. The particular location of the telephone to be tapped or the room to be bugged and facts or informant information in-

dicating that incriminating conversations will take place over the phone to be tapped or in the room to be bugged.

e. The length of time (with a maximum of thirty (30) days) for which the electronic surveillance Court Order will be in effect. (If the investigator cannot estimate the length of time that will be needed, the Organized Crime Unit will assist in determining the duration of the Court Order.)

f. The facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or appear likely to fail or are too dangerous to employ.

g. The facts concerning any known prior application for wiretapping or electronic eavesdropping of the same facilities, places or persons as in the current investigation.

C. From the information supplied to the supervisor of the Intelligence Bureau, a determination will be made regarding the sufficiency of the probable cause. When probable cause is deemed sufficient, the applicant, in cooperation with an attorney

from the Organized Crime Unit, will draft an affidavit of application in quadruplicate, routing of four copies shall be:

1. Original - The judge authorizing the interception
2. First carbon copy - Electronic Surveillance Unit
3. Second carbon copy - Organized Crime Unit
4. Third carbon copy - The applicant.

D. After the application is drafted, the personal approval of the Attorney General shall be obtained in writing in quadruplicate. One copy shall be attached to each copy of the affidavit of application.

E. After the approval of the application is obtained from the Attorney General, the investigator, and when necessary, a lawyer from the Organized Crime Unit shall then apply for an order from a judge of the Superior Court who has been designated by the Supreme Court to receive electronic surveillance applications. The order shall be prepared in five copies. Routing of the copies shall be:

1. Original - Judge authorizing interception
2. First and Second Copies - Electronic Surveillance Unit.
3. Third Copy - Organized Crime Unit

4. Fourth Copy - Shall be kept by the applicant at the plant during operation.

F. At least one copy of each document routed to the Electronic Surveillance Unit for Master File must carry the actual signatures of the officials applying and authorizing such documents.

G. If the nature of the investigation is such that the authorization should not automatically terminate when the desired type of communication has been first obtained, the original application must contain a particular statement of facts establishing probable cause to believe that additional communications of the same type will continue to occur after the first communication.

H. The original Court Order will require that the electronic surveillance begin and "as soon as practicable." In no event may any order authorize interception for more than thirty (30) days.

II. Renewal Procedures:

A. The statute permits an indefinite number of extensions or renewals of the original order, each for a period of not more than thirty (30) days, if additional procedures are complied with.

B. An application for a renewal must be made basically in the same manner as the original application.

The renewal application will incorporate by reference the various allegations and fact statements of the original application. In addition, the application for renewal must contain a statement of facts showing the results obtained from the electronic surveillance so far, or a reasonable explanation of the failure to obtain results.

C. It will be necessary if a renewal is desired without interrupting the electronic surveillance to obtain the renewal order prior to the expiration of the original order.

D. It is vital that the investigative unit contact the Organized Crime Unit through the Intelligence Bureau at least five (5) days, excluding weekends and holidays, prior to the expiration of the Court Order in order to process an application for renewal.

E. Upon each renewal, distribution of court documents shall be the same as with an original application and order.

OCTOBER 13, 1970
ADDENDUM #2

ELECTRONIC SURVEILLANCE EMERGENCY PROCEDURE

I. The statute provides for a highly restrictive procedure for the emergency installation of wiretaps and electronic eavesdropping in circumstances where "IMMEDIATE INTERCEPTION" is required "before an application for an order could with due diligence" be submitted to a judge.

II. Emergency application requires all the procedural steps as with a written application and order to be covered. Approval by the Intelligence Bureau Head, consultation when necessary with the Organized Crime Unit, the personal authorization of the Attorney General for the emergency installation.

III. An "informal application" then must be made orally to a judge. The Court must determine from this oral application that legal grounds exist upon which a formal order could be issued pursuant to the statute. In addition, the court must find that "an emergency situation exists with respect to the investigation of conspiratorial activities of organized crime," related to one of the specific offenses in connection with which an order normally could be issued. The statute has failed to define the phrase"conspiratorial activities of organized crime."

IV. If the court makes the required findings, it may grant verbal approval for the use of electronic surveillance without a written order, conditioned upon the filing, within 48 hours, of a formal written application in accordance with normal procedures. If the written order is granted, it is retroactive to the time of the verbal approval given by the court.

V. The statute provides that an emergency installation "shall immediately terminate when the communication sought is obtained or when an application for an order is denied."

VI. It should be noted that if emergency verbal approval is granted by a judge and the installation made, and if the formal written application is denied, notice and an inventory must be provided to the subject in accordance with the normal statutory procedures.

VII. In view of the requirements of this procedure, it is imperative that the following be adherred to:

A. Any conversations monitored during the 48 hour emergency period must remain strictly confidential and not disseminated except to:

1. Prevent the commission of a crime
2. Apprehend a fleeing felon
3. Recover stolen property, contraband or evidence of a crime where the movement of the property

is expected before formal application can be made.

B. No transcripts shall be made of tapes made during the emergency portion.

C. Any duplicate tapes made during the emergency portion of this operation must be turned over to the court when an application in writing is denied.

D. Any conversation monitored under the emergency provisions of the law where an application made is denied shall not be used or disclosed in any legal procedings except in a civil action brought by an aggrieved person.

E. Before dissemination of information obtained during the emergency portion of this act is made, the monitor shall communicate with a lawyer from the Organized Crime Unit to determine if such information can be disseminated.

VIII. The reporting procedure outlined in Addendums 4, 5 and 6 shall be followed except for the following:

A. No reports shall be forwarded to any Unit or Station until after the written application for the Court Order has been approved.

B. In the event that the formal order for court approval is denied, all reports and copies prepared during the initial operation shall be forwarded to the Electronic Surveillance Unit for destruction.

OCTOBER 13, 1970
ADDENDUM #3

OPERATION OF AN ELECTRONIC SURVEILLANCE PLANT

I. Upon receipt from the applicant of the prescribed number of copies of Court Documents authorizing a wiretap or the use of electronic eavesdropping, the Electronic Surveillance Unit shall open a master file for the installation and shall assign a "JOB NUMBER". This "JOB NUMBER" consists of the last two digits of the year, plus the number of the installation for that year.

EXAMPLE: The first application approved in 1969 will be 69-1 and the second 69-2, etc.

II. The electronic Surveillance Unit shall, if necessary, furnish one copy of the Court Order to the appropriate telephone company and obtain the necessary pair and cable information and whatever assistance effectively is required to execute the order.

III. The Electronic Surveillance Unit, with whatever assistance is required from the applicant, will locate the plant (monitoring location). The Unit shall complete the installation of all necessary equipment to execute the Court Order.

IV. During the operation of the plant, the Electronic Surveillance Unit shall provide whatever assistance, instruction, maintenance and service of equipment that is

deemed necessary.

V. The plant, or the monitoring location, shall be manned by members of the investigative unit, station or troop responsible for the investigation. One man shall be placed in charge of the operation and he shall be responsible for monitoring the plant, plant security and whatever outside investigation is required under the circumstances.

VI. If the results of the electronic surveillance are to be admissable in Court proceedings, it is vital that the original tapes, herein referred to as "OFFICIAL TAPES", be handled in accordance with the following procedures:

A. "OFFICIAL TAPES" will be issued by the Electronic Surveillance Unit to the person designated responsible for the plant operation.

1. "OFFICIAL TAPE" Reels shall be transparent blue in color.
2. Only "OFFICIAL TAPES" shall be used in any installation.
3. Unused "OFFICIAL TAPE" shall be returned at completion of an operation.

B. When an "OFFICIAL TAPE" is placed on a recorder, the take-up reel will be numbered using an indelible felt black pen with the plant number followed by the

letter "T" and the number of the reel of tape used in the operation.

EXAMPLE: If the plant number is 69-1, the first reel of tape used will be marked 69-1-T1 and the next reel will be marked 69-1-T2, etc.

C. The actual tape will also be marked with a black indelible felt pen approximately one foot in from the end on the dull side of the recording tape. Immediately after the tape identification number the monitoring officer will place his initials. This shall be done at the beginning and end of each tape.

D. When a tape is completed or must be removed from the recorder, the tape shall be immediately wound forward on the take-up reel which bears the tape number.

E. The "OFFICIAL TAPE" must never be left unattended. At the close of the days operation, if the plant is not in a continual 24 hour operation, any tape that has been used to record intercepted communications will be removed from the recorder onto the take-up reel and sealed.

F. To seal an "OFFICIAL TAPE" it shall be placed in it's original cardboard container, both the container and reel shall then be placed in a supplied envelope. A piece of transparent sealing tape shall

be placed around the entire envelope. (Do not moisten adhesive on envelope's flap) Along the tape, on the flap side of the envelope, shall be written the tape number, the date and the time the tape covers, the identification and signature of the person responsible for that tape's sealing. The sealers initials shall also be written on the seam on the large flap so that the envelopes cannot be opened without separating the initials. The sealing must be accomplished in such a manner so as to completely prohibit entry into the envelope without being detected.

G. If the envelope must be opened to allow for reviewing or copying the tape, the original seal shall be broken (cut) at the envelope flap to permit entry. The date and the name of the person breaking the seal shall be written on the original seal. The resealing procedure shall be the same as with an original tape, using the same envelope. The new seal shall be placed along side of the original and still attached seal. No unsealed "OFFICIAL TAPE" shall leave the possession of the person who has removed it from its envelope.

H. All "OFFICIAL TAPES" will be returned to the Electronic Surveillance Unit within 24 hours after the

final day of plant operation. Care should be taken not to mutilate the envelope or seal during transportation.

I. A copy of all tapes will be made by the Electronic Surveillance Unit when the log indicates any pertinent incriminating conversation is recorded, as outlined in Addendum #4, and returned to the plant supervisor. The security and custody of these copies of the "OFFICIAL TAPES" shall be the responsibility of the plant supervisor. They will be kept until the completion of any resulting trials and then returned to the Electronic Surveillance Unit for magnetic erasuring and reused for copy work. NOTE: No Transcripts will be made using the "OFFICIAL TAPE".

VII. The statute required that "IMMEDIATELY" after the termination of the electronic surveillance, all tapes must be returned to the court and sealed by the judge. Once this is done, it will not be possible to unseal a tape for the purpose of reviewing or copying or making a transcript without obtaining an additional court order. It is therefore important that tapes be copied as soon as possible after the interception of pertinent data.

VIII. Immediately upon the termination of an installation, the Electronic Surveillance Unit shall make arrangements to return the tapes to the Court for the purpose of sealing.

IX. The reports designated in Addendum #4, #5, and #6 shall be made by the investigator responsible for the plant operation or someone expressly designated by him to complete these reports.

OCTOBER 13, 1970
ADDENDUM #4

ELECTRONIC SURVEILLANCE LOG FORM 465 AND CONTINUATION

PAGE FORM 466

I. PURPOSE OF THE LOG

The Electronic Surveillance Log, SP Form 465, and the Continuation Page, SP Form 466, shall be used to maintain a chronological record of surveillance plant operations.

II. MECHANICS

A. The Electronic Surveillance Log, SP Form 465 shall be submitted with each reel of "OFFICIAL TAPE".

1. The Log will cover one reel.

2. No one Log shall cover more than a 24 hour period.

B. The Log together with the tape shall be forwarded to the Electronic Surveillance Unit within 48 hours of its being recorded.

C. When additional space is necessary to complete the log, use the Continuation Page, SP Form 466.

D. Uniform abbreviations appear at the bottom of the Log and are to be used when relevant.

E. This report shall be prepared in four copies.

F. Routing of the four copies shall be as follows:

1. Original - to the Electronic Surveillance Unit and placed in master file.

2. First copy - to the Electronic Surveillance Unit to be forwarded to the Organized Crime Unit.

3. Second copy - Station/unit copy.

4. Third copy - Prosecutor's copy, to be maintained in the station/unit case file pending court action.

III. INSTRUCTIONS FOR PREPARATION OF THE ELECTRONIC SURVEILLANCE LOG, SP FORM 465, AND CONTINUATION PAGE, SP FORM 466.

A. The numbers on the Electronic Surveillance Log, SP Form 465, and the Continuation Page, SP Form 466, have been inserted to simplify filling out the report. They correspond with the numbers and titles in this guide.

1. STATION/UNIT - Enter the name of State Police/ Unit maintaining the log.

2. CODE - Enter the Station/Unit code designation. (Refer to Station-Troop Code, Addendum #9, O. O. 227, Investigation Reporting Procedures)

3. PLANT NUMBER - Enter the number assigned to the plant operation. (This number will be received from the Electronic Surveillance Unit on obtaining a court order.

4. DIVISION CASE NUMBER - Insert Division Case Number. (This number will be a combination of the Station code number and the Station case number.)

Example: A02691 will be the Division case number of the first investigation report from Absecon Station for the calendar year 1969.

5. TAPE NUMBER - Enter the number of the reel of tape used during the period covered by the log.

6. DATE AND TIME LOG STARTED - Enter the date and time the tape is placed on machine.

7. DATE AND TIME LOG ENDS - Enter the date and time the tape ended or the operation ceased.

8. TOTAL HOURS - Enter the total number of hours of all personnel used in the plant operation during the time covered by the log.

9. TIME IN - In this column, insert the time of all incoming calls, If the plant is an eavesdropping operation, also enter the time any person enters the room being bugged.

10. TIME OUT - In this column, enter the time of all out-going calls. If the plant is an eavesdropping operation, also enter the time any person leaves the room being bugged.

11. DETAILS - This space is used for all information pertinent to the operation and a brief text of monitored conversation.

a. The first entry will record the time the reel was placed on the machine, the number of the reel that is to receive the monitored conversation, the person making the log and who assisted in plant operation. The first entry will also denote that the plant is opening for the day or is a continual operation.

Example: The plant was opened at 9:00 A.M. with tape number 69-1-T1 placed on the recorder. The index was set at (000). In this case the entry would read:

9:00 A.M. Plant opened. Official Tape 69-1-T1 placed on machine by Det. Brown. Index set at (000). Assisted in plant operation by Dets. M. Black and J. White.

Examole continued: If the plant was in continual operation and an official reel was removed and another placed on machine the entry would read:

9:00 A.M. Continual Operation. Official tape 69-1-T2 placed on machine by Det. Brown...etc.

b. Relief of monitoring personnel will be recorded in this space.

Example: Det. B. Brown was the original monitor on the plant shift. He and his assistants were relieved by Det. J. Jones and crew at 11:55 A.M. with tape reel 69-1-T2 on the recorder at index setting (60). In this case no further entries are made on that page of the log. A new "Continuation Page" will be headed:

11:55 A.M. Det. J. Jones relieving Det. B. Brown, Tape 69-1-T2 on index (60). Dets. Black and White relieved by Green and Blue.

c. Outgoing Calls. If the Electronic Surveillance Unit has provided some means of immediately retrieving the outgoing called number - place that number in the details column.

Example: 123-4567 ( )

(Explanation) - The parenthesis are provided for the insertion of the name of that phone numbers subscriber which can be inserted later.)

Under certain circumstances the called number cannot be immediately obtained but can be at a later time using the recorded dial pulses or touch tones. In this case, number each out going call placing a "D/" or "TT/" to indicate if it was a dialed call or a touch tone call.

Example:

D/#1 ( ) ( )

Text of call

D/#2 ( ) ( )

TT/#3 ( ) ( )

TT/#4 ( ) ( )

Explanation: The "D" indicates it was an outgoing dialed call and the "TT" indicates it was an outgoing touch tone call. The first parenthesis is provided for the insertion of the phone number at a later time - the second for the subscriber.

The Electronic Surveillance Unit will later assist in the retrieval of the numbers.

d. Incoming calls - Uniform abbreviations appearing at the bottom of the log will be used where relevant.

Example: During a plant operation, an unidentified male answers the phone and speaks with an unidentified female. The conversation concerns the purchase of a desk for the caller's office. Therefore, this conversation is not pertinent to the investigation in progress or related to another crime. In this case, the entry would read:

U.M. ( ) to U.F. ( ) re purchase of desk. (25) N/P

Explanation: The parenthesis are provided for insertion of the names of those involved should they be identified later in the investigation. The parenthesized number is the index number.

e. The last entry on the log will be the time the reel ends. The last entry will also denote if the plant is continuing operation or is closing for the day.

Example: The tape reel in use was 69-1-T2. The reel had run out (or was about to), and a new reel of tape was to be placed on machine to continue operation. In this case the entry would read:

6:00 P.M. Det. Brown removes and seals tape 69-1-T2 and places 69-1-T3 on machine.

Example continued: If the plant was closing for the day:

6:00 P.M. Det. Brown removes and seals tape 69-1-T2. Plant Closed.

12. DATE - Appears on Continuation Page only. Place date of last entry covered on that page of the Log.

13. NAME - Signature of the monitor for that page of the Log.

14. BADGE NUMBER - Monitor's, if applicable.

15. PAGE___OF___PAGES. (Self-explanatory)

16. NUMBER OF CONVERSATIONS - TOTAL. Total number of conversations intercepted and covered by this single log.

17. NUMBER OF CONVERSATIONS - INCRIMINATING. Number of incriminating conversations covered by this single log.

CONTINUED

5 OF 8

NEW JERSEY STATE POLICE
ELECTRONIC SURVEILLANCE LOG

(1) STATION/UNIT	(2) CODE	(3) PLANT NUMBER	(4) DIVISION CASE NUMBER
(5) TAPE NUMBER	(6) DATE & TIME LOG STARTED	(7) DATE & TIME LOG ENDS	(8) TOTAL HOURS (OF ALL PLANT PERSONNEL)

(9) TIME IN	(10) TIME OUT	(11) DETAILS

ABBREVIATIONS: UM - UNIDENTIFIED MALE UF - UNIDENTIFIED FEMALE D/# - DIAL CALL
NP - CONVERSATION NOT PERTINENT NA - NO ANSWER TR - TRANSCRIBE TT/# - TOUCH TONE

(33) NAME	(14) BADGE NO.	(15) PAGE ___ OF ___ PAGES	NUMBER OF CONVERSATIONS (16) TOTAL	(17) INCRIMINATING

S.P. 465 Rev. 7-70 WHITE - Elec. Surv. Unit YELLOW - Org. Crime Unit PINK - Station/Unit GOLDENROD - Prosecutor

NEW JERSEY STATE POLICE
ELECTRONIC SURVEILLANCE LOG
CONTINUATION PAGE

(1) STATION/UNIT	(3) PLANT NUMBER	(4) DIVISION CASE NUMBER	(5) TAPE NUMBER

(9) TIME IN	(10) TIME OUT	(11) DETAILS

ABBREVIATIONS: UM - UNIDENTIFIED MALE UF - UNIDENTIFIED FEMALE D/# - DIAL CALL
NP - CONVERSATION NOT PERTINENT NA - NO ANSWER TR - TRANSCRIBE TT/# - TOUCH TONE

(12) DATE	(13) NAME	(14) BADGE NO.	(15) PAGE ___ OF ___ PAGES

S.P. 466 Rev. 7-70 WHITE - Elec. Surv. Unit YELLOW - Org. Crime Unit PINK - Station/Unit GOLDENROD - Prosecutor

OCTOBER 13, 1970
ADDENDUM #5

ELECTRONIC SURVEILLANCE FINAL PLANT REPORT FORM 467

I. PURPOSE OF THE REPORT

A. The Electronic Surveillance Final Plant Report, SP Form 467, summarizes a completed surveillance operation. In effect, the report is a compilation of certain information recorded in the Electronic Surveillance Logs. This data will permit reporting to State and Federal Government as required by law.

B. Conduct of the investigation will be reported according to Operation Orders covering the Investigation Reporting System. (S.O.P. 195,000)

1. In the event that no investigation report has been made prior to the implementation of an electronic surveillance court order, this report shall be made within 48 hours of the installation of any electronic surveillance equipment.

2. Supplementary Investigation Reports will be submitted as required.

II. MECHANICS

A. The Electronic Surveillance Final Plant Report, SP Form 467, shall be submitted following the completion of any electronic surveillance operation by the person in charge.

B. This report shall be prepared in three copies.

C. Routing of the three copies shall be as follows:

1. Original and first copy - Original copy to the Electronic Surveillance Unit master file via channels and the first copy will be furnished to the Organized Crime Unit.

2. Second copy - Station/Unit copy, case file.

III. INSTRUCTIONS FOR PREPARATION OF THE ELECTRONIC SURVEILLANCE FINAL PLANT REPORT FORM 467

A. The numbers on the Electronic Surveillance Final Plant Report, SP Form 467, have been inserted to

simplify filling out the report. They correspond with the numbers and titles in this guide.

1. STATION/UNIT - Type the name of the State Police Station/Unit reporting the investigation.

2. CODE - Enter Station/Unit code designation.

3. PLANT NUMBER - Enter the number assigned to the plant operation. (This number was assigned by the Electronic Surveillance Unit on receiving the Court Order.)

4. DIVISION CASE NUMBER - Type Division Case Number. (This number will be a combination of the Station Code Number and the Station Case Number.)

5. PERSON AUTHORIZING INTERCEPTS

NAME OF JUDGE-ADDRESS. The name and court address of the judge who signs the court order.

NAME & ADDRESS OF PERSON AUTHORIZING INTERCEPTION APPLICATION.

EXAMPLE: A. G. Geo. F. Kugler, Trenton.
Act. A. G. Wm. Smith, Trenton.

6. CRIME SPECIFIED - Enter the crime under investigation at the time of application for the court order.

7. PERIOD ORIGINALLY REQUESTED - The number of days permitted to intercept by the order.

DATE OF APPLICATION - Date application was signed by court.

DATE OF ORDER - Date order was signed by court.

8. LENGTH OF EXTENSIONS 1st, 2nd, 3rd - The number of days permitted by the respective extension.

DATE OF APPLICATION & DATE OF ORDER - Dates renewal application and renewal order were signed by the court.

9. TYPE OF INTERCEPTION - Type "X" in the space indicating whether the surveillance was phone wiretap, microphone/eavesdrop or other - specify what other.

10. LOCATION OF THE INTERCEPTIONS - Type "x" at the location where the monitored conversation took place.

    Residence - One family dwelling
    Multiple - Two, three or four family dwelling
    Apartment - More than four family dwelling
    Business Location (Specify) Example: New Car Dealer - Office, Hardware Store - counter, Restaurant - cashier, Used Car Dealer - garage, etc.
    Other (Specify) - Car, train, bus, park, beach, street, etc.

11. DURATION BETWEEN - Date plant officially opened, month - type number, day of month, year - type last two digits, "and" date plant was "terminated" using same date indications.

12. NUMBER OF DAYS IN ACTUAL USE - Enter number of days plant was operated.

13. NUMBER OF PERSONS WHOSE COMMUNICATIONS WERE INTERCEPTED - Probably the most important figure on whole report. Attempt to be as accurate as possible. Count <u>total number of people</u> whose conversations were heard. <u>Example</u>: In a bookmaking operation, the bookmaker is <u>one</u> and each of his customers are counted <u>once</u>, no matter how many times they call in.

14. NUMBER OF COMMUNICATIONS INTERCEPTED - Total number of conversations entire operation.

15. NUMBER OF INCRIMINATING COMMUNICATIONS INTERCEPTED - Total number of incriminating conversations of entire operation.

16. AVERAGE FREQUENCY OF INTERCEPT (Per Day) - Divide the number of days in actual use (12) into communications intercepted (14) for daily average. This figure might help in arriving at a reasonable estimate for number of persons whose communications were intercepted (13).

17. NATURE & QUANTITY OF MANPOWER USED - Man Hours - Type in respective block man hours for each category - only which apply.

18. RESOURCE COST - Type in respective block costs of plant rental, telephone service (if known), tape used, number of reels, other (specify).

19. ARRESTS, NAMES & ADDRESSES - List all those persons whose arrests were responsible (immaterial to what degree) due to some monitored conversation resulting from this particular plant.

    State & Federal Law requires each of these persons be given a notice of inventory (Advisement of intercepted communications) within ninety (90) days of the orders termination.

20. DOES NAME APPEAR ON OTHER FINAL PLANT REPORT - Type "yes" or "no" for each arrested person.

21. OTHER RELATED INSTALLATIONS - Type number of other related plants which contributed to investigation. (steps)

22. REPORTING DATE - Self-explanatory

23. NAME AND BADGE NUMBER - Self-explanatory

NEW JERSEY STATE POLICE

ELECTRONIC SURVEILLANCE
FINAL PLANT REPORT

(1) Station/Unit	(2) Code	(3) Plant number	(4) Division case number

(5) Person Authorizing the Intercepts — Name and address of Judge

Name and address of person authorizing interception application

Application Order or Extension

(6) Crime specified

(7) Period originally requested →	Date of application	Date of order

(8) LENGTH OF EXTENSIONS REQUESTED

1st →		
2nd →		
3rd →		

(9) Type of interceptions

☐ Wire tap ☐ Microphone / eavesdrop ☐ Other (specify)

(10) Location of interception ☐ Resident ☐ Apartment ☐ Multiple dwelling ☐ Business location ☐ Other (specify)

(11) Description of Intercepts	Duration: Between / and	Month	Day	Year	(12) Number of days in actual use	Number of: (13) Persons whose communications were intercepted	(14) Communications intercepted	(15) Incriminating communications intercepted	(16) Average frequency of intercepts per day

NATURE OF RESOURCES

(17) Manhours - Monitoring	Installation	Transcribing	Other

RESOURCE COST

(18) Plant rent	Telephone service	Tapes used — No. of reels	Other (specify)

ACTION RESULTING FROM INTERCEPTED COMMUNICATIONS

(19) Arrests — NAMES AND ADDRESSES	(20) Does name appear on any other final report: Yes	No

(21) Other related installations | (22) Reporting date | (23) Name and badge number

OCTOBER 13, 1970
ADDENDUM #6

COURT RESULTS

The Final Plant Report, while it provides a good portion of the data required to be reported to State and Federal Government as required by law, fails to supply subsequent resulting court action. This information must be supplied yearly as a supplemental report to previous actions. The Final Plant Report completes the applicants obligations as far as required Electronic Surveillance Reports and fails to fill this void.

However, it is still necessary to extract certain resulting court action from the State Police Investigation Reporting System. The "Final Arrest Report" carries the court results, trials, and convictions, necessary to meet statutory requirements.

In order that this information may reach the Electronic Surveillance Unit whose responsibility it is to prepare these statistics, the following shall be accomplished:

To Operations Order #228 Investigation Reporting System - Addendum #1 Instructions for Preparation of Arrest - Section 68 "Narrative" the following shall be added:

"if the arrest is the result of evidence gathered through a court authorized electronic surveillance, type "Elec. Sur." in the upper right hand corner of this report below the perforation."

The Bureau of Internal Records, shall forward a photostatic copy of a Final Arrest Report, carrying this identification, to the Electronic Surveillance Unit.

JUNE 29, 1971
ADDENDUM #7

ELECTRONIC SURVEILLANCE MONITORING

I. Monitoring shall take place only so long as it is required to establish the elements of the offense and the identity of all persons involved.

II. Hours stipulated in the court order for monitoring shall not be exceeded. There shall be self-imposed restrictions on the hours of monitoring in an effort to minimize or eliminate interception of non-pertinent conversation.

Monitoring hours shall be regularly reviewed by the monitors and their supervisors to achieve that objective.

III. During the period specified in Paragraph #1 monitoring shall take place every day permitted by court order with the following exceptions:

A. When it is learned that incriminating conversation is not likely to be intercepted during a given period of time, e.g. principal suspect on vacation or out of town.

B. Where in the judgment of the investigators the elements of the offense have been established and the perpetrators identified, but some investigative consideration necessitates recommencing monitoring

at a later date, e.g. preparation for a raid.

C. Where monitoring an electronic surveillance installation is one phase of a broader investigation and it is necessary to suspend monitoring during an interim period to conduct other forms of investigation in preparation for further monitoring.

IV. If monitoring of an electronic surveillance installation is to be suspended for a period of time the following procedure will be followed:

A. The unit leader monitoring the installation will contact the Electronic Surveillance Unit supervisor on the last date of operation and advise him that monitoring will be suspended temporarily.

B. A log will be prepared and forwarded for each day of suspended operation. This log will list reason for suspension and be signed by the Plant and Unit Supervisors.

C. Prior to resuming monitoring the Unit Supervisor will contact the Electronic Surveillance Unit supervisor or his representative and advise him of the intention to resume monitoring.

D. Logs and tapes will be forwarded in the prescribed manner.

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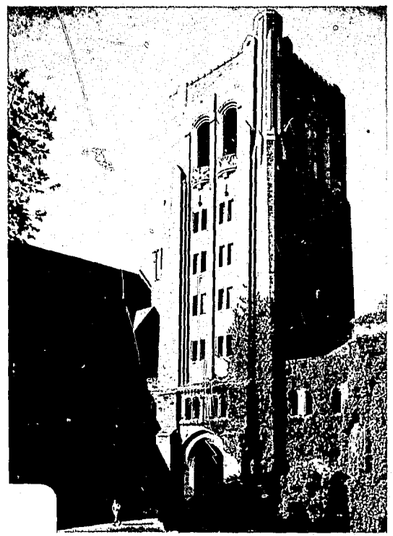

Techniques in the Investigation and Prosecution of Organized Crime

Electronic Surveillance: Two Views Volume 2

G. ROBERT BLAKEY • JAMES J. HOGAN

Cornell Institute on Organized Crime

Techniques in the Investigation and Prosecution of Organized Crime

ELECTRONIC SURVEILLANCE: TWO VIEWS

Based on lectures by G. Robert Blakey and James J. Hogan delivered at the Cornell Institute on Organized Crime 1976 and 1979 Summer Seminar.

edited by:
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TABLE OF CONTENTS

APPENDIX D

Electronic Surveillance at the
Adjudicative Stage

1

Federal Privilege In The Grand Jury

Outline

SUMMARY

¶1 The duty to testify before a grand jury is firmly established. Federal courts may summon a witness from anywhere in the nation, and most states have reciprocal agreements for summoning witnesses upon a showing of materiality and necessity. A witness may move to quash the subpoena in the court having jurisdiction over the grand jury. Orders denying a motion to quash are generally non-appealable, though state statutes may allow appeals. A witness may consult with counsel outside the grand jury room. An ordinary witness is entitled to no warnings prior to testifying, though he may invoke the Fifth Amendment. A potential defendant should be warned of his Fifth Amendment privilege and his right to consult with counsel. If a witness receives immunity, he can still refuse to answer a question based on unlawful electronic surveillance. A witness need not answer questions that violate a common-law or statutory testimonial privilege.

¶2 The federal policy of grand jury secrecy conflicts with the need for disclosure of federal grand jury minutes to state authorities combatting public corruption. The policy favoring secrecy of grand jury proceedings has existed for several hundred years,[1] and is "older than our nation itself."[2] Yet the policy "is not absolute, and cannot be applied blindly."[3] The rationale behind grand jury secrecy is based on protecting the workings of the grand jury. Grand jury secrecy is not a right of the witness. The traditional reasons for secrecy often become inapplicable after the return of an indictment or after trial.

¶3 Rule 6(e) of the Federal Rules of Criminal Procedure governs the disclosure of federal grand jury minutes, and permits disclosure to be made "in connection with a judicial proceeding." This is the primary avenue for state access to grand jury minutes. Even when disclosure would not be permitted under Rule 6(e), the courts have permitted it where a superior public interest is found. If the witness was granted immunity by the federal court, the testimony may still be used in a state civil proceeding. The fact that immunity was granted, may weigh heavily in favor of granting state access to the minutes.

¶4 In an involved grand jury investigation such as those looking into political corruption, a prosecutor may wish to subpoena those upon whom the investigation has focused as potential defendants in order to examine them as to allegedly criminal activities and suspicious transactions. The target witness is generally afforded less procedural and constitutional protection than a de jure defendant. The practice of subpoenaing a target has not been found to be violative of the target's Fifth Amendment rights. A target may consult his attorney outside the grand jury room, but he has no broader right to counsel than a mere witness. The courts have placed few limitations on the extent to which the target strategy may be used. Once the target is the subject of an indictment he can no longer be compelled to testify about the crime which is alleged in the indictment. Generally, the state courts provide greater protection than do the federal courts.[4]

A. GRAND JURY BACKGROUND

¶5 The power to compel persons to appear and testify before grand juries has developed over centuries. Until the 16th century, juries in civil or criminal cases were supposed to find facts based on their own knowledge, and a witness who volunteered to testify risked being sued for maintenance.[5] As juries bacame less able to find facts on their own, witnesses were allowed to testify in civil cases,[6] and the freedom to

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1 For historical background, see R. Calkins, "Grand Jury Secrecy," 63 Mich. L. Rev. 455 (1964).

> At its inception in 1166, the "Grand Assize" (as the grand jury was then called) was not protected by secrecy. By 1368, "le grande inquest" had evolved, and began the custom of hearing witnesses in private. R. Calkins, supra, at 456, 457. "However, the true independence of the grand jury and the institution of grand jury secrecy as a legal concept received their first real impetus in 1681, as a result of the Earl of Shaftesbury Trial." Id.

2 Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 399 (1959).

3 In re Cement-Concrete Block, Chicago Area, 381 F.Supp. 1108, 1109 (N.D. Ill. 1974).

4 A survey of Illinois, Massachusetts, California, Florida and Ohio case law produced little, if any, reference to any litigation surrounding the strategy herein described.

5 See, e.g., [1450] Y.B. 28 Hen. 6, 6, 1.

6 Stat. of Elizabeth, St., 1563, 5 Eliz. 1, c.9, §12.

testify soon became a duty. In 1612, Sir Francis Bacon in the Countess of Shrewsbury Trial[7] asserted confidently:

> You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and land, but of their knowledge and discovery. If there be anything that imports the king's service they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer.

In this country, the duty to testify before a grand jury is firmly established.[8]

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[7] [1612] 2 How. St. Tr. 769, 778.

[8] Blair v. United States, 250 U.S. 273, 280-281 (1919):

> At the foundation of our federal government the inquisitorial function of the grand jury and the compulsion of witnesses were recognized as incidents of the judicial power of the United States. By the Fifth Amendment, a presentment or indictment by grand jury was made essential to hold one to answer for a capital or otherwise infamous crime, and it was declared that no person should be compelled in a criminal case to be a witness against himself; while, by the Sixth Amendment, in all criminal prosecutions the accused was given the right to a speedy and public trial, with compulsory process for obtaining witnesses in his favor. By the first Judiciary Act (September 24, 1789, c. 20, §30, 1 Stat. 73, 88), the mode or proof by examination of witnesses in the courts of the United States was regulated, and their duty to appear and testify was recognized. These provisions, as modified by subsequent legislation, are found in §§861-865, Rev. Stats. By Act of March 2, 1793, c. 22, §6, 1 Stat. 333, 335, it was enacted that subpoenas for witnesses required to attend a court of the United States in any district might run into any other district, with a proviso limiting the effect of this in civil causes so that witnesses living outside of the district in which the court was held need not attend beyond a limited distance from the place of their residence. See 876, Rev. Stats. By §877, originating in Act of February 26, 1853, c. 80, §3, 10 Stat. 161,

B. Existence of Federal Privilege for Unlawful Surveillance

¶ 6 Nevertheless, an immunized witness may still be reluctant to testify. He may attempt to avoid testifying by claiming that the questions are based upon an unlawful electronic surveillance. Consequently, he may assert that his testimony may not be received in evidence under the exclusionary rule of 18 U.S.C. § 2515.[9] When the witness makes this calim the government must affirm or deny the alleged unlawful

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[9] Omnibus Crime Control and Safe Streets Act, Title III, § 802, 187 U.S.C. § 2515 (1976):

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury... or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Section 2515 was included in Title III to protect the privacy of those affected by an unlawful surveillance. S. Rep. No. 1097, 90th Cong. 2d Sess. 66 reprinted in [1968] U.S. Code Cong. & Ad. News 2112. "The perpetrator must be denied the fruits of his unlawful actions." Id. at 69. No use whatsoever is to be made of the product of such surveillance. Consequently, the witness usually bases his claim here on an assertion that but for the unlawful electronic surveillance, he would not have been able to ask certain questions. He argues that because section 2515 calls for the exclusion of evidence which is the result of both direct and derivative use of the unlawful electronic surveillance, he need not answer the questions.

act under 18 U.S.C. § 3504(a).[10] If the government meets this burden and adequately denies that the questions are based upon unlawful electronic surveillance, the witness must testify or be subject to a contempt proceeding.[11] If the government concedes that the questions are based upon an

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[10] Organized Crime Control Act, Title VII, § 702(a), 18 U.S.C. § 3504(a) (1976):

> In any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States--
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of any unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act (emphasis added)...

For comparable state rules, see infra ¶¶ 72-75. But see In re Millow, 529 F.2d 770, 775 (2d Cir. 1976) ("The majority opinion In re Evans insofar as it allows a witness to rely on 'mere assertion' seems to us unsound"); Matter of Special February 1975 Grand Jury, 565 F.2d 407, 412-16 (7th Cir. 1977).

[11] See, e.g., United States v. Vielguth, 502 F.2d 1257 (9th Cir. 1974) (witness's affidavit setting forth belief that he was the subject of electronic surveillance, identifying telephone numbers, and time period in question sufficient to trigger government's obligation to respond); United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974) (court, in absence of sworn written representation indicating agencies checked, unable to affirm government's denial); United States v. Alter, 482 F.2d 1016, 1027 (9th Cir. 1973) (government's denial was insufficient as it was conclusory, not concrete and specific); In re Evans, 452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972) (witness's mere assertion of unlawful surveillance required government to affirm or deny allegation).

unlawful electronic surveillance or fails to meet this burden, the witness may not be compelled to testify.[12]

1. Adequacy of witness's claim

¶ 7 A grand jury witness may claim that the questions he is being asked are based upon an unlawful electronic surveillance by:

1. making a mere assertion; or
2. filing a factually based affidavit.[13]

In In re Evans,[14] the Court of Appeals for the District of Columbia held that the mere assertion that an unlawful wiretap was used was adequate to trigger the government's obligation to respond.[15] It was argued that to require no more than a demand encouraged the elimination of unlawful intrusions, while it imposed only a minimal additional burden on the government; to require more could well impose a burden

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[12] Gelbard v. United States, 408 U.S. 41 (1972).

[13] See 1976 Guild, supra note 35, at § 12.8(f) (Challenges to the Government's denial, involving specific showing of electronic surveillance of the witness).

[14] 452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972).

[15] 452 F.2d at 1247. Evans was followed in United States v. Toscanino, 500 F.2d 267, 281 (2d Cir. 1974). See also In re Grusse, 402 F. Supp. 1232, 1234 (D.C. Conn.), aff'd, 515 F.2d 157 (2d Cir. 1975).

upon defendants and witnesses that could rarely be met.[16] This argument is not always persuasive. In In re Vigil,[17] the Tenth Circuit rejected the "mere assertion" rule. The court held that the claim asserted was insufficient since the affidavit filed lacked any concrete evidence, or even suggestions, of surveillance. To trigger a government response, factual circumstances from which it can be inferred that the witness was the subject of electronic surveillance must be set forth. This conflict in the circuits is as yet unresolved by the Supreme Court.[18]

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[16] In Evans, Chief Judge Bazelon stated his belief that because electronic surveillance functions best when its object has no idea that his communications are being intercepted, the burden upon defendants to come forward with specific information would, in most instances, be impossible to carry. He further stated that unless the government was in the habit of conducting lawless wiretaps, it could easily refute any ill-founded claims. He suggested that any additional burden upon the government could well be met through employing computors to record and sort government wiretap records. 452 F.2d at 1247-50. Judge Wilkey, in a dissenting opinion, vehemently disagreed, citing House reports concerning the number of inquiries and the time required to process each. 452 F.2d at 1255.

[17] 524 F.2d 209, 214, (10th Cir. 1975), cert. denied, 425 U.S. 927 (1976).

[18] See also In re Millow, 529 F.2d 770 (2d Cir. 1976) (government, in response to claim based upon knowledge that some electronic surveillance was used in the investigation of other persons involved in the same activities leading to examination of witness, submitted authorizing orders to presiding judge; witness was not entitled to more as section 3504 was not intended to turn investigations by government into investigations of government).

¶ 8 When a grand jury witness claims that the basis of the questions he is being asked is an unlawful electronic surveillance of a third pary (i.e., an attorney), the adequacy of the claim is generally maesured by standards first set out in United States v. Alter, where the Ninth Circuit held that:

> Affidavits or other evidence in support of the claim must reveal
> (1) the specific facts which reasonably lead the affiant to believe that named counsel for the named witness has been subjected to electronic surveillance;
> (2) the dates of the suspected surveillance;
> (3) the outside dates of representation of the witness by the lawyer during the period of surveillance;
> (4) the identity of persons by name or description together with their respective telephone numbers, with whom the lawyer (or his agents or employees) was communicating at the time the claimed surveillance took place; and
> (5) facts showing some connection between possible electronic surveillance and the grand jury witness who asserts the claim or the grand jury proceeding in which the witness is involved.[19]

The witness does not, of course, have to plead or prove his entire case, but he must make a prima facie showing that

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[19] 482 F.2d at 1026. See also In re Vigil, 524 F.2d 209, 216 (10th Cir. 1975) cert. denied, 425 U.S. 927 (1976) (knowledgeable U.S. attorney, in charge of investigation, provided court with assurance that there was no surveillance by filing a responsive, factual affidavit); United States v. D'Andrea, 495 F.2d 1170 (3d Cir.), cert. denied, 419 U.S. 855 (1974) (a check of all agencies involved with an accompanying affidavit not required); Korman v. United States, 486 F.2d 926 (7th Cir. 1973) (an official government denial by officer of a responsible government office, sworn to by the prosecutor in charge of investigation or government agency conducting the grand jury investigation, is required); In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied, 410 U.S. 914 (1973) (oral testimony that every government agency related to investigation was checked was sufficient denial).

good cause exists to believe that there was an unlawful electronic surveillance.

2. Adequacy of denial

¶9 When the witness's claim is adequate to trigger the duty to respond, the government then has the burden of affirming or denying the allegation. The government may:

1. deny that there was any surveillance;

2. deny that there was any unlawful surveillance;[20]

or

3. concede the existence of the electronic surveillance and that it was unlawful.

The government's response could take the form of:

1. a general statement;

2. an affidavit;

3. testimony under oath; or

4. a plenary suppression hearing.

¶10 When the government denies the existence of surveillance, the practical difficulties of proving a negative arise.[21] This dictates a practical rather than a technical approach. The problem is ascertaining a minimum standard.

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[20] Note: If the language of the prosecution in responding under section 3504 to an objection is: "The questions are not based upon an unlawful electronic surveillance," the objecting witness will not be sure if there was a surveillance unless he has received a section 2518(8) (d) inventory notice.

[21] See In re Weir, 495 F.2d 879, 881 (9th Cir.), cert. denied, 419 U.S. 1038 (1974).

> Proving a negative is, at best, difficult and in our review, a practical, as distinguished from a technical, approach is dictated.

Fortunately, there is a trend towards flexibility, and the necessary scope and specificity of a denial are tied to the concreteness of the claim.[22] As the specificity of the claim increases, the specificity required in response increases accordingly. Thus, a general claim may be met by a general response, but a substantial claim requires a detailed response. A detailed response means that the government agencies connected with the investigation must search their files scrupulously and a summarizing affidavit indicating the agencies contacted and their respective responses must be submitted to the court.[23]

¶11 Although this is the trend, some courts still adhere to the standards set out by the court in Alter for the govern-

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[22] In re Millow, 529 F.2d 770 (2d Cir. 1976) (where a substantial claim is made, the government agencies closest to investigation must file affidavits); In re Hodges, 524 F.2d 568 (1st Cir. 1975) (oral testimony of government attorney gave affirmative assurance that no information had come from unlawful surveillance where claim made one week after refusal to answer and 25 minutes before contempt hearing); In re Buscaglia, 518 F.2d 77 (2d Cir. 1975) (where only basis for claim was refusal of prosecutor to affirm or deny to witness's counsel that there had been surveillance, information tendered by prosecutor under oath to the court sufficient to establish no surveillance); United States v. Stevens, 510 F.2d 1101 (5th Cir. 1975) (where witness's claim was in general and unsubstantiated terms, government's unsworn general denial, given at the direction of the court, was sufficient); United States v. See, 505 F.2d 845 (9th Cir. 1074), cert. denied, 420 U.S. 992 (1975) (claim was vague to the point of being a fishing expedition); United States v. D'Andrea, 495 F.2d 1170 (3d. Cir.), cert. denied, 419 U.S. 855 (1974) (where there is no evidence showing government's representations to be false, witness has no right to a hearing as to the existence of wiretap). Matter of Archuleta, 561 F.2d 1059 (2d Cir. 1977) (where the questions are narrow in scope an affidavit by the prosecutor in charge, as distinguised from an all agency search, suffices since the prosecutor knows if his questions are the fruits of illegal surveillance).

[23] See 1976 Guild, supra note 35, at § 12.8(e) (defense challenges to the government's denial involving general factual showings of government inaccuracies or falsehoods concerning electronic surveillance).

ment's response.[24] Generally, under Alter, if the government's position is a denial, it should be given in absolute terms by an authoritative officer speaking with knowledge of the facts and circumstances; the response must be factual, unambiguous, and unequivocal.[25] Usually, such a denial will take the form of an affidavit stating that all agencies authorized to carry on electronic surveillance or those connected with the investigaton[26] have been checked, summarizing the respective responses.[27] The witness then contends that he should be granted a plenary suppression hearing to determine the existence of unlawful electronic surveillance. Such requests are universally denied.[28]

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[24] 482 F.2d 1016, 1026 (9th Cir. 1973). Alter has engendered a great deal of confusion. It has been widely miscited for the proposition that it sets forth a checklist of requirements that must be met by a witness to establish a claim which will trigger the government's obligation to respond under section 3504. This is not the case. Alter applies only to a claim by the witness that the questions he is being asked are tainted by surveillance of conversations in which he did not participate. See United States v. Vielguth, 502 F.2d 1257, 1259 (9th Cir. 1974).

[25] 482 F.2d at 1027.

[26] In re Quinn, 525 F.2d 222 (1st Cir. 1975).

[27] Generally, the denial will be in the form of an affidavit as it facilitates the task of the presiding judge in inspecting the papers. But this is not an absolute requirement. The denial may be in such terms as satisfy the district court judge. See United States v. D'Andrea, 495 F.2d 1170, 1174 n. 12, (3d Cir.), cert. denied, 419 U.S. 855 (1974).

[28] In re Persico, 491 F.2d 1156, 1162 (2d Cir.), cert. denied, 419 U.S. 924 (1974). The request would have to be in the form of a motion to suppress under 18 U.S.C. §2518 (10) which provides:

¶12 When the government acknowledges the existence of a wiretap but denies that it was unlawful, the courts generally accept the production of an authorizing court order as an adequate denial of illegality, providing, of course, that the order is not facially defective.[29] At this point, witnesses usually contend that the order should be turned over to them to examine, while the government counters that an in camera inspection is sufficient. For the most part, the

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[28] (continued)

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication,
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

But section 2518 does not provide for such a motion in the context of a grand jury proceeding. The legislative history specifically states:

> Because no person is a party as such to a grand jury proceeding, the provision [section 2518 (10)] does not envision the making of a motion to suppress in the context of such a proceeding itself.

S. Rep. No. 1097, 90th Cong. Sess. 106, reprinted in (1968) U.S. Code Cong. & Ad. News 2195. See Cali v. United States, 464 F.2d 475 (1st Cir. 1972).

[29] See, e.g., In re Marcus, 491 F.2d 901 (1st Cir. 1974)(witness precluded from raising defense that questions were based upon improperly authorized electronic surveillance after judge found the interception order was not facially defective); Cali v. United States, 464 F.2d 475 (1st Cir. 1972) (witness may not make motion to suppress in grand jury).

courts accept the government's position.[30] The proper procedure is described by Judge Gee in In re Grand Jury Proceeding (Worobyzt):[31]

> The petitioner herein did not seek a full-blown adversary hearing... All that he sought was the opportunity to examine the underlying affidavits and the order authorizing the top in short, a peek...
>
> The relevant facts make this case indistinguishable from Persico, and we think the rule there the proper one. Where the only question raised is the facial regularity of a wiretap authorization, we prefer to rely on the district judge's in camera determination.[32]

This procedure, however, is not universally followed. The First Circuit, in In re Lochiatto,[33] has held that an in camera inspection is insufficient protection for the witness. Under Lochiatto, a witness is entitled to an opportunity to examine the authorizing application, affidavits, and orders for facial defects.

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30 In re Grand Jury Proceedings (Worobyzt), 522 F.2d 196 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976) (witness not entitled to inspect authorizing documents where district court judge has examined the facial regularity of the documents in camera); Droback v. United States, 509 F.2d 625 (9th Cir. 1974), cert. denied, 421 U.S. 964 (1975) (witness cannot delay grand jury proceeding to conduct a plenary challenge of electronic surveillance); In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974) (grand jury witness not entitled to hearing to determine whether questions are based upon unlawful surveillance). United States v. Marales, 566 F.2d 402 (2d Cir. 1977) (Persico extended to criminal contempt proceedings).

31 522 F.2d 196 (5th Cir. 1975) cert. denied, 425 U.S. 911 (1976).

32 Id. at 197-98. Such a procedure protects the privacy of all parties while still protecting the interest of the grand jury witness.

33 497 F.2d 803, 808 (1st Cir. 1974).

¶ 13 At this point, the witness would like a plenary suppression hearing to determine the validity of the authorizing orders, but the courts generally refuse to grant such a request.[34]

¶ 14 When the government concedes that there was an unlawful surveillance or the judge finds the orders to be facially defective, the grand jury witness has the privilege not to answer questions based upon the unlawful surveillance.[35] The problem then arises: how is the privilege vindicated? There are three possibilities:

1. trust the prosecutor not to ask any questions based upon the surveillance, with the witness challenging any suspected questions on an ad hoc basis;
2. have the presiding judge in an in camera proceeding limit the scope of questioning; or
3. hold a plenary suppression hearing to determine the extent of the taint.

There are no definitive cases on this point.[36]

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34 In re Mintzer, 511 F.2d 471 (1st Cir. 1974); In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974).

35 Gelbard v. United States, 408 U.S. 41 (1972).

36 Standing may be determined by an in camera inspection, Taglianetti v. United States, 394 U.S. 316 (1969), but Alderman v. United States, 394 U.S. 165 (1969) requires an adversary hearing to determine whether a conviction was tainted by the existence of an illegal wiretap.

See Giordano v. United States, 394 U.S. 310 (1969) (Alderman limited to situation where violation present). The argument is that a similar hearing would also be required to determine the extent to which the illegality taints the

3. Refusal to testify after an adverse finding

¶ 15 If a witness still objects to questions and refuses to answer after an in camera inspection or an adequate denial, he may be held in civil contempt by the court.[37] . At this

36 (continued)
questioning. See United States v. Seale, 461 F.2d 345,365 (7th Cir. 1972) (sworn testimony, subject to cross-examination, of relevant government witnesses must be submitted to show lack of taint in a contempt proceeding where overheard conversation was link in communication from lawyer to defendant); United States v. Fox, 455 F.2d 131 (5th Cir. 1972) (a defendant who has been illegally overheard has a right not only to the intercept logs, but also to examine the appropriate officials to determine the connection between the records and the case made against him, but he is not allowed to rummage randomly through the government's files); United States v. Fannon, 435 F.2d 364 (7th Cir. 1970) (where there is conceded illegal surveillance of a co-defendant, neither an in camera inspection not the unsworn answers of the prosecutor are adequate); United States v. Cooper, 397 F. Supp. 277 (D. Neb. 1975) (transmittal to the prosecutor of information obtained through unlawful surveillance must be shown).

But see, In re Mintzer, 511 F.2d 471 (1st Cir. 1974) (limits Alderman as a post-conviction case to trial evidence, refusing to allow grand jury witness opportunity to develop case to show the taps found to be unlawful, i.e., without authorizing order on a facially defective order, are arguably relevant to the question posed).

37 28 U.S.C. §1826(a)(1970):

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

point, the witness will again usually argue that he be granted a plenary suppression hearing, urging that the contempt hearing is a "proceeding" within 18 U.S.C. §2518(10). A contemporaneous contempt proceeding was not, however, held to be different from a grand jury proceeding in In re Persico, and the witness was not granted a suppression hearing. In Persico, the court looked to Justice White's concurring opinion in Gelbard, in which he observed:

> Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full-blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation... Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings.[38]

4. Disclosure

¶ 16 18 U.S.C. §§2518(8)(d), (9), and (10)[39] give an aggrieved party only limited pretrial disclosure of papers and the product of surveillance. A grand jury witness objecting to

37 (continued)

> (1) the court proceeding, or
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Contempt that may be purged by compliance is civil. Shillitani v. United States, 384 U.S. 364 (1966). Grand jury witnesses who refuse to testify are usually held in civil contempt since imprisonment for criminal contempt, under federal statutes, is limited to six months absent a jury trial. Cheff v. Schnackenberg, 384 U.S. 373 (1966).

38 408 U.S. 41, 70-71 (1972).

39 18 U.S.C. §2518(8)(d)(1976):

questioning and seeking to see the underlying documents or intercepted communications, therefore, will find himself

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[39] (continued)

> Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercept communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of--
>
> (1) the fact of the entry of the order or application;
> (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
> (3) the fact that during the period wire or oral communications were or were not intercepted.
>
> The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for insepection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice...

18 U.S.C. §2518(9) (1976):

> The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved...

18 U.S.C. §2518(10)(a) (1976):

> ... The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

with highly limited rights.[40] If the surveillance is terminated, he will receive notice in accordance with section 2518 (8) (d). But sections 2518 (9) and (10) are inapplicable to a grand jury proceeding or a contemporaneous civil contempt hearing.[41] If there is a conceded illegality or a finding by the presiding justice that the surveillance was unlawful, it is unclear as to what type of disclosure the aggrieved witness is entitled.[42] But this will be, hopefully, a rare situation. It is, therefore, likely that normally there will be limited disclosure, if any, in connection with the grand jury proceeding.

¶17 But if the contumacious grand jury witness is prosecuted for criminal contempt, he is entitled to a full disclosure under section 2518 (9). If the wiretap is found to be unlawful, then the witness is arguably entitled to disclosure and an adversary taint hearing under:

1. section 2518 (10); or
2. Alderman.[43]

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[40] In re Grand Jury Proceedings (Worobyzt), 522 F.2d 196 (5th Cir. 1975), cert. denied, 425 U.S. 911 (1976).

[41] In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974).

[42] Supra note 204.

[43] 394 U.S. 165 (1969). United States v. Fox, 455 F.2d 131 (5th Cir. 1972) elaborated upon Alderman; it granted an aggrieved party:

43 (continued)

(1) a right to inspect the intercept logs;

(2) a right to examine appropriate officials in regards to the connection between the records and case made against him; and

(3) a right to find out who the appropriate officials are.

This is not, though, a right to rummage through all the government files.

Alderman, however, granted the right to an adversary hearing to determine the extent of taint in the context of pre-1968 surveillance. The Supreme Court has not reconsidered its holding in Alderman in light of Title III. See United States v. United States District Court, 407 U.S. 297, 324 (1972).

The question now left open is whether under Title III an in camera inspection procedure is authorized to determine whether unlawfully intercepted information is arguably relevant to a prosecution before the material must be turned over to the defendant. The issue of automatic disclosure versus an initial in camera proceeding cannot be settled by looking at a constitutional text. See Taglianetti v. United States, 394 U.S. 316 (1969) (not every issue raised by electronic surveillance requires an adversary proceeding and full disclosure).

It is unclear whether the decision in Alderman rested upon the Court's supervisory power over the admission of evidence or on the Constitution. It is a reasonable interpretation that it rested upon the supervisory power. If so, Alderman has arguably been superseded by Congress when it enacted Title III. The legislative history of Title III specifically states:

> This provision [section 2518(10)(a)] explicitly recognizes the propriety of limiting access to intercepted communications or evidence derived therefrom according to the exigencies of the situation. The motion to suppress envisioned by this paragraph should not be turned into a bill of discovery by the defendant in order that he may learn everything in the confidential files of the law enforcement agency. Nor should the privacy of other people be unduly invaded in the process of litigating the property of the interception of an aggrieved person's communications.

S. Rep. No. 1097, 90th Cong., 2d Sess. 106 reprinted in [1968] U.S. Code Cong. & Ad. News 2195. See e.g., 116 Cong. Rec. 35245 (1970).

(continued)

Disclosure of overheard conversations may harm persons who have completely innocent conversations with people later prosecuted, or who are merely mentioned in such conversations. See, e.g., Life Magazine, May 30, 1969, pp. 45-47 (excerpts from transcripts of conversations overheard through government electronic surveillances published there contained unflattering references to prominent entertainment figures, an elected official, and members of the judiciary, none of whom was a party to any of the published conversations); R. Conolly, "The Story of Patriarca Transcripts," Boston Evening Globe, September 2, 1971, p. 22 (transcripts, despite a protective order, appeared in the newspaper three weeks after disclosure). The lives and families of people identified in the conversations may be endangered. Pending investigations can be significantly impaired as disclosure frequently leads to flight by potential defendants and the destruction of evidence.

The argument against disclosure where the aggrieved person is overheard merely by happenstance is particularly strong as the interception is incidental and wholly irrelevant to the purpose of the surveillance. In this context, an in camera review will protect the defendant's interests because the judge is capable of determining that an interception has no relation to a prosecution.

18 U.S.C. §3504(a)(2) further provides for only limited disclosure for pre-1968 interceptions. This statute, although not applicable to post-1968 interceptions, can also be viewed as expressing a congressional intent to limit the holding in Alderman. The legislative history reveals an intent to overrule Alderman as it pertains to pre-1968 interceptions. See, e.g., 112 Cong. Rec. H9649 (daily ed. Oct. 6, 1970).

These arguments are particularly strong when made in the context of a national security surveillance. Secrecy is an absolute necessity. Disclosure will include location of the listening device which can be devastating. The identity of agents may also be revealed. To disclose may compromise national security. If the information cannot be disclosed under any circumstances, the entire investigation may have to be abandoned. Thus, there is a need to re-evaluate the present position on disclosure. Legality in the national security area is generally now determined through an in camera procedure. United States v. Lemonakis, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974). See also 1976 Guild, supra note 35, at ch. 12.

In sum, a grand jury witness is not entitled to a hearing to determine if surveillance was conducted or to test the legality of any such surveillance. He may refuse to answer only where surveillance was conducted and there was no authorizing order, where the government concedes that the surveillance was unlawful, or where there was a prior judicial adjudication of illegality. Consequently, while Gelbard recognizes the testimonial privilege of the grand jury witness, that privilege is effective only when there is either a conceded illegality or when the court finds insufficient the authorizing order or the governmental denial of illegality. In other instances, i.e., where the government shows that the questions are not based upon unlawful electronic surveillance, the witness will be compelled to testify.

5. Wiretap privilege in New York

¶ 18 New York wiretap—grand jury practice is not as fully developed as its federal counterpart. Nevertheless, in New York, a grand jury witness need not answer questions which are based upon an illegal wiretap.[44] Since section 3504 is not applicable to the states,[45] a slightly different procedure follows a recalcitrant witness's claim of unlawful

[44] People v. Einhorn, 35 N.Y.2d 948, 324 N.E.2d 551, 365 N.Y.S.2d 171 (1974).

[45] H. Rep. No. 1549, 91st Cong., 2d Sess. 3, 16 reprinted in (1970) U.S. Code Cong. & Ad. News 4007, 4009, 4027.

> As amended by the committee, the application of Title VII is limited to Federal judiciary and administrative proceedings.

interception. Upon the request of the witness[46] (which must be respectful), he is brought before the presiding justice who may make appropriate inquiry either in camera or in open court as to the soundness of the objection. Here, the inquiry by the presiding justice is not in the nature of a suppression hearing. Since lengthy suppression hearings are too disruptive of grand jury proceedings, they are not available to grand jury witnesses.[47] If the presiding justice finds that there was no wiretap or that there are no facial defects in the court order authorizing the wiretap, he may then compel the witness to testify or be subject to a contempt citation.

¶ 19 A prosecution for contempt in New York is generally

[46] People v. Breindel, 73 Misc. 2d 734, 739, 342 N.Y.S.2d 428, 434 (Sup. Ct. N.Y. County 1973), aff'd, 45 A.D.2d 691, 356 N.Y.S.2d 626 (1st Dep't), aff'd, 35 N.Y.2d 928, 324 N.E.2d 545, 365 N.Y.S.2d 163 (1974) (Ronald Chester Goldstock, of counsel, for plaintiffs).

> I hold, therefore, that the People are under no obligation to disclose to a grand jury witness that the questions about to be propounded are the product of electronic surveillance. '[A] balance must be struck between the due functioning of the grand jury system and a defendant's rights under the eavesdropping statutes.' (People v. Mulligan, 40 App. Div. 2d 165, 166, supra). The integrity of the grand jury's fact-finding process is what is at stake here. Providing an uncooperative or hostile witness with the type of information requested in this case permits him to tailor his testimony to matters already known to the grand jury, thereby defeating the purpose of calling him. Such disclosure also jeopardizes the secrecy of the investigation and hence its chances of success with respect to the targets thereof.

[47] People v. Mulligan, 40 A.D.2d 165, 338 N.Y.S.2d 488 (1st Dep't 1972); In re O'Brien, 76 Misc. 2d 303, 350 N.Y.S.2d 498 (Rockland County Court 1973).

criminal in nature.[48] Because it is, the witness being prosecuted is entitled to all applicable procedural safeguards: most importantly, a plenary suppression hearing.[49]

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[48] N.Y. Penal Law §215.51 (McKinney 1975) provides:

> A person is guilty of criminal contempt in the first degree when he contumaciously and unlawfully refuses to be sworn as a witness before a grand jury, or, having been sworn as a witness, he refuses to answer any legal and proper interrogatory. Criminal contempt in the first degree is a class E felony.

The legislative history of this statute provides clearly:

> The intent of the new enactment, as expressed in the Governor's Memorandum of Approval, was to increase 'the penalty for refusal to... testify before a grand jury--after having been granted immunity--from a possible jail sentence of one year to a maximum prison sentence of four years... Recently, district attorneys investigating organized criminal activity have been confronted by witnesses who refuse to testify before grand juries, even after they have been granted immunity. The increase in penalty... should encourage otherwise uncooperative witnesses to assist grand juries in their investigations.'

Hechtman, Comment, Penal Law (McKinney 1971).

N.Y. Penal Law §275.50, providing for misdemeanor contempt, is still occasionally used. Criminal contempt prosecution is preferred over civil contempt prosecution because the contumacious witness can only be imprisoned for the term of the grand jury when found to be civilly contempt, but he can be imprisoned for up to four years when he is found to be criminally contempt. The civilly contempt witness may also purge himself of the contempt by testifying. The criminally contempt witness cannot. The crime for which he is charged was completed in the grand jury. The prosecuting attorney may, however, dismiss any charges brought against a contumacious or recalcitrant grand jury witness if that witness subsequently cooperates. This, of course, is solely a matter of the prosecutor's discretion. Thus, there is a strong double incentive to testify.

[49] 18 U.S.C. §2518(10) and N.Y. Crim. Pro. Law art. 710 (McKinney, 1971).

But to guard against vague and unsupported allegations, the Court of Appeals established a set of criteria to be met by a defendant making such a claim. In People v. Cruz,[50] the court said:

> [The] defendant should have the burden of coming forward with the facts which reasonably lead him to believe that he or his counsel have been subjected to undisclosed electronic surveillance. The defendant's allegation should be reasonably precise and should specify, insofar as practicable
>
> [1] the dates of suspected surveillance,
> [2] the identity of the persons and their telephone numbers, and
> [3] the facts relied upon which allegedly link the suspected surveillance to the trial proceedings.[51]

Following such a showing, the people then have the burden of affirming or denying the allegations with a reasonably specific and comprehensive affidavit. The affidavit should specify:

> [1] [The] appropriate local, State, and if applicable, Federal law enforcement agencies contacted to determine whether electronic surveillance had occured,
> [2] the persons contacted,
> [3] the substance of the inquiries and replies, and
> [4] the dates of claimed surveillance to which the inquiries were addressed.[52]

These guidelines are to apply only in the context of a criminal trial, not in the context of a grand jury proceeding.[53]

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[50] 34 N.Y.2d 362, 314 N.E.2d 39, 357 N.Y.S.2d 709 (1974).

[51] Id. at 369, 314 N.E.2d at 43, 357 N.Y.S.2d at 714.

[52] Id.

[53] The standards set out in Cruz and in Einhorn are often confused and used interchangeably. See In re Myers, 173 N.Y.L.J. 17 (1975).

The right of a witness to raise this objection is not without limitation. There can be only one appearance before a justice to determine the existence or validity of a wiretap.[54] The right to object is not absolute and multiple challenges serve only to disrupt and delay the proceedings. The right is waivable.[55] A witness may not testify in hope that such testimony is later suppressable. The proper procedure is to raise the objection and request to be taken before the presiding justice. If the challenge fails, the witness must still remain silent when questioned before the grand jury to preserve his objection.

6. Wiretap privilege in New Jersey

¶20 The New Jersey wiretap statute is modeled on Title III; its legislative history is explicit:

> This bill is designed to meet the Federal requirements and to conform to the Federal act [Title III] in terminology, style and format which will have obvious advantages in its future application and construction.[56]

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54 People v. Langella, 82 Misc.2d 410, 370 N.Y.S.2d 381 (Sup. Ct. N.Y. County 1975).

55 People v. McGrath, 86 Misc.2d 249, 380 N.Y.S.2d 976 (New York County 1976). In McGrath, the presiding justice, upon inspection, found no facial defects with the authorizing order and ordered the defendant to testify. The defendant did so "under protest." His answers were evasive and a prosecution for contempt followed. The court then found that the wiretap orders were, indeed, invalid because they were issued without probable cause; however, the court also found that the defendant had waived this objection by testifying.

56 N.J. Stat. Ann. 2A:156A-1 et seq. (West 1971); Rep. on S. No. 897, Electronic Surveillance, S. Committee on Law, Public Safety and Defense, Oct. 29, 1968, p. 21.

The New Jersey courts have not faced a question of a privilege before a grand jury based on an unlawful electronic surveillance. A reasonable inference may be drawn, however, that federal decisions would be considered persuasive authority. This is even clearer after the recent appellate decision in State v. Chaitkin.[57] In response to a motion to suppress at trial, the court fashioned a procedural remedy to protect Fourth Amendment rights. The court said:

> The right to move to suppress evidence is conditional upon
>
> (1) a claim by the person that he is aggrieved by an unlawful search and seizure; and
> (2) a showing of reasonable grounds to believe that the evidence will be used against him in some penal proceeding...
>
> [In determining the reasonableness of each defendant's belief] the standards should be as follows:
>
> (1) Defendants's allegation should be reasonably precise;
> (2) The allegation should set forth, insofar as practicable:
>
> (a) the dates of suspected surveillance,
> (b) the identity of the persons and their telephone numbers, and
> (c) the facts relied upon which allegedly link the suspected surveillance to the trial proceedings.[58]

No standards were established defining the specificity required by the people's response, but in light of the heavy reliance upon Alter in formulating the standards in Chaitkin, a trial context, it is extremely likely that the New Jersey court would adopt Alter type standards in the grand jury context.

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57 135 N.J. Super. 179, 342 A.2d 897 (App. Div. 1975).

58 Id. at 187-188, 342 A.2d at 902.

7. Wiretap Privilege in Massachusetts

¶21 The question of whether a grand jury witness has the privilege to refuse to answer questions based upon an unlawful electronic surveillance has not been decided by any court in Massachusetts but there is no reason why they, too, will not draw heavily from the decisions in federal courts.[59]

8. Wiretap Privilege in Florida

¶22 The Florida Security of Communications Act was patterned after Title III.[60] Not surprisingly, a district court of appeals following Gelbard v. United States,[61] denied that witnesses were privilege to invoke the evidentiary prohibition of the Florida Act.[62] The Supreme Court, however, expressly declined to follow Gelbard, and held that a witness summoned before the grand jury was an "aggrieved person," and thus had standing to challenge the legality of an interception by way

[59] In Commonwealth v. Vitello, ___ Mass. ___, 327 N.E.2d 819 (1975), the Massachusetts wiretap statute, Mass. Ann. Laws ch. 272 § 99 (Michie/Law. Co-op Supp. 1978), was found to conform with the requirements of the comprehensive federal legislation. In so doing, the court set a standard for suppression questions. Suppression is required only where there has been a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of the extraordinary device. See 327 N.E.2d at 845. This approach follows the federal rule. See United States v. Giordano, 416 U.S. 505 (1974).

[60] Fla Stat. Ann. ch. 934 (West 1973). § 934.06 is a replica of § 2515 of the federal act; § 934.09 a duplicate of § 2518.

[61] Supra note 203.

[62] In re Grand Jury Investigation, 276 So. 2d 235 (Fla. Dist. Ct. App. 1973).

of preindictment hearing on a motion to suppress prior to interrogation.[63] Upon the filing of such a motion, the judge may make available to the movant such portions of the intercepted communication or evidence derived therefrom as he determines to be in the interests of justice.[64]

[63] In re Grand Jury Investigation, 287 So. 2d 43 (Fla. 1973).

[64] Fla. Stat. Ann. § 934.09(9)(a)(3) (West 1973).

FEDERAL PRIVILEGE IN THE GRAND JURY

Addenda and Errata

B. Existence of Federal Privilege for Unlawful Surveillance

¶6, Note 9: Correction: ... 18 _ U.S.C. § 2515 ...

¶12, Note 28: Correction: Any aggrieved person ... may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that:

¶12, Note 29: Correction: In re Marcus, 491 F.2d 901 (1st Cir.) (Witness ...), vacated, 417 U.S. 942 (1974).

¶16, Note 39: Correction: 18 U.S.C. § 2518 (9) (1978):

> The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom ... .

¶19, Note 54: Add at end: , aff'd, 51 A.D. 2d 906, 380 N.Y.S. 2d 833 (1st Dep't 1976)

¶20, Note 57: Correction: 135 N.J. Super. 179, 342 A.2d 897 (Essex County Ct. 1975), aff'd, 164 N.J. Super. 93, 395 A.2d 878 (App. Div. 1978).

¶21, Note 59: Correction: In Commonwealth v. Vitello, 367 Mass. 224, 327 N.E. 2d 819 (1975) ... . See 367 Mass. at ——, 327 N.E. 2d at 845.

¶22, Note 62: Correction: In re Grand Jury Investigation, 276 So. 2d 234 (Fla. Dist. Ct. App.), rev'd, 287 So.2d 43 (Fla. 1973).

Electronic Surveillance: Suppression for Non-Compliance with Statute

Outline

Introduction

¶1 The purpose of these materials is to provide a brief outline of cases in which federal and state law enforcement authorities failed in some fashion to comply with statutory requirements for electronic surveillance, and where the evidence resulting from the surveillance was suppressed. The case summaries are organized according to the requirements of Title III of the Omnibus Crime Control and Safe Streets Act, though not all of the statute's requirements have led to mistakes and the suppression of evidence. The hope is that by providing this catalogue of mistakes repetition can be avoided.

I. Who may obtain surveillance warrants

A. What officer must apply for the warrant

¶2 United States v. Giordano, 416 U.S. 505 (1974).

The defendant moved to suppress evidence obtained under a wiretap order on the grounds that the application was, in fact, approved by the Attorney General's Executive Assistant, although the application for the order named an "Assistant Attorney General specially designated by the Attorney General" as the applicant. The Executive Assistant placed the Assistant Attorney General's signature on the application; neither the Attorney General nor any Assistant Attorney General personally reviewed the application. The Supreme Court affirmed the district court's suppression of the evidence.

¶3 But see United States v. Chavez, 416 U.S. 562 (1974), the companion case to Giordano. The application for a wiretap order recited approval by a specially designated Assistant Attorney General but, in fact, was approved by the Attorney General himself. The Court held that approval by the proper official was the statutory requirement and that this requirement was met. The improper recital of authorization on the application was a clerical matter and did not affect the propriety of the order. Every violation of Title III, in short, does not automatically require suppression of evidence.

B. Application by an acting federal officer

¶4 United States v. Swanson, 399 F. Supp. 441 (D.

Nev. 1975).

An Acting Assistant Attorney General approved an application for a warrant before he was confirmed by the Senate. The court held that he did not have the authority to make an application and suppressed the evidence. But see United States v. Guzek, 527 F.2d 552, 559-60 (8th Cir. 1975)(upholding a wiretap application made by a specially designated assistant more than thirty days after the Acting Attorney General took office; the court found that the Acting Attorney General held office pursuant to 28 U.S.C. §508(b)[1970], and was thus not subject to the thirty-day limitation of 5 U.S.C. §3348 [1970]).

C. Restrictions on state officers

1. What officer must apply for the warrant

¶5 Application of Olander, 213 Kan. 282, 515 P.2d 1211 (1973).

The state statute authorized "the attorney general, an assistant attorney general or a county attorney" to apply for a surveillance order. The court suppressed evidence obtained under an order applied for by an assistant county attorney. Similarly, State v. Frink, 296 Minn. 57, 206 N.W.2d 664 (1973); contra, People v. Nahas, 9 Ill. App.3d 570, 575-76, 292 N.E.2d 466, 468-70 (Ill. App. Ct. 1973); State v. Angel, 261 So.2d 198 (Fla. Dist. Ct. of App.), aff'd, 270 So.2d 715 (Fla. 1972).

2. Delegation in case of vacancy

¶6 State v. Cocuzza, 123 N.J. Super. 14, 21, 301 A.2d 204

208 (Essex County Crim. Ct. 1973).

Delegation of authority to make applications was not proper even though authorized by the chief prosecutor, where the chief prosecutor was not actually absent or disabled.

II. Contents of the application for surveillance

A. Enumerated crimes

1. Federal crimes

2. State crimes

3. Limitation to crimes punishable by imprisonment for more than one year

¶7 People v. Amsden, 82 Misc.2d 91, 368 N.Y.S.2d 433 (Sup. Ct. Erie County 1975).

The defendant moved to suppress evidence obtained pursuant to warrants issued only for the crime of promoting gambling in the second degree, a misdemeanor, not punishable by imprisonment for more than one year. The court held that the "imprisonment for more than one year" clause modifies all of 18 U.S.C. §2516(2)(1970) and suppressed the evidence.

¶8 Contra, United States v. Carubia, 377 F. Supp. 1099, 1104-05 (E.D. N.Y. 1974); People v. Nicoletti, 84 Misc.2d 385, 390-93, 375 N.Y.S.2d 720, 726-28 (Niagara County Ct. 1975); S. Rep. No. 1097, 90th Cong., 2d Sess. 99 (1968).

B. Particularity as to conversations sought

C. Particularity as to place

D. Particularity as to persons

1. Failure to identify known parties

¶9 United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975), cert. pending.

Where government agents had probable cause to believe that the defendant would be overheard on a tapped phone, the failure to identify him in applications for extensions required the court to suppress evidence obtained as a result of interceptions otherwise authorized by the order of extension.

¶10 United States v. Moore, 513 F.2d 485, 495-98 (D.C. Cir. 1975).

The court reversed the conviction and suppressed evidence from the surveillance and its illegal fruits where the defendant was not named in the surveillance order. The defendant was known to the government and there was probable cause that he was committing the specified crimes and that his conversations would be overheard.

¶11 Similarly, United States v. Donovan, 513 F.2d 337 (6th Cir. 1975), cert. granted, 18 Crim. L. Rptr. 4161 (Feb. 24, 1976). Contra, United States v. Civella, 19 Crim. L. Rptr. 2136 (8th Cir. Apr. 16, 1976); United States v. Doolittle, 507 F.2d 1368 (5th Cir.), aff'd en banc, 518 F.2d 500 (1975), cert. pending; United States v. Kilgore, 518 F.2d 496, 499 (5th Cir.), reh. en banc denied, 524 F.2d 957 (5th Cir. 1975), cert. pending; United States v. Chiarizio, 388 F. Supp. 858 (D. Conn.), aff'd, 525 F.2d

289 (2d Cir. 1975); People v. Palozzi, 44 App. Div.2d 224, 227, 353 N.Y.S.2d 987, 989 (4th Dept. 1974).

E. Inadequacy of investigative alternatives

¶12 United States v. Curreri, 388 F. Supp. 607 (D. Md. 1974).

The court suppressed evidence obtained as a result of electronic surveillance because the application for the warrant did not state reasons why other investigative techniques failed, would fail, or would be too dangerous.

¶13 United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975).

The application for an order authorizing a wiretap in a gambling case included statements by the investigating officers that other methods of investigation would not work, based on their "knowledge and experience." The court suppressed the evidence from the wiretaps, holding that the application must include a "full and complete statement of underlying circumstances."

¶14 Contra, United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), cert. denied, 19 Crim. L. Rptr. 4058 (May 19, 1976).

F. Period of time surveillance to be authorized

G. Prior applications

¶15 United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974).

The defendant, charged with gambling violations,

moved to suppress evidence obtained pursuant to a surveillance warrant. The court granted the motion on the grounds that the application for the warrant failed to indicate that the defendant was previously the subject of a wiretap in an unrelated narcotics investigation. But see United States v. Kilgore, supra ¶11, at 500.

III. Contents of the surveillance order

A. Determination of probable cause

1. Taint of evidence from prior illegal wiretaps

¶16 United States v. Houltin, 525 F.2d 943 (5th Cir. 1976).

The court ordered suppression of evidence and reversal of the convictions of the defendants because of prior evidence received from illegal state wiretaps. The court found that the evidence used in the federal prosecution was tainted by the illegal state evidence.

¶17 State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975).

The Supreme Court of Kansas ordered suppression of wiretap evidence made under a valid statute because of taint from wiretaps made under the previous Kansas statute, which did not comply with Title III requirements.

¶18 Contra, United States v. McHale, 495 F.2d 15, 17 (7th Cir. 1974), where a wiretap was upheld because there were sufficient untainted sources in the application.

¶19 See also United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975), cert. denied, 19 Crim. L. Rptr. 4070 (June 2, 1976), where evidence obtained by Canadian authorities in compliance with Canadian law, though not

in a manner which would have complied with United States constitutional or statutory requirements, was admissible in federal court. Title III was irrelevant where interception was not in this country.

B. Directives limiting the scope of the surveillance

1. Identification of speakers

2. Duration and termination directives

a. Failure to include a directive requiring termination upon attainment of the objective of the order

¶20 People v. Pieri, 69 Misc.2d 1085, 332 N.Y.S.2d 786 (Erie County Ct. 1972), aff'd, 41 App. Div.2d 1031, 346 N.Y.S.2d 213 (4th Dept. 1973).

A warrant permitted surveillance to continue for thirty days regardless of whether or not incriminating evidence was obtained. The warrant was held to be invalid on constitutional and statutory grounds and the evidence was suppressed.

¶21 Similarly, Johnson v. State, 226 Ga. 805, 177 S.E.2d 699 (1970); State v. Siegel, 266 Md. 256, 272-74, 292 A.2d 86, 95-96 (1972). But see United States v. Poeta, 455 F.2d 117 (2d Cir.), cert. denied, 406 U.S. 948 (1972); United States v. Baynes, 400 F. Supp. 285, 300-10 (E.D. Pa.), aff'd mem., 517 F.2d 1399 (3d Cir. 1975); People v. Fiorillo, 63 Misc.2d 480, 311 N.Y.S.2d 574 (Montgomery County Ct. 1970); People v. Palozzi, 44 App. Div.2d 224, 227, 353 N.Y.S.2d 987, 990 (4th Dept. 1974); State v. Braeunig, 122 N.J. Super. 319, 325, 300 A.2d 346, 349 (App. Div. 1973); State v. Christy, 112 N.J. Super. 48,

270 A.2d 306 (Essex County Crim. Ct. 1970).

b. Failure to date the order

¶22 United States v. Lamonge, 458 F.2d 197 (6th Cir.), cert. denied, 409 U.S. 863 (1972).

Wiretap evidence was suppressed because of the absence of a date of issuance on the amending order, making the duration of the wiretap unlimited.

3. Minimization directives

C. Signature of the court

¶23 United States v. Ceraso, 355 F. Supp. 126 (M.D. Pa. 1973).

The court ordered suppression of evidence where the judge failed to sign the warrant.

IV. Execution of the surveillance order

A. Who may execute surveillance orders

¶24 People v. Lossinno, 38 N.Y.2d 316, 379 N.Y.S.2d 77 (1975), rev'g, 47 App. Div.2d 534, 363 N.Y.S.2d 834 (2d Dept. 1975). A motion to suppress failed where the order permitted the district attorney to designate any "person" to execute the warrant; the court construed "person" to mean "law enforcement officer," and further identification was not necessary.

B. Avoidance of excessive surveillance

1. Failure to minimize intercepted conversations

¶25 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories," 61 Cornell L. Rev. 92, 94-126 (1975).

a. Failure to make any attempt to minimize

¶26 United States v. George, 465 F.2d 772 (6th Cir. 1972).

Evidence from all conversations was suppressed where government agents failed to comply with the limitations contained in the order authorizing the interception.

b. Failure to minimize despite a good faith effort

¶27 United States v. LaGorga, 336 F. Supp. 190, 195-97 (W.D. Pa. 1971).

Where agents attempted to minimize the interceptions, but did record conversations which were unrelated to the objectives of the warrant, the court ordered suppression of only those conversations which were irrelevant, refusing to issue a blanket suppression order.

¶28 But see United States v. Armocida, 515 F.2d 29, 42-46 (3d Cir. 1975), cert. denied, ____U.S.____ (1976), where the court, while denying a motion to suppress, formulated a three-factor test for reviewing minimization efforts:

(1) the nature and scope of the criminal enterprise under investigation;

(2) the government's reasonable expectation as to the character of and the parties to the conversations;

(3) the degree of judicial supervision by the authorizing judge.

See also United States v. Chavez, 19 Crim. L. Rptr. 2101 (9th Cir. March 31, 1976), cert. denied, 19 Crim. L. Rptr. 4072 (June 2, 1976).

2. Interception of privileged communications

C. Amending the surveillance order

¶29 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶25, at 126-39.

1. Failure to amend retrospectively for crimes not specifically designated but related to designated offenses and therefore legally intercepted

a. Federal crimes and federal orders

¶30 United States v. Brodson, 528 F.2d 214 (7th Cir. 1975).

The court affirmed the dismissal of an indictment where the gambling evidence supporting the indictment was obtained by a wiretap authorized for violations of a separate gambling statute. The government delayed until eight months after the indictment, until just prior to the trial, before applying under 18 U.S.C. §2517(5)(1970) for authorization to use the contents of the communications intercepted concerning criminal activities not specified in the original order. The court found that the government's application was not made "as soon as practicable."

¶31 See also United States v. Campagnuolo, ___F. Supp.___ (S.D. Fla. Dec. 31, 1975). Contra, United States v. Moore, 513 F.2d 485, 500-03 (D.C. Cir. 1975).

b. Federal crimes and state orders

¶32 United States v. Marion, ___F.2d___ (2d Cir. May 7, 1976), rehearing application pending.

Conversations intercepted and used as evidence in federal grand jury and criminal proceedings, where the interception was by state court order specifying analogous but separate and distinct state offenses, were suppressed and the federal convictions reversed because the federal government failed to obtain judicial approval for the use of the conversations under 18 U.S.C. §2517(5) (1970). Title III provisions control their state counterparts unless the state provisions are more restrictive. The opinion notes that where an order is extended or renewed by subsequent court order, the review by the issuing judge is sufficient to satisfy section 2517(5), provided there is some indication that additional offenses, federal or state, might be involved.

¶33 But see United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944 (1974); United States v. Tortorello, 480 F.2d 764, 781-83 (2d Cir.), cert. denied, 414 U.S. 866 (1973). See also United States v. Vento, 19 Crim. L. Rptr. 2102 (3d Cir. March 16, 1976) (no authorization is needed to use wiretap evidence to secure another wiretap).

2. Failure to amend in a prompt fashion for unrelated crimes

¶34 United States v. Brodson, supra ¶30; United States v. Marion, supra ¶32; United States v. Campagnuolo, supra ¶31.

¶35 Cf. People v. DiStefano, 38 N.Y.2d 640, 345 N.E.2d 548, 382 N.Y.S.2d 5 (1976); but see People v. Ruffino, 62 Misc.2d 653, 309 N.Y.S.2d 805 (Sup. Ct. Queens County 1970). See also United States v. Cox, 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972).

3. Failure to amend prospectively

a. Persons

¶36 United States v. Capra, 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975).

The wiretap warrant authorized interception of conversations of one party "with" conspirators, the police continued to intercept conversations of the defendant after his identity became known to them, delaying seventeen days before amending the warrant. The court suppressed all conversations of the defendant intercepted during that period, calling the interception a warrantless surveillance in violation of Title III.

¶37 See also United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975), cert. pending; United States v. Donovan, 513 F.2d 337 (6th Cir. 1975), cert. granted, 18 Crim. L. Rptr. 4161 (Feb. 24, 1976).

¶38 But see United States v. Kahn, 415 U.S. 143 (1974), where the warrant authorized interception of communications of the husband and "others as yet unknown." The Court denied a motion to suppress conversations between the wife and a third party, finding that since the government did not have probable cause to suspect the wife of complicity in the specified crimes at the time the application was made, she fell into the category of persons "as yet unknown."

¶39 See also People v. DiStefano, supra ¶35, at 648-50, 345 N.E.2d at 553, 382 N.Y.S.2d at 10, where the police intercepted one conversation of the defendant, but failed to amend the subsequent application for an extension to include the defendant or the crimes for which he was eventually indicted. The court refused to suppress the conversations, holding that after the first conversation the police lacked probable cause to amend the warrant to name the defendant, or to include the crimes for which he was charged, or even to assert that he would use the tapped telephone again.

b. Crimes

¶40 People v. DiLorenzo, 69 Misc.2d 645, 330 N.Y.S.2d 720 (Rockland County Ct. 1971).

The court ordered suppression of conversations relating to a crime not specified in the surveillance warrant because the state officers failed immediately to amend the warrant to include the crime. The court did allow conversations of the defendant, who was not identified

in the original warrant, which related to the specified crimes to be admitted in evidence. Subsequent authorization for use of these conversations was obtained, though at the same time as the authorization for the conversations relating to the new crime which were suppressed.

¶41 Contra, United States v. Denisio, 360 F. Supp. 715, 720 (D. Md. 1973).

D. Extension of the surveillance period

E. Termination of the surveillance

V. Post-surveillance requirements

A. Delivery, sealing, and storage of applications, orders, and recordings

¶42 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶25, at 139-41.

¶43 People v. Sher, 38 N.Y.2d 600, 345 N.E.2d 314, 381 N.Y.S.2d 843 (1976).

The Court of Appeals ordered suppression of recordings and all evidence derived from interceptions, where the prosecution unsealed them shortly before trial without judicial approval or supervision. Unsealing them for the purposes of the trial was not seen as a satisfactory excuse for explaining the absence of the seal.

¶44 People v. Nicoletti, 34 N.Y.2d 249, 313 N.E.2d 336, 356 N.Y.S.2d 855 (1974).

Suppression of recordings was ordered where the police failed to present them to the issuing judge for sealing

upon expiration of the warrant. The defendant needed only to show that the recordings were unsealed, and did not need to show evidence of actual tampering.

Contra, United States v. Cantor, 470 F.2d 890, 892-93 (3d Cir. 1972).

B. Delivery of notice of the surveillance

¶45 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶25 at 141-54.

¶46 United States v. Chun, 386 F. Supp. 91 (D. Hawaii 1974).

Individuals who were unnamed at the time their conversations were intercepted moved to suppress the evidence obtained. The court held that because this interception was not brought to the attention of the issuing judge and because inventory notice was not served within the ninety days allowed by section 2518(8)(d) the evidence should be suppressed.

¶47 Similarly, United States v. Donovan, supra ¶37; United States v. Eastman, 326 F. Supp. 1038 (M.D. Pa. 1971), aff'd, 465 F.2d 1057 (3d Cir. 1972); State v. Berjah, 266 So.2d 696 (Fla. Dist. Ct. of App. 1972). See also United States v. Civella, 19 Crim. L. Rptr. 2136, 2137 (9th Cir. April 16, 1976), where the court suppressed wiretap evidence related to two defendants who never received inventory notice, while permitting such evidence to be admitted against defendants who received inventory notice five and thirteen days respectively after the expiration of the ninety-day period allowed by section 2518(8)(d).

¶48 But see United States v. LaGorga, 336 F. Supp. 190, 194 (W.D. Pa. 1971); People v. Hueston, 34 N.Y.2d 116, 312 N.E.2d 462, 356 N.Y.S.2d 272 (1974), cert. denied, 421 U.S. 947 (1975); State v. Rowman, ___N.H.___, 352 A.2d 737 (1976).

Electronic Surveillance

Suppression for Non-Compliance with Statute

Addenda and Errata

Table of Contents

Addenda and Errata

(Double underlining indicates corrected material)

¶2: Add at end: Under Giordano suppression is required only for:

> . . . [a] failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device ... . [T]he provision for pre-application approval was intended to play a central role in the statutory scheme and ... suppression must follow when it is shown that this statutory requirement has been ignored.

416 U.S. at 527-28.

¶3: Add at end: The Court distinguished Giordano:

> [In Giordano,] we did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications "unlawful" ... . [I]t is apparent from the scheme of [18 U.S.C. 2518(10)(a) (1976)] that paragraph (i) was not intended to reach every failure to follow statutory procedures, else paragraphs (ii) and (iii) would be drained of meaning.

Id. at 574-75.

¶3B: Also see: United States v. De la Fuente, 548 F.2d 528 (5th Cir. 1977). Despite the defendants' vigorous objection to the introduction of an authorization to intercept communications, signed by the Attorney General, the memorandum was admitted. The court held that because the defendants made no allegations and offered no proof that the Attorney General's authorizing signature was inauthentic or irregular, the prosecution was not obligated to prove the authenticity of the signature.

I'. Who may authorize surveillance warrants

A. Federal

B. State

¶6A: State v. Adams, 2 Kan. App. 2d 135, 576 P.2d 242 (1978).

When a state district judge authorized the interception of communication from a telephone outside of his territorial jurisdiction, evidence obtained was suppressed. A state statute expressly limited a judge's ability to authorize interceptions to his territorial jurisdiction.

¶8A: C. Particularity as to place

Calhoun v. State, 34 Md. App. 365, 367 A.2d 40 (Ct.Spec. App. 1977).

The court suppressed evidence from a wiretap where the state made an application, supported by valid affidavit, to tap a particular telephone and later sought a new order to tap a different telephone. The court found the second application insufficient since the government attempted to incorporate by reference the allegations of the first application to satisfy the "probable cause" requirement of the second application, but offered no new allegations that normal investigative procedures would not succeed. Id. at 375-76, 367 A.2d at 45-46. Refusing to permit the "tacking" of a prior valid affidavit to cure a present defective affidavit used in another application, the court reasoned: "If such a procedure were allowed, it is possible that the police could obtain a valid order based on a legally sufficient affidavit and then in a whole series of new applications incorporate the prior affidavit by reference so as to comply superficially with 18 U.S.C.

§ 2518." Id. at 376, 367 A.2d at 46.

¶9: Omit and substitute: United States v. Donovan, 429 U.S. 413 (1977).

The federal statute requires that each application for a wiretap order contain "the identity of the person, if known, committing the offense and whose communications are to be intercepted." 18 U.S.C. § 2518 (1) (b)(iv) (1976). The government must identify all individuals whom it has probable cause to believe are engaged in the activity under investigation and whose conversations it expects to intercept over the tapped telephone. Id. at 428. The Court concluded that although the identification requirement (18 U.S.C. § 2518(1)(b)(iv) (1976)) and the notice requirement (18 U.S.C. § 2518 (8)(d) (1976)) "play a 'central role' in the statutory framework," it did "not think that the failure to comply fully with those provisions renders unlawful an intercept order that in all other respects satisfies the statutory requirements." Id. at 434. The Court formulated the following rule:

> If, after evaluating the statutorily enumerated factors in light of the information contained in the application, the judge concludes that the wiretap order should issue, the failure to identify additional persons who are likely to be overheard engaging in incriminating conversations could hardly invalidate an otherwise lawful judicial authorization. Id. at 435.

¶9A: Distinguishing Giordano, the Court reasoned that, in Giordano, the statutory requirement of prior approval by specified Justice Department officials bypassed a congressionally imposed limitation on the use of the intercept procedure,

whereas in Donovan all statutory preconditions to authorization were satisfied--"the issuing judge was simply unaware that additional persons might be overheard engaging in criminal conversations." Id. at 435-36.

¶9B: Donovan holds that the inadvertent failure to name additional individuals is not grounds for automatic suppression. The decision, however, is limited to the facts of the case; the Court left open the questions of knowing omission of identification and knowing failure to provide the mandatory inventory notice. Id. at 436 n.23. Moreover, the scope of the Donovan holding is still unclear--because the Court relaxed the identification and notice requirements in Donovan perhaps it will also construe the other warrant requirements flexibly in future cases. What is clear, however, is that all decisions on this issue made prior to Donovan should be read in light of its holding which seems to require intentional omission or substantial prejudice as a precondition to suppression.

¶9C: Add: United States v. Di Girlomo, 550 F.2d 404 (8th Civ. 1977).

The Court, faced with a government failure to identify parties whose conversations had been intercepted, remanded, in light of Donovan, on the issues of inadvertance and prejedice. See also U.S. v. Rabstein, 554 F.2d 190 (5th Civ. 1977) (Court held the failure to mention a known individual in the application order, absent bad faith, would not lead to suppression).

¶10: Omit and substitute:

See United States v. Civella, 533 F.2d 1395 (8th Cir. 1976),

533 F.2d 1395 (8th Cir. 1976), vacated in part, 430 U.S. 902, cert. denied in part, 430 U.S. 905 (1977); United States v. Doolittle, 507 F.2d 1368 (5th Cir.), cert. dismissed, 423 U.S. 1008 (1975), United States v. Kilgore, 518 F.2d 496 (5th Cir. 1975), cert. denied, 425 U.S. 950 (1976); United States v. Chiarizio, 388 F. Supp. 858 (D. Conn.), aff'd, 525 F.2d 289 (2d Cir. 1975); People v. Palozzi, 44 A.D.2d 224, 227, 353 N.Y.S.2d 987, 989 (4th Dep't. 1974).

¶10A: See also United States v, Bernstein, 509 F.2d 996, 1003 (4th Cir. 1975) (the identification requirement, 18 U.S.C. § 2518 (1)(b)(iv)(1976), "is a precondition to lawful interception with respect to a known person"), vacated, 430 U.S. 902 (1977) (remanded for further consideration in light of Donovan; see ¶9, supra); United States v. Lee, 542 F.2d 353 (6th Cir. 1976) (evidence obtained from court-authorized wiretap on defendant's telephone suppressed where the affidavit submitted in support of the application included defendant's name but the order itself did not), vacated, 430 U.S. 902 (1977) (remanded for further consideration in light of Donovan; see ¶9, supra).

¶11: Omit and substitute:

All decisions on this issue made prior to the Supreme Court's decision in Donovan should be read in light of that decision which seems to require intentional omission or substantial prejudice for suppression.

¶12: Add at end: See also Calhoun v. State, 34 Md. App. 365, 367 A.2d 40 (Ct. Spec. App. 1977) (a second application that

other conventional investigative techniques will not succeed). Also see United States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977). An affidavit failed to satisfy 18 U.S.C. § 2518 (1)(c) (1976) by failing to allege specific facts which would permit the district judge to determine that ordinary investigative procedures were inadequate in the case at hand. A standard of reasonableness was employed in measuring the affidavit against the statutory requirements.

United States v. Muro, 540 F.2d 503 (1st Cir. 1976). (Although the instant affidavit was held to be sufficiently specific, the court warned that an agent's bare conclusory statement that normal investigative techniques are generally unproductive in dealing with the operation under investigation would be insufficient to meet statutory safeguards).

United States v. Santora, 583 F.2d 453 (9th Cir. 1978), aff'd, 25 Crim. L. Rep. 4053 (May 16, 1979). The court held that while an initial affidavit sufficiently alleged a lack of reasonable alternatives, two subsequent affidavits involving different suspects that relied on the first, were insufficient. The court required an independent allegation that alternative investigative techniques would not work with respect to such other suspects.

¶12A: A liberal trend, possibly a reflection of Donovan (¶9), appears to be developing. See United States v. DePalma, 461 F. Supp. 800 (S.D.N.Y. 1978). The court stated that "the purpose of the 'other investigative techniques requirements' is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved

in the use of conventional techniques." Id. at 812. The court employed a practical, common sense, analysis as the test. United States v. Licardi, 456 F. Supp. 960, 963 (N.D. Ohio 1978) (the statute is satisfied if the government demonstrates that other procedures appear reasonably unlikely to succeed, or that such procedures are overly dangerous to pursue) (emphasis in original).

¶13: Add at end: But see United States v. Matya, 541 F.2d 741, 745 (8th Cir. 1976) (since the government is not limited to using wiretaps only as a last resort, it need not exhaust or explain away all other investigative techniques in an application for an order), cert. denied, 429 U.S. 1091 (1977); accord, United States v. Steinberg, 525 F.2d 1126, 1130 (2d Cir. 1975) (application for wiretap order sufficient where it merely tracked the language of 18 U.S.C. § 2518 (1)(c) (1976), and incorporated by reference the affidavit of undercover agent), cert. denied, 425 U.S. 971 (1976).

¶14: Omit and substitute: contra (to Kalustran): United States v. Armocida, 595 F.2d 29, 38 (3d Cir. 1975); cert. denied, 423 U.S. 858 (1975); United States v. Bobo, 477 F.2d 974, 983 (4th Cir. 1973), cert. denied, 421 U.S. 909 (1975); United States v. Robertson, 504 F.2d 289, 293 (5th Cir. 1974), cert.denied, 421 U.S. 913 (1975); United States v. Schaefer, 510 F.2d 1307, 1310 (8th Cir.), cert. denied, 421 U.S. 928 (1975).

See also United States v. Donovan, 429 U.S. 413, 433-34 (1977) ("Suppression is required only for a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of

intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.' United States v. Giordano, 416 U.S. 505, 527 (1974).")

¶15: Add at end: But see United States v. Kilgore, 518 F.2d 496, 500 (5th Cir. 1975) (application which indicated that the government previously tapped defendant's telephone without detailing the contents of the prior interception was sufficient since 18 U.S.C. § 2518 (1)(e) (1976) does not require a fully detailed statement of the contents of the prior interception although a judge may require such additional facts at his discretion), cert. denied, 425 U.S. 950 (1976).

See also United States v. Martorella, 455 F. Supp 459, 460 (W.D. Pa. 1978) (§ 2518 (1)(e) does not require that an application for an order to intercept wire or oral communications include the disclosure that conversations with the subject had been previously overheard through a judicially authorized wiretap of another person, place, or facility).

¶16: Correction: United States v. Houltin, 525 F.2d 943 (5th Cir. 1976), cert. denied, ___ U.S. ___, 99 S. Ct. 97 (1978).

Add at end: See also United States v. Spagnuolo, 549 F.2d 705 (9th Cir. 1977). The court suppressed the evidence obtained from two interceptions where probable cause for them was based on evidence obtained from a prior, illegal, tap.

¶16A: Add: 2. Test for finding probable cause

United States v. Abramson, 553 F.2d 1164 (8th Cir. 1977). The test is whether the sworn information before the court is of sufficient apparent reliability to warrant a neutral magistrate

in finding that there is probable cause to believe that an offense is being committed.

See also Andrews v. United States, 25 Crim. L. Rep. 4064 (9th Cir. March 26, 1979) (§ 2518 (3)(a) requires a showing of probable cause with respect to a named individual in the order, but not a similar showing with respect to each person mentioned).

¶17: Correction: State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975), cert. denied, 426 U.S. 949 (1976).

¶19: Correction: United States v. Cotroni, 527 F.2d 708, 711 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976).

¶21: Correction: State v. Christie

¶22A: Add:

C. Failure to include a particular surreptitious entry provision in the order.

Dalia v. United States 47 U.S.L.W. 4423 (April 17, 1979). Federal agents covertly entered the premises in question, without specific court approval. Nevertheless, the Court held that while particularization might be desirable, "nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that . . . search warrants . . . must include a apecification of the precise manner in which they are to be executed." Id. at 4428.

¶24: Correction: People v. Lossinno, 38 N.Y.2d 316, 342 N.E. 2d 556, 379 N.Y.S.2d 777 (1975).

¶25A: Add: Scott v. United States, 436 U.S. 128 (1978). Government agents intercepted all phone conversations

from a single phone for one month, even though only 40% of the calls were related to the investigation. The court refused to suppress the evidence, however, holding that evidence obtained by a wiretap where no effort was made to minimize would not, per se, be suppressed. It stated:

> ... consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate after a statutory or constitutional violation has been established. But the existence vel non of such a violation turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. Subjective intent alone . . . does not make otherwise lawful content illegal or unconstitutional. Id. at 136.

Since the Court found that conversations had not been overheard unlawfully, it elaborated on the scope of the suppression remedy in the event of an intentional violation of the minimization requirement, where more was listened to than was proper. Id. at 135-36 n. 10.

Similarly: Higgins v. Fuessenich, 452 F. Supp. 1331, 1335 (D. Conn. 1978) (holding the standard to be objective reasonableness and a question for the jury in a civil action for damages); Morrow v. State, 147 Ga. App. 395, 249 S.E.2d 110 (1978) (requiring a standard of objective reasonableness); United States v. DePalma, 461 F. Supp, 800, 819 (S.D.N.Y. 1978) (Court permitted admission of evidence where 400 conversations out of 12,000 were challenged as violating a minimization order. The Court held the "issue of reasonableness of the government's minimization efforts [should be judged] not with the benefit of hindsight, but rather in light of the circumstances as they existed at the time of the interception").

¶26: Add at end: But see Scott v. United States, 436 U.S. 128 (1978).

¶28: Correction: United States v. Armocida, 515 F.2d 29, 42-46 (3d Cir. 1975), cert. denied, 423 U.S. 858 (1976), ... United States v. Chavez, 533 F.2d 491 (9th Cir. 1976), cert. denied, 426 U.S. 911 (1976).

Also see Scott v. United States, supra.

¶31: Correction: United States v. Campagnuolo, 556 F.2d 1209, 1212 (5th Cir. 1977), rev'g, unreported (S.D. Fla. Dec. 31, 1975).

The defendant was questioned before the grand jury in relation to a violation of 18 U.S.C. 1955, the named offense in the court authorized interception. Two months later, the government amended and introduced the same evidence to the same grand jury alleging violations of 18 U.S.C. 1084 and 1952. Over defendant's objections the evidence was held admissible.

¶32: Correction: United States v. Marion, 535 F.2d 697 (2d Cir. 1976).

¶33: Correction: United States v. Vento, 533 F.2d 838 (3d Cir. 1976).

¶37: Omit and Substitute:

Even though the Supreme Court has not directly considered this issue, the holding of Capra is of questionable validity in light of United States v. Donovan, supra ¶9.

¶38A: Add: But see United States v. Donovan, 429 U.S. 413 (1976).

> "[A]lthough there is language is Kahn suggesting that wiretap applications must identify such individuals [whose conversations probably will be intercepted], the identification question presented

here was not before us in Kahn. The question in that case was whether a wiretap application had to identify a known user of the target telephone whose complicity in the criminal activity under investigation was not known at the time of the application. Kahn is relevant, though not controlling, precedent. Id. at 423, n. 11.

¶39: Add at end:

Because the subsequent conversations were "inadvertently" overheard, the court admitted the wiretap evidence under the "plain view" doctrine. Id. at 648-50, 345 N.E.2d at 553, 382 N.Y.S.2d at 10.

¶41: Add: United States v. DePalma, 461 F. Supp. 800 (S.D.N.Y. 1978). The court held the statute does not contemplate the immediate amendment of orders of authorization as soon as any information relating to other offenses is intercepted. Id. at 825. Furthermore, the court appears to require a showing of prejudice before it will suppress evidence, even after a substantial delay in amendment. Id. at 826.

See also United States v. Aloi, 449 F. Supp. 698 (E.D.N.Y. 1977). The court held an amendment made over 3 months after the initial order proper. " ... [S]tate Court authorization permitting disclosure of the intercepted communications as evidence of possible federal offenses was obtained prior to disclosure of the seized conversations. Under these circumstances the defendants can show no prejudice since prior to the use of the interceptions, a judge of competent jurisdiction had favorably passed on the good faith and the legality of the initial orders." Id. at 716.

¶41A: Add:

F. Limitation on where surveillance can be exercised

A minority of State Constitutions (which recognize a

right to privacy) have been interpreted to restrict the scope of eavesdropping activity beyond the limitations imposed by Title III. See Sarmiento v. State, 25 Crim. Law Rep. 2132 (Fla. Ct. App. April 19, 1979). Although they lacked a warrant, police monitored a drug sale conversation between an undercover detective, who had been wired for sound, and the defendant, in the latter's home. The court held that the state constitution "shields from government monitoring conversations in which an individual has a reasonable expectation of privacy." Id. at 2132. The court suppressed the tapes, but would have permitted the detective, himself, to testify because the defendant had no "reasonable expectation of privacy with respect to his face-to-face private communications." Id. at 2132.

¶44A: Add: United States v. DePalma, 461 F. Supp. 800, 827 (S.D.N.Y. 1978).

The court set out requirements to preserve the accuracy of recordings and to deter alterations pending a judicial sealing order. These include restricted access to the monitoring area, records indicating who had custody of the tapes at all times, and storage of the tapes under lock and key.

Also see United States v. Sotomayer, 592 F.2d 1219, 1223 (2d Cir. 1979). The interception was performed solely by state agents, and a state sealing requirement was violated. The court held, however, that even where evidence gathered by state officers could be inadmissible in a state court, if federal law is not violated, the evidence is admissible in federal court.

¶44B: But see United States v. Mendoza, 574 F.2d 1373 (5th Cir. 1978).

Statutory sealing requirements were inapplicable when one party consented to the interception. The primary purposes of Congress in enacting the sealing requirements were to safeguard recordings from editing or alteration and to maintain the confidentiality of recordings. Both purposes are served with respect to consensual recordings. Id. at 1377.

See also United States v. Vancier, 25 Crim. L. Rep. 2004 (S.D.N.Y. March 9, 1979) (the requirement of sealing does not apply with respect to tapes made with the consent of one party to the intercepted communication).

¶46: Omit and substitute:

United States v. Chun, 503 F.2d 533 (9th Cir. 1974). Post-intercept identification of every party intercepted is not required. Id. at 538 n.9. But in order to enable the judge to give discretionary service of inventory notice to intercepted parties not named in the order, the government must provide a description of the general classes of persons intercepted and, should the judge desire more information, the government must furnish all information available to it. Id. at 540. The Supreme Court cited this holding with approval in United States v. Donovan, 429 U.S. 413, 430-31 (1977).

¶46A: Add:

United States v. Donovan, 429 U.S. 413 (1977).

The government's failure to inform the issuing judge of the identities of individuals having participated in incriminating

conversations, thereby effectively preventing the judge from giving discretionary inventory notice to those persons, was not grounds for automatic suppression. Id. at 438. "The legislative history indicates that postintercept notice was designed instead to assure the community that the wiretap technique is reasonably employed ... . [W]e do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure." Id. at 439. The Court seems to require either substantial prejudice, intentional omission, or knowingly preventing the service of notice as a precondition to suppression. See ¶9, supra.

But see United States v. Fury, 554 F.2d 522 (2d Cir. 1977).

The court held that "failure to give proper notification will result in suppression of the wiretap evidence only where prejudice is shown, even where notice is "mandatory" under 18 U.S.C. § 2518 (8)(d)." Id. at 528.

¶47: Omit and substitute:

See United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), cert. denied, 430 U.S. 905 (1977). The court suppressed wiretap evidence relating to two defendants who never received inventory notice, while permitting such evidence to be admitted against defedants who received inventory notice five and thirteen days, respectively, after the expiration of the ninety-day period allowed by section 2518(8)(d). See also United States v. Principie, 531 F.2d 1132 (2d Cir. 1976) (requiring a showing of prejudice by defendant for suppression on the grounds of failure to give notice), cert. denied, 430 U.S. 905 (1977);

United States v. DiGirlomo, 550 F.2d 404 (8th Cir. 1977) (court remand for determination on question of prejudice under Donovan). Contra, United States v. Eastman, 326 F. Supp. 1038 (M.D. Pa. 1971), aff'd, 465 F.2d 1057 (3rd Cir. 1972); State v. Berjah, 266 So. 2d 696 (Fla. Dist. Ct. App. 1972).

¶48: Correction: State v. Rowman, 116 N.H. 41, 352 A.2d 737 (1976).

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AVOIDANCE OF THE SUPPRESSION SANCTION

Outline

Summary

¶1 A court's power to suppress evidence derives from the Constitution, inherent supervisory powers, or statutes. The procedure governing this power in federal courts is set out in Fed. R. Crim. P. 41. Wiretap cases are controlled by 18 U.S.C. §2518 (1970). New York's procedure is set out by statute, while rules of court govern in Massachusetts and New Jersey.

¶2 Generally, motions to suppress evidence are made before trial, unless the defendant shows a compelling reason for failing to make a pretrial motion.

¶3 Hearings proceed after an initial showing of fact is made by the moving party. The defendant must first establish that alleged illegal acts violated his personal rights. Next, he must show illegality and that the product of the illegality will be used against him.

¶4 After establishing standing, the moving party carries the burden of proving illegality when the police collected the evidence under a warrant. Where evidence is seized without a warrant, the government must prove that it is lawful under recognized exceptions. Similarly, when a confession is challenged, the government must prove that it was made voluntarily.

¶5 If "tainted" evidence provides substantial leads to other evidence, the other evidence must be suppressed. The defendant must prove that the derivative evidence was obtained by the exploitation of the primary illegal action. When the government alleges that the alleged derivative evidence came from an independent source or that the connection is attenuated it must so persuade the court. Although illegal evidence is inadmissible on the question of guilt, prosecutors may introduce it to impeach witnesses, to refresh their memories, or to facilitate decisions in sentencing and parole hearings.

¶6 Each jurisdiction provides for appeal of the suppression decision. Federal and New York courts permit the government to make an interlocutory appeal while the defendant must wait until after trial. In Massachusetts and New Jersey, either party may take an interlocutory appeal; only the defendant may appeal after verdict.

I. Sources of the Power to Suppress

A. Constitutional

¶7 The exclusionary rule prohibits the use of unconstitutionally obtained evidence in criminal prosecutions. Because the Fifth Amendment specifically forbids compelled self-incrimination, the exclusionary rule was first applied to challenge compelled testimony.[1] Federal courts later expanded the rule to exclude evidence obtained in violation of the Fourth Amendment's search and seizure clause.[2]

¶8 Over the years several justifications for this expansion evolved. The most debatable of these is that the rule deters unlawful police conduct.[3] The courts also uphold the rule as an essential guarantee of constitutional rights.[4] Finally, it is justified as the imperative of judicial integrity.[5]

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[1] Boyd v. United States, 116 U.S. 616, 634-35, 638 (1896).

[2] Weeks v. United States, 232 U.S. 383, 393 (1914).

[3] For arguments in support of deterrence, see Elkins v. United States, 364 U.S. 206, 217 (1959); and Linkletter v. Walker, 381 U.S. 618, 636 (1964). The opposing view is set out by Chief Justice Burger's dissent in Bivens v. Six Unknown Agents, 403 U.S. 388, 411-24 (1971).

[4] United States v. Calandra, 414 U.S. 338, 347 (1974).

[5] Justice Brandeis expressed this view in his dissent in Olmstead v. United States, 277 U.S. 438, 485 (1928):

> In a government of laws, existence of the government will be imperilled if it fails to

¶9 In 1961, despite continual debate over the utility of the rule, the Supreme Court applied it to state criminal proceedings through the Fourteenth Amendment.[6] Currently, evidence obtained in violation of other constitutional provisions is also rendered inadmissible by the exclusionary rule.[7]

B. Supervisory

¶10 Federal courts also exclude evidence on the basis of their supervisory authority, regardless of constitutional violations.[8] Although the McNabb confession rule was ostensibly superseded by section 3501 of the Omnibus Crime Control Act of 1968, exclusion of evidence based on judicial supervisory powers remains possible. Few courts, however,

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5 (continued)
> observe the law scrupulously. Our Government is the potent the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

[6] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[7] These violations include:

1. evidence received as a direct result of an unconstitutional entry and arrest, Wong Sun v. United States, 371 U.S. 471, 487 (1963); and
2. evidence obtained in the absence of defendant's counsel in violation of the Sixth Amendment, Massiah v. United States, 377 U.S. 201, 205-06 (1964)(confession); United States v. Wade, 388 U.S. 218, 224, 227 (1967)(line-up identification).

[8] McNabb v. United States, 318 U.S. 332, 340-41 (1943) (confession of defendant ruled inadmissible because it was obtained during an illegal detention before arraignment).

continued to suppress evidence on the basis of their supervisory powers.

C. Statutory

¶11 Suppression of evidence may be required by statute. Before current wiretap legislation was passed, the Court implemented statutory suppression in Nardone v. United States.[9] Evidence obtained in violation of section 605 of the Federal Communications Act of 1934 was excluded. Police failure to comply with recent electronic surveillance laws may currently be grounds for suppression.[10]

¶12 In 1974, the Supreme Court handed down two decisions discussing violations of the federal electronic surveillance statute that require suppression.[11] Approval of tap applications by an official not designated by the statute rendered the product of the tap suppressible in United States v. Giordano.[12] The Court reasoned that "pre-application approval was intended to play a central role in the statutory scheme. . . ."[13] Mere misidentification of the proper official who approved a tap application, however, does not rise to these standards according to United States v. Chavez.[14] Consequently, violations of the wiretap statute may or may not require suppression depending on how they are categorized under Giordano-Chavez.

¶13 Likewise, minor irregularities in procedure or

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[9] 320 U.S. 379 (1937).

[10] See, e.g., 18 U.S.C.A. §§2510-2520 (1970), as amended, (Supp. 1976); N.Y. Crim. Pro. Law art. 700 (1971), as amended, (Supp. 1975); N.J. Stat. Ann. §2A:156A (1971); Mass. Gen. Laws Ann. ch. 272, §99 (1968), as amended, (Supp. 1976).

[11] A motion to suppress evidence obtained by electronic surveillance may be, inter alia, based on the following theories:

1. absence of probable cause, 18 U.S.C.A. §2518(1)(b) (1970); N.Y. Crim. Pro. Law §700.15(2)(McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c)(1971); Mass. Gen. Laws Ann. ch. 272, §99F(2)(a), (3)(Supp. 1976);

2. absence of required executive authorization, 18 U.S.C.A. §2516(1)(Supp. 1976); N.Y. Crim. Pro. Law §700.20(2)(a)(McKinney 1971); N.J. Stat. Ann. §2A:156A-8(1971); Mass. Gen. Laws Ann. ch. 272, §99F(1)(Supp. 1976);

11 (continued)

3. failure to identify all parties, 18 U.S.C.A. §2518(1)(b)(1970); N.Y. Crim. Pro. Law §700.20(2)(b)(McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c)(1)(1971); Mass. Gen. Laws Ann. ch. 272, §99K(3)(Supp. 1976);

4. failure to minimize, 18 U.S.C.A. §2518(5)(1970); N.Y. Crim. Pro. Law §700.30(7)(McKinney 1971); N.J. Stat. Ann. §2A:156A-12(f)(1971); Mass. Gen. Laws Ann. ch. 272, §99K(3)(Supp. 1976);

5. absence of investigative need, 18 U.S.C.A. §2518(1)(c)(1970); N.Y. Crim. Pro. Law §700.15(4)(McKinney 1971); N.J. Stat. Ann. §2A:156A-9(c)(6)(1971); not required by Massachusetts statute;

6. omissions or errors in affidavits, applications, or warrants;

7. failure to list all prior related wiretaps, 18 U.S.C.A. §2518(1)(e)(1970); N.Y. Crim. Pro. Law §700.20(2)(f)(McKinney 1971); N.J. Stat. Ann. §2A:156A-9(e)(1971); Mass. Gen. Laws Ann. ch. 272, §99F(2)(h)(Supp. 1976); and,

8. failure to give notice, 18 U.S.C.A. §2518(8)(d)(1970); N.Y. Crim. Pro. Law §700.50(3)(McKinney 1971); N.J. Stat. Ann. §2A:156A-16(1971); Mass. Gen. Laws Ann. ch. 272, §99O(1)(2)(Supp. 1976).

[12] 416 U.S. 505 (1974).

[13] 416 U.S. at 528.

[14] 416 U.S. 562, 569 (1974).

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6 OF 8

insignificant violations of administrative regulations generally do not mandate exclusion.[15] In federal courts, therefore, if evidence is not obtained in violation of the Constitution or a statute requiring suppression for violation, it is not suppressible.[16] Theoretically, courts could exercise their supervisory powers to exclude such evidence, but this is seldom done.

II. Motion to Suppress: Authority

A. Federal

¶14 Fed. R. Crim. P. 41(f) provides for a pretrial motion to suppress evidence. The motion may be made in the district of trial; afterwards, the judge may convene a hearing and receive evidence on the motion. If the defendant fails to move to suppress before trial, he waives the right to object.[17] But, if the opportunity to move

[15]Recently, a federal court commented that the violation of agency regulations, designed to protect a defendant's rights in a criminal tax fraud prosecution, would probably not constitute grounds for suppression of the evidence. Although the First, Fourth, and Ninth Circuits have held the other way, the court noted disillusionment with the exclusionary rule in recent Supreme Court opinions, as the basis for its dictum. United States v. Leonard, 524 F.2d 1076, 1088-89 (2d Cir. 1975). Also see, Bivens v. Six Unknown Agents, 403 U.S. 443 (1971) (Burger, C.J. dissenting); and Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[16]Olmstead v. United States, 277 U.S. 438, 467-68 (1928).

[17]Segurola v. United States, 275 U.S. 106, 111-12 (1927); United States v. Mauro, 507 F.2d 802, 806-07 (2d Cir.), cert. denied, 420 U.S. 991 (1974). See also United States v. Sisca, 503 F.2d 1337, 1349 (2d Cir. 1974), cert. denied, 419 U.S. 1008 (1975). Some courts have been more permissive on the grounds that Fed. R. Crim. P. 12(b)(1) states that pre-trial motions may be made before trial. This wording does leave room for judicial discretion. See United States v. Collins, 491 F.2d 1050, 1052 (5th Cir. 1974).

did not arise or if the defendant was not aware of grounds for the motion, the court has discretion to hear the motion at trial or in a separate hearing.[18]

¶15 Fed. R. Crim. P. 41(e) deals specifically with the return and inadmissibility of illegally seized property.[19] Motions to suppress unconstitutionally obtained confessions are treated analogously, except that these motions are commonly made during trial.[20]

¶16 The federal wiretap statute specifically provides for a motion to suppress.[21] Defense attorneys must make such motions before trial.[22] This provision was included to

[18]United States v. Ramos-Zaragosa, 516 F.2d 141, 143 (9th Cir. 1975) (prosecutor and defense counsel agreed to exclude seized heroin, but analysis of it was not suppressed; defendant was not to be penalized for making untimely motion due to counsel's maneuvers).

[19]Before 1972, Fed. R. Crim. P. 41(e) set out the grounds for a motion to suppress evidence:

1. the property was illegally seized without a warrant; or,
2. the warrant is insufficient on its face; or,
3. the property seized is not that described in the warrant; or,
4. there was no probable cause for believing the existence of the grounds on which the warrant was issued; or,
5. the warrant was illegally executed.

[20]Pinto v. Pierce, 389 U.S. 31, 32-33 (1967). But see, Hickman v. Sielaff, 521 F.2d 378, 386 (7th Cir. 1975) (if a motion to suppress is made at trial, the defendant has a right not to have the hearing before the jury).

[21]18 U.S.C.A. §2518(10)(a)(1970).

[22]United States v. Sisca, 503 F.2d 1337, 1348-49 (2d Cir. 1974), cert. denied, 419 U.S. 1008 (1975).

prevent defeat of the government's right to appeal under subparagraph 10(b) of the same section.[23]

B. New York

¶17 In New York, motions to suppress evidence are governed by N.Y. Crim. Pro. Law §710(McKinney 1971). The motion must be brought and decided in the Supreme Court within the same jurisdiction as the trial court. If the motion involves a simplified traffic information, a prosecutor's information, or a misdemeanor complaint, it can be made in the local criminal court.[23a] Section 710.70 designates this motion the exclusive means of suppressing evidence in criminal prosecutions. Failure to make a timely motion constitutes waiver, but a motion may be made during the trial if:

1. the defendant was unaware of the facts;[24] or

2. the defendant had no reasonable opportunity to make the motion before trial.

Section 710 also deals with confessions and tainted in-court identifications. If a defendant was not notified of the prosecutor's intent to use involuntary statements by the defendant to a public official or testimony of a witness who made an improper identification, a motion to exclude such evidence may be made during the trial.

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[23] S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968).

[23a] N.Y. Crim. Pro. Law §710.50 (McKinney Supp. 1975).

[24] People v. McCall, 17 N.Y.2d 152, 156-57, 216 N.E.2d 570, 573, 269 N.Y.S.2d 396, 399-400 (1966).

¶18 The New York wiretap statute does not specifically authorize a motion to suppress the product of an illegal wiretap. Nevertheless, the courts treat such evidence as they treat results from any illegal search and seizure.[25]

C. Massachusetts

¶19 Massachusetts provides for the suppression of evidence through rules of its District and Superior Courts.[26] An unjustified failure by the defense to make a motion within ten days of pleading constitutes a waiver.[27] Exceptions are recognized when there is no opportunity to make the motion or when the defendant is unaware of the grounds for such a motion.[28] Generally, motions to suppress confessions are made at trial.[29]

¶20 The Massachusetts wiretap statute permits the defendant to suppress the contents of intercepted wire or oral communications for the reasons noted below.[30] In practice,

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[25] People v. McCall, 19 App. Div.2d 630, 631, 241 N.Y.S.2d 439 (2d Dept. 1963).

[26] See Mass. Super. Ct. R. 8, 61 and Mass. Dist. Ct. R. 73-A.

[27] Commonwealth v. Hanger, 357 Mass. 464, 468, 258 N.E.2d 555, 558 (1970).

[28] Commonwealth v. Bottiglio, 357 Mass. 593, 595, 259 N.E.2d 570, 572 (1970). See also Mass. Super. Ct. R. 61.

[29] Commonwealth v. Campbell, 352 Mass. 387, 403, 226 N.E. 2d 211, 220-21 (1967).

[30] Mass. Gen. Laws Ann. ch. 272, §99 P (Supp. 1976):

1. That the communication was unlawfully intercepted.

Massachusetts courts look to the rule of court governing regular motions to suppress for procedure requirements.

D. New Jersey

¶21 In New Jersey, motions to suppress evidence obtained by illegal search and seizure are governed by New Jersey Rule of Criminal Practice 3:5-7. The motion may be made in the Superior Court of trial or in the county court of the county where the evidence was obtained.[31] Failure to make a pre-trial motion waives the right,[32] but an exception is granted when the defendant was unaware of grounds for the motion at that time.[33]

¶22 New Jersey rules distinguish a motion to suppress from an objection to the admissibility of a confession.[34] Objections to confessions may be raised during the trial.

¶23 Like the federal statute, New Jersey's wiretapping law provides for a motion to suppress illegally obtained evidence. It must be made ten days before the trial, unless the moving party was not aware of grounds for the motion.[35] The law enumerates the grounds on which evidence from a tap may be challenged.[36]

III. Initial Showing

¶24 All four jurisdictions require a defendant to make a minimal initial showing of fact with his motion to obtain a pre-trial hearing. The motion is summarily denied unless the accompanying affidavit or evidence is definite and sufficiently detailed to permit the court to conclude that relief is warranted, if the allegations are proved.[37]

¶25 In New York, the affidavit accompanying the motion may be the defendant's or another person's, provided the affiant has personal knowledge of the facts alleged.[38] For

30 (continued)
2. That the communication was not intercepted in accordance with the terms of this section.

3. That the application or renewal application fails to set forth facts sufficient to establish probable cause for the issuance of a warrant.

4. That the interception was not made in conformity with the warrant.

5. That the evidence sought to be introduced was illegally obtained.

6. That the warrant does not conform to the provisions of this section.

31 N.J. Rules of Criminal Practice 3:5-7(a).

32 N.J. Rules of Criminal Practice 3:5-7(c). See also State v. McKnight, 52 N.J. 35, 48, 243 A.2d 240, 247-48 (1968).

33 N.J. Rules of Criminal Practice 3:5-7(a); State v. Roccasecca, 130 N.J. Super. 585, 591, 328 A.2d 35, 38 (Law Div. 1974).

34 State v. Hale, 127 N.J. Super. 407, 412, 317 A.2d 731, 733 (App. Div. 1974).

35 N.J. Stat. Ann. §2A:156A-21 (1971).

36
1. The communication was unlawfully intercepted; or,

2. the order of authorization is insufficient on its face; or,

3. the interception was not made in conformity with the order of authorization.

37 United States v. Ledesma, 499 F.2d 36, 39 (9th Cir. 1974); People v. Coleman, 72 Misc.2d 202, 203, 338 N.Y.S. 2d 168, 170 (Dutchess County Ct. 1972); State v. Cullen, 103 N.J. Super, 360, 366-67, 247 A.2d 346, 349-50 (App. Div. 1968); Commonwealth v. Bottiglio, 357 Mass. 593, 595, 259 N.E.2d 570, 573 (1970).

38 N.Y. Crim. Pro. Law §710.60 (McKinney Supp. 1975); People v. Harry, 65 Misc.2d 553, 558, 318 N.Y.S.2d 172, 176-77 (Westchester County Ct. 1971).

a motion to suppress a confession, an affidavit by the defense counsel raising a constitutional objection is enough to get a hearing. Nonetheless, a failure to allege involuntariness permits denial of the motion.[39]

¶26 Massachusetts requires a written motion with verification by affidavit. The motion is readily dismissed for lack of specificity about the evidence to be excluded.[40] In contrast, a defendant may obtain a hearing on the voluntariness of a confession upon request.[41]

¶27 In New Jersey, any motion to suppress must be accompanied by a full brief on the facts and the law.[42] A defendant may get a hearing upon request in confession cases.[43]

¶28 Generally, an initial showing is not difficult to make in search and seizure, confession, or identification cases because the defendant is likely to have first-hand knowledge of irregularities. Electronic surveillance cases pose

[39] People v. Spartarella, 34 N.Y.2d 157, 162, 313 N.E.2d 38, 40-41, 356 N.Y.S.2d 566, 569 (1974).

[40] Commonwealth v. Bottiglio, 357 Mass. 593, 595, 259 N.E.2d 570, 573 (1970); Commonwealth v. Slaney, 350 Mass. 400, 403, 215 N.E.2d 177, 180 (1966).

[41] Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E. 2d 630, 639 (1943).

[42] N.J. Rules of Criminal Practice, 3:5-7(a); State v. Walker, 117 N.J. Super. 397, 398, 285 A.2d 37, 38 (App. Div. 1971).

[43] N.J. Rules of Evidence 8(3):

> In the case of a statement against the penal interest of the defendant on trial in a criminal proceeding, the judge, if requested, shall hear and determine the question of its admissibility out of the presence and hearing of the jury.

special problems to the defense. Consequently, the government must give defendants access to surveillance records before trial so that they can take full advantage of pre-trial motions.[44]

IV. Hearing

A. Nature of Proceedings

¶29 Although a defendant has no constitutional right to be present at the suppression hearing, Fed. R. Crim. P. 43 implies that he should be present, particularly if testimony is given.[45] On the other hand, New York and Massachusetts courts hold that the defendant has the right to be present upon his request.[46]

¶30 All four jurisdictions agree that admissibility of

[44] Alderman v. United States, 394 U.S. 165, 182 (1969). See also, Taglianetti v. United States, 394 U.S. 316, ". . . an adversary proceeding and full disclosure were required in those cases [Alderman and companion cases], . . . only because the in camera procedures at issue there would have been an inadequate means to safeguard a defendant's Fourth Amendment rights." 394 U.S. at 317.

[45] In part, Fed. R. Crim. P. 43 provides:

> . . . . The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of the sentence, except as otherwise provided by these rules.

See also, United States v. Dalli, 424 F.2d 45, 48 (2d Cir.), cert. denied, 400 U.S. 821 (1970), and Burley v. United States, 295 F.2d 317, 319 (10th Cir. 1961).

[46] People v. Anderson, 16 N.Y.2d 282, 213 N.E.2d 445, 266 N.Y.S.2d 110 (1966); People v. Restifo, 44 App. Div.2d 870, 355 N.Y.S.2d 496 (3d Dept. 1974); Amado v. Commonwealth, 349 Mass. 716, 212 N.E.2d 205 (1965).

evidence is an issue for the court.[47] The presence of a jury is not, however, reversible error. The rules of evidence are usually relaxed or inapplicable at these hearings.[48]

B. Standing

¶31 The Supreme Court recognized the personal nature of Fourth, Fifth, and Sixth Amendment rights over a period of time beginning in 1905 with McAlister v. Henkel.[49] The

[47] United States v. Whitaker, 372 F.2d 154, 161 (3d Cir. 1974). See also, People v. DuBois, 31 Misc.2d 157, 161, 221 N.Y.S. 2d 21, 25 (Queens County Ct. 1961)(whether evidence should be suppressed as the fruit of an illegal search is to be determined by the court); People v. Leftwich, 82 Misc.2d 993, 996, 372 N.Y.S.2d 888, 891 (Sup. Ct. New York County 1975)(the voluntariness of a confession is first determined by the judge); State v. Price, 108 N.J. Super. 272, 282, 260 A.2d 877, 883 (Law Div. 1970)(determining the voluntariness of a consent to a search is a factual decision to be made by the hearing judge); State v. Smith, 32 N.J. 501, 161 A.2d 520, cert. denied, 364 U.S. 936 (1960)(the trial judge makes the initial determination of the voluntariness of a confession, but the ultimate issue is left to the jury); Commonwealth v. LePage, 352 Mass. 403, 410, 226 N.E.2d 200, 204 (1967)(whether a search was illegal is a question for the judge and not the jury); Commonwealth v. Johnson, 352 Mass. 311, 316, 225 N.E.2d 360, 364, cert. denied, 389 U.S. 816, cert. dismissed, 390 U.S. 511 (1967)(the judge passes on the voluntariness of a confession in the first instance, but the final determination is one of fact for the jury).

[48] For example, hearsay is admissible and counsel is permitted to ask leading questions. See United States v. Matlock, 415 U.S. 164, 172-73 (1974); People v. Harrington, 70 Misc.2d 303, 305, 332 N.Y.S.2d 789, 792-93 (Allegany County Ct. 1972); Commonwealth v. Lehan, 347 Mass. 197, 206, 196 N.E.2d 840, 846 (1964).

[49] 201 U.S. 90, 91 (1905)(Fifth Amendment right against self-incrimination is personal to the witness himself). This view was recently reaffirmed in Fisher v. United States, ___U.S.___, 19 Crim. L. Rptr. 3018, 3021, 3024 (Apr. 21, 1976). Fourth Amendment rights are personal as set forth in United States v. Miller, ___U.S.___, 19 Crim. L. Rptr. 3031, 3033 (Apr. 21, 1976). The Sixth Amendment right to counsel may be raised only by the individual whose right was violated. Massiah v. United

Court recognized this rationale, too, in 1969 in the wiretap area.[50] As a consequence, defendants must have standing to complain about unconstitutionally acquired evidence before it can be suppressed on their request.

¶32 To illustrate, a defendant may move to suppress only his own confession. Search and seizure cases present more complex standing problems. To object, the defendant must have a privacy interest in the premises searched or in the property seized. Finally, standing in electronic surveillance cases is currently defined by privacy and property rights.[51] Katz found eavesdropping in a public telephone booth a violation of the defendant's "reasonable expectation of privacy."[52] But the court also affirmed the vitality of property principles in Alderman by granting standing to the owner of the place where a wiretap was located; his participation in the intercepted conversations was held irrelevant.[53]

1. Search and Seizure

¶33 The concept of standing is most fully developed in

49 (continued)
States, 377 U.S. 201, 205 (1963). See also, People v. Estrada, 28 App. Div.2d 681, 280 N.Y.S.2d 825 (2d Dept. 1967); State v. Casale, 106 N.J. Super. 157, 254 A.2d 531 (App. Div. 1969); Commonwealth v. Dirring, 354 Mass. 523, 532, 238 N.E.2d 508, 513-14 (1968).

[50] Alderman v. United States, 394 U.S. 165, 176 (1969).

[51] See infra ¶42 and note 79.

[52] Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring).

[53] Alderman, 394 U.S. at 179-80.

search and seizure cases. In Jones v. United States,[54] the Supreme Court recognized traditional ideas of standing based on the ownership or possession of the premises searched.[55] The decision went on to articulate a new principle which expanded standing in these cases to those who were legitimately on the premises during the search.

¶34 In practice, federal courts grant standing to:

1. a tenant complaining about an illegal search of his apartment;[56]

2. an occupant of a hotel room whose room was illegally searched;[57]

3. a guest or licensee of the owner or tenant of the premises searched;[58] and,

4. one of the users of an office that was illegally searched.[59]

Federal courts refuse to grant standing to:

1. one who had assumed rent payments for the leased building before the search occurred;[60]

[54] 362 U.S. 256 (1960).

[55] This concept was reaffirmed in Brown v. United States, 411 U.S. 223 (1972). See ¶40 of these materials.

[56] Chapman v. United States, 365 U.S. 610, 617-18 (1961).

[57] Stoner v. California, 376 U.S. 483, 488-90 (1964); United States v. Anderson, 453 F.2d 174 (9th Cir. 1971).

[58] United States v. Wright, 466 F.2d 1256, 1259 (2d Cir.), cert. denied, 410 U.S. 916 (1972); United States v. Miguel, 340 F.2d 812, 814 (2d Cir.), cert. denied, 382 U.S. 854 (1965).

[59] Mancusi v. DeForte, 392 U.S. 364, 368-69 (1968).

[60] United States v. Konigsberg, 336 F.2d 844, 847 (3d Cir. 1964); United States v. Wolfson, 299 F. Supp. 1246, 1249-50 (D. Del. 1969).

2. a business associate of the co-defendant and owner of the property searched;[61]

3. a tenant who willfully abandoned the premises before the illegal search occurred;[62] and,

4. a trespasser who merely used the premises searched.[63]

¶35 Generally, New York, Massachusetts, and New Jersey follow federal guidelines where standing is governed by the defendant's relationship to the property searched.[64]

¶36 If a defendant does not have standing because of his interest in the premises he may achieve it through his interest in the property seized. Total ownership[65] or possessory interest[66] establish standing to complain. Possessory interest is broadly defined in the federal

[61] United States v. Grosso, 358 F.2d 154, 161 (3d Cir. 1966).

[62] Feguer v. United States, 302 F.2d 214, 248-49 (8th Cir.), cert. denied, 371 U.S. 872 (1962).

[63] United States v. Watt, 309 F. Supp. 329, 331 (N.D. Cal. 1970).

[64] Defendants had standing to protest as guests of the lessee of an apartment where incriminating narcotics were seized. People v. Cokley, 42 App. Div.2d 538, 344 N.Y.S.2d 796 (1st Dept. 1973).
A defendant had no standing to object to the seizure of a car that he neither owned nor possessed. Commonwealth v. Campbell, 352 Mass. 387, 402, 226 N.E.2d 211, 220 (1967). A person does have standing if he has a proprietary, possessory, or participatory interest in the place where the evidence was found. State v. Allen, 113 N.J. Super. 245, 273 A.2d 587 (App. Div. 1970).

[65] Schwimmer v. United States, 232 F.2d 855, 860-61 (8th Cir.), cert. denied, 352 U.S. 833 (1956)(a lawyer had standing to complain about subpoena duces tecum of records he had deposited with a corporation for storage).

[66] United States v. Ong Goon Sing, 149 F. Supp. 267, 268 (S.D. N.Y. 1957)(defendant was holding papers seized for a third person from whom he purchased laundry).

courts to include constructive possession of property.[67]

¶37 If a defendant relinquishes his interest in property before the illegal search, he has no standing to complain.[68] Likewise, a defendant has no standing to object to the seizure by federal officers of papers filed with a state court.[69]

¶38 Until 1960, defendants charged with a possessory offense faced a special dilemma when they asserted standing through ownership of seized property. If possession of the seized property itself constituted a crime, a defendant could not, in effect, acquire standing without confessing an incriminating interest in contraband or stolen property. The Court first recognized this dilemma in Jones v. United States.[70] There it held that where "possession both convicts and confers standing" the defendant need not allege an interest in the premises or property.

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[67] Mancusi v. DeForte, 392 U.S. 364, 367 (1968). See also, United States v. Re, 313 F. Supp 442 (S.D. N.Y. 1970) (records stored with an accountant, in absence of agreement, were not constructively possessed by defendant); United States v. Birrell, 242 F. Supp. 191, 200 (S.D. N.Y. 1965) (records of defendant stored with an attorney).

[68] Abel v. United States, 362 U.S. 217, 240-41 (1960) (evidence reclaimed from hotel wastebasket after defendant vacated room). New York follows a similar rule. People V. Pantoja, 76 Misc.2d 869, 351 N.Y.S.2d 873 (Sup. Ct. Bronx County 1974) (defendant gave rifles to third party who held them at the time of the search). But New York courts did find standing where abandonment of property was unintentional. People v. Adorno, 37 Misc.2d 36, 234 N.Y.S.2d 674 (New York City Criminal Ct. 1962).

[69] United States v. Silverman, 449 F.2d 1341, 1345 (2d Cir. 1971).

[70] 362 U.S. 257, 261 (1960).

¶39 The scope of Jones may well have been narrowed in Simmons v. United States.[71] The court held that the Jones automatic standing doctrine applies where the defendant is accused of possessory offenses. He must, the Court said, continue to allege possession to achieve standing to challenge evidence when charged with a non-possessory offense.[72] The court further added

> . . .when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.[73]

¶40 Consequently, under Simmons it could be argued that the need for automatic standing was removed. Indeed, in Brown v. United States,[74] the court held that defendants in a possession crime had to allege possession to establish standing to suppress.[75] Later, however, the opinion is careful to note that it was not yet necessary to decide if Simmons removed the need for "automatic standing." The court specifically reserved that decision for a case "where possession at the time of the contested search and seizure is 'an essential element of the offense charged.'"[76]

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[71] 390 U.S. 377 (1967).

[72] Simmons, 390 U.S. at 389-93.

[73] Simmons, 390 U.S. at 394.

[74] 411 U.S. 223 (1972).

[75] Brown, 411 U.S. at 228.

[76] Brown, 411 U.S. at 228, quoting Simmons, 390 U.S. at 390.

2. Electronic Surveillance

¶41 Electronic surveillance provides a complex setting for the application of standing rules. The terms "search and seizure" or "unlawful invasion of privacy" are used in reference to recordings of conversations overheard by government authorities. Frequently, these recordings are acquired without physical trespass onto the defendant's property. Rarely is there seizure of tangible property. Traditional standing doctrines illustrated by Jones or Brown do not readily apply to electronic surveillance situations.

¶42 Katz v. United States[77] defined an illegal wiretap, under the Fourth Amendment, as one that invaded person's "reasonable expectation of privacy." The Court recognized Katz's standing to object to the tap even though his calls were made from a public telephone booth. Standing in the context of electronic surveillance was faced more directly in Alderman v. United States.[78] There the Court recognized two classes of defendants who have standing to suppress evidence from an illegal electronic surveillance:

1. a party to the conversations overheard; and

2. the owner of the premises where the tap was located, regardless of his presence at the time of the conversations.[79]

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[77] 389 U.S. 347, 361 (1967).

[78] 394 U.S. 165 (1969).

[79] Id. at 176-80. New York also grants standing to defendants who participated in the conversations intercepted. People v. Butler, 33 App. Div. 675, 305 N.Y.S.2d 367 (1st Dept. 1969). A person who was not party to conversations

¶43 Under 18 U.S.C. §2510(10)(1971) an "aggrieved person" is entitled to invoke the motion to suppress evidence from illegal electronic surveillance. Such a person is one who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.[80]

3. Confessions

¶44 In general, a defendant only has standing to suppress his own confession, if it was obtained by unconstitutional methods.[81] Nevertheless, he may suppress the confession of his co-defendant in particular circumstances.[82]

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79 (continued)
intercepted under an originally defective wiretap order lacked standing to attack conversations intercepted under the order. State v. Cocuzza, 123 N.J. Super. 14, 301 A.2d 204 (Law Div. 1973).

[80] 18 U.S.C.A. §2510(11)(1970). Comments in the legislative history of the bill indicate that this provision was intended to reflect existing law. See Jones v. United States, 362 U.S. 257 (1960); Goldstein v. United States, 316 U.S. 114 (1942); and Wong Sun v. United States, 371 U.S. 471 (1963). S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968).

[81] Constitutional rights are personal; they may not be asserted vicariously. Alderman v. United States, 394 U.S. 165, 174 (1969). An involuntary confession may violate several of the defendant's constitutional rights, depending on how it was obtained. A coerced confession violates the right against self-incrimination. Boyd v. United States, 116 U.S. 616 (1896). A confession received in the absence of counsel may violate Sixth Amendment guarantees. Massiah v. United States, 377 U.S. 201, 205-06.

[82] In Bruton v. United States, 391 U.S. 123 (1968), the Court set aside a conviction because a co-defendant's confession implicating the defendant was received in evidence. Although the jury was instructed to disregard the confession, the Court felt that there was substantial risk that it influenced the verdict. The joint trial also precluded cross-examination of the co-defendant, in violation of the defendant's right of confrontation under the Sixth Amendment.

C. Illegality: Allocation of Burdens

¶45 In a motion to suppress, the burden of proof is upon the moving party to show that the evidence to be excluded was obtained by illegal means. To succeed, the showing must be made by a preponderance of the evidence.[83]

¶46 New York places the initial burden of coming forward with a showing of legality upon the state. When that is met, the ultimate burden of persuasion rests on the moving party.[84]

1. Search With Warrant

¶47 In a marginal case, the courts tend to sustain a search under a warrant, where without one it would fail.[85]

[83] United States v. Matlock, 415 U.S. 164, 177 (1974); Coolidge v. New Hampshire, 403 U.S. 443, 484-90, reh. denied, 404 U.S. 874 (1971); Commonwealth v. Hanger, 357 Mass. 464, 467-68, 258 N.E.2d 555, 558 (1970); State v. Stolzman, 115 N.J. Super. 231, 236, 279 A.2d 114, 115 (App. Div. 1971)(implication).

[84] People v. Malinsky, 15 N.Y.2d 86, 96, 204 N.E.2d 188, 195, 255 N.Y.S.2d 850, 861 (1965); People v. Berrios, 28 N.Y.2d 361, 367-68, 270 N.E.2d 709, 712-13, 321 N.Y.S.2d 884, 888-89 (1971).

[85] United States v. Ventresca, 380 U.S. 102, 106 (1965). Grounds for attacking a warrant follow:

1. The warrant is invalid on its face because of:
   a. failure to show probable cause;
   b. failure to specify with particularity, the places to be searched, or persons or things to be seized;
   c. facial inaccuracy; or
   d. improper authorization.
2. The warrant was improperly executed because:
   a. either notice, inventory, or return was neglected; or
   b. the search was beyond the scope of the warrant.

ALI Model Penal Code of Prearraignment Procedure, Tent. Draft No. 4 (1971) §8.02.

If the violation is technical or clerical, proof of illegality does not mandate suppression.[86] To suppress evidence, then, the defendant must show bad faith, prejudice, or infringement of substantial rights. Further, if the prosecutor makes a showing of substantial compliance or good faith, the suppression motion may often be defeated.[87]

¶48 In contrast, if the violation is constitutional and the burden is carried, suppression is required.[88]

[86] United States v. Hall, 505 F.2d 961 (3d Cir. 1974).

> Rule 2 expresses values sought to be achieved by the Federal Rules of Criminal Procedure. We are commanded to give the rules a construction which secures 'simplicity in procedure, fairness in administration and elimination of unjustifiable expense and delay.' Id. at 963.

See also, People v. Mallard, 79 Misc.2d 270, 359 N.Y.S.2d 622 (Sup. Ct. Queens County, 1974); Commonwealth v. Cromer, ___Mass.___, 313 N.E.2d 557, 559 (1974).

[87] United States v. Hall, 505 F.2d 961, 963 (3d Cir. 1974)(failed to return search warrant promptly); United States v. Harrington, 504 F.2d 130, 134 (7th Cir. 1974)(failure to leave a copy of the warrant and a receipt for the property taken); United States v. Ravich, 421 F.2d 1196, 1201 (2d Cir. 1970)(nighttime search of unoccupied room); United States v. Sturgeon, 501 F.2d 1270, 1275 (8th Cir. 1974)(issuance by state judge without designating a federal magistrate to whom it was to be returned); United States v. Burke, 517 F.2d 377, 381 (2d Cir. 1975)(failure of affidavit to recite reliability of informant, where reliability was apparent from the facts); People v. Rose, 52 Misc.2d 648, 276 N.Y.S.2d 450 (Dist. Ct., Nassau County, 1st Dist. 1967)(failure to give receipt for property seized); Commonwealth v. Cromer, ___Mass.___, 313 N.E.2d 557,561(seven day delay in execution of warrant)(1974); State v. Bisaccia, 58 N.J. 586, 279 A.2d 674 (1971)(erroneous address in affidavit and warrant).

[88] Coolidge v. New Hampshire, 403 U.S. 443, 447 (1971)(approval by chief prosecutor acting as magistrate); People v. Malinsky 15 N.Y.2d 86, 204 N.E.2d 188, 255 N.Y.S.2d 850 (1965)(lack of probable cause); People v. Rothenberg, 20 N.Y.2d 35, 38, 228 N.E.2d 379, 380, 281 N.Y.S.2d 316, 317 (1967)(lack of specificity in warrant); Commonwealth v. Owens, 350 Mass. 633, 636, 216 N.E.2d 411, 412-13 (1966)(lack of probable cause; reliability of informant not established).

¶49 The jurisdictions handle attacks on supporting affidavits differently.[89] Despite diversity in approach,[90] each places a heavy burden on a defendant who wishes to go behind an affidavit in a suppression hearing.[91]

2. Search Without a Warrant

¶50 Searches conducted outside the judicial process on a defendant's property are per se unreasonable.[92] Once a defendant shows that a search took place without a warrant, the government must prove that circumstances justified the action under one of the recognized exceptions to the rule.[93] The government need only go forward with evidence to establish the exception by a preponderance of the evidence; proof beyond a reasonable doubt is not necessary.[94]

¶51 Exceptions to the prohibition of warrantless searches present variations to the general rule.[95] These exceptions and their procedural implications are treated in the

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[89] Federal courts may go beyond the face of the affidavit to consider any facts asserted under oath before the magistrate who received the application. United States v. Focarile, 340 F. Supp. 1033, 1043-44 (D. Md.), aff'd sub nom. United States v. Giordano, 469 F.2d 522, aff'd, 473 F.2d 906, aff'd, 416 U.S. 505 (1974). New York and New Jersey also consider supplemental testimony given under oath before the issuing magistrate. It must be recorded or transcribed, however. In New Jersey the transcript must be attached to the affidavit. People v. Schnitzler, 18 N.Y.2d 456, 460, 223 N.E.2d 28, 30, 276 N.Y.S.2d 616, 618 (1966); State v. Stolzman, 115 N.J. Super. 231, 234-35, 279 A.2d 114, 115 (App. Div. 1971). Federal and New Jersey courts indicate the prosecution may call the issuing magistrate to verify oral testimony accompanying the affidavit under some circumstances, United States v. Falcone, 364 F. Supp. 877, 888, 895 (D.N.J. 1973), aff'd, 500 F.2d 1401 (3d Cir. 1974); State v. Clemente, 108 N.J. Super. 189, 198, 260 A.2d 514, 520 (App. Div. 1969). Massachusetts does not permit supplementation of the affidavit by sworn testimony. Commonwealth v. Monosson, 351 Mass. 327, 330, 221 N.E.2d 220, 221 (1966).

[90] Most of the federal circuits hold that a defendant is entitled to a hearing delving below the surface of a facially sufficient affidavit upon a showing of:

1. a misrepresentation by the government of a material fact; or
2. an intentional misrepresentation by the government, regardless of materiality. United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973); Jackson v. United States, 336 F.2d 579, 580 (D.C. Cir. 1964); United States v. Dunnings, 425 F.2d 836, 840 (2d Cir.), cert. denied, 397 U.S. 1002 (1969); King v. United States, 282 F.2d 398, 400-01 (4th Cir. 1960); United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973); United States v. Marihart, 492 F.2d 897, 899-90 (8th Cir. 1974); United States v. Harwood, 470 F.2d 322, 324-25 (10th Cir. 1972); United States v. Damitz, 495 F.2d 50, 53-54 (9th Cir. 1974).

New York will inquire into the veracity of an affidavit, but a presumption in favor of validity exists. People v. Alfinito, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965).

New Jersey does not permit such an inquiry. State v. Petillo, 61 N.J. 165, 173, 293 A.2d 649, 653, cert. denied, 410 U.S. 944 (1972).

[91] United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973) (defendant must show recklessness regarding a material error or intentional untruthfulness).

[92] Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971).

[93] Coolidge, 403 U.S. at 453; People v. Berrios, 28 N.Y.2d 361, 367, 270 N.E.2d 709, 712, 321 N.Y.S.2d 884, 888-89; Commonwealth v. Autobenedetto, ___ Mass. ___, 315 N.E.2d 530, 534 (1974); State v. Contursi, 44 N.J. 422, 425, 209 A.2d 829, 832 (1965). Exceptions include search incident to arrest, consent search, seizure of objects in plain view, and search under exigent circumstances.

[94] United States v. Matlock, 415 U.S. 164, 177 (1974); People v. Harrington, 70 Misc.2d 303, 305, 332 N.Y.S.2d 789, 792-93 (Allegany County Ct. 1972); State v. Brown, 132 N.J. Super. 180, 185, 333 A.2d 264, 267 (App. Div. 1975).

[95] United States v. Jeffers, 342 U.S. 48 (1951).

> Only where incident to a valid arrest. . . or in exceptional circumstances. . . may an exemption lie and then the burden is on those seeking the exemption to show the need for it. . . . Id. at 51 (citations omitted).

following sections.

a. Search Incident to Arrest

¶52 When the government asserts that a warrantless search was incident to an arrest, it must show a lawful arrest. The arrest must conform both to the requirements of state law;[96] and to the mandates of the federal Constitution.[97] Beyond this, the prosecution must prove that the search was appropriately limited in scope. Arrests fabricated to permit warrantless searches under this doctrine are not tolerated.[98]

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[96] United States v. Montos, 421 F.2d 215, 224 (5th Cir. 1970).

[97] Ford v. United States, 352 F.2d 927, 932-33 (D.C. Cir. 1965); People v. Martin, 32 N.Y.2d 123, 125, 296 N.E.2d 245, 246, 343 N.Y.S.2d 343, 345-46 (1973); State v. Brown, 132 N.J. Super. 180, 185, 333 A.2d 264, 266-67 (App. Div. 1975); Commonwealth v. Autobenedetto, ___Mass.___, 315 N.E.2d 530, 533 (1974). The Constitution requires that probable cause exist to arrest without a warrant.

[98] The Supreme Court set out the factors that determine the scope of a search in Chimel v. California, 395 U.S. 752 (1969):

> . . . it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. Id. at 763.

The decision also permitted a search of the area into which the defendant might reach for weapons or evidence. For examples, see Coolidge v. New Hampshire, 403 U.S. 443, 478 (the prosecution had to prove that the evidence seized was within the grasp of the arrestee); People v. Lewis, 26 N.Y.2d 547, 260 N.E.2d 538, 311 N.Y.S.2d 905 (1970) (when a suspect is arrested in his apartment, a search of his car is not proper).

b. Plain View

¶53 If evidence is in plain view when police are making a lawful search or arrest it may be seized. The government must show that the challenged object was exposed to the view of the officer. It must also prove that the officer had a right to be where he was when he saw the object.[99]

¶54 Generally, the legality of a policeman's presence may be proved by showing:

1. he was present to make a lawful arrest,

2. he was present with a warrant, or

3. he was on the premises with consent of the owner or occupant.

¶55 Federal courts also require the prosecution to prove that the discovery was inadvertant.[100] A recent Fourth Circuit decision, however, indicates that lower courts do not always require a showing of inadvertance.[101]

c. Consent

¶56 In contrast to the minimal showing required in the previous two sections, a heavy burden to show voluntariness is on the government in consent searches.[102] Clear and

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[99] Harris v. United States, 390 U.S. 234, 236 (1968); People v. Gatti, 29 App. Div.2d 617, 285 N.Y.S.2d 437 (4th Dept. 1967); Commonwealth v. Fields, ___Mass.___, 319 N.E.2d 461, 463 (1974); State in Interest of A.C., 115 N.J. 77, 81, 278 A.2d 225, 227 (App. Div. 1971). The intrusion that brings the officer within plain view of the object may be under warrant or under one of the exceptions to the warrant rule. Coolidge v. New Hampshire, 403 U.S. 443, 465.

[100] Coolidge, 403 U.S. at 469.

[101] United States v. Bradshaw, 490 F.2d 1097, 1101 at note 3 (4th Cir. 1974).

[102] Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

convincing proof of consent must be offered.[103] Lower federal courts distinguish between consent given in custody and consent given out of custody.[104] Recently, the Supreme Court also implied that the burden on the government varies depending on whether the defendant was in or out of custody when he gave consent.[105] In general, a slightly higher standard of proof is required in cases where consent was given while the defendant was in police custody. Some courts use the language of presumption to describe this standard,[106] but it would be more accurate to think of it as a "favored inference."

¶57 While New York and New Jersey clearly follow federal practice, the situation in Massachusetts is not clear. The

[103] United States v. Jones, 475 F.2d 723, 728 (5th Cir. 1973); State v. Price, 108 N.J. Super. 272, 282, 260 A.2d 877, 883 (Law Div. 1970).

[104] United States v. Montos, 421 F.2d 215, 223 (5th Cir.), cert. denied, 397 U.S. 1022 (1970) (postal inspector asked employee two routine questions); United States v. Candella, 469 F.2d 173, 175 (2d Cir. 1972) (defendant under arrest, pointed locations of handguns after he was informed of his rights); United States ex rel. Dunham v. Quinlan, 327 F.Supp. 115, 123 (S.D. N.Y. 1971) (defendant under arrest, gave keys of his apartment to sheriff and told him to search it after he was advised of his rights). Findings of consent were upheld in all cases.

[105] Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1970).

> We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

[106] United States v. Elrod, 318 F. Supp. 524, 526 (E.D. La. 1970), aff'd, 441 F.2d 353 (5th Cir. 1971).

Autobenedetto decision, in 1974, required the prosecution to show the legality of a warrantless search for the first time. The standards applicable to the showing are not yet established. Previously, a policeman's testimony was adequate proof of voluntariness.[107] Now, this would probably not be sufficient.

d. Stop and Frisk

¶58 All four jurisdictions require the prosecution to justify a "frisk" preceded by a temporary detention.[108] Massachusetts has a statutory provision governing "stop and frisk." The courts construe it to conform with requirements set out in federal cases.[109]

e. Exigent Circumstances

¶59 A final exception to the prohibition of warrantless searches is where officers reasonably should not be expected to obtain a search warrant. In these cases the prosecution must show that the officers reasonably believed the evidence or objects sought would be destroyed or removed if not

[107] Commonwealth v. Garreffi, 355 Mass. 428, 431, 245 N.E.2d 442, 445 (1969).

[108] United States v. Cupps, 503 F.2d 277, 280-81 (6th Cir. 1974); People v. Mack, 26 N.Y.2d 311, 315, 258 N.E.2d 703, 707, 310 N.Y.S.2d 292, 296 (1970); State v. Dilley, 49 N.J. 460, 464, 231 A.2d 353, 357 (1967). See generally, Terry v. Ohio, 392 U.S. 1 (1968).

[109] Mass. Gen. Laws Ann. ch. 41, §98 (1973). Commonwealth v. Anderson, ___ Mass. ___, 318 N.E.2d 834 (1974).

seized immediately.[110]

¶60 Airport body searches are the most recent exception to the search warrant rule. In general, the courts require the government to show that from all the facts available to the officer, he was justified in taking immediate action.[111]

3. Electronic Surveillance

¶61 After the defendant makes a minimal showing required for a hearing, the prosecution bears the burden of persuasion on most of the issues raised. The standard of proof required is preponderance of the evidence, but the burden itself varies with the issue.[112] If violation of the governing statute rises to a "constitutional" level the prosecution must show compliance with the statute. On the other hand, if the violation is "ministerial," the government may show substantial compliance or good faith on the part of the officers to carry its burden and avoid suppression.

¶62 The defendant must prove that the government failed

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[110] Schmerber v. California, 384 U.S. 757, 770-71 (1966) (blood samples taken before alcohol dissipated); Carroll v. United States, 267 U.S. 132, 159 (1925) (search of an automobile immediately after the chase); People v. McIlwain, 28 App. Div.2d 711, 281 N.Y.S.2d 218 (2d Dept. 1967) (entry by officer seeking narcotics after hearing a toilet flush).

[111] See United States v. Moreno, 475 F.2d 44, 48-50 (5th Cir. 1973); United States v. Bell, 464 F.2d 667, 672 (2d Cir. 1972); United States v. Slocum, 464 F.2d 1180, 1183 (3d Cir. 1972); United States v. Epperson, 454 F.2d 769, 770-71 (4th Cir. 1972); People v. Boyles, 73 Misc.2d 576, 578, 341 N.Y.S.2d 967, 969 (Sup. Ct., Queens County 1973); State v. Adams, 125 N.J. Super. 587, 312 A.2d 642 (App. Div. 1973).

[112] See note 11 for a list of issues.

to minimize the interceptions.[113] This is rather difficult because the courts apply a general good faith test to establish proper minimization.[114]

¶63 Failure to notify the defendant after a tap may be grounds for suppression.[115] Where this is an accepted basis for suppression, the defendant is usually required to show failure to notify plus resulting prejudice.[116]

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[113] United States v. Cox, 462 F.2d 1293, 1300-01 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974).

[114] Interception of all calls is not failure to minimize per se. United States v. James, 494 F.2d 1007, 1018 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975); State v. Dye, 60 N.J. 518, 534, 291 A.2d 825, 833 (1971), cert. denied, 409 U.S. 1090 (1972). Even if the defense can show improper minimization, a showing of good faith by the prosecution will prevent suppression. United States v. King, 353 F. Supp. 523, 541-44 (S.D. Ca. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974); United States v. Curreri, 363 F. Supp. 430, 437 (D. Md. 1973); People v. Solomon, 75 Misc.2d 847, 849-50, 348 N.Y.S.2d 673, 676-77 (Sup. Ct., Kings County 1973); State v. Molinaro, 122 N.J. Super. 181, 182, 299 A.2d 75 (App. Div.), cert. denied, 62 N.J. 574, 303 A.2d 327 (1973); State v. LaPorte, 62 N.J. 312, 316, 301 A.2d 146, 148 (1973) (search of car subjected to less stringent standards than in federal cases); Commonwealth v. Duran, ___ Mass. ___, 293 N.E.2d 285, 287 (1972) (suitcases unidentifiable except upon arrival, were seized at the airport). For further discussion see Coolidge v. New Hampshire, 403 U.S. 443, 474-84; United States v. Bradshaw, 490 F.2d 1097 (4th Cir. 1974).

[115] The circuits split on this issue. The Fourth and Sixth Circuits held failure to notify is grounds for suppression, while the Second Circuit did not find it sufficient to suppress. See, e.g., United States v. Donovan, 513 F.2d 337, 343 (6th Cir. 1975) (grounds for suppression); United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.) (not grounds for automatic suppression), cert. denied, 417 U.S. 944 (1974).

[116] United States v. Iannelli, 477 F.2d 999, 1003 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975); People v. Tartt, 71 Misc.2d 955, 959, 336 N.Y.S.2d 919, 923 (Sup. Ct., Erie County 1972); People v. Hueston, 34 N.Y.2d 116, 356 N.Y.S.2d 272, 120, 312 N.E.2d 462, 356 N.Y.S.2d 272, 275-76 (1974); State v. Dye, 60 N.J. 518, 546, 291 A.2d 825, 839-40 (1972).

4. In-court Identification

¶64 To defeat a motion to suppress an in-court identification, based upon a prior illegal identification,[117] the prosecution must show that the in-court testimony comes from a legal source.[118] The burden of persuasion is met by a preponderance of the evidence.[119]

5. Confessions

¶65 Treatment of confessions is somewhat confused presently. Nevertheless, all four jurisdictions agree that when the government introduces an inculpatory statement or confession by the defendant, it must prove that it was made voluntarily.[120]

¶66 The Supreme Court approved the practice of New Jersey and Massachusetts when it found proof by a preponderance of the evidence on this issue passes constitutional muster.[121] New York goes beyond this standard to require proof beyond a reasonable doubt.[122]

¶67 All four jurisdictions submit the question of voluntariness to both the judge and the jury. First, the judge conducts a hearing on admissibility from which the jury is excluded. If he finds the confession "voluntary" for constitutional admission purposes, the trial continues with the introduction of the evidence. Finally, the judge instructs the jury to weigh the confession during its deliberations. His previous determination does not preclude a finding of involuntariness on its part for credibility purposes.[123]

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[117] See, United States v. Wade, 388 U.S. 218, 223-27 (1967) as modified by Kirby v. Illinois, 406 U.S. 682, 687-91 (1972); and United States v. Ash, 413 U.S. 300, 313-17 (1973).

[118] Wade, 388 U.S. at 242; People v. Bilinski, 40 App. Div.2d 617, 335 N.Y.S.2d 785 (3d Dept. 1972); Commonwealth v. Cefalo, 357 Mass. 255, 257-58, 257 N.E.2d 921, 923 (1970).

[119] Factors to consider in determining independence are:

1. prior opportunities to observe the defendant;
2. discrepancies between a pre-line-up description and the acutal description of the defendant;
3. previous mistaken identifications;
4. pre-line-up identification of the defendant by photography;
5. failure to identify the defendant on a prior occasion; and
6. time lapse between the crime and the line-up.

Commonwealth v. Cooper, 356 Mass. 74, 84, 248 N.E.2d 253, 260 (1969) quoting United States v. Wade, 388 U.S. at 241.

[120] Miranda v. Arizona, 384 U.S. 436, 475 (1966); People v. Huntley, 15 N.Y.2d 72, 78, 204 N.E.2d 179, 182-83, 255 N.Y.S.2d 838, 843-44 (1965); State v. Yough, 49 N.J. 587, 231 A.2d 598 (1967).

[121] Lego v. Twomey, 404 U.S. 477, 489 (1972); Commonwealth v. White, 353 Mass. 409, 232 N.E.2d 335 (1967); State v. Yough, 49 N.J. 587, 600, 231 A.2d 598, 603-04 (1967). Note, the New Jersey Supreme Court recommended that state courts switch to a "beyond a reasonable doubt" standard in light of the Miranda line of decisions. After Lego v. Twomey, the same court cited Yough for the proposition that "beyond a reasonable doubt" standard should be applied. The court also indicated that Lego might have some effect here. It seems, therefore, likely that New Jersey will return to the preponderance of the evidence rule. State v. Kelly, 61 N.J. 283, 294, 294 A.2d 41, 47 (1972).

[122] People v. Huntley, 15 N.Y.2d 72, 78, 204 N.E.2d 179, 182-83, 255 N.Y.S.2d 838, 843-44 (1965); People v. Thasa, 32 N.Y.2d 712, 714, 296 N.E.2d 804, 344 N.Y.S.2d 2 (1973).

[123] 18 U.S.C.A. §3501(a)(1969); People v. Huntley, 15 N.Y. 2d 72, 78, 204 N.E.2d 179, 182-83, 255 N.Y.S.2d 838, 843-44 (1965); State v. Tassiello, 39 N.J. 282, 291-93; 188 A.2d 406, 411-12 (1963); Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E.2d 630, 639 (1943). Note, in New York a defendant must raise his objections to a confession at trial in order for the jury to be charged on voluntariness. People v. Cefaro, 23 N.Y.2d 283, 288-89, 244 N.E.2d 42, 46, 296 N.Y.S.2d 345, 350-51 (1968).

¶68 Arriving at a suitable definition for "voluntary" has caused the most confusion in this area of law. "Voluntary" can mean "trustworthiness"; it can also mean "given with full understanding of the consequences." The crux of the issue has come initially to mean: did the defendant know about his rights to remain silent and to have counsel? Case law developed the knowledge requirement beyond reading Miranda warnings upon arrest. Now the government must prove both that the defendant had the capacity to understand his rights, and that he did, in fact, understand them.[124] Any showing of misunderstanding on the part of the defendant might refute "voluntariness" in the sense of knowledge of the consequences. Once the Miranda rules are met, traditional voluntariness standards obtain.[125]

6. Harmless Error[126]

¶69 Not all violations of the Constitution mandate

[124] United States v. Cox, 487 F.2d 634, 636 (5th Cir. 1973) (defendant was informed of rights, signed waiver, and officers testifed to his apparent coherence; confession admitted); United States v. Fraizer, 476 F.2d 891, 897 (D.C. Cir. 1973) (expert testimony established defendant had capacity to understand Miranda warnings given to him). People v. Lux, 34 App. Div. 2d 662, 310 N.Y.S.2d 410 (2d Dept. 1970) (despite low IQ, capacity shown by level of education, employment, and service in the army).

[125] Davis v. North Carolina, 384 U.S. 737, 740-41 (1966); Clewis v. Texas, 386 U.S. 707, 708-09 (1967). In both of these cases, the trial took place before the Miranda decision. Consequently, the Court looked to Miranda plus traditional tests of voluntariness for guidelines to judge the admissibility of the defendants' confessions.

[126] Harmless error is to be distinguished from clerical or ministerial errors where the wrong address is typed on a search warrant or the name of the object of a wiretap is misspelled on the application. See, e.g., State v. Bisaccia, 58 N.J. 586, 592, 279 A.2d 675, 678 (1971).

suppression or retrial where illegally obtained evidence is admitted. On appeal, after the defendant shows that evidence was obtained unconstitutionally, the prosecution may prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[127] At the same time, courts recognize, ". . . there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . ."[128]

¶70 In practice, the Court seems to view all of the evidence to decide what impact the challenged elements had on the jury's decision. If the evidence was not decisive, the verdict usually stands[129] despite language in Chapman indicating that if it had any influence at all, there was reversible error.[130]

¶71 The federal wiretap statute requires suppression on specified grounds.[131] In addition, other violations of

[127] Chapman v. California, 386 U.S. 18, 24 (1967).

[128] Id. at 23. The Court seems to be referring to coerced confessions. It cites Payne v. Arkansas, 356 U.S. 560, 568 (1958) where it previously held, "the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment."

[129] Harrington v. California, 395 U.S. 250, 254 (1969); Milton v. Wainwright, 407 U.S. 371, 372-73 (1972) (overwhelming evidence of the prisoner's guilt, aside from the the challenged materials, was presented); People v. Crimmens, 36 N.Y.2d 230, 237, 326 N.E.2d 787, 791, 367 N.Y.S.2d 213, 218 (1975); State v. Bankston, 63 N.J. 263, 273, 307 A.2d 65, 70 (1973); Commonwealth v. McDonald, ___Mass.___, 333 N.E.2d 189, 192 (1975).

[130] Chapman, 386 U.S. at 23-24.

[131] 18 U.S.C.A §2518(10)(c)(1970).

the statute have been held bases for suppression.[132] As with constitutional errors, not all statutory violations result in automatic suppression. For instance, the Third Circuit affirmed a lower court's refusal to suppress wiretap evidence where the purpose of the violated provision had been served and the defendant failed to demonstrate prejudice or intentional neglect on the part of the government.[133]

V. Fruit of the Poisonous Tree

¶72 Evidence derived from other illegally obtained evidence must be suppressed. This "fruit of the poison tree" doctrine was set out by the Supreme Court in Silverhorne Lumber Co. v. United States.[134] The Court refused to admit evidence obtained as a direct result of an illegal search saying, ". . . the knowledge gained by the government's own wrong cannot be used in the way proposed."[135]

[132] United States v. Giordano, 416 U.S. 505, 528 (1974):

> We are confident that the provision for pre-application approval was intended to play a central role in the statutory scheme and that suppression must follow when it is shown that this statutory requirement has been ignored.

[133] United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973), aff'd, 485 F.2d 682 (3d Cir. 1973), aff'd, 487 F.2d 1395 (3d Cir. 1973) (government failed to serve defendants with copies of applications and court orders for wiretap, ten days before the trial). See also United States v. Burke, 517 F.2d 377 (2d Cir. 1975) (affidavit failed to recite reliability of informant, but reliability was apparent from facts).

[134] 251 U.S. 385 (1920).

[135] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 393 (1920).

¶73 Since Silverthorne, evidence derived from illegal wiretaps,[136] illegal entry and arrest,[137] and illegal line-ups[138] has been excluded from trial.

¶74 To determine whether evidence is the fruit of the poisonous tree, courts look to "[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality. . ."[139]

A. Standing

¶75 The Supreme Court determined the standing issue by analogy to simple search and seizure cases.[140] To suppress derivative evidence, a defendant must be the victim of the primary illegality.

B. Attenuation

¶76 From the outset, courts recognized that although

[136] Nardone v. United States, 308 U.S. 338 (1939).

[137] Wong Sun v. United States, 371 U.S. 471 (1963).

[138] United States v. Wade, 388 U.S. 218 (1967).

[139] Wong Sun, 371 U.S. at 388. See also, People v. Robinson, 13 N.Y.2d 296, 301, 196 N.E.2d 261, 262, 246 N.Y.S.2d 623 (1963).

[140] Goldstein v. United States, 316 U.S. 114 (1942):

> . . . the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of unconstitutional search and seizure to object to the introduction in evidence of that which was seized. A fortiori the same rule should apply to the introduction of evidence induced by the use or disclosure thereof to a witness other than the victim of the seizure. Id. at 121.

derived from illegal acts, some evidence would be admissible. If the knowledge was gained from an independent source,[141] or if the connection between the acts and the evidence becomes "so attenuated as to dissipate the taint,"[142] it may be introduced at trial.[143]

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[141] Silverthorne, 251 U.S. at 392. Some courts suggest that if derivative evidence would have been discovered through lawful investigation, it should be admissible regardless of illegal police activity. Roberts v. Ternullo, ___ F.2d ___, 18 Crim. L. Rptr. 2415 (2d Cir., Jan. 7, 1976), People v. Fitzpatrick, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973). The Fifth Circuit recently rejected this view. United States v. Castellana, 488 F.2d 325 (5th Cir. 1974).

[142] Nardone, 308 U.S. at 341. Dissipation of the taint is often proved in confession cases by demonstrating that the confession was an act of free will. Wong Sun, 371 U.S. at 491. The court must judge free will according to the facts of each case. For instance, in Brown v. Illinois, 422 U.S. 590, 605 (1975) the Court found a confession made two hours after an illegal arrest, insufficiently attenuated for admission. See also State v. Hodgson, 44 N.J. 151, 156-57, 207 A.2d 542, 545, cert. denied, 384 U.S. 1021 (1965).

[143] Nardone, 308 U.S. at 341:

> . . . the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

On remand to the Second Circuit, the admission of evidence in Nardone was upheld. United States v. Nardone, 127 F.2d 521 (2d Cir.), cert. denied, 316 U.S. 698 (1942). Judge Learned Hand found that evidence, obtained after police uncovered illegal evidence, was properly admitted. The illegal evidence contributed to the prosecution only insofar as it convinced police to continue the investigation. Commenting on the previous Supreme Court rulings, Hand wrote:

> Such expressions indicate no dispositions towards the refinements inevitable in deciding how far the illicit information may have encouraged and

C. Allocation of Burdens

¶77 The defendant has the initial burden to show that the evidence introduced against him derives from illegal police activity. Once this is done, the government must convince the trial court that the "fruit" is either purged of the primary illegality or removed enough to be attenuated from it.

D. Collateral Uses

¶78 Unlawfully obtained evidence may, however, be used at trial on issues other than guilt. Illegally seized evidence or voluntary, but otherwise illegal, confessions may be introduced to impeach the defendant's testimony.[144] Further, illegally seized evidence may be admitted during trial to refresh a witness's memory.[145]

143 (continued)
> sustained the pursuit. We hold that, having proved to the satisfaction of the trial judge that the "taps" and telegrams did not, directly or indirectly, lead to the discovery of any of the evidence used upon the trial, or to break down the resistence of any unwilling witnesses, the prosecution had purged itself of its unlawful conduct. Id. at 523.

Also in Brown, 420 U.S. at 504, the Supreme Court held that the burden of showing the voluntariness of a confession made in custody after an illegal arrest is on the prosecution. Factors to be considered are:

1. temporal proximity of arrest and confession;
2. presence of intervening circumstances; and,
3. purpose and flagrance of official misconduct.

[144] Monroe v. United States, 234 F.2d 49, 56-57 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956).

[145] Walder v. United States, 347 U.S. 62 (1954) (search and seizure); Harris v. New York, 401 U.S. 222 (1971) (confession); Oregon v. Hass, 420 U.S. 714 (1975). Recently, New Jersey adopted the impeachment exception for the use of unconstitutionally obtained confessions in State v. Miller, ___ N.J. ___, 17 Crim. L. Rptr. 2121 (May 14, 1975). The impeachment exception is also applicable to wiretaps. United States v. Caron, 474 F.2d 506 (5th Cir. 1973).

¶79 In Gilbert v. California,[146] the Supreme Court excluded from a penalty hearing testimony derived from an illegal line-up identification.[147] Some lower courts admit such evidence at sentencing hearings for various reasons.[148]

¶80 Involuntary confessions are treated differently. Some courts reject them because admission conflicts with fundamental fairness.[149]

¶81 Finally, illegally obtained evidence is admissible at parole revocation proceedings, so long as it is reliable.[150]

VI. Appeal

¶82 In federal courts, a defendant may raise the suppression decision during his appeal after conviction. In contrast, the government may appeal the ruling directly

[146] 388 U.S. 263 (1967).

[147] Gilbert v. California, 388 U.S., 263, 272-74 (1967).

[148] United States v. Schipani, 435 F.2d 26, 28 (1970), cert. denied, 401 U.S. 983 (1971) (illegal wiretap evidence was admitted in sentencing hearing where it was reliable and it was not gathered to improperly influence sentencing); Armpriester v. United States, 256 F.2d 294, 297 (4th Cir. 1958) (illegally obtained confession not sufficient grounds to vacate sentence because no prejudice to defendant was shown). Contra, United States v. Weston, 448 F.2d 626, 631-32 (9th Cir. 1972) and Verdugo v. United States, 402 F.2d 599, 610-13 (9th Cir. 1968). See also, People v. Jackson, 20 N.Y.2d 440, 231 N.E.2d 722, 285 N.Y.S.2d 8, cert. denied, 391 U.S. 928 (1967) (involuntary confessions inadmissible at sentencing hearings).

[149] United States ex rel. Brown v. Rundle, 417 F.2d 282, 284-85 (3d Cir. 1969).

[150] United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (1970).

under 18 U.S.C. §3731 (Supp. 1976). The appeal must be made before the defendant is put in jeopardy, and after the United States attorney certifies that the action is not dilatory and that the evidence is substantial proof of a material fact.

¶83 The federal electronic surveillance statute specifies that in addition to other rights of appeal, the government may appeal the granting of a motion to suppress. Again, the U.S. attorney must certify that the appeal is not made for delay. Notice of appeal must be filed within thirty days of the order.[151]

¶84 New York's Criminal Procedure Law permits defendants to appeal the denial of a motion to suppress upon an appeal of the conviction.[152] The People may appeal as of right after filing a notice of appeal and a statement asserting that the deprivation of evidence makes it almost impossible to pursue the prosecution to conviction.[153]

¶85 In New Jersey, both the State and the defendant may appeal a suppression decision with leave of the Appellate Division.[154] The state wiretap statute specifically provides for an immediate appeal by the State provided the

[151] 18 U.S.C.A. §2518(10)(b)(1970).

[152] N.Y. Crim. Pro. Law §710.70(2)(McKinney 1971).

[153] N.Y. Crim. Pro. Law §§450.20(8), 450.50 (McKinney 1971).

[154] See N.J. Court Rules 2:3-1 (Appeals by the state in Criminal Actions), 2:5-6(a)(Appeals from Interlocutory Orders, Decisions, and Actions), and 2:2-3 (Appeals to the Appellate Division from Final Judgments, Decision, Actions, and from Rules).

officer who authorizes the tap certifies that the appeal is not taken for purposes of delay.[155]

¶86 Massachusetts permits the defendant to appeal after the trial. In addition, interlocutory appeal may be made upon application of either party; provided a justice or the chief justice of the Supreme Judicial Court determines an immediate appeal would facilitate the administration of justice.[156]

[155]N.J. Stat. Ann. §2A:156A-21 (1971).

[156]Mass. Gen. Laws Ann. ch. 278, §28E(Supp. 1976).

Appendix

Admissibility of Tainted Witness Testimony

Outline

Summary

¶1 The "fruit of the poisonous tree" doctrine prohibits the introduction, at trial, of evidence derived from a prior illegal search. This doctrine applies to the testimony of witnesses and to tangible evidence.

¶2 The Supreme Court has recognized two exceptions to this doctrine. The independent source exception allows evidence or testimony to be admitted if discovered through a source apart from, or in addition to, the illegal source. The attenuation exception allows admission of evidence if the connection between illegal discovery and the evidence has become so attenuated that the taint of illegality no longer adheres to the evidence.

¶3 Some jurisdictions recognize a third exception, admitting tainted evidence in cases of "inevitable discovery." Under this exception, courts accept evidence which, notwithstanding its illegal seizure, would have been discovered in the course of a lawful police investigation.

¶4 United States v. Ceccolini represents a significant development in the area of admissibility of live witness testimony. In Ceccolini, the Supreme Court asserted that judges must take into account the special characteristics of witnesses when analyzing the attenuation between an illegal search and subsequently tendered testimony. The Court held that whether refusal to admit oral evidence would advance the deterrent purpose of the exclusionary rule provides an important consideration in the live witness context. Weighing these factors, the Court emphasized that judges should be more reluctant to apply the poisonous tree doctrine when the prosecution offers live witness testimony rather than tangible evidence.

I. "Fruit of the Poisonous Tree" Doctrine

¶5 The "fruit of the poisonous tree"[1] doctrine excludes at trial evidence derived from other illegally seized evidence. It is a subset of the exclusionary rule in that the doctrine applies to secondary evidence which is not the direct product of an illegal search.[2] As with the exclusionary rule, courts developed the poisonous tree doctrine primarily to deter police conduct that violates constitutional guarantees.[3]

¶6 The Supreme Court first stated the poisonous tree doctrine in Silverthorne Lumber Co. v. United States[4] holding, "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[5] (emphasis added).

¶7 The application of this rule in Silverthorne prevented the Government from using illegally seized books and papers to secure additional evidence against the defendant.

¶8 In Wong Sun v. United States[6] the Supreme Court elaborated the standard governing the classification of evidence as "fruit

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[1]The Supreme Court first used this phrase in Nardone v. United States, 308 U.S. 338, 341 (1939).

[2]See Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepardized, 56 Cal. L. Rev. 579, 581 (1968): "The evidence initially obtained by virtue of the illicit conduct becomes the poisonous tree. When this evidence leads to other evidence, then the secondary evidence becomes the 'fruit of the poisonous tree.'"

[3]See Stone v. Powell, 428 U.S. 465, 486 (1976).

[4]251 U.S. 385 (1920).

[5]Id. at 392.

[6]371 U.S. 471 (1963).

of the poisonous tree." The Court held that courts must ask the question, "[w]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."[7]

¶9 Courts have universally applied this standard in determining the admissibility of derivative evidence at trial.

II. Applicability of Doctrine to Tainted Witnesses

¶10 The courts have generally held the poisonous tree doctrine applicable to witnesses discovered through illegal searches and seizures and illegal wiretaps.[8] In Wong Sun v. United States[9] the Supreme Court discussed the admissibility of "verbal" evidence:

> The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion . . . . Similarly, testimony as to matters observed during an unlawful invasion has been excluded in order to enforce the basic constitutional policies . . . . Thus, verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest . . . is no less the "fruit" of official illegality than the mere common tangible fruits of the unwarranted intrusion.[10]

¶11 Although the Court's immediate concern in Wong Sun was the

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[7] Id. at 488 (quoting from Maguire, Evidence of Guilt, 221 (1959)).

[8] The courts which have applied the doctrine to witnesses are generally more reluctant to invoke it when a witness is identified through an inadmissible confession rather than an illegal search and seizure. See Smith v. United States, 324 F.2d 879, 881 (D.C. Cir. 1963) Michigan v. Tucker, 417 U.S. 433 (1974) (holding limited to facts of case in which adequate but not full Miranda warnings given). Witnesses may not refuse to testify before a grand jury on the basis of discovery through an illegal search or wiretap. United States v. Calandra, 414 U.S. 338, 349-52 (1974).

[9] 371 U.S. 471 (1963).

[10] Id. at 485.

admissibility of the defendant's out-of-court statements rather than those of a third-party live witness, courts have generally applied the Wong Sun rule to tainted witnesses through a broad interpretation of its dictum: "Nor do the policies underlying the exclusionary rule invite any logical distinction between physical and verbal evidence."[11]

¶12 The Illinois supreme court, in People v. Martin,[12] for the first time held that witnesses discovered through an unlawful search of defendant's books and papers could not be used at trial. Invoking the Silverthorne[13] rule, the court held that constitutional principles required suppression of both physical evidence and testimony of witnesses.

¶13 Similarly the Pennsylvania supreme court held in Commonwealth v. Cephas[14] that the testimony of a witness discovered at the time of an illegal search must be suppressed at trial. The Court stated:

> To permit the prosecution to use a witness obtained as a direct result of an illegal search will frustrate the objectives of the Fourth Amendment just as much as would use of a tangible article found during the same search, thus, the Fourth Amendment would be turned into a mere "form of words."[15]

¶14 But in People v. Eddy[16] the Michigan supreme court ruled

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[11] Id. at 486. See also United States v. Ceccolini, 22 Crim. L. Rep. 3070, 3072 (U.S. March 21, 1978), infra in which the court interprets Wong Sun as applicable to live-witness testimony.

[12] 382 Ill. 192, 200, 46 N.E.2d 997, 1001 (1942).

[13] 251 U.S. 385, 392 (1920).

[14] 447 Pa. 500, 291 A.2d 106 (1972).

[15] Id. at 511, 291 A.2d at 112.

[16] 349 Mich. 637, 85 N.W.2d 117 (1957).

that the lower court properly denied a motion to suppress the testimony of witnesses, some of whom were discovered through an illegal search, since, in so doing, the testimony of legally known witnesses would also be suppressed. The court broadly stated: "[F]acts as to how the authorities learned whom to subpoena as witnesses are immaterial to the question of the competence of the testimony they gave. Learning of their identity through unlawfully seized documents could not serve to seal their lips forever."[17]

III. Admissibility of Testimony through Exceptions to Doctrine

¶15 The Supreme Court has recognized two exceptions to the "fruit of the poisonous tree" doctrine--the independent source rule and the attenuation exception.[18]

A. Independent Source

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[17] Id. at 639, 85 N.W.2d at 119.

[18] Some state courts have recognized "inevitable discovery" as a third exception. This exception states that, "[I]f the witness was discovered as a result of illegal police conduct, his testimony is admissible if he would have been discovered in the normal course of a lawfully conducted investigation." Lockridge v. Superior Court, 3 Cal. 3d 166, 170, 89 Cal. Rptr. 731, 734, 474 P.2d 683, 686 (1970). See also Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir.), cert. denied, 375 U.S. 860 (1963). But see United States v. Paroutian 299 F.2d 486, 489 (2d Cir. 1962) in which the court held that, "[A] showing that the government had sufficient independent information available so that in the normal course of events it might have discovered the questioned evidence without an illegal search cannot excuse the illegality or cure tainted matter." The Supreme Court rejected an opportunity to rule on the constitutionality of the inevitable discovery exception when it denied certiorari in Fitzpatrick v. New York, 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793, cert. denied, 414 U.S. 1050 (1973). This has particular importance since the New York Court of Appeals adopted the exception while the Second Circuit rejected it.
Justice White, in favor of granting certiorari, stated in a dissenting opinion, "[I]t is a significant constitutional question whether the 'independent source' exception to inadmissibility of fruits . . . encompasses a hypothetical as well as an actual independent source." Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1953).

¶16 In Silverthorne Lumber Co. v. United States[19] the Supreme Court stated that, although illegally acquired evidence could not be used at all, "this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others . . . ."[20] This rule reflects the logic of the "fruit of the poisonous tree" doctrine, by suppressing evidence which was obtained by an illegal search and seizure.

¶17 Arguably, exclusion of tainted evidence--even when an independent source exists--would augment the deterrence objective by extending sanctions for police illegality. Such a rule, however, would sweep too broadly. In effect, the doctrine would operate against those who had adhered to fourth amendment commands. Viewed from the perspective of the investigator who discovered evidence through a legitimately independent source, admissibility of legally seized evidence would turn on the mere happenstance of unrelated police violators.[21] Moreover, the extent of deterrence added by this broadened sanction is probably not significant; police officers are not likely to consider the effect of their own legal conduct on the efforts of others. In addition, since police will not often expect an independent discovery of evidence, the threat of suppression of the fruits of their searches should sufficiently deter violators.

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[19] 251 U.S. 385 (1920).

[20] Id. at 392.

[21] See Pitler, supra note 2, at 627.

¶18 In United States v. Barrow[22] the defendant moved to suppress testimony of a witness whom police had discovered during an illegal search of defendant's casino. The court found sufficient evidence to indicate independent knowledge of the witness; the witness frequently visited the casino, federal agents observed his visits and had photographed him. The court held that, "[I]nformation . . . was gained from personal observation and did not become unusable merely because the same information was subsequently discovered during the illegal search."[23]

¶19 In Lockridge v. Superior Court[24] the court accepted testimony of witnesses whose identities were discovered by means of an illegal search and seizure. The illegal seizure of a gun and the tracing of its serial number led police to robbery victims who were able to identify the defendant and testify against him. In Lockridge the court seemingly stretched the independent source exception. It held that because the police already knew the witnesses were victims of a robbery and because police seized the gun during a search unrelated to the robbery, the testimony fell within the exception to the doctrine.[25] Foreshadowing Ceccolini,[26] the court also relied heavily on the exclusionary rule's deterrent function. The court asserted that the suppression of the gun,

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[22]363 F.2d 62 (3d Cir. 1966).

[23]Id. at 66.

[24]3 Cal. 3d 166, 89 Cal. Rptr. 731, 474 P.2d 683 (1970).

[25]The court held in the alternative allowing the testimony at trial as either discovered through an independent source or falling under the "inevitable discovery" rule adopted by the California courts. Id. at 170, 89 Cal. Rptr. at 733-34, 474 P.2d at 685-86.

[26]22 Crim. L. Rep. 3070 (U.S. March 21, 1978).

the primary illegal evidence, adequately served this function and therefore exclusion of testimony was unnecessary.[27]

B. Attenuation

¶20 The Supreme Court first recognized the attenuation exception in Nardone v. United States.[28] The Court took note of the independent source rule enunciated in Silverthorne[29] and went on to state:

> In practice this generalized statement [admissibility of tainted evidence only if from an independent source] may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint.[30] (emphasis added).

¶21 The attenuation exception differs from the independent source rule in that it applies directly to evidence discovered illegally. The courts, however, find the causal connection between the illegality and the production of the evidence too remote to suppress the evidence.

¶22 Attenuation analysis becomes particularly important in the area of tainted witnesses. Several lower courts have held testimony of tainted witnesses admissible because the witness's free will "dissipated the taint" of illegality.

¶23 In Smith v. United States,[31] for example, the court found

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[27]But cf. Note, 20 Buff. L. Rev. 696 (1971) (criticizes California court for making policy choice in admitting witnesses' testimony). See also State v. O'Bremski, 423 P.2d 530 (Wash. 1967) (applies independent source rule to tainted witnesses).

[28]308 U.S. 338 (1939). See also Wong Sun v. United States, 371 U.S. 471 (1963) for additional support for this exception.

[29]251 U.S. 385 (1920).

[30]Id. at 341.

[31]324 F.2d 879 (D.C. Cir. 1963).

the relationship between an inadmissible confession,[32] by which the police learned the identity of eyewitnesses, and the testimony of those witnesses to be "so attenuated that there is no rational basis for excluding it."[33] The court continued in broad terms to distinguish witnesses from physical evidence:

> The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized . . . . [T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give.
>
> The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence. [34]

¶24 A recent Fifth Circuit case, United States v. Houltin,[35] adopted this reasoning in an effort to admit compelled testimony at trial.[36]

¶25 Although the case concerned defendants and not third-party

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[32] As noted earlier, see note 8, supra, courts have generally been reluctant to invoke the poisonous tree doctrine when the taint stems from an inadmissible confession.

[33] 324 F.2d at 881.

[34] Id. at 881-82. See also McLindon v. United States, 329 F.2d 238 (D.C. Cir. 1964), a case decided by the same court one year later. The court emphasized that its holding in Smith did not mean that courts must always admit live witness testimony. In each case, the court must determine whether human factors have intervened to such an extent as to find sufficient attenuation to admit the testimony. 329 F.2d at 241 n.2.

[35] 22 Crim. L. Rep. 2432 (5th Cir. January 30, 1978).

[36] The court initially held the evidence obtained from an illegal wiretap inadmissible. Since federal agents had testified using the wiretap information, the court remanded for a new trial. On remand, the Government granted immunity to four co-defendants. The defendants then stipulated that they would give the same testimony as that of the federal agents at the first trial. Thus, the government was able to submit the testimony at trial while avoiding the exclusionary rule.

witnesses, the court recognized the special characteristics of live witnesses and found them applicable to the case. In finding that the compelled testimony fell within the exceptions to the poisonous tree doctrine,[37] the court explained that the determining factors in analyzing attenuation when there is a live witness are, "proof that the witness has come forward 'by his own volition, regardless of his identification by the illegal search . . .' [and] 'evidence that the witness was completely uncooperative when originally discovered by the illegal search but later changed his attitude and supplied the necessary information.'"[38] Although the testimony was compelled, the court held that the defendants still retained a choice and freely chose to testify rather than to risk contempt prosecution: "One source of attenuation . . . is to be found in the exercise of the defendants' own wills."[39]

¶26 The Supreme Court has followed this liberal trend in the area of live witness testimony in United States v. Ceccolini.[40]

IV. United States v. Ceccolini

A. Facts

¶27 Police officer Ronald Biro entered the defendant's Sleepy Hollow Flower Shop to visit his friend, Lois Hennessey, an employee of the defendant. While in the shop, Biro noticed an envelope containing money. When he examined it closer he discovered that

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[37] The court ruled that the co-defendant's own knowledge of the circumstances was the independent source for the testimony. It did not matter that the government knew of the events first from a tainted source.

[38] 22 Crim. L. Rep. at 2433 (quoting from United States v. Marder, 474 F.2d 1192, 1196 (5th Cir. 1973).

[39] Id.

[40] 22 Crim L. Rep. 3070 (U.S. March 21, 1978).

the envelope also contained policy slips. Hennessey informed him that the envelope belonged to the defendant.

¶28 Biro reported the incident to Tarrytown detectives who relayed the information to an FBI agent investigating gambling operations in the area. Four months later the agent interviewed Hennessey. Although the agent did not mention Biro's visit to the shop, Hennessey told the agent of that incident in giving him information about her employer.

¶29 A grand jury subpoened Ceccolini who testified that he had never taken any policy bets; Hennessey, however, testified to the contrary which led to Ceccolini's indictment for perjury. Ceccolini moved to suppress both the policy slips and Hennessey's testimony as "fruits of the poisonous tree."

¶30 The District Court granted defendant's motion and suppressed both the policy slips and testimony as products of an illegal search. The Court of Appeals affirmed finding "the road to [Hennessey's] testimony from . . . Biro's concededly unconstitutional search . . . both straight and uninterrupted."[41]

B. Holding

¶31 In reversing the Court of Appeals and holding Hennessey's testimony sufficiently attenuated to be admissible, the Supreme Court found it necessary to elaborate principles applicable within the area of live witnesses before reaching a holding for the case at bar.

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[41] Id. at 3072 (quoting from 542 F.2d 136, 142 (2d Cir. 1976)).

¶32 Although the Court explicitly reaffirmed its holding in Wong Sun that verbal evidence is no less the "fruit" of an illegal discovery than tangible evidence, the Court qualified Wong Sun's statement that there is no "logical distinction" between the two types of evidence.[42]

¶33 The Court stated explicitly that in a case of live witnesses, i.e. testimony, rather than tangible evidence, courts should invoke the exclusionary rule "with much greater reluctance."[43]

¶34 The holding of Ceccolini applies within the framework of attenuation analysis. In the case of live witnesses, the Court requires "a closer, more direct link between the illegality and [the] . . . testimony . . ."[44] before suppressing the testimony. Because of the special characteristics of live witnesses, the Court set out four factors that courts must consider in analyzing the extent of attenuation between the illegality and the proffered testimony.

¶35 First, courts must consider the length of the "road" from the illegality to the testimony and not only whether it is an uninterrupted one. Second, the court should consider the degree to which the witness has exercised his or her free will in testifying.[45]

¶36 Third, courts must take into account the consequences of ex-

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[42] 22 Crim. L. Rep. at 3072. The Court points out that Wong Sun dealt specifically with defendant testimony. It emphasizes that distinctions do exist and must be considered, "at least in a case such as this, where . . . the alleged 'fruit of the poisonous tree' [was] the testimony of a live witness, . . . [and] the witness was not a putative defendant . . . ." Id. The Court indicates, however, that most of the distinctions are applicable to putative defendants as well.

[43] Id. at 3074.

[44] Id. at 3073.

[45] Id. The Court favorably cites Smith v. United States, 324 F.2d 879 (D.C. Cir. 1963), see note 8 and accompanying text, supra, concerning the uniqueness of the live witness.

cluding witness testimony which "would perpetually disable a witness from testifying about relevant and material facts, regardless of how unrelated such testimony might be to the purpose of the originally illegal search or the evidence discovered thereby."[46]

¶37 Fourth, courts must consider whether exclusion of the testimony will advance the deterrent purpose of the exclusionary rule given a similar situation in the future.

¶38 By considering these factors, the Court concluded that sufficient attenuation existed between Biro's illegal search and Hennessey's testimony to allow the testimony at trial.[47]

C. Analysis

¶39 In Ceccolini the Supreme Court clearly reached its decision based on its perception of the costliness of the exclusionary rule. It noted the trend away from a broad application of the rule as a protection of fourth amendment privileges. The focus of the Court has turned instead to determining in each particular situation if a refusal to admit tainted witness testimony will advance the deterrent purpose of the exclusionary rule in similar situations.

¶40 In holding that courts should invoke the rule reluctantly, the Court comes close to establishing a presumption in favor of admitting the tainted testimony. Although the Court isolates the factors which are important in analyzing attenuation, it is unclear

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[46] Id.

[47] Id. at 3073-74. The Court concluded that: (1) testimony was an act of Hennessey's own free will; (2) there was a substantial time lag between the illegal search and the testimony; (3) the agent knew the identity of the witness before the incident in the shop; (4) no evidence that the purpose of Biro's visit was to conduct an illegal search; (5) application of the exclusionary rule in this particular case would have no deterrent effect on future behavior of those in a situation to Biro's.

whether each factor carries an equal amount of weight or whether, for example, the likelihood of deterrence should be given greater consideration.

¶41 In its discussion of the free will factor, the Court reasoned that "the greater the willingness of the witness to freely testify, . . . the smaller the incentive to conduct an illegal search to discover the witnesses."[48] As the dissent noted, however, this reasoning reverses what is the usual sequence of events:

> The instances must be very few in which a witness's willingness to testify is known before he or she is discovered . . . . When the police are certain that a witness "will be discovered by legal means . . ." they of course have no incentive to find him or her by illegal means, but the same can be said about physical objects that the police know will be discovered legally.[49]

¶42 While the majority emphasized the need to distinguish live witnesses from physical evidence in attenuation analysis, the dissent accurately noted that these differences are already accommodated by the "poisonous tree" doctrine and its exceptions. A witness who voluntarily comes forward to testify, for example, may fall within the independent source exception to the doctrine. It is questionable, however, whether that witness still is not a "fruit" of the illegality and would have come forth unless known to the police.

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[48] Id. at 3076.

[49] Id.

V. Admissibility of Testimony after Ceccolini

¶43 The Ceccolini decision significantly broadens the factors necessary to the attenuation analysis in the case of live witnesses. Thus, Ceccolini will facilitate the introduction of tainted witness testimony at trial. The Ceccolini analysis allows courts to begin with a presumption against application of the exclusionary rule. The defense must show not only that the testimony is a fruit of illegal evidence, but also that there is a "clear and direct link" between that illegality and the witness's testimony. To find sufficient attenuation, the prosecution should show that: (1) the length of time between the illegal discovery and the testimony at trial was long enough to weaken the link; (2) the testimony was in fact the product of the witness's own free will and; (3) there is little or no possibility for deterrence in a similar situation.

¶44 There may be a few clear cases in which a witness is discovered directly through illegality and shows no willingness to testify; thus, given the factors the courts must consider, there may be insufficient attenuation to admit the testimony. The lack of deterrence advancement, however, still may function to override other considerations and allow the testimony at trial.

Addenda and Errata

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Addenda and Errata

(Double underlining indicates corrected material)

¶1: Correction: Delete last sentence. Add: The state's procedures are generally set out either in statutes or in court rules. Michigan's procedure is governed by case law.

¶6: Correction: Delete last two sentences. Add: Federal courts permit the government to make an interlocutory appeal, but require the defendant to wait until after trial. Most state courts allow the state to make an interlocutory appeal; some allow defendants to do so.

¶7; Note 1: Add: The continuing validity of the substantive holding of Boyd is questionable after Fisher v. United States, 425 U.S. 391 (1976) and United States v. Miller, 425 U.S. 435 (1976).

¶8; Note 4: Addition: See, Dunaway v. New York, N.Y. Times, June 6, 1979, at A17, col. 1 (S. Ct. June 5, 1979) (No. 78-5066) ("The central importance of the probable cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised [by calling an arrest a holding for questioning].").

¶9; Note 7: Addition:

3. Confession obtained after Miranda warnings, but without probable cause for arrest. Dunaway v. New York, N.Y. Times, June 6, 1979, at A17, col. 1 (S. Ct. June 5, 1979) (No. 78-5066).

¶11; Note 9: Correction: 308 U.S. 338 (1939).

¶11; Note 10: Omit and substitute: See, e.g., 18 U.S.C.A. § 2510 - 2520 (West 1969 & Supp. 1979); Mass. Ann. Laws ch. 272 § 99 (Michie/Law. Co-op Supp. 1979); N.J. Stat. Ann. § 2A:156A (West 1971 & Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978 ch. 51, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700 (McKinney 1971 & Supp. 1978-1979).

¶12; Note 11: Omit and substitute: A motion to suppress evidence obtained by electronic surveillance may be, inter alia, based on the following theories:

1. absence of probable cause, 18 U.S.C.A. § 2518(1)(b) (West 1969 & Supp. 1979); Ariz. Rev. Stat. Ann. § 13-3010(A) (1978); Colo. Rev. Stat. § 16-15-102(4) (1978); Fla. Stat. Ann. § 934.09(3) (West 1973); Mass. Ann. Laws ch. 272, § 99F(2)(a); (3) (Michie/Law. Co-op Supp. 1979); Nev. Rev. Stat. § 179.470(3) (1973); N.J. Stat. Ann. § 2A:156A-9(c) (West Supp.

1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51 § 9, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700.15(2) (McKinney 1971); R.I. Gen. Laws § 12-5.1-4(a) (Supp. 1978); Wis. Stat. Ann. § 968.30(3) (West 1971);

2. absence of required executive authorization, 18 U.S.C.A. § 2516(1) (West 1969 & Supp. 1979); Ariz. Rev. Stat. Ann. § 13-3010(A) (1978); Colo. Rev. Stat. § 16-15-102(1)(a) (1978); Ill. Ann. Stat. ch. 38, § 108A-1 (Smith-Hurd Supp. 1979); Mass. Ann. Laws ch. 272, § 99 F(1) (Michie/Law. Co-op Supp. 1979); Nev. Rev. Stat. § 179.460(1) (1975); N.J. Stat. Ann. § 2A:156A-8 (West Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51, § 3, 9, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700.20(2)(a) (McKinney 1971); R.I. Gen. Laws § 12-1.5-2(a) (Supp. 1978); Wis. Stat. Ann. § 968.28 (West Supp. 1978-1979);

3. failure to identify all parties, 18 U.S.C.A. § 2518(1)(b) (West 1969 & Supp. 1979); Ariz. Rev. Stat. Ann. § 13-3010(B)(2)(b) (1978); Colo. Rev. Stat. § 16-15-102(5)(a) (1978); Fla. Stat. Ann. § 934.09(4)(a) (West Supp. 1979); Ill. Ann. Stat. ch. 38, § 108A-3(a)(2)(d) (Smith-Hurd Supp. 1979); Mass. Ann. Laws ch. 272, § 99K(3) (Michie/Law. Co-op Supp. 1979); Nev.

Rev. Stat. § 179.470(1)(b)(4) (1973); N.J. Stat. Ann. § 2A:156A-9(c)(1) (West Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978 ch. 51, § 9, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700.20(2)(b) (McKinney 1971); R.I. Gen. Laws § 12-5.1-2(b)(2)(iv) (Supp. 1978); Wis. Stat. Ann. § 968.30(1)(b)(4) (West 1971);

4. failure to minimize, 18 U.S.C.A. § 2518(5) (West 1969); Ariz. Rev. Stat. Ann. § 13-3010 (D)(6) (1978); Colo. Rev. Stat. § 16-15-102(6) 1978); Fla. Stat. Ann. § 934.09(1)(c) (West 1973); Ill. Ann. Stat. ch. 38, § 108A-3(a)(3) (Smith-Hurd Supp. 1979); Mass. Ann. Laws ch. 272, § 99K(3) (Michie/Law. Co-op Supp. 1979); Nev. Rev. Stat. § 179.470(1)(c) (1973); N.J. Stat. Ann. § 2A:156A-12(f) (West Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51, § 5, 9, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700.30(7) (McKinney 1971); R.I. Gen. Laws § 12-5.1-5(b) (Supp. 1978); Wis. Stat. Ann. § 968.30(5) (1971);

5. absence of investigative need, 18 U.S.C.A. § 2518(1)(c) (West 1969 & Supp. 1969); Ariz. Rev. Stat. Ann. § 13-3010(c)(3) (1978); Colo. Rev. Stat. § 16-15-102(2)(c) (1978); Fla. Stat. Ann. § 934.09(1)(c) (West 1973); Mass. Ann. Laws ch. 272, § 99E(3) (Michie/Law. Co-op Supp. 1979);

Nev. Rev. Stat. § 179.470(1)(c) (1973); N.J. Stat. Ann. § 2A:156A-9(c) (West Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51, § 9, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700.15(4) (McKinney 1971); R.I. Gen. Laws § 12-5.1-2(b)(3) (Supp. 1978); Wis. Stat. Ann. § 968.30 (1)(c) (West 1971);

6. omissions or errors in affidavits, applications, or warrants;

7. failure to list all prior related wiretaps, 18 U.S.C.A. § 2518(1)(e) (West 1969 & Supp. 1979); Ariz. Rev. Stat. Ann. § 13-3010(B)(5) (1978); Colo. Rev. Stat. § 16-15-102(2)(e) (1978); Fla. Stat. Ann. § 934.09(1)(e) (West 1973); Ill. Ann. Stat. ch. 38, § 108A-3(a)(4) (Smith-Hurd Supp. 1979); Mass. Ann. Laws ch. 272, § 99F(2)(h) (Michie/Law. Co-op Supp. 1979); Nev. Rev. Stat. § 179.470(1)(e) (1973); N.J. Stat. Ann. § 2A:156A-9(e) (West Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51, § 9, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700.20(2)(f) (McKinney 1971); R.I. Gen. Laws § 12-5.1-2(b)(5) (Supp. 1978); Wis. Stat. Ann. § 968.30(1)(e) (West 1971);

8. failure to give notice, 18 U.S.C.A. § 2518(8)(d) (West 1969); Ariz. Rev. Stat. Ann. § 13-3010(I) (1978); Colo. Rev. Stat. § 16-15(8)(d) (1978); Fla. Stat. Ann. § 934.09(7)(e) (West 1973); Ill. Ann. Stat. ch. 38, § 108A-8 (Smith-Hurd Supp. 1979); Mass. Ann. Laws ch. 272, § 99O(1)(2) (Michie/Law. Co-op Supp. 1979); Nev. Rev. Stat. § 179.495(1) (1975); N.J. Stat. Ann. § 2A:156A-16 (West 1971), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51, § 6, 9, 102 N.J.L.J. NL-42 (1978); N.Y. Crim. Proc. Law § 700.50(3) McKinney 1971); R.I. Gen. Laws § 12-5.1-11 (Supp. 1978); Wis. Stat. Ann. § 968.30(7)(d) (West 1971 & Supp. 1978-1979).

¶12; Note 14: Add at end: But courts are careful to assure proper authorization. See United States v. Iannelli, 528 F.2d 1290 (3d Cir. 1976).

¶13; Note 15: Correction: United States v. Leonard, 524 F.2d 1076, 1088-89 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976).

¶14; Note 17: Correction: United States v. Collins, 491 F.2d 1050, 1052 (5th Cir.), cert. denied, 419 U.S. 857 (1974).

¶15; Note 20: Correction: United States ex rel. Hickman v. Sielaff, 521 F.2d 378, 386 (7th Cir. 1975), cert. denied, 424 U.S. 958 (1976).

¶16; Note 25: Correction: 18 U.S.C.A. § 2518(10)(a) (West Supp. 1979).

¶19; Note 26: Correction: See Mass. Super. Ct. R. 8 and 61, and Mass. R. Civ. P. 43.

¶20; Note 30: Correction: Mass. Ann. Laws ch. 272, § 99P (Michie/Law. Co-op Supp. 1979).

¶21: Delete: of trial.

¶23; Note 35: Correction: N.J. Stat. Ann. § 2A:156A-21 (West Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51, 102 N.J.L.J. NL-42 (1978).

¶23; Note 26: Add at end: , or, in accordance with the requirements of N.J. Stat. Ann. § 2A-156A-12 (West Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51, 102 N.J.L.J. NL-42 (1978).

¶23A: Addition: New Section

E. Arizona

Arizona provides for motions to suppress evidence in its Rule of Criminal Procedure 16. The defendant must make his motion in the Superior Court at least twenty days before trial.[36A] Failure to make a timely motion results in waiver, unless three conditions are present:

[36A] Ariz. R. Crim. Pro. 16.1(b)(West 1978).

¶23B: the defendant did not know the basis for such a motion; he could not, through the exercise of reasonable diligence, have discovered the basis for such a motion; and he moved promptly upon learning of the grounds for the motion.[36B]

F. California

In California, suppression motions[36C] are governed by sections 1538.5 of the Penal Law. If the seizure took place pursuant to a warrant, the magistrate who issued the warrant must hear the suppression motion.[36D] A felony defendant may move for suppression at the preliminary hearing.[36E] A special hearing is held for suppression motions in misdemeanor prosecutions.[36F] If no opportunity existed for a pretrial motion, or if the defendant was unaware of the grounds for such a motion, he may move at trial for suppression.[36G]

[36B] Id. 16.1(c).

[36C] In his suppression motion, a defendant may raise the issue of a confession's "voluntariness." People v. Massey, 59 Cal. App.3d 777, 782, 130 Cal. Rptr. 581, 584 (1976).

[36D] Cal. Penal Code § 1538.5(b) (West Supp. 1979).

[36E] Id. § 1538.5(f).

[36F] Id. § 1538.5(g).

[36G] Id. § 1538.5(h).

Absent these special circumstances, however, the court may not hear a suppression motion during the trial itself.[36H]

¶23C: G. Colorado

Colorado provides for the suppression of evidence through its Rule of Criminal Procedure 41. Failure to make a pretrial motion waives the right, unless no opportunity existed for the motion or the defendant was unaware of the grounds for the motion.[36I] The court has discretion to hear the motion at trial.[36J]

¶23D: The Colorado wiretap statute lists several grounds for suppressing the contents of intercepted wire and oral communications.[36K] The defendant must move for suppression before trial, unless no opportunity existed for a pre-trial motion or the person aggrieved was unaware of the grounds for the motion.[36L]

[36H] People v. Smith, 30 Cal. App.3d 277, 280-281, 106 Cal. Rptr. 272, 274 (1973).

[36I] Colo. R. Crim. P. 41(e), 41(g).

[36J] Id.

[36K] Colo. Rev. Stat. § 16-15-102(10):

1. The communication was unlawfully intercepted;
2. The order of authorization or approval under which it was intercepted is invalid on its face; or
3. The interception was not made in conformity with the order of authorization or approval.

[36L] Id.

¶23E: H. Florida

Florida provides for the suppression of illegally obtained evidence through Florida Rule of Criminal Procedure 3.109(h)(i). Failure to make a pre-trial suppression motion results in waiver, unless no opportunity existed to make the motion or the defendant was ignorant of the grounds for the motion.[36M] In its discretion, however, the court may entertain a suppression motion or similar objection at trial.[36N]

¶23F: Florida's wiretap statute specifically authorizes motions to suppress the product of illegal wiretaps. Such a motion must be made before trial, unless no opportunity existed to make the motion or the defendant was unaware of the grounds for the motion.[36O] The statute enumerates several grounds for challenging wiretap evidence.[36P]

¶23G: I. Illinois

In Illinois, motions to suppress illegally seized evidence are governed by Code of

[36M] Fla. R. Crim. Proc. 3.190(h)(4), 3.190(i)(2); see, T.C. v. State, 336 So.2d 17 (Fla. App. 1976).

[36N] Fla. R. Crim. Proc. 3.190(h)(4), 3.190(i)(2); see, Davis v. State, 226 So.2d 257 (Fla. App. 1969).

[36O] Fla. Stat. Ann. § 934.09(9)(a) (West 1973).

[36P] Id.:

1. The communication was unlawfully intercepted;
2. The order of authorization or approval was insufficient on its face; or
3. The interception was not made in conformity with the order of authorization or approval.

Criminal Procedure section 114-12. A defendant may move to suppress evidence only in a court which has jurisdiction to try the offense.[36Q] Failure to make the motion before trial waives the right, unless no opportunity existed to make the motion or the defendant was unaware of the grounds for the motion.[36R]

¶23H: The Illinois wiretap statute allows tapping only if one party to any recorded conversation consents to the tap.[36S] The statute provides for the suppression of certain illegal wiretaps.[36T] Suppression motions must be made before trial, unless no opportunity existed for such a motion.[36U]

¶23I: J. Louisiana

In Louisiana, motions to suppress evidence are governed by article 703 of the Code of Criminal Procedure. If a defendant receives notice of his trial at least thirty days before trial, he waives his right to move for the suppression of illegally seized physical evidence unless

[36Q] Ill. Rev. Stat. ch. 38, § 112-12(d) (West 1977).

[36R] Id. § 114-12(c).

[36S] Ill. Rev. Stat. ch. 38, § 108A-4(a) (West Supp. 1979).

[36T] Under Ill. Rev. Stat. ch. 38, § 108A-9(a), any aggrieved person may move to suppress wiretap evidence if:

1. the conversation was unlawfully overheard or recorded;
2. the order of authorization or approval was improperly granted; or
3. the recording or interception was not made in conformity with the order of authorization.

[36U] Id. § 108A-9(b).

he so moves at least fourteen calendar days before trial. If the defendant receives notice of trial less than thirty days before trial, he waives his right to move for the suppression of illegally seized physical evidence unless he makes his motion at least three judicial days before trial. No waiver takes place, however, if the defendant lacked opportunity to make a timely motion or if he was unaware of the grounds for such a motion. The court has discretion to hear such a motion at any time before or during trial.[36V]

¶23J: Louisiana law distinguishes motions to suppress illegally seized physical evidence from motions to suppress confessions. A defendant must meet the same time limits for written confessions as for physical evidence, but if the motion to suppress is untimely, he can still introduce evidence to discredit the confession.[36W] Oral confessions, however, are not subject to a motion to suppress.[36X]

¶23K: K. Michigan

In Michigan, procedural rules governing suppression motions are set forth in case law. The

[36V] La. Code Crim. Pro. Ann. art. 703(A) (West Supp. 1979).

[36W] Id. art. 703(B).

[36X] State v. Daniels, 262 La. 475, 483, 263 So.2d 859, 862 (1972), cert. denied, 410 U.S. 944 (1973).

defendant waives his right to move for suppression of illegally seized evidence, unless he does so before trial or he did not know the evidence was illegally seized.[36Y] A limited exception to this rule arises when the defendant's failure to make a pre-trial motion results from a mistake by defense counsel and the evidence contributed to conviction.[36Z]

¶23L: Michigan courts decide the admissibility of confessions at pre-trial hearings known as "Walker hearings."[36AA] The defendant is entitled to such a hearing in any case where a confession is admitted into evidence, but the court is not required to hold such a hearing on its own motion.[36BB]

¶23M: L. Missouri

Missouri provides for the suppression of illegally seized evidence through Missouri Annotated Statutes section 542.296. The defendant must move for suppression in the court of the pending prosecution which grew out of the subject matter of the seizure.[36CC] Failure

[36Y] People v. Ferguson, 376 Mich. 90, 135 N.W.2d 357 (1965).

[36Z] People v. Blassingame, 59 Mich. App. 327, 229 N.W.2d 438 (1975).

[36AA] See People v. Walker, 374 Mich. 331, 132 N.W.2d 87 (1965).

[36BB] People v. Pitts, 25 Mich. App. 92, 181 N.W.2d 78 (1970).

[36CC] Mo. Ann. Stat. § 542.296(2) (Vernon Supp. 1978).

to make a pre-trial motion waives the right, unless the defendant had no opportunity to make a motion or was unaware of the grounds of such a motion.[36DD] In his discretion, the judge may entertain a suppression motion during trial.[36EE]

¶23N: M. Nevada

In Nevada, motions to suppress evidence are governed by section 179.085 of the Revised Statutes. The defendant may move for suppression in a court which has jurisdiction either to try the case[36FF] or over the place of seizure.[36GG] Failure to move for suppression before preliminary hearing, or before trial if there is no hearing, waives the right,[36HH] unless no opportunity existed to make a motion or the defendant was unaware of the grounds for such a motion.[36II] The court has discretion to entertain a suppression motion at trial.[36JJ]

[36DD] Id. § 542.296(3).

[36EE] Id.

[36FF] Nev. Rev. Stat. § 179.085(3) (1975).

[36GG] Id. § 179.085(1).

[36HH] Id. §§ 179.085(3), 174.125, 174.135; One 1970 Chevrolet v. Nye County, 90 Nev. 31, 35, 518 P.2d 38, 40 (1974).

[36II] Nev. Rev. Stat. § 179.085(3) (1975).

[36JJ] Id.

¶23O: The Nevada wiretap statute allows defendants to suppress the contents of intercepted wire and oral communications for the reasons noted below.[36KK] The motion must be made before trial, unless no opportunity existed to make the motion or the defendant was unaware of the grounds for the motion.[36LL]

¶23P: N. Ohio

Ohio Rule of Criminal Procedure 12 provides for motions to suppress illegally obtained evidence. A defendant must make a suppression motion within thirty-five days after arraignment or at least seven days before trial, whichever is earlier.[36MM] Failure to make the motion within the requisite time period results in waiver, but the court may, for good cause, grant relief from such waiver.[36NN]

[36KK] Id. § 179.505:

1. The communication was unlawfully intercepted;
2. The order of authorization under which it was intercepted was unlawful on its face;
3. The interception was not made in conformity with the order of authorization; or
4. The period of the order and any extension had expired.

[36LL] Id.

[36MM] Ohio R. Crim. P. 12(C); State v. Mitchell, 42 Ohio St. 71, 329 N.E.2d 682 (1975).

[36NN] Ohio R. Crim. P. 12(G); State v. Higgins, 50 Ohio App.2d 389, 363 N.E.2d 758 (1976).

¶23Q: O. Rhode Island

Rhode Island provides for the suppression of evidence through rules of its District and Superior Courts.[36OO] The defendant may move for suppression in either the court with jurisdiction to try the case or the court with jurisdiction over the place of seizure. Failure to make the motion before trial, or before a preliminary examination in District Court, waives the right.[36PP] No waiver occurs, however, if the defendant lacked opportunity for a timely motion or was unaware of the grounds for such a motion.[36QQ] The court has discretion to hear a suppression motion at trial or preliminary hearing.[36RR]

¶23R: The Rhode Island wiretap statute sets forth several grounds for suppressing the contents of intercepted wire or oral communications.[36SS]

[36OO] R.I. Super. Ct. R. 41(f); R.I. Dist. Ct. R. 41(f).

[36PP] Id.

[36QQ] Id.

[36RR] Id.

[36SS] R.I. Gen. Laws § 12-5.1-12(a) (Supp. 1977):

1. The communication was unlawfully intercepted;
2. The order under which it was intercepted is insufficient on its face;
3. The interception was not made in conformity with the order;
4. Service was not made as provided (by statute);
5. The seal required (by statute) is not present and there is no satisfactory explanation for its absence.

The defendant must move to suppress such contents before trial, unless no opportunity existed for a pre-trial motion or the defendant was unaware of the grounds for such a motion.[36TT]

¶23S: P. Texas

In Texas, motions to suppress illegally seized evidence are governed by articles 38.22 and 38.23 of the Code of Criminal Procedure. The court may elect to hear suppression motions at a pre-trial hearing;[36UU] if so, the defendant must have a notice period of five days in which to file his motion. Failure to file within the five-day period results in waiver, except by permission of the court for good cause shown.[36VV] If the court decides not to hold a pre-trial hearing, the defendant may move for suppression at trial.[36WW]

¶23T: Q. Wisconsin

Wisconsin provides for the suppression of illegally seized evidence through Wisconsin Statutes Annotated section 971.31. Failure

[36TT] Id. § 12-5.1-12(b).

[36UU] Tex. Code Crim. Pro. Ann. art. 28.01(6) (Vernon Supp. 1978-1979).

[36VV] Id.

[36WW] Writt v. State, 541 S.W.2d 424, 425 (Tex. Crim. App. 1976).

to move before trial for suppression results in waiver, unless the defendant appears to be surprised by the State's possession of the allegedly illegally seized evidence. Whether or not waiver takes place, the court has discretion to entertain a suppression motion at trial.[36XX]

¶23U: Wisconsin distinguishes motions to suppress confessions from motions to suppress other evidence. Motions to suppress confessions may be made before or during trial.[36YY]

¶23V: The Wisconsin wiretap statute allows the defendant to suppress the contents of intercepted wire and oral communications for the reasons noted below.[36ZZ] The defendant must move for suppression before trial, unless there was no opportunity for a pre-trial motion or he was unaware of the grounds for such a motion.[36AAA]

¶24: Correction: Many jurisdictions require . . .

[36XX] Wis. Stat. Ann. § 971.31(2) (West 1971).

[36YY] Id. § 971.31(3).

[36ZZ] Id. § 968.30(9)(a) (Supp. 1978):

1. The communication was unlawfully intercepted;
2. The order of authorization or approval under which it was intercepted is insufficient on its face;
3. The interception was not made in conformity with the order of authorization or approval.

[36AAA] Id.

¶24; Note 37: Correction: United States v. Ledesma, 499 F.2d 36, 39 (9th Cir.), cert. denied, 419 U.S. 1024 (1974).

¶27: Correction: A defendant shall get a hearing in confession cases.

¶27; Note 42: Correction: State v. Walker, 117 N.J. Super. 397, 398, 285 A.2d 37, 38 (A.D. 1971), cert. denied, 63 N.J. 258 (1973).

¶27; Note 43: Correction: N.J. Rules of Evidence 8(3) (Supp. 1978):

> Where by virtue of any rule of law a judge is required in a criminal action to make a preliminary determination as to the admissibility of a statement by the defendant, the judge shall hear and determine the question of its admissibility out of the presence of the jury . . . .

Addition: New Section

¶27A: In Arizona, the court may require counsel to write written memoranda on any issue, and may limit or deny oral argument on any motion.[43A]

[43A] Ariz. R. Crim. P. 16.6(b) (West 1978).

¶27B: In California, suppression motions are defective unless they specify the grounds for the motion.[43B] Trial courts may validly require that such motions be in writing.[43C]

¶27C: In Florida, motions to suppress evidence derived from illegal searches must specify the underlying factual basis.[43D] Upon their own motion, courts can suppress illegally obtained confessions.[43E]

¶27D: Illinois requires that motions to suppress illegally obtained evidence state facts sufficient to show illegality.[43F] Such motions, however, need not be in writing.[43G]

¶27E: Under Nevada law, trial courts may decide suppression motions on affidavits or in such other manner as the court directs.[43H]

¶27F: Texas allows its trial courts to determine the merits of suppression motions by examining

[43B] People v. Tremayne, 20 Cal. App.3d 1006, 98 Cal. Rptr. 193 (1971).

[43C] People v. Lewis, 71 Cal. App.3d 817, 139 Cal. Rptr. 673 (1977).

[43D] Fla. R. Crim. P. 3.190(h)(2) (West 1979).

[43E] Id. 3.190(i)(1).

[43F] Ill. Rev. Stat. ch. 38, § 114-12(b) (West 1977).

[43G] People v. Canale, 52 Ill.2d 107, 285 N.E.2d 133 (1972).

[43H] Nev. Rev. Stat. § 174.135(3) (1975).

the motions, by hearing oral testimony, or by requiring affidavits.[43I]

¶28: Addition: In federal courts the initial showing required for a suppression hearing on wiretap evidence is the same as that for other types of evidence. United States v. Losing, 539 F.2d 1174 (8th Cir. 1976), cert. denied, 434 U.S. 969 (1977)

¶29; Note 45: Fed. R. Crim. P. 43 (amended 1974) provides:

> The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

¶29: Addition: In Texas, the defendant must be present during any pre-trial suppression.[46A]

¶29; 46A Tex. Code Crim. Proc. Ann. art. 38.01(1) (Vernon Supp. 1978-1979).

¶30; Note 47: Correction: Delete State v. Smith, 32 N.J. 501 and replace with State v. Melvin, 65 N.J. 1, 6 n.1, 319 A.2d 450, 453 n. 1 (1974) (Judge, alone, determines voluntariness of a confession).

[43I] Tex. Code Crim. Proc. Ann. art. 28.01(1)(6) (Vernon Supp. 1978-1979).

¶30; Note 47: Correction: United States v. Whitaker, 372 F. Supp. 154, 161 (M.D. Pa.), aff'd 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 (1975); Commonwealth v. Johnson, 352 Mass. 311, 316, 255 N.E.2d 366, 364, cert. granted, 389 U.S. 816 (1967), cert. dismissed, 390 U.S. 511 (1968).

¶30; Note 47: Addition: Brown v. State, 352 So.2d 60 (Fla. App. 1977) (suppression motion presents issues solely for determination by trial court); People v. Bernette, 45 Ill.2d 227, 258 N.E.2d 793 (1970), rev'd on other grounds, 403 U.S. 947 (1971) (admissibility of confession must be decided by trial judge); State v. Lawrence, 260 La. 169, 255 So.2d 729 (1971) (admissibility of seized evidence is a legal question which the judge should determine); Wis. Stat. Ann. § 971.31(3) and (4) (West 1971) (court should decide suppression motions, outside the jury's presence); State v. Hocker, 113 Ariz. 450, 556 P.2d 784 (1976) (suppression motions require judge to exercise a function that is peculiarly his); Nev. Rev. Stat. § 174.135(3) (1975) (suppression motion to be determined by trial judge); People v. Duncan, 176 Colo. 427, 498 P.2d

941 (1971) (it is the function of the court to determine the factual issues presented by a motion to suppress).

¶30: Addition: Add after footnote 47 in the text: Only in Florida, however, does the presence of the jury give rise to reversible error.[47A]

¶30 Note 47A: See, Land v. State, 293 So.2d 704 (Fla. 1974).

¶30; Note 48: Addition: State v. Jackson, 307 So.2d 604 (La. 1975). But see N.J. Rules of Evidence 8(3) (in a hearing on a motion to suppress a statement by the defendant the rules of evidence apply).

¶31; Note 49: Correction: Fisher v. United States, 425 U.S. 391 (1976) . . . United States v. Miller, 425 U.S. 435 (1976); . . . People v. Estrada, 28 App. Div.2d 681, 280 N.Y.S.2d 825 (2d Dep't 1967), aff'd, 23 N.Y.2d 719, 244 N.E.2d 57, 296 N.Y.S. 2d 364 (1968), cert. denied, 394 U.S. 953 (1969).

¶33; Note 54: Correction: 362 U.S. 257 (1960).

¶33: Addition: . . . during the search.[55A]

¶33; Note 55A: But see, Rakas v. Illinois, 99 S. Ct. 421 (1978) (Court rejects the "legitimately on the premises" rationale of Jones). This holding may substantially limit a defendant's ability to challenge illegally seized evidence.

¶34; Note 61: United States v. Grosso, 358 F.2d 154, 161 (3d Cir. 1966), rev'd, 390 U.S. 62 (1968).

¶35; Correction: Generally, the states follow federal . . .

¶35; Note 64: Addition: A defendant has standing to object to a search or seizure if he is legitimately present on the premises when the search or seizure occurs. People v. Towers, 176 Colo. 295, 297, 490 P.2d 302, 304 (1971).

¶37; Note 68: Correction: People v. Pantoja, 76 Misc.2d 869, 351 N.Y.S.2d 873 (Sup. Ct. Bronx County 1974), aff'd, 47 App. Div.2d 814 (1975).

¶37; Note 69: Correction: United States v. Silverman, 449 F.2d 1341, 1345 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1971).

¶42; Note 79: Correction: People v. Butler, 33 App. Div. 2d 675, 305 N.Y.S.2d 367 (1st Dep't 1969), aff'd, 28 N.Y.2d 499, 267 N.E.2d 587, 318 N.Y.S. 2d 943 (1971).

¶46: Correction: New York and Missouri place the initial . . .

¶46; Note 84: Correction: People v. Malinsky, 15 N.Y.2d 86, 91, 204 N.E.2d 188, 192, 255 N.Y.S.2d 850, 856 (1965); . . .

¶46; Note 84: Addition: Mo. Ann. Stat. § 542.296(6) (Supp. 1978); State v. Newhart, 539 S.W.2d 486 (Mo. App. 1976).

¶46A: Addition: In Arizona, the State must prove, by a preponderance of the evidence, the lawfulness of the acquisition of evidence.[84A] If any of the following circumstances are present, however, the prosecution's burden arises only after the defendant establishes prima facie that the evidence should be suppressed: the defendant is entitled, through the discovery rules, to learn the circumstances surrounding the acquisition of the evidence; the evidence was obtained pursuant to a valid search warrant, or defense counsel was present at the time and place of seizure.[84B]

¶46; Note 84A: Ariz. R. Crim. P. 16.2(b) (West 1978).

¶46; Note 84B: Id.

¶47; Note 86: Correction: Commonwealth v. Cromer, 365 Mass. 519, 521-22, 313 N.E.2d 557, 559 (1974).

¶47; Note 87: Correction: United States v. Ravich, 421 F.2d 1196, 1201 (2d Cir. 1970), cert. denied, 400 U.S. 834 (1970); . . . United States v. Sturgeon, 501 F.2d 1270, 1275 (8th Cir. 1974), cert. denied, 419 U.S. 1071 (1974) . . .

Commonwealth v. Cromer, 365 Mass. 519, 525, 313 N.E.2d 557, 561 (1974).

¶49; Note 89: Correction: State v. Clemente, 108 N.J. Super. 189, 198, 260 A.2d 514, 520 (A.D.1969), cert. denied, 55 N.J. 450, 262 A.2d 704 (1970).

¶49; Note 89: Addition: after Clemente: But see, State v. Fariello, 71 N.J. 552, 562-564, 366 A.2d 1313, 1318-1319 (1976) (Oral testimony must be summarized or transcribed if it is to be admissible).

¶49; Note 90: Correction: United States v. Marihart, 492 F.2d 897, 899-900 (8th Cir.), cert. denied, 419 U.S. 827 (1974); United States v. Thomas 489 F.2d 664, 669 (5th Cir. 1973), cert denied, 423 U.S. 844 (1975).

¶50; Note 93: Correction: Commonwealth v. Antobenedetto, 366 Mass. 51, 57, 315 N.E.2d 530, 534 (1974).

¶50; Note 93: Addition: People v. James, 19 Cal.3d 99, 561 P.2d 1135, 137 Cal. Rptr. 447 (1977).

¶50; Note 94: Addition: State v. Whittington, 142 N.J. Super. 45, 51-52, 359 A.2d 881, 885 (A.D. 1976).

¶52; Note 96: Correction: United States v. Montos, 421 F.2d 215, 224 (5th Cir.), cert. denied, 397 U.S. 1022 (1970).

¶52; Note 97: Correction: Commonwealth v. Antobenedetto, 366 Mass. 51, 55, 315 N.E.2d 530, 533 (1974).

¶53; Note 99: Correction: Commonwealth v. Fields, 2 Mass. App. Ct. 679, 682, 319 N.E.2d 461, 463 (A.D.), cert. denied, 366 Mass. 851 (1974) . . . In Re State in Interest of A.C., 115 N.J. Super. 77, 81, 278 A.2d 225, 227 (1971).

¶55; Note 101: Correction: United States v. Bradshaw, 490 F.2d 1097, 1101 n. 3 (4th Cir.), cert. denied, 419 U.S. 895 (1974) (Also at: ¶62; Note 114).

¶56; Note 103: Correction: United States v. Jones, 475 F.2d 723, 728 (5th Cir.), cert. denied, 414 U.S. 841 (1973).

¶56; Note 105: Correction: Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

¶56; Note 105: Addition: United States v. Abbott, 546 F.2d 883 (10th Cir. 1977) (court applied waiver test to consent search, found no implied consent; ignored Schneckloth).

¶58; Note 109: Correction: Commonwealth v. Anderson, 366 Mass. 394, 318 N.E.2d 834 (1974).

¶60; Note 111: Correction: United States v. Moreno, 475 F.2d 44, 48-50 (5th Cir.), cert. denied, 414 U.S. 840 (1973); United States v. Bell, 464 F.2d 667, 672 (2d Cir.), cert. denied, 409 U.S. 991 (1972); United States v. Epperson, 454 F.2d 769, 770-71 (4th Cir.), cert. denied, 406 U.S. 947 (1972).

¶62; Note 113: Correction: United States v. Cox, 462 F.2d 1293, 1300-01 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974), reh. denied, 419 U.S. 885 (1974).

¶62; Note 114: Correction: Commonwealth v. Duran, 363 Mass. 229, 231, 293 N.E.2d 385, 287 (1973).

¶63; Note 115: United States v. Donovan, 513 F.2d 337, 343 (6th Cir. 1975), rev'd, 552 F.2d 735 (6th Cir. 1977), rev'd, 429 U.S. 413 (1977).

¶63; Note 116: Correction: People v. Hueston, 34 N.Y.2d 116, 120, 312 N.E.2d 462, 465, 356 N.Y.S.2d 272, 275-76 (1974), cert. denied, 421 U.S. 947 (1975); State v. Dye, 60 N.J. 518, 546, 291 A.2d 825,

839-40 (1972), cert. denied, 409 U.S. 1090 (1972).

¶65: Correction: Nevertheless, all jurisdictions which have considered the issue agree that . .

¶65; Note 120: Addition: Ill. Rev. Stat. ch. 38, § 114-11(d) (1975); La. Code Crim. Pro. Ann. art. 703 (c) (West 1967).

¶68; Note 124: Correction: People v. Lux, 34 App. Div.2d 662, 310 N.Y.S.2d 416 (2d Dep't 1970), aff'd, 29 N.Y.2d 848, 277 N.E.2d 923, 328 N.Y.S.2d 2 (1973).

¶68; Note 124: Addition: But see, Dunaway v. New York, N.Y. Times, June 6, 1979, at A17, col. 1 (S. Ct. June 5, 1979) (No. 78-5066) (Confession suppressed, even though proper Miranda warnings, because police lacked probable cause to hold for questioning).

¶70; Note 129: Correction: People v. Crimmins.

¶70; Note 129: Add at end: See also United States v. Hunt, 548 F.2d 268 (9th Cir. 1977).

¶71; Note 133: Correction: United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa. 1973), aff'd, 485 F.2d 682 (3d Cir. 1973), aff'd, 487 F.2d 1395 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974).

¶76; Note 141: Correction: Roberts v. Ternullo, 407 F. Supp. 1172 (E.D.N.Y. 1976); . . . People v. Fitzpatrick,

32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973), cert. denied, 414 U.S. 1033 (1973).

¶76; Note 143: Correction: Also in Brown v. Illinois, 422 U.S. 590, 603-604 (1975), the Supreme Court . . .

¶78; Note 145: Correction: State v. Miller, 67 N.J. 229, 337 A.2d 36 (1975).

¶79; Note 148: Correction: United States v. Schipani, 435 F.2d 26, 28 (2d Cir. 1970).

¶79; Note 148: Correction: United States v. Weston, 448 F.2d 626, 631-32 (9th Cir.), cert. denied, 404 U.S. 1061 (1972); Verdugo v. United States, 402 F.2d 599, 610-13 (9th Cir. 1968), cert. denied sub nom., Turner v. United States, 397 U.S. 925 (1970).

¶79; Note 148: Addition: People v. Belleci, 23 Crim. L. Rptr. 2380 (Cal. Ct. of App. 1978) (A trial judge may consider illegally seized evidence when deciding upon a sentence).

¶81; Note 150: Correction: United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (2d Cir. 1970).

¶85; Note 155: Correction: N.J. Stat. Ann. § 2A: 156A-21 (West Supp. 1978-1979), as amended by Act of June 23, 1978, Pub. L. No. 1978, ch. 51, 102 N.J.L.J. NL-42 (1978).

Cite checked and Shepardized through volumes dated:

January, 1979: Nevada, Rhode Island.

March, 1979: Arizona, California, New Jersey, Texas, Wisconsin.

April, 1979: Federal cases and statutes, Florida, Illinois, Louisiana, Michigan, Missouri, New York, Ohio.

May, 1979: Colorado, Massuchusetts.

Crim. L. Rptr. examined through issue dated March 28, 1979.

Lexis searches conducted June 2, 1979.

APPENDIX

ADMISSIBILITY OF TAINTED WITNESS TESTIMONY

Addenda and Errata

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Addenda and Errata

(Double underlining indicates correction)

Outline: Correction: III. . . . . ¶15.

¶5; Note 2: Correction: . . . becomes the 'poisonous tree'. When this . . .

¶8: Correction: . . . question, "whether, granting . . ."

¶9: Correction: ". . . illegality than the more common . . ."

¶11; Note 11: Correction: United States v. Ceccolini, 435 U.S. 268, 273-279 (1978), . . .

¶12; Note 12: Correction: . . . 46 N.E.2d 997, 1001-1002 (1942).

¶13; Note 15: Addition: But see, Commonwealth v. Daniels, 470 Pa. 523, 368 A.2d 1279 (1975) (Court reduces the scope of Cephas "but for" test and permits tainted witness testimony).

¶15; Note 18: Correction: Wayne v. United States, 318 F.2d 205, 209 (D.C. Cir. 1963), . . .

¶15; Note 18: Correction: . . . held that "a showing . . .

¶15; Note 18: Correction: . . . dissenting opinion, "it is a . . .

¶15; Note 18: Correction: Fitzpatrick v. New York, 414 U.S. 1050, 1051 (1973).

¶18: Correction: The court held that "information . . .

¶19; Note 25: Correction: Id. at 170-171, 89 Cal. Rptr. at 733-734, . . .

¶19; Note 26: Correction: 435 U.S. 268 (1978).

¶19; Note 27: Correction: 20 Buff. L. Rev. 696 (1970-1971).

¶23; Note 34: Correction: Id. at 881-882.

¶24; Note 35: Correction: 566 F.2d 1027 (5th Cir. 1978), cert. denied, 99 S. Ct. 97 (1978).

¶25; Note 38: Correction: 566 F.2d at 1032 (quoting . . .)

¶25; Note 39: Correction: 566 F.2d at 1032.

¶26; Note 40: Correction: 435 U.S. 268 (1978).

¶30; Note 41: Correction: Id. at 273 . . .

¶32; Note 42: Correction: Id. at 275.

¶33; Note 43: Correction: Id. at 280.

¶34; Note 44: Correction: Id. at 278.

¶35; Note 45: Correction: Id. at 277.

¶36; Note 46: Correction: Id. at 277.

¶38; Note 47: Correction: Id. at 279-280.

¶38; Note 47: Correction: . . . in a situation similar to Biro's.

¶41: Correction: . . . reasoned that "[t]he greater . . .

¶41: Correction: . . . discover the witness."[48]

¶41; Note 48: Correction: Id. at 276.

¶41: Correction: "[T]he instances must . . .

¶41: Correction: . . . in which a witness' willingness . . .

¶41; Note 49: Correction: Id. at 288.

¶44: Addition: . . . the testimony at trial.[50]

¶44; Note 50: See United States v. Scios, 23 Crim. L. Rptr. 2424 (D.C. Cir. July 21, 1978) (Court used Ceccolini test in refusing to admit witness testimony).

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ADDITION TO APPEALS SECTION OF
"THE AVOIDANCE OF THE SUPPRESSION SANCTION."

¶87 Arizona allows criminal defendants to appeal only from final judgments of conviction.[157] The State may make an interlocutory appeal from a suppression order,[158] but the defendant must be released from custody pending the appeal.[159]

¶88 Colorado allows criminal defendants to appeal only final judgments of conviction.[160] The State may make an interlocutory appeal of a suppression order, provided that the State certifies that the appeal is notdilatory and that the suppressed evidence is a substantial part of the proof of the charge pending against the defendant.[161] In addition, the Colorado wiretap statute gives the State the right to appeal from suppression orders and from orders denying an application for a wiretap.[162]

¶89 In Florida, the defendant may appeal after trial. The State may make an interlocutory appeal of an order granting a motion to suppress.[163] In addition, the wiretap statute gives the State the right to appeal orders granting motions to suppress or deny applications for wiretaps, but the prosecutor must certify that the appeal is not dilatory.[164]

[157] Ariz. Rev. Stat. Ann. § 13-4033 (1978).

[158] Id., § 13-4032 (7).

[159] Ariz. R. Crim. P. 31.16.

[160] Colo. App. R. 1(a)(1) (1973).

[161] Id. 4.1(a).

[162] Colo. Rev. Stat. § 16-15-102(11) (1973).

[163] Fla. Stat. Ann. § 924.07 (West 1973).

[164] Id. § 934.09(9)(b).

¶90 Illinois allows the defendant to appeal after trial.[165] The State may make an interlocutory appeal of constitutional rulings which result in suppression of evidence.[166] Additionally, the Illinois wiretap statute allows the State to appeal orders granting motions to suppress and denials of applications for wiretap authorization.[167]

¶91 Louisiana law makes no special provision for appeals from a ruling on a motion to suppress. A defendant can reserve a bill of exceptions for use in a regular appeal of the case. The State may either continue the prosecution without the evidence or confession or apply for certiorari.[168]

¶92 In Michigan, the defendant may appeal a final judgment of conviction.[169] The State may apply for an interlocutory appeal from an order granting a motion to suppress, but has no such appeal as a matter of right.[170]

¶93 Missouri allows criminal defendants to appeal only from final judgments of conviction.[171] The State may appeal a suppression order only if the order causes an indictment or information to be held insufficient.[172]

¶94 In Nevada, a criminal defendant may appeal only from a final judgment of conviction.[173] Within certain statutory time limits, the State may make interlocutory appeals from suppression orders.[174] In addition, the state wiretap statute gives the prosecution the right to appeal suppression orders, so long as such an appeal is not taken for purposes of delay.[175]

¶95 In Ohio, a defendant may, after trial, appeal an order denying a motion to suppress. Appellate courts have discretion to allow the State to make an interlocutory appeal of a suppression order. The State, however, has no right to make an interlocutory appeal; the Ohio Supreme Court held unconstitutional a rule granting the state such a right.[176]

¶96 Rhode Island allows both the defendant and the State to appeal a decision on a suppression motion.[177] In addition, the state wiretap statute specifically allows the state to appeal a suppression order within thirty days after issuance of the order.[178]

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[165] Ill. Rev. Stat. ch. 110A, § 604(b) (Smith-Hurd 1976).

[166] Id., § 604(a); People v. Lara, 44 Ill. App.3d 116, 357 N.E.2d 1354 (1976).

[167] Ill. Rev. Stat. ch. 38, § 108A-10 (Smith-Hurd Supp. 1979).

[168] La. Code Crim. Pro. Ann. art. 703 note (g) (West 1967).

[169] Mich. Const. art. I, § 20; People v. Pickett, 391 Mich. 305, 215 N.W.2d 695 (1974).

[170] People v. Currie, 59 Mich. App. 659, 229 N.W.2d 818 (1975) (per curiam).

[171] Mo. Ann. Stat. § 547.070 (Vernon 1949).

[172] Id., §§ 547.200 - 210; Mo. Sup. Ct. R. 28.04.

[173] Nev. Rev. Stat. § 177.015(2) (1977).

[174] Id., § 189.120 (1973). The appeal must be taken within five days of a suppression order issued at a preliminary hearing, and within two days of a suppression order issued at trial.

[175] Id., § 179.510 (1975).

[176] State v. Waller, 47 Ohio St.2d 52, 351 N.E.2d 195 (1976).

[177] R.I. Gen. Laws § 9-24-32 (Supp. 1978).

[178] Id., § 12-5.1-12(d).

¶97 In Texas, only convicted defendants may appeal orders denying suppression motions.[179] The state constitution prohibits appeals by the state in criminal cases.[180]

¶98 Wisconsin allows defendants to appeal the denial of suppression motions only after conviction.[181] The State may take an interlocutory appeal within forty-five days from an order granting such a motion.[182] The Wisconsin wiretap statute specifically allows the State to appeal either from an order denying an application for a wiretap or from an order granting a suppression motion, provided that the officer who authorized the tap certifies that the appeal is not dilatory and that he will diligently prosecute the appeal.[183]

[179] Tex. Code Crim. Proc. art. 44.02 (Vernon 1979).

[180] Tex. Const. art. 5, § 26 (Vernon 1955). See also, Tex. Code Crim. Proc. art. 44.01 (Vernon 1979).

[181] State v. Withers, 61 Wis.2d 37, 211 N.W.2d 456 (1973).

[182] Wis. Stat. Ann. § 974.05(1)(d) (West Supp. 1978-1979).

[183] Id. § 968.30(9)(b) (West 1971).

Outline

Summary

¶1 The admissibility of tape recordings, after constitutional and statutory objections are met, is an evidentiary issue. A foundation must be laid that the device works, the operator was competent, and that the recording is authentic. A showing of compliance with statutory sealing requirements must also be made. Before a recording can be introduced, the parties speaking must be identified and it must be shown that the recording is complete. Evidentiary use of tape recordings include direct evidence, impeachment, and witness recollection refreshment. Techniques of presenting tape recordings include the use of ear phones, public address systems, and transcripts.

CONTINUED

7 OF 8

I. Introduction

¶2 The great weight of authority sanctions the use of sound recordings obtained through electronic surveillance[1] where the matters recorded are competent and relevant,[1a]

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[1] As used in [these materials] the term electronic surveillance generally includes wiretapping and bugging, although the terms electronic surveillance and wiretapping are sometimes used interchangeably. Wiretapping generally refers to the interception (and recording) of a communication transmitted over a wire from a telephone, without the consent of any of the participants. Bugging generally refers to the interception (and recording) of a communication transmitted orally, without the consent of any of the participants. The term consensual surveillance refers to the overhearing, and usually the recording, of a wire or oral communication with the consent of one of the parties to the conversation.

See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance xiii (1976).

[1a] Only evidence which is competent and relevant is admissible. J. Wigmore, Evidence §§9-12 (3d ed. 1940). See also Fed. R. Evid. 401-03. For discussion of issues concerning sound recordings, see generally Annot., "Admissibility in Evidence of Sound Recording as Affected by Hearing and Best Evidence Rules," 58 A.L.R.3d 598 (1974); Annot., "Omission or Inaudibility of Portions of Sound Recordings as Affecting Its Admissibility in Evidence," 57 A.L.R.3d 746 (1974); Annot., "Admissibility, in Criminal Prosecutions, of Evidence Secured by Mechanical or Electronic Eavesdropping Devices," 97 A.L.R.2d 1283 (1964); Annot., "Identification of Accused by Voice," 70 A.L.R.2d 995 (1960); Annot., "Admissibility of Sound Recording as Evidence in Federal Criminal Trial," 10 L.Ed.2d 1169 (1964). See also ABA Standards for Criminal Justice: Electronic Surveillance (approved draft 1971); ABA Standards for Criminal Justice: Discovery and Procedures before Trial (approved draft 1970); Zuckerman and Lyons, "Strategy and Tactics in the Prosecution and Defense of Complex Wire-Interception Cases," Commission Studies: National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 25-59 (1976)(hereinafter cited Commission Studies).

and the recordings were made in compliance with the various wiretap statutes.[2] Sound recordings may prove to be an invaluable aid to the court and the jury. In fact, a sound recording may be more satisfactory and persuasive evidence than written and signed documents or oral testimony of witnesses, who must rely solely upon their memories.[3] Sound recordings are used for a variety of purposes. In the majority of instances, they are used as independent evidence of the fact in question,[4] but they may also be

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[2] The 24 jurisdictions which have enacted wiretap statutes and their respective statutes are: 18 U.S.C. §§2510-2520 (1968); Ariz. Rev. Stat. Ann. §§13-1051 to -1061 (Supp. 1973); Colo. Rev. Stat. Ann. §§16-15-101 to -104, 18-9-301 to -310 (1973); Conn. Gen. Stat. Ann. §§53a-187 to -189, 54-41a to -41s (Supp. 1975); Del. Code Ann. tit. 11, §§1335-36 (1974); D.C. Code Ann. §§23-541 to -556 (1973); Fla. State Ann. §§934.01 - .10 (Supp. 1975); Ga. Code Ann. §§26-3001 to -3010 (1972); Kan. Stat. Ann. §§22-2514 to -2519 (1974); Md. Cts. & Jud. Pro. Code Ann. §§10-401 to -408 (1974); Mass. Gen. Laws Ann. ch. 272 §99 (Supp. 1975); Minn. Stat. Ann. §§626A.01 to -.23 (Supp. 1975); Neb. Rev. Stat. §§86-701 to -707 (1971); Nev. Rev. Stat. §§179.410 to .515, 200.610 to .690 (1973); N.H. Rev. Stat. Ann. §§570-A:1 to -A:11 (1974); N.J. Stat. Ann. §§2A:156A-1 to -26 (1971); N.M. Stat. Ann. §§40A-12-1.1 to -1.10 (Supp. 1973); N.Y. Crim. Pro. Law §§700.05 to .70 (McKinney 1971), N.Y. Penal Law §§250.00 to .20 (McKinney 1967); Ore. Rev. Stat. §§141.720 to .990 (1974); R.I. Gen. Laws Ann. §§12-5.1-1 to -16 (Supp. 1974); S.D. Compiled Laws Ann. §23-13A-1 to -11 (Supp. 1974); Va. Code Ann. §§19.1-89.1 to -89.10 (Supp. 1975); Wash. Rev. Code Ann. §§9.73.030 to .100 (Supp. 1974); Wis. Stat. Ann. §§968.27 to .33 (Supp. 1975).

[3] See discussion in text, infra at ¶6.

[4] See, e.g., Zamloch v. United States, 193 F.2d 889 (9th Cir.), cert. denied, 343 U.S. 934 (1952)(conspiracy); Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950)(treason); United States v. Schanerman, 150 F.2d 940 (3d Cir. 1945)(bribery).

used to corroborate other evidence,[5] to impeach the credibility of a witness,[6] or to refresh the memory of a witness.[7] Before a sound recording may be used, however, a proper foundation must be laid.[8] The usual procedure followed in determining the admissibility of a sound recording is having the trial judge listen to the recording out of the presence of the jury and rule on its admissibility as a matter of law.[9]

II. Objections to the Tape Recording as a Whole

¶3 The rule against hearsay is often invoked when a tape recording is offered into evidence. The ability to cross-examine to determine the weight to be given to a particular piece of evidence is a characteristic feature of Anglo-Saxon trial advocacy. The objection is sometimes made that a tape recording cannot be cross-examined or that its contents are hearsay. Neither objection is sound without

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[5] Kilpatrick v. Kilpatrick, 123 Conn. 218, 225, 193 A. 765, 768 (1937) (conversation testifed to was simultaneously recorded); People v. Hornbeck, 277 App. Div. 1136, 101 N.Y.S.2d 182 (2d Dept. 1950) (complaining witness in rape testified to conversation with defendant which had been recorded at her end of the line).

[6] See discussion in text, infra at ¶38.

[7] See discussion in text, infra at ¶39.

[8] See discussion in text, infra at ¶7.

[9] Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961), cert. denied, 368 U.S. 989 (1962); State v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 672 (1962).

a careful examination of the facts, for while the tape cannot be cross-examined, its operator may be, and the rule against hearsay itself is fraught with exceptions and qualifications.[10] Hearsay objections may, for example, be defeated by,

1. the co-conspirator rule;
2. the admissions exception;
3. the declaration against interest exception; and
4. the good hearsay rule.

Where a conspiracy is involved,[11] statements of co-conspirators which incriminate the defendant are admissible.[12] These statements, however, must be made during the course of the conspiracy;[13] they also must be made in the furtherance of the conspiracy.[14] Any other statements do not fall within the exception.

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[10] See generally J. Wigmore, Evidence §§669, 1420-27 (Chadbourne rev. 1970).

[11] In instances where a wiretap is being employed, one of the charges for which the defendants are indicted is usually conspiracy.

[12] Fed. R. Evid. 801(d)(2)(E) defines such statements as non-hearsay. N.J. Rules of Evidence, Rule 63(9)(b) make such statements an exception to the hearsay rule.

[13] Logan v. United States, 144 U.S. 263, 309 (1892); United States v. Cox, 449 F.2d 679 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972) (must be so connected as to be considered a part of the conspiracy). See also Note, "Developments in the Law of Conspiracy," 72 Harv. L. Rev. 920, 983-86 (1959).

[14] Comm. v. McDermott, 255 Mass. 575, 152 N.E. 704 (1926); People v. Ryan, 263 N.Y. 298, 305, 189 N.E. 225, 227 (1934).

¶4 If the recorded statement was made by the defendant, it is an admission, and it can be used against him.[15] If the recorded statement was made by another party, i.e., a mere witness, it may also be admissibile as a declaration against interest. This is a limited exception to the hearsay rule. The statements must be harmful to the speaker's pecuniary or penal interest. In most instances, the speaker must also be unavailable to testify.[16]

¶5 The purpose of the rule against hearsay is to prevent the admission of unreliable or untrustworthy evidence. But where the evidence offered is both trustworthy and reliable and there is a need to receive the evidence, the need for the rule disappears. There has been a trend in recent years to accept this argument.[17] The new Federal Rules of Evidence have, in part, adopted this position.[18] This position should also be adopted when a

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[15] Fed. R. Evid. 801(d)(2)(A) defines an admission as non-hearsay. At common law, it is a well recognized exception to the rule against hearsay.

[16] See Fed. R. Evid. 804(b)(3).

[17] See Dallas County v. Commercial Union Assurance Co., 268 F.2d 388, 396 (5th Cir. 1961)(newspaper in library); United States v. Iaconetti, 18 Crim. L. Rptr. 2419 (E.D. N.Y. Jan. 8, 1976)(evidence more probative than anything else and it deals with an important matter); United States v. Barbati, 284 F. Supp. 404 (E.D. N.Y. 1968)(cites Dallas County for non-mechanical application of rule against hearsay); Hew v. Aruda, 51 Hawaii 451, 462 P.2d 476 (Sup. Ct. 1969)(businessman's statements to an attorney); Woll v. Dugas, 104 N.J. Super. 586, 250 A.2d 775 (App. Div. 1969)(dicta).

[18] See Fed. R. Evid. 803(24), 804(b)(5) which allow the use of hearsay evidence that is as reliable as the other listed exceptions.

hearsay objection is made to the offer of a tape recording as evidence. Where the tapes can be shown to be accurate and authentic and there is a need to receive them, they should be admitted.[19]

¶6 Challenges to the admissions of a tape recording may also be made on the best evidence rule. It is clear, however, that the tape recording is the best evidence of a conversation; the testimony of a witness to the conversation is only secondary.[20] A tape recording, if authentic, is clearly more accurate than the memory of a witness.[21]

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[19] In wiretap cases, the need to receive the material is great. Without it, convictions of the higher echelon of the criminal order cannot be obtained, because they are generally not otherwise connected with the criminal conduct.

The admission of tapes does not, however, solve all hearsay problems. Where there is hearsay within hearsay, there must be an exception for each to allow them to be admitted. Fed. R. Evid. 805. See also Palmer v. Hoffman, 318 U.S. 109 (1943); Kelly v. Wasserman, 5 N.Y.2d 425, 158 N.E.2d 241, 185 N.Y.S.2d 538 (1959); Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930).

[20] United States v. Jacobs, 451 F.2d 530, 542 (5th Cir.), cert. denied, 405 U.S. 1049 (1971)(recollection of witness a year or more after conversation occurred questioned); Lindsey v. United States, 332 F.2d 688, 691 (9th Cir. 1964)(recording more accurate); United States v. Klosterman, 147 F. Supp. 843, 849 (E.D. Pa.), rev. on other grounds, 248 F.2d 191 (3d Cir. 1957)(recording apt to be more accurate and complete); State v. Dye, 60 N.J. 518, 529, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972)(defendant has the right to use original tapes for purposes of cross-examination or to replay them for the jury); People v. Feld, 305 N.Y. 322, 329, 113 N.E.2d 440, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953)(tapes offered because of severe attack upon witenss's credibility); People v. Mitchell, 40 App. Div.2d 117, 118, 338 N.Y.S.2d 313, 315 (3d Dept. 1972)(generally admissible).

[21] Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S. 937 (1956).

In fact, a defendant may be better protected by a tape recording, which includes the entire conversation, than by the testimony of a mere witness, who is likely to recall only the most crucial and incriminating parts of a conversation.[22]

III. Laying the Foundation

¶7 Before a tape recording may be admitted into evidence, a foundation must be laid. The government must show that

1. the recording device was capable of taping the conversation now offered as evidence;
2. the operator was competent to operate the device;
3. the recording is authentic, without changes, additions, or deletions;
4. the recording was preserved in a manner that is shown to the court;
5. the speakers are identified; and
6. the conversation elicited was made voluntarily, in good faith, and without inducement.[23]

[22] United States v. Klosterman, supra note 20.

[23] See, e.g., United States v. McKeever, 169 F. Supp. 426, 430 (S.D. N.Y. 1958)(defendant wished to offer tapes of conversations with the alleged victim of extortion made after the indictment to prove a prior inconsistent statement); United States v. McMillan, 508 F.2d 101, 104 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975)(quoting McKeever); State v. Driver, 38 N.J. 255, 287, 183 A.2d 655, 672 (1972)(foundation similar to McKeever established where recording is offered to corroborate a confession).

The prceise elements of the foundation are discretionary with the judge. Brandow v. United States, 268 F.2d 559 (9th Cir. 1959). He must determine if the foundation established is such that a jury could find that the tapes are connected to the defendant. Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963), cert. denied, 377 U.S. 961, reh. denied, 377 U.S. 1010 (1964). But the location of the tap need not be revealed. State v. Travis, 133 N.J. Super. 326, 332, 336 A.2d 439 (App. Div. 1975).

These facts must be shown in order to prove that the recording accurately demonstrates what it purports to demonstrate.[24]

A. Credibility of Device

¶8 Before any evidence obtained through the use of scientific or technical devices may be introduced into evidence, it must be shown that the device has a basis in the laws of nature, i.e., that it works. When the device is first used, this entails lengthy expert testimony. Eventually, this burden may be avoided, and the court may take judicial notice of facts which are common knowledge. But a court may take judicial notice only where the fact is one of common knowledge in the locality of the court and is by its nature indisputable[25] or where there is general scientific acceptance of the device as a reliable means of ascertaining the truth.[26] The Second Circuit, in United States v. Sansone,[27] took judicial notice of the general public's familiarity with the use of tape recorders and admitted the tape recording being

[24] See, e.g., 3 J. Wigmore, Evidence, §790 (Chadbourne rev. 1970).

[25] Varcoe v. Lee, 180 Cal. 338, 181 P. 223 (1919).

[26] State v. Cary, 90 N.J. Super. 323, 239 A.2d 680, aff'd, 56 N.J. 16, 264 A.2d 209 (1970).

[27] 231 F.2d 887, 890 (2d Cir.), cert. denied, 351 U.S. 987 (1956)(defendant's conversation with informer overheard by a concealed transmitter and recorded by portable recording set two hundred feet away).

offered.[28] Taking judicial notice is a matter within the judge's discretion. If the judge resists, proof is required.

¶9 Once there has been a showing that the device can work, it must then be shown that the particular device used did work. Usually this is done through the testimony of the person who operated the device. This task is made simpler if

1. a test of the device is made before there is any transmission, recording, etc.; or
2. a test is made after the interception to ensure that the device was working.[29]

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[28] Id. at 890.

> We think that the general public, in this day of car telephones, home recording instruments, and amateur transmitting and receiving equipment, is sufficiently aware of the effectiveness and the weaknesses of these mechanical devices so that the party advancing the evidence need not lay an elaborate foundation of expert testimony in order to be admitted.

[29] United States v. McMillan, 508 F.2d 101, 104-05 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975)(tapes played back immediately after recording to ensure that recorder was operating); United States v. Sansone, 231 F.2d 887, 890 (2d Cir.), cert. denied, 351 U.S. 987 (1956)(test made prior to recording); United States v. McKeever, 169 F. Supp. 426, 430-31 (S.D. N.Y. 1958)(testimony that recording device was capable of receiving from a distance and recording conversations); State v. Dye, 60 N.J. 518, 528, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972)(agents tested device by placing a phone call to the tapped phone, a pay phone in a liquor store, and conversing briefly with the person who answered; test was recorded and tape itself could later be used to corroborate agent's testimony); People v. Vellella, 28 Misc.2d 578, 580-82, 216 N.Y.S.2d 488, 490-91 (Ct. of Gen. Sess. N.Y. City 1961)(explicit testimony by persons who installed and operated recorder).

The operator may then testify to the results of these tests and satisfy the requirement.

B. Competency of Operator

¶10 The person who operates the recording device must be competent.[30] There is no licensing requirement to operate a recording device,[31] but if the agent has any special training or experience qualifying him to operate the device, he should include it in his testimony.[32] If the agent lacks training or experience, however, he must present evidence of his competence.[33]

C. Authenticity of Recording

¶11 While the requisite foundation for tape recordings may vary at times, the element of authenticity is universally recognized as required. The agents who conducted the wiretaps must testify that the tape recorder accurately recorded what was said in the original

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[30] United States v. McKeever, supra note 23 at 430. See also Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S. 937 (1956)(agent testified to the operation of the recording device, his method of operating it, and the accuracy of the recording).

[31] Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961), cert. denied, 368 U.S. 989 (1962)(failure to have license if one were required would not render the evidence inadmissible).

[32] State v. Dye, supra note 29 at 527, 291 A.2d at 835.

[33] United States v. McMillan, 508 F.2d 101 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); State v. Driver, 38 N.J. 255, 287, 183 A.2d 655, 672 (1962).

conversation overheard by the monitors.[34] A party or a witness to the conversation may also testify that the tape accurately recorded the conversation he heard.

¶12 Accuracy includes a showing that no changes, additions, or deletions were made. This requirement, in a large part, serves to prevent falsification of the tape recording.[35] The potential for abuse with skillful editorial manipulation can be great.[36] The manipulation can, at times, be undetectable, but the presence of unusual or unexpected sounds or the absence of expected sounds may be an indication of falsification.[37] If a challenge

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[34] United States v. Starks, 515 F.2d 112, 122 (3d Cir. 1975)(proof of accuracy must be clear and convincing); United States v. Stubbs, 428 F.2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 993 (1971)(no abuse of discretion where judge found tape to be on the whole accurate and complete).

[35] People v. Nicoletti, 34 N.Y.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (1958).

[36] Id. See generally Weiss and Hecker, "The Authentication of Magnetic Tapes: Current Problems and Possible Solutions," Commission Studies 216-40 (1976).

[37] Signs suggestive of falsification are:

1. gaps;
2. transients (abrupt sounds of short duration);
3. fades (reduction in strength of sound);
4. equipment sounds;
5. extraneous voices; and
6. information inconsistencies.

Weiss and Hecker, supra note 36 at 216, 220-21. These signs may be innocuous, the product of environmental condictions, instrument malfunctions, or improper recording technique. Id. at 222. But they may also be the sign of purposeful falsification by means of:

based upon suspect sounds is made, the burden of proving the accuracy will be upon the government. It may be possible to prove that the tapes have not been erased, spliced, or altered in any way, but the task will, in all likelihood, be expensive and arduous since it requires expert scientific examination and testimony.[38] It is not unusual, however, for the accuracy of the tapes to be stipulated by the defendant after constitutional and other objections are overcome.[39]

D. Preservation of Recording

¶13 Integrity is related to authenticity. The integrity of the tapes may be shown with proof that

1. the sealing requirements, if any, have been fulfilled; and
2. the chain of custody prevented access to the tapes by any unauthorized parties.

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37 (continued)

1. deletion;
2. obscuration (making part of recording unintelligible);
3. transformation (changing or rearranging portions to alter meaning); or
4. synthesis (generation of an entirely artificial recording).

Id. at 223-24.

[38] People v. Feld, 305 N.Y. 322, 113 N.E.2d 440, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953)(expert called by defense to testify that the tapes were not altered).

[39] See, e.g., United States v. James, 494 F.2d 1107 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974).

¶14 The purpose of the sealing requirements[40] is to ensure the integrity of the tapes and to preserve the confidentiality of sensitive information.[41] A delay in sealing or sealing by someone other than the judge is excusable error if a satisfactory explanation can be made for the failure, a showing is made that the requirements were substantially complied with, and if no showing is made that the defendant was prejudiced.[42] But if there is no explanation, the tape

[40]18 U.S.C. §2518(8)(a)(1968) provides:

> . . . Immediately upon the expiration of the period of the order or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders.

See also N.J. Stat. Ann. 2A:156A-14 (West 1971); N.Y. Crim. Pro. Law §700.50 (McKinney 1971). The Massachusetts statute, Mass. Gen. Laws Ann. ch. 272, §99(M) and (N) (Supp. 1975) does not explicitly require sealing. The integrity requirement can be satisfied through proof of custody. Commonwealth v. Vitello, ___Mass.____, 327 N.E.2d 819, 844 (1975).

[41]United States v. Cantor, 479 F.2d 890, 893 (3d Cir. 1972)(section 2518(8) designed to ensure orders and applications are treated confidentially).

[42]Id. at 893 (although appropriate for judge to seal, agent permitted to seal; judge's sealing would not add to confidentiality); United States v. Poeta, 455 F.2d 117, 122 (2d Cir.), cert. denied, 406 U.S. 948 (1972) (due to mistaken impression that issuing judge had to seal, there was a thirteen day delay); People v. Blanda, 80 Misc.2d 79, 362 N.Y.S.2d 735 (Monroe County Ct. 1974)(delay from Friday to the following Monday excusable).

recordings are not admissible.[43]

¶15 A chain of custody must also be shown. The purpose is to both ensure integrity and to provide an additional check upon the possibility of falsification.[44] The custodial care of the tape recordings must at all times be reasonable.[45] Once the tapes are sealed, custody is to be wherever the court directs. Often this is with the law enforcement agencies because their facilities are, by and large, better equipped for safekeeping.[46] The same standard of care applies to the custody of the tapes

[43]People v. Nicoletti, 34 N.Y.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (1974)(explanation offered that judge knew of storage arrangements and the tapes were needed for transcription and analysis was inadequate explanation for lack of seal when measured against the potential for abuse through skillful editorial manipulation which may be undetectable or detectable only with expensive expert analysis). See also People v. Sher, 38 N.Y.2d 600, 345 N.E.2d 314, 381 N.Y.S.2d 843 (1976) (tapes previously sealed were unsealed two or three days prior to trial for purposes of the trial without judicial supervision; even without claim of alteration, such a procedure is prohibited; failure to comply with sealing requirements renders the evidence inadmissible).

[44]See discussion in text supra at ¶11. Sealing itself helps to establish claim of custody. People v. Nicoletti supra note 43 at 253, 313 N.E.2d at 338, 356 N.Y.S.2d at 858. See also United States v. Fuller, 441 F.2d 755, 762 (4th Cir.), cert. denied, 404 U.S. 829 (1971)(where tape made by defendants was seized by government agents, they had to establish a chain of custody from the time of seizure to the time of trial).

[45]People v. Blanda, 80 Misc.2d 79, 86, 362 N.Y.S.2d 736, 744 (Monroe County Ct. 1974)(reasonable standards include labeling, initialing, cataloging, and safekeeping).

[46]Congress recognized this possibility. S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968) states:

during the investigation and prior to sealing even though this time period is not dealt with in the various wiretap statutes.[47]

E. Identification of Speakers

¶16 The identity of the speakers on a recording is essential. Ultimately, it is a fact question to be decided by the jury.[48] Voice identification is usually a relatively simple task, but the government may be forced to present extensive evidence of voice identification if the defense offers evidence to show that the defendant's voice is not on the tape.[49] Further, voice identification must be particularized; connection of the voices on a tape recording to a group of defendants as a whole is not sufficient.[50] Identification can be made by:

1. circumstantial "clues" on the tapes themselves which identify the speaker;
2. testimony of anyone familiar with the voice;
3. expert testimony based upon spectrogram (voice) analysis; and
4. permitting the jury to compare for itself the voice on the tape with the voice of the defendant or an exemplar of his voice.[51]

Where several possible methods of identification are available[52] they should all be used, particularly if the

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46 (continued)

> Most law enforcement agency's facilities for safekeeping will be superior to the court's and the agency normally should be ordered to retain custody, but the intent of the provision is that the records should be considered confidential court records.

See also 18 U.S.C. §2518(8)(a) and (b)(1968); N.J. Stat. Ann. 2a:156A-14 (West 1971); N.Y. Crim. Pro. Law §700.55(2) (McKinney 1971). Mass. Gen. Laws Ann. ch. 272, §99(N)(1) (Supp. 1975) requires storage in a plce to which only the judge or court personnel have access. Cf. United States v. Cantor, 470 F.2d 890, 893 (3d Cir. 1972)(tapes kept by agent); State v. Dye, 60 N.J. 518, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972)(tapes kept in prosecutor's office).

47 People v. Nicoletti, 34 N.Y.2d 249, 313 N.E.2d 336, 356 N.Y.S.2d 855 (1974)(tapes stored in agent's footlocker unreasonable); People v. Blanda, 80 Misc.2d 79, 83-86, 362 N.Y.S.2d 735, 741-44 (Monroe County Ct. 1972)(tapes kept in detective's safe to which no one else had combination and in officer's locker to which he had only key found to be reasonable custody).

48 United States v. Whitaker, 372 F. Supp. 154, 163 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974)(without opinion), cert. denied, 419 U.S. 1113 (1975).

49 There are few examples in the cases of a defendant attacking the prosecution's identification, usually because either the defendant identifies himself on the tape, there is other evidence of whose voice it is, or he concedes that the voice is his own. Usually, too, the defendant recognizes that there is no constitutional objection to taking a voice exemplar. United States v. Dionisio, 410 U.S. 1 (1972).

50 People v. Abelson, 309 N.Y. 643, 649, 132 N.E.2d 994, 886 (1956)(conviction reversed and a new trial ordered where agent whose testimony was not based upon personal familiarity identified voices as belonging to a group of defendants rather than one particular defendant).

51 A fifth, but not really viable, method of voice identification appears in People v. Lubow, 29 N.Y.2d 58, 272 N.E.2d 331, 323 N.Y.S.2d 829 (1971). There, no evidence of voice identification was offered by the prosecution. Instead, the judges (there was no jury) were given transcripts of the tapes to use as aids in listening to the tapes. The transcripts were not admitted into evidence. These transcripts identified the speakers by name. The defense counsel made no objection. Id. at 68, 272 N.E.2d at 336, 323 N.Y.S.2d at 835.

52 Most tapes will contain some circumstantial evidence identifying the speaker as the defendant. Moreover, the agent monitoring the wiretap often will become familiar with the defendant's voice either through pre-wiretap investigation or post-wiretap questioning.

defendant challenges the identification.[53]

¶17 Generally, the most effective means of voice identification is through the use of circumstantial evidence.[54] The most direct source of evidence is, of course, those tape recordings in which the parties to the conversations identify themselves by name.[55] The tapes may also reveal a planned course of action. Where the plan is later carried out by the defendants, this is circumstantial evidence

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[53] United States v. Cox, 449 F.2d 679, 689 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972)(circumstantial and agent); Chapman v. United States, 271 F.2d 593 (5th Cir. 1959), cert. denied, 362 U.S. 928 (1960)(officer taping conversation testified to identity on tape and own familiarity); United States v. Moia, 251 F.2d 255 (2d Cir. 1958)(voice identification and eyewitness identification); United States v. Sample, 378 F. Supp. 44, 51-54 (E.D. Pa. 1974)(spectrogram and eyewitness); United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973)(agent plus circumstantial). See generally, Zuckerman and Lyons, supra note 1a at 45-46.

[54] Carbo v. United States, 314 F.2d 718, 738 (9th Cir. 1963), cert. denied, 377 U.S. 961, reh. denied, 377 U.S. 1010 (1964)(conversation recorded by two independent means); State v. Molinaro, 117 N.J. Super, 276, 291, 284 A.2d 385, 393 (Essex County Ct. 1971), rev. on other grounds, 122 N.J. Super. 181, 199 A.2d Div. 1973)(non-criminal conversation circumstantial evidence tending to establish identity).

[55] United States v. Cox, 449 F.2d 679, 689 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972)(voice on tape said "this is Maurice"; defendant was Maurice LaNear; phone also registered to defendant); Palos v. United States, 416 F.2d 438, 440 (5th Cir.), cert. denied, 397 U.S. 980 (1969)(government informant dialed number registered to defendant, asked "Palitos?", and received response "yes, this is he."); United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973)(voice of defendant identified by references to "Frank" on tape of conversations overheard on wiretap of defendant's phone).

identifying the defendants as the speakers.[56] The defendant's voice may also be identified by evidence linking him to placing a phone call at the time the monitors were activated.[57] In each instance, however, the identification evidence must be linked to the defendant, and where the connection is not readily apparent, testimony should be given explaining the connection.

¶18 Voice identification may also be by opinion testimony which is based upon hearing the voice at any time under circumstance connecting it with the alleged speaker.[58] Such testimony may be given by a witness who was acquainted with the speaker,[59] a government agent, including one who

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[56] United States v. McMillan, 508 F.2d 101, 105 (8th Cir. 1974), cert. denied, 419 U.S. 916 (1975)(plan enacted by speakers); United States v. Bonanno, 487 F.2d 654, 659 (2d Cir. 1973)(substance of communication may be sufficient to form a prima facie case); United States v. Alper, 449 F.2d 1223, 1229 (3d Cir. 1971), cert. denied, 405 U.S. 988 (1972)(Similarity of content of calls known to have been made to other parties).

[57] United States v. Moia, 251 F.2d 255, 257 (2d Cir. 1958) (testimony that defendant entered phone booth to answer incoming call); State v. Dye, 60 N.J. 518, 528, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972)(defendant walked toward phone which was out of sight in liquor store before each call came over monitor).

[58] Fed. R. Evid. 901(b)(5).

[59] United States v. Whitaker, 372 F. Supp. 154, 162 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974)(without opinion), cert. denied, 419 U.S. 1113 (1975)(identification by woman who knew defendant); State v. Vanderhave, 47 N.J. Super, 483, 488, 136 A.2d 296, 299 (App. Div. 1957), aff'd sub nom., State v. Giordinia, 27 N.J. 313, 142 A.2d 609 (1958)(identification by switchboard operator who overheard conversation).

conducted the wiretap,[60] or a party to the tapped conversation who consented to the wiretap.[61] Familiarity with the voice may be acquired before [62] or after [63] the wiretap. Familiarity with the voice may be acquired differently from the way in which the voice was recorded. Any difference, however, between the circumstances surrounding the basis of the witness's familiarity with a person's voice and the transmission of the voice which the witness is identifying will detract from the weight to be given to the evidence.[64]

¶19 At times, an attempt may be made to show voice identification through spectographic analysis.[65] For the analysis to be admissible, the government must show that it has a scientific basis in the laws of nature. The standard to be applied is whether there is general acceptance of the use of the device in the scientific community.[66] Most of the early cases excluded such analysis because the technique had not been adequately tested under field conditions.[67] But after extensive

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[60] Chapman v. United States, 271 F.2d 593, 595 (5th Cir. 1959), cert. denied, 362 U.S. 928 (1960)(testimony by agents of conversations with defendants which were recorded); Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S.. 937 (1956)(agent who used minifon to record conversations identified speakers); United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973)(testimony by agents corroborated by circumstantial evidence).

[61] People v. Brannaka, 46 App. Div.2d 929, 361 N.Y.S.2d 434 (3d Dept. 1974).

[62] United States v. James, 494 F.2d 1007 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974)(identification by agent who had conducted surveillance of suspects in restaurant and bar for at least seventy hours); United States v. Sansone, 231 F.2d 887 (2d Cir.), cert. denied, 351 U.S. 987 (1956)(one prior conversation with defendant); Commonwealth v. Murphy, 356 Mass. 604, 611, 254 N.E.2d 895, 900 (1970)(phone conversation); People v. Dinan, 15 App. Div.2d 786, 787, 224 N.Y.S.2d 624, 627 (2d Dept.), aff'd, 11 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406, cert. denied, 371 U.S. 877 (1962)(remoteness of personal conversations between identifying witness and defendant and voice identification goes only to weight). But see State v. Malaspina, 120 N.J. Super. 26, 30, 293 A.2d 224, 226 (App. Div.), cert. denied, 62 N.J. 75, 299 A.2d 73 (1972)(identification resting purely on ability to recognize defendant's voice from memory unsatisfactory from state's standpoint; proof by content).

[63] United States v. Cox, 449 F.2d 679, 689-90 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972)(voice identified to police as defendant's); United States v. Moia, 251 F.2d 255 (2d Cir. 1958)(agent's identification based upon a single conversation subsequent to twelve taped conversations); People v. Strollo, 191 N.Y. 42, 61, 83 N.E. 573, 580 (1908)(testimony of phone conversation with man who was subsequently recognized to be defendant was weak, but not incompetent).

[64] United States v. Rizzo, 492 F.2d 443, 448 (2d Cir.), cert. denied, 417 U.S. 944 (1974)(observations from physical surveillance admissible although nominal); United States v. Whitaker, 372 F. Supp. 154, 165 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974)(without opinion), cert. denied, 419 U.S. 1113 (1975)(face to face conversation).

[65] See Kamine, "Voiceprint Technique: Its Structure and Reliability," 6 San Diego L. Rev. 213 (1969); Romig, "Review of the Experiments Involving Voiceprint Identification," 16 J. Forensic Sci. 183 (1971); Comment, "The Admissibility of Voiceprint Evidence," 14 San Diego L. Rev. 129 (1969); Comment, "The Evidentiary Value of Spectrographic Voice Identification," 63 J. Crim. L. C. and P. S. 343 (1972). See also Annot., "Admissibility and Weight of Voiceprint or Sound Spectrograph Evidence," 49 A.L.R. 3d 915 (1973).

[66] United States v. Stifel, 433 F.2d 431, 437 (6th Cir. 1970), cert. denied, 401 U.S. 994 (1971); Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923); Commonwealth v. Vitalo, 346 Mass. 266, 191 N.E.2d 479 (1963).

[67] See, e.g., People v. King, 266 Cal. App.2d 437, 72 Cal. Rptr. 478 (1968); State v. Cary, 99 N.J. Super. 323, 239 A.2d 680 (App. Div.), aff'd per curiam, 56 N.J. 16, 264 A.2d 437 (1968).

experiments[68] there seems to be a trend favoring admissibility.[69] Mere admissibility does not, however, determine the weight to be given to the evidence. If the spectographic analysis is the only evidence offered to show voice identification, it may be subject to strict scrutiny.[70] At the present time, spectrographic analysis may best be employed as a means of corroborating other identification evidence.[71]

¶20 The jury may also be allowed to decide from their own impressions whose voice is on the tape. The jury can compare the voices on the tapes with the voices of the parties if they testify.[72] In addition, the jury may also compare the voices on the tape with a voice exemplar

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[68] See Tosi, "Michigan State University Voice Identification Project," Voice Identification Research 35, 57-58 (L.E.A.A. 1972)(incorrect identification at 6%; suggests refinements to reduce error to 2%).

[69] United States v. Baller, 519 F.2d 463, 466 (4th Cir. 1975); United States v. Franks, 511 F.2d 25, 33 (6th Cir.), cert. denied, 422 U.S. 1048 (1975)(admitted after 25 page inquiry into qualifications and reliability); United States v. Sample, 378 F. Supp. 44, 53 (E.D. Pa. 1974)(admitted only to corroborate other evidence); Commonwealth v. Lykus, ___ Mass. ___, 327 N.E.2d 671 (1975)(lengthy and comprehensive voir dire); State v. Anreatta, 61 N.J. 544, 549-51, 296 A.2d 641, 645-47 (1972)(mandates voir dire). But see United States v. Addison, 498 F.2d 741, 743-45 (D.C. Cir. 1974).

[70] Commonwealth v. Lykus, supra note 69, 327 N.E.2d at 679.

[71] United States v. Sample, supra note 69 at 51-54.

[72] People v. Hornbeck, 277 App. Div. 1136, 101 N.Y.S.2d 182 (2d Dept. 1950)(jury instructed to compare after defendant testified).

of the defendant.[73] If an exemplar is used, however, it must be made under substantially similar circumstances to those of the recording with which it is to be compared.[74]

F. Identification of Conversation

¶21 The particular conversation may be identified by showing:

1. the monitor's logs;
2. evidence derived from a pen register, number recorder, or technowriters; or
3. telephone records.

A monitor's log should include:

1. a notation of whether calls were incoming or outgoing;
2. the time of each call;
3. the phone numbers called;
4. a synopsis of the content of each call;
5. the numerical reading on the tape;
6. a designation of pertinent or non-pertinent; and

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[73] Requiring a defendant to submit to a voice exemplar is not an intrusion upon his constitutional rights. United States v. Dionisio, 410 U.S. 1 (1973)(not testimonial). But the prosecution may be required to show admissibility before requiring an exemplar. State v. Cary, 49 N.J. 343, 230 A.2d 384 (1967). See also Annot., "Requiring Suspect or Defendant in Criminal Case to Demonstrate Voice for Purposes of Identification," 24 A.L.R.3d 1261 (1969).

[74] United States v. Whitaker, 372 F. Supp. 154, 165 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 (1975)(different recording machines at different distances does not invalidiate voice exemplar).

7. the time monitoring began and ended each day.[75]

¶22 A pen register can be used to show that a call was made and to where it was made. The use of a pen register is authorized by Title III.[76] The foundation required for its introduction is within the court's discretion.[77] Phone company records may be used to corroborate the accuracy of the pen register by showing that the numbers shown by the device are registered under the names of the suspects,[78] and that the calls were made at the time the calls were monitored.[79] The weight to be given to this evidence is, of course, a matter for the jury.

¶23 Phone company records may also be used to identify a conversation. The records can show what calls were made from one phone.[80] The admissibility of business records is governed by statute.[81] In general, the government must show that the records are made in the regular course of business, that it is the regular course of business to make such records, and that the particular records were made in the regular course of business.[82] Once admitted, the weight to be given these records is a fact question for the jury.[83]

IV. Presentation of the Tapes

¶24 Structuring the evidentiary presentation in a wiretapping case is crucial. The particular culpability of each defendant must be clearly shown. This requires a great deal of planning and preparation, especially if there is a large volume of intercepted communications.[84] These problems must be anticipated before trial. If they are not, a successful prosecution is not likely.

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[75] State v. Molinaro, 117 N.J. Super. 276, 281, 284 A.2d 385, 388 (Essex County Ct. 1971), reversed on other grounds, 122 N.J. Super. 181, 299 A.2d 750 (App. Div. 1973). This is not required by the various wiretap statutes. But without such a record, it is extremely unlikely that the requisite minimization can be shown. A prosecutor should make certain these records are kept in antitipation of a criminal prosecution.

[76] See, e.g., S. Rep. No. 1097, 90th Cong. 2d Sess. 90 (1968).

[77] United States v. Ianelli, 477 F.2d 999, 1002 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975).

[78] United States v. Kohne, 358 F. Supp. 1053, 1054 (W.D. Pa.), aff'd, 495 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973).

[79] United States v. Whitaker, 372 F. Supp. 154, 167 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 (1975).

[80] United States v. Fuller, 441 F.2d 755, 758 (4th Cir.), cert. denied, 409 U.S. 829 (1971) (phone records subpoenaed to show 259 calls made in six months between phone booth under surveillance and residence).

[81] Fed. R. Evid. 803(6) (1975); N.J. Rules of Evid. 63 (13) (West 1971); N.Y. C.P.L.R. 4518(a) (McKinney 1963).

[82] United States v. Whitaker, supra note 79.

[83] United States v. Gallo, 123 F.2d 229, 231 (2d Cir. 1941) (although the phone records are admissible, the weight to be given them may be slight as the identity of the caller is unknown).

[84] See generally Zuckerman and Lyones, supra note 1a at 25.

A. Problems of Audibility

¶25 The admissibility of a tape recording is always within the sound discretion of the court.[85] The tape recordings often contain inaudible portions due to mechanical failures, background noises, or inadequate recording technique. A question often presented for the judge's determination is whether the inaudible portions are so substantial so as to render the recording as a whole untrustworthy.[86] The accepted procedure is for the judge to listen to the tapes out of the presence of the jury and to base his decision upon this inspection.[87] Although substantial portions of the tape may be inaudible, it can be admitted into evidence[88] if the jury would not be forced to speculate as to the content of the inaudible portions.[89] A factor often given great weight in determining audibility and intelligi-

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[85] United States v. Hodges, 480 F.2d 229, 234 (10th Cir. 1973)(inaudibility due to microphone leads connected under agent's clothing coming in contact with or rubbing against clothing); United States v. Frazier, 479 F.2d 983, 985 (2d Cir. 1973)(judge requested a transcript to aid in his determining whether inaudible portions would give a misleading impression to the jury); United States v. Avila, 443 F.2d 792, 795-96 (5th Cir.), cert. denied, 404 U.S. 944 (1971); United States v. Weiser, 428 F.2d 932, 937 (2d Cir. 1969), cert. denied, 402 U.S. 949 (1971); United States v. Cooper, 365 F.2d 246, 249 (6th Cir. 1966), cert. denied, 385 U.S. 1030 (1967); Monroe v. United States, 234 F.2d 49, 55 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S. 937 (1956); State v. Dye, 60 N.J. 518, 530, 291 A.2d 825, 831, cert. denied, 409 U.S. 1090 (1972); People v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 672 (1962); People v. Lubow, 29 N.Y.2d 58, 66, 323 N.Y.S.2d 829, 836, 272 N.E.2d 331, 336 (1971); People v. Gucciardo, 77 Misc. 2d 1049, 1050 (Kings County Ct. 1974)(audibility a preliminary question of fact).

[86] Monroe v. United States, supra note 85 at 54-55:

> No all-embracing rule on admissiblity should flow from partial inaudibility or incompleteness. The Court of Appeals for the Third Circuit, in United States v. Schannerman, 150 F.2d 941, 944, has said that partial inaudibility is no more valid reason for excluding recorded conversations than the failure of a personal witness to overhear all of a conversation should exclude his testimony as to these parts he did hear. Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy the recording is admissible.

(Footnote 86, continued)

See also Gorin v. United States, 313 F.2d 641, 652 (1st Cir. 1963), cert. denied, 379 U.S. 971 (1965)(audible portions are not without evidentiary value and the inaudible portion is not so substantial that it renders the tapes more misleading than helpful); Cape v. United States, 283 F.2d 430, 435 (9th Cir. 1960)(test is whether the thread of conversation, though thin in places, has been broken).

[87] United States v. Chiarizio, 525 F.2d 289, 293 (2d Cir. 1975)(where materials available for one year but objection is made only one day before trial, defendant waives right to object; does not condone non-compliance with in camera); United States v. Bryant, 480 F.2d 785, 789 (2d Cir. 1973)(proper procedure is for out of court determination, but failure to do so does not require reversal); United States v. Kaufer, 387 F.2d 17, 19 (2d Cir. 1967)(trial judge determined out of court that tapes were sufficiently audible); Gorin v. United States, 313 F.2d 641, 652 (1st Cir. 1963), cert. denied, 379 U.S. 971 (1965)(recordings played in presence of counsel but not in presence of jury); State v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 675 (1962)(judge to determine if recording is sufficiently audible, intelligible, not obviously fragmented and whether editing of prejudicial material is required).

[88] United States v. Frazier, 479 F.2d 983, 985 (2d Cir. 1973)(admissible with 75% inaudible); United States v. Cooper, 365 F.2d 246, 249 (6th Cir. 1966), cert. denied, 385 U.S. 1030 (in general distinctly audible); United States v. Hall, 342 F.2d 849, 853 (4th Cir.), cert. denied, 382 U.S. 812 (1965)(admissible with 25% inaudible); State v. Seefelt, 51 N.J. 472, 487, 242 A.2d 322, 330 (1968)(clear and uninterrupted despite background noise).

[89] United States v. Skillman, 442 F.2d 542, 552 (8th Cir.), cert. denied, 404 U.S. 833 (1971)(as tape was admitted not for content but for impeachment, there would be no speculation); State v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 672 (1962)(garbled and full of static and foreign sounds); People v. Sacchitella, 31 App. Div.2d 180, 181, 295 N.Y.S.2d 880, 882 (1st Dept. 1968)(thoroughly and completely inaudible).

bility is the ability of the court reporter to make a transcript of the tape.[90]

B. Efforts to Mitigate the Effects of Inaudibility

¶26 Courts have attempted to find a way of overcoming the problem of inaudibility. In the past, they have:

1. used headphones;
2. made re-recordings; and
3. used transcripts.

¶27 Often, a tape recording may be difficult to hear and understand because of background noise in the courtroom. This problem is sometimes aggravated by the large size of the courtroom and the poor quality of the equipment. To alleviate these problems, judges have permitted the jury to listen to the tapes with headphones.[91] The objection has been raised to this procedure that it denies the defendant his constitutional right to the public trial. This problem may be overcome by anticipating the objection and employing other means to ensure a public trial. In

[90] United States v. Carlson, 423 F.2d 431, 440 (9th Cir.), cert. denied, 400 U.S. 847 (1970)(although government conceded partial inaudibility, court reporter was able to transcribe a substantial part of tape); People v. Lubow, 29 N.Y.2d 58, 68, 272 N.E.2d 331, 336, 323 N.Y.S. 2d 829, 836 (1971)(stenographer who had not heard tape before was able to transcribe most of it).

[91] United States v. Bryant, 480 F.2d 785, 790 (2d Cir. 1973) (headphones used after jury could not understand when tape was played in courtroom and the jury room); D'Aquino v. United States, 192 F.2d 338, 365 (9th Cir. 1951) (phonograph records used for voice identification); Gillars v. United States, 182 F.2d 962, 977 (D.C. Cir. 1950)(common sense approach to objection; no attempted secrecy); United States v. Kohne, 358 F. Supp. 1053, 1063 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973)(records are exhibits which are not passed around to spectators in courtroom).

D'Aquino v. United States,[92] forty sets of earphones were installed, allowing the testimony to be heard by the judge, jury, clerk, reporter, counsel, defendant, and press.[93] In Gillars v. United States,[94] spectators were also given the opportunity to hear by having the court supply extra headphones.[95] In United States v. Kohne,[96] a public address system was employed in conjunction with the headphones.[97]

¶28 The wiretap statutes recommend that a duplicate or work copy of a tape recording be made.[98] The sealing requirements of the wiretap statutes practically necessitate this procedure.[99] The work copies may be used to

1. maximize volume by recording on a larger tape;[100]

[92] 192 F.2d 338 (9th Cir. 1951).

[93] Id. at 365.

[94] 182 F.2d 962 (D.C. Cir. 1950).

[95] Id. at 977.

[96] 358 F. Supp. 1053 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973).

[97] 358 F. Supp. at 1063.

[98] 18 U.S.C. §2518(8)(a)(1968); Mass. Gen. Laws Ann. ch. 272, §99(N)(1)(Supp. 1975); N.J. Stat. Ann. §2A:156A-14 (West 1971); N.Y. Crim. Pro. Law §700.55(2)(McKinney 1971).

[99] People v. Nicoletti, 34 N.Y.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (work copy not made; original used; sealing requirements violated).

[100] United States v. Riccobene, 320 F. Supp. 196, 203 (E.D. Pa. 1970), aff'd, 451 F.2d 586 (3d Cir. 1971) (where copy was identical with substitution solely for listening convenience of the jury, court found no infirmity with procedure).

2. filter out background noises on the tape;[101]

3. preserve the original during preliminary proceedings; or[102]

4. edit to include only relevant conversations.[103]

An inherent problem, however, is the inability to distinguish the duplicate from the original.[104] For the duplicate copy to be admissible, there must be a substantial showing of

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[101] Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied sub nom., Marshall v. United States, 390 U.S. 1005 (1968)(the existence of a significant degree of background noise might interfere with the jury's understanding the substance of the conversation; reliable method existed of removing the interference by making a copy while running the tape through a suppression device; copy was admitted as an accurate reflection of the conversation); United States v. Knohl, 379 F.2d 400 (2d Cir.), cert. denied, 389 U.S. 973 (1967)(filtering without determining if low pitched voices were lost); United States v. Madda, 345 F.2d 400, 403 (7th Cir. 1965) (testimony that entire conversation was re-recorded, that the material was identical on both tapes, that no sounds were dubbed, that the copy was more audible than the original, and that it accurately reflected the original before the copy was admitted).

[102] 379 F.2d at 440-41.

[103] United States v. Whitaker, 272 F. Supp. 154, 164 (M.D. Pa.), aff'd, 503 F.2d 1400 (2d Cir. 1974), cert. denied, 419 U.S. 1113 (1975)(summary tapes were played where agents testifed to their accuracy); State v. Dye, 60 N.J. 518, 532, 291 A.2d 825, 832, cert. denied, 409 U.S. 1090 (1972)(procedure saved court 102-1/2 hours of tedious and unnecessary listening; no prejudice; copies of all work tapes given to defendant). See also supra ¶14.

[104] United States v. Starks, 515 F.2d 112, 121 (3d Cir. 1975).

accuracy.[105] This showing may not be required if the defense will stipulate to its accuracy.[106] The defense counsel must be given an opportunity to compare the copy with the original,[107] but failure on his part to make a comparison will preclude his objections to its admission.[108]

¶29 Objections are often made to the admission of a duplicate based upon the best evidence rule. The best evidence rule is founded upon a concern for accuracy.[109]

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[105] Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied sub nom., United States v. Marshall, 390 U.S. 1005 (1968)(not necessary to establish physical defect first); Knohl v. United States, 379 F.2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967)(testimony by keeper of tapes, prosecuting attorney, and FBI agents); United States v. Madda, 345 F.2d 400, 403 (7th Cir. 1965)(extensive testimony by agent); United States v. Whitaker, 373 F. Supp. 154, 164 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 (1975)(notes in log pertaining to accuracy).

[106] Johns v. United States, 323 F.2d 421 (5th Cir. 1963) (no objection may be made where the defense counsel openly conceded accuracy of re-recording).

[107] United States v. Riccobene, 320 F. Supp. 196, 202 (E.D. Pa. 1970), aff'd, 451 F.2d 586 (3d Cir. 1971) (government offered to permit defense counsel to listen to both copies and original to insure that they were identical); State v. Breunig, 122 N.J. Super. 319, 329-32, 300 A.2d 346, 351-52 (App. Div. 1973)(synopsis tapes given to protect privacy of innocent third parties).

[108] State v. Dye, 60 N.J. 518, 532, 291 A.2d 825, 832 (1972)(where tapes given to defendant five months before trial any question of accuracy should be settled by request before trial).

[109] See 4 J. Wigmore, Evidence §§1173-75 (Chadbourne rev. 1970). See also Fed. R. Evid. 1002 (requires original) and 1003 (permitting duplicates unless there is a genuine question of the authenticity of the original).

Where there is the requisite showing of accuracy, the best evidence rule will not be barred the admission of the duplicate.[110]

¶30 A tape transcript is usually made. It serves

1. as an aid in trial preparation;[111]
2. as a listening aid;[112]
3. to identify speakers for the jury;[113]
4. to aid appellate courts where an appeal is taken;[114]

[110] Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied sub nom., Marshall v. United States, 390 U.S. 1005 (1968) (ease of analysis, intelligibility, and mechanical convenience factors in justifying duplicate); United States v. Knohl, 379 F.2d 427, 441 (2d Cir.), cert. denied, 389 U.S. 973 (1967) (where witness took tape and lost it, court found proper foundation had been laid for admission of duplicate); United States v. Riccobene, 320 F. Supp. 196, 203 (E.D. Pa. 1970), aff'd, 451 F.2d 586 (3d Cir. 1971) (where transfer was from small cassette to tape to improve hearing, court noted procedure of playing original was for jury convenience). See also supra ¶14; Annot., "Admissibility in Evidence of Sound Recording as Affected by Hearsay and Best Evidence Rules," 58 A.L.R.3d 598 (1974).

[111] Zuckerman and Lyons, supra note 1a at 25.

[112] United States v. Bryant, 480 F.2d 785, 791 (2d Cir. 1973) (where transcripts inaccurate, judge's cautionary instruction to rely upon what is heard and not what is written satisfactory); United States v. Jacobs, 451 F.2d 530, 541 (5th Cir. 1971), cert. denied, 405 U.S. 955, reh. denied, 405 U.S. 1049 (1972) (jury instructed to use tape only to identify speakers and not for its content although transcripts were admitted into evidence); People v. Feld, 305 N.Y. 322, 332, 113 N.E.2d 440, 444, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953) (recognized as assistance to understanding).

[113] See discussion in text, infra at ¶33.

[114] People v. Colombo, 24 App. Div.2d 505, 506, 261 N.Y.S. 2d 836, 838 (2d Dept. 1965) (without a transcript, court found it impossible to review the conviction although it was sent the tape recordings).

5. to avoid the necessity of repetitive playing.[115]

The transcripts, regardless of whether they are introduced into evidence or not, must be shown to be accurate,[116] usually by the person who prepared the transcripts.[117] The parties may also stipulate to its accuracy after comparison with the tape.[118] A failure to present any evidence of accuracy may be reversible error.[119]

¶31 Occasionally a written transcript is objected to as violative of the hearsay rule. In Duggan v. State[120] and

[115] United States v. Lawson, 347 F. Supp. 144, 148 (E.D. Pa. 1972) (where repetitive playing to gain comprehension would unduly prolong and possibly prejudice the government's case because of overemphasis, transcripts were used as a listening aid).

[116] United States v. Bryant, 480 F.2d 785, 790-91 (2d Cir. 1973) (agent testifed as to accuracy); United States v. Maxwell, 383 F.2d 437, 443 (2d Cir. 1967), cert. denied, 389 U.S. 1043, 1057 (1968) (testimony of accuracy unchallenged); People v. Feld, 305 N.Y. 322, 332, 113 N.E.2d 440, 444, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953).

[117] United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); United States v. Bryant, 480 F.2d 485, 490-91 (2d Cir. 1973); United States v. Maxwell, 383 F.2d 437, 443 (2d Cir. 1967), cert. denied, 398 U.S. 1043, 1057 (1968); People v. Feld, 305 N.Y. 322, 332, 113 N.E.2d 440, 444, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953).

[118] United States v. Carson, 464 F.2d 424, 437 (2d Cir.), cert. denied, 409 U.S. 949 (1972) (only where there was a difference between transcript and tape were both used); United States v. Koska, 442 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971) (proper limiting instructions despite stipulation).

[119] People v. O'Keefe, 280 App. Div. 546, 557-58, 115 N.Y.S. 2d 740, 744-45 (3d Dept. 1952), aff'd, 306 N.Y. 619, 116 N.E.2d 80 (1953), cert. denied, 347 U.S. 989 (1954). But see United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) (foundation required only where accuracy is challenged).

[120] 189 So.2d 890 (Fla. 1966).

Bonicelli v. State,[121] the courts found that the rule was violated because the court reporters who made the transcripts were not present when the recording was made and that the transcript was therefore pure hearsay. Consequently, it was inadmissible. These are the only reported cases on the point. Neither seems well taken. Instead, the issue should be seen as a best evidence question.

¶32 More often the transcript is objected to as violative of the best evidence rule. Where there is no contention that the transcript is inaccurate or there is a showing of accuracy, the tapes are generally admitted into evidence.[122] Nevertheless, the matter within the court's discretion.[123] The courts have usually required both the tapes and the transcipts to be admitted into evidence if the transcripts are to be in evidence at all.[124] The courts, however, will still generally limit the use of the transcripts, directing

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[121] 339 P.2d 1063 (Colo. 1959).

[122] United States v. Carson, 464 F.2d 424, 437 (2d Cir.), cert. denied, 409 U.S. 949 (1972)(in camera inspection); United States v. Koska, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971)(court had both tapes and transcript); United States v. Maxwell, 383 F.2d 437, 443 (2d Cir. 1967), cert. denied, 389 U.S. 1043, 1057 (1968) (testimony on transcript accurate).

[123] People v. Mitchell, 40 App. Div.2d 117, 121, 338 N.Y.S. 2d 313, 317 (3d Dept. 1972)(tape was best evidence; within court's discretion to exclude transcripts).

[124] United States v. Carson, supra note 122 at 437; Lindsey v. United States, 332, F.2d 388, 691 (9th Cir. 1964); People v. Feld, 305 N.Y. 322, 332, 113 N.E.2d 440, 444, reh. denied, 305 N.Y. 924, 114 N.E.2d 475 (1953)(best evidence is already before the court in the form of the original recording and the transcripts are intended merely to assist the court and jury).

the jury to rely upon what is heard on the tapes, not on what is read.[125] But where the tapes have been lost through no fault of the prosecution, the tapes may be admitted into evidence if a proper foundation of accuracy is made.[126]

¶33 The general rule is that transcripts are not to be used by the jury during deliberation.[127] But the Second Circuit does not follow this rule; the decision is left to the discretion of the judge.[128]

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[125] United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975)(jury must be instructed to rely upon what is heard and not what is written); United States v. Bryant, 480 F.2d 785, 791 (2d Cir. 1973)(disregard transcript if recording does not conform); United States v. Jacobs, 451 F.2d 530, 541 (5th Cir. 1971), cert. denied, 405 U.S. 1049 (1972)(limit to voice identification); United States v. Kohne, 358 F. Supp. 1053 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973)(visual aid); United States v. Lawson, 347 F. Supp. 144, 148 (E.D. Pa. 1972)(other methods unduly prejudicial); People v. Lubow, 29 N.Y.2d 58, 68, 272 N.E.2d 331, 336, 323 N.Y.S.2d 829, 835-36 (1971)(used to identify voice but not admitted into evidence).

[126] United States v. Maxwell, supra note 122 at 443. See also United States v. Knohl, 379 F.2d 427, 441 (2d Cir.), cert. denied, 389 U.S. 973 (1967).

[127] United States v. McMillan, 508 F.2d 101, 106 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975); United States v. Carlson, 423 F.2d 431, 440 (9th Cir.), cert. denied, 400 U.S. 847 (1970); United States v. Lawson, 347 F. Supp. 144, 148 (E.D. Pa. 1972).

[128] United States v. Carson, 464 F.2d 424, 437 (2d Cir.), cert. denied, 409 U.S. 949 (1972), United States v. Koska, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971).

The proper procedure would seem to be to have the witness and the defense counsel listen to the tapes out of the court's hearing and to then question the witness as to his memory of those conversations.[144]

¶39 The use of the tapes to refresh a witness's memory is often a prelude to impeaching the witness with his prior inconsistent statements. Where the tape recordings are the product of an unlawful surveillance or otherwise inadmissible, this can be an important use. It is well settled that although the government cannot make affirmative use of illegally obtained evidence, a defendant cannot use the illegality as a shield against contradiction of his own patently false testimony.[145] A defendant is allowed

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[144] But see New Mexico Savings and Loan Ass'n v. United States Fidelity and Guarantee Co., 454 F.2d 328, 336-37 (10th Cir. 1972)(although proper to have witness refresh memory out of hearing of jury, failure to do so is not reversible error).

[145] Walder v. United States, 347 U.S. 62, 64 (1954). See also Harris v. New York, 401 U.S. 422, 425 (1971)(inadmissible statement, due to failure to give Miranda warnings, may be used to impeach a witness if its trustworthiness satisfies legal standards). An argument has been made that the enactment of Title III changed this rule. This argument was rejected in United States v. Caron, 474 F.2d 506, 509 (5th Cir. 1973). The legislative history clearly provides otherwise:

> It [section 2515] largely reflects the existing law. It applies to suppress evidence directly or indirectly obtained in violation of the chapter.[citation omitted]. There is, however, no intention to change the attenuation rule. [citations omitted]. Nor generally to press the scope of the suppression role [sic] beyond present search and seizure law. See Walder v. United States, 347 U.S. 62 (1954).

S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968).

to deny complicity in the crimes for which he is on trial, but when he goes beyond a mere denial, the government is allowed to protect the integrity of the trial from his affirmative resort to perjurious testimony.[146] The government may then impeach the witness through the use of his prior inconsistent statements found on the recordings. But before the recording may be used, a foundation to assure it accuracy and authenticity must be shown.[147] If the same showing required before a recording may be admitted into evidence as part of the government's case in chief is not also required before the same recording is used for impeachment, the evils which the requirement sought to avoid, i.e., prevention of injudicious editing, will again emerge. Once the foundation is laid and the recordings are admitted, the tapes may not, in general, be offered to prove the truth of the statements recorded; they may be only used to impeach the credibility of the witness, i.e., to show that he is not worth believing.[148]

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[146] United States v. Bell, 506 F.2d 207, 213 (D.C. Cir. 1974)(follows Walder); United States v. Caron, 474 F.2d 506 (5th Cir. 1973)(recording of telephone conversations); Commonwealth v. Harris, 363 Mass. 888, 303 N.E.2d 115 (1973)(statements made to police); State v. San Vito, 129 N.J. Super. 185, 322 A.2d 509 (App. Div. 1974)(proof of facts of arrest); People v. Fiore, 34 N.Y.2d 81, 312 N.E. 2d 174, 356 N.Y.S.2d 38 (1974)(statements inconsistent with refusal to waive immunity).

[147] United States v. McKeever, 169 F. Supp. 426, 431 (S.D. N.Y. 1958)(impeachment by tape recording of prior inconsistent statements).

[148] United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975), cert. denied, 18 Crim. L. Rptr. 4164 (U.S. Feb. 25, 1976). But see Fed. R. Evid. 801(d)(1)(A)(1975) (prior inconsistent statement as substantive evidence).

C. Voice Identification

¶34 While the tapes are being played, it is necessary for the various voices speaking to be identified. The means chosen is within the discretion of the court.[129] Most trial courts are now using transcripts to identify the voices.[130] The possibility of overemphasis and prejudice is outweighed by the inconvenience and confusion caused by stopping the tape to identify each speaker.[131] Care must be taken in the preparation of these transcripts so that they accurately designate the speakers and correctly transcribe the conversation.[132]

D. Completeness

¶35 The prosecution must present the entire picture of a crime to obtain a conviction. This necessitates judicious use of the tape recordings. The timing of the presentation must be carefully planned to allow for corroborative testimony which develops the surrounding circumstances.

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[129] United States v. Hall, 342 F.2d 849, 853 (4th Cir.), cert. denied, 382 U.S. 812 (1965).

[130] Id. at 853. See also United States v. Jacobs, 451 F.2d 530, 541 (5th Cir. 1971), cert. denied, 405 U.S. 955, reh. denied, 405 U.S. 1049 (1972) (jury surrendered transcripts after tapes played); Fountain v. United States, 384 F.2d 624, 632 (5th Cir. 1967), cert. denied sub nom., Marshall v. United States, 390 U.S. 1005 (1968) (use limited to voice identification); Chavira Gonzales v. United States, 314 F.2d 750, 752 (9th Cir. 1963) (reporter's transcript used to refresh jury's memory).

[131] United States v. Hall, supra note 129, at 853.

[132] United States v. Fountain, supra note 130, at 632 (preparer personally familiar with voices of each party to the conversation).

Similarly, what is presented by the tapes will often have to be corroborated to obtain a conviction.[133]

¶36 Often, the tape recording will include the use of a code or slang that the jury is not able to understand. To present a clear picture of the crime, the meaning of the code or slang must be explained to the jury. An expert witness must be qualified and testify as to the meaning of the code or slang. This will usually be an agent with experience in the field.[134] Failure to do so may be ground for reversal.[135] It may also be possible to accompany the expert's testimony with a chart defining the code or slang to act as a visual aid to the jury.

¶37 The tapes may also contain irrelevant, obscene, or prejudicial material. The court may instruct the jury to

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[133] People v. Abelson, 309 N.Y. 643, 650, 132 N.E.2d 884, 887 (1956) (where phone conversation revealed plan for betting on horse races and sporting events, it must be shown that the horses actually ran or the sports events held on the dates mentioned).

[134] United States v. Lawson, 347 F. Supp. 144, 149 (E.D. Pa. 1972) (because of his experience as a narcotics investigator, agent was allowed to testify as to the meaning of certain words and expressions). See also United States v. Avila, 443 F.2d 792 (5th Cir.), cert. denied, 417 U.S. 944 (1974) (translation of foreign languaged allowed).

[135] People v. Abelson, 309 N.Y. 643, 650, 132 N.E.2d 884, 887 (1956) (where government failed to qualify expert witness to explain jargon, the conviction was reversed due to possibility of jury speculation).

disregard this material.[136] Without this instruction, the playing of the tapes may be reversible error.[137] The prosecution may also aid in this by examining the possible jurors for possible prejudice because of the use of this type of material.[138] The materials may also be edited.[139] Editing, though, does present the problem of creating jury speculation.

V. Alternative Uses

¶38 A witness's memory may fail him on the witness stand. Unless the witness can recall the events in question, he cannot testify. Often, a tape recording may help the witness remember. Anything may be used to refresh a

[136] Chapman v. United States, 271 F.2d 593, 595 (5th Cir. 1959), cert. denied, 362 U.S. 938 (1960)(caution to jury to reject anything not said in presence of defendant); State v. Malaspina, 120 N.J. Super. 26, 30, 293 A.2d 224 (App. Div. 1972)(telephone conversation relating to criminal charge pending in another case); People v. Mitchell, 40 App. Div.2d 117, 118, 338 N.Y.S.2d 313, 315 (3d Dept. 1972)(political gossip). The judge may also have the tapes selectively played. United States v. Howard, 504 F.2d 1281, 1287 (8th Cir. 1974)(not prejudicial).

[137] United States v. Gocke, 507 F.2d 820, 823 (8th Cir.), cert. denied, 429 U.S. 974 (1974)("before I was in penitentiary" and use of profanity included on tapes; judge gave limiting instruction; comments of brief and passing nature inadvertently made constitute harmless error); United States v. Cianchetti, 315 F.2d 584, 590 (2d Cir. 1963) (references to defendant as thief, racketeer, and loafer on the tape; no clear limiting instruction given; prejudicial error).

[138] United States v. Whitaker, 372 F. Supp. 154, 164 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974)(without opinion), cert. denied, 419 U.S. 1113 (1975)(inquiry on voir dire).

[139] See discussion in text, supra ¶15.

memory if it in fact revives the witness's recollection.[140] The materials may even be illegally obtained.[141] These can be used because they are not admitted into evidence. The only evidence which is admitted is the testimony of the witness after his memory has been refreshed.[142] It is clear, then, that no foundation need be established. But the defense counsel does have a right to inspect the tapes before they are used to refresh the witness's memory to enable him to properly cross-examine the witness to establish whether the witness did in fact remember.[143]

[140] United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), cert. denied, 329 U.S. 805 (1947).

[141] United States v. Baratta, 397 F.2d 215, 221-22 (2d Cir.), cert. denied, 393 U.S. 939 (1968)(statements used were obtained without Miranda warnings).

[142] 157 F.2d at 967. See also Gaines v. United States, 349 F.2d 190, 192 (D.C. Cir. 1965)(permitting jury to hear statements used to refresh memory was error because it could cause the jury to consider their content as evidence notwithstanding instruction to the contrary). An opponent, though, may allow it to come into evidence, but only after a proper foundation is established. Fed. R. Evid. 612.

[143] Lemmon v. United States, 20 F.2d 190, 193 (8th Cir. 1927); Morris v. United States, 149 F. 123, 126 (5th Cir. 1906); State v. Hunt, 25 N.J. 514, 523-31, 138 A.2d 1, 5-10 (1958); People v. Gezzo, 307 N.Y. 385, 394, 121 N.E.2d 380, 384 (1954); People v. Woodrow, 18 App. Div. 1050, 238 N.Y.S.2d 555 (4th Dept. 1963)(mem.). See also 3 J. Wigmore, Evidence §762 (Chadbourne re. 1970). But see United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940)(no iron-clad rule; right to inspect within sound discretion of judge; no error where grand jury testimony used was not shown to either witness or counsel but inspected by judge); Commonwealth v. Greenberg, 339 Mass. 557, 581, 160 N.E.2d 181, 196 (1959)(inspection only after witness sees document).

Electronic Surveillance: Issues at Trial

Addenda and Errata

Table of Contents

Addenda and Errata

(Double underlining indicates corrected material.)

¶2; Note 2: Correction: 18 U.S.C.A. § 2510-2520 (West 1970 and West Supp. 1978); Ariz. Rev. Stat. Ann. §§ 13-3004 to -3014 (1978); Conn. Gen. Stat. Ann. §§ 53a-187 to -189, 54-41a to -41s (West Supp. 1979); Del. Code Ann. tit. 11, § 1335-36 (1974 and Supp. 1978); Fla. Stat. Ann. § 934.01-.10 (West 1973 and West Supp. 1978); Ga. Code Ann. §§ 26-3001 to -3010 (1978); Hawaii Rev. Stat. § 803-41 to -50 (Supp. 1978); Md. Cts. and Jud. Proc. Code Ann. §§ 10-401 to -412 (1977); Mass. Gen. Laws Ann. ch. 272 § 99 (West Supp. 1978); Minn. Stat. Ann. §§ 626A.01 to -.23 (West Supp. 1978); Neb. Rev. Stat. §§ 86-701 to -707 (West 1976 and Supp. 1978) N.H. Rev. Stat. Ann. §§ 570-A:1 to -A:11 (1974 and Supp. 1977); N.J. Stat. Ann. §§ 2A: 156A-1-26 (West 1971 and West 1978); N.M. Stat. Ann. §§ 30-12-1 to -11 (1978); N.Y. Crim. Proc. Law §§ 700.05 to .70 (McKinney 1971 and McKinney Supp. 1978); N.Y. Penal Law §§ 250.00 to .20 (McKinney 1967 and McKinney Supp. 1978); Or. Rev.

Stat. §§ 133.73 to .727 (1975); 18 Pa. Cons. Stat. Ann. §§ 5702-5705 (Purdon Supp. 1978); R.I. Gen. Laws Ann. §§ 12-5.1-1 to -16 (Supp. 1978); S.D. Compiled Laws Ann. §§ 23-13A-1 to -11 (Supp. 1978); Va. Code Ann. §§ 19.2-66 to -70 (Supp. 1978); Wis. Stat. Ann. §§ 968.27 to .33 (West 1971 and West Supp. 1978); Wash. Rev. Code Ann. §§ 9.73.030 to .100 (1977 and Supp. 1979).

¶2; Note 4: Correction: . . . United States v. Schanerman, 150 F.2d 941 (3d Cir. 1945) (bribery).

¶4: Correction: . . . it may also be admissible . . .

¶5; Note 17: Correction: Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396 (5th Cir. 1961); United States v. Iaconetti, 406 F. Supp. 554 (E.D.N.Y.), aff'd, 540 F.2d 574 (2d Cir. 1976), cert. denied, 429 U.S. 1041, rehearing denied, 430 U.S. 911 (1977); United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968).

¶6; Note 20: Correction: United States v. Jacobs, 451 F.2d 530, 542 (5th Cir. 1971), cert. denied, 405 U.S. 955 (1972); . . . United States v. Klosterman, 147 F. Supp. 843, 849 (E.D.Pa.) (recording apt to be more accurate and complete), rev'd on other grounds, 248 F.2d 191 (3d Cir. 1957) . . .

¶7; Note 23: Correction: State v. Driver, 38 N.J. 255, 287, 183 A.2d 655, 672 (1962) (foundation similar to McKeever established where recording is offered to corroborate a confession). . . . Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963), cert. denied, 377 U.S. 953, reh. denied, 377 U.S. 1010 (1964). But the location of the tap need not necessarily be revealed. State v. Travis, 133 N.J. Super. 326, 332, 336 A.2d 489, 492 (1975).

¶8; Note 26: Correction: State v. Cary, 99 N.J. Super. 323, 329 A.2d 680 (App. Div. 1968), aff'd, 56 N.J. 16, 264 A.2d 209 (1970).

¶8; Note 28: Correction: . . . the party advancing the evidence need not lay an elaborate foundation of expert testimony in order for such evidence to be admitted.

¶9; Note 29: Correction: . . . State v. Dye, 60 N.J. 518, 528, 291 A.2d 825, 830, cert. denied, 409 U.S. 1090 (1972) (agents tested device by placing a phone call to the tapped phone, a pay phone in a liquor store, and conversing briefly with the person who answered; test was recorded and tape itself could later be used to corroborate

agents' testimony); People v. Vellella, 28 Misc.2d 579, 580-82, 216 N.Y.S.2d 488, 490-91 (Ct. of Gen. Sess. N.Y. County 1961) (explicit testimony by persons who installed and operated recorder).

¶11; Note 34: Correction: . . . Stubbs v. United States, 428 F.2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 1009 (1971) (no abuse of discretion where judge found tape to be on the whole accurate and complete).

¶12; Note 35: Correction: People v. Nicoletti, 34 N.Y.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (1974).

¶12; Note 39: Correction: United States v. James, 494 F.2d 1007 (D.C. Cir.), cert. denied sub nom., Tantillo v. United States, 419 U.S. 1020 (1974).

¶14; Note 40: Before "See also":

The Sixth Circuit has established the following as the minimum requirements for the sealing and custody of tape recordings:

(1) recordings shall be placed in cartons, sealed with tape, identified by letter designation and initialed by the attorney who obtains the sealing order;

(2) the custodian shall maintain separate inventory under each court order;

(3) cartons shall be stored in a limited access area, used exclusively for storage of such recordings and a log of persons entering shall be kept;

(4) cartons shall be locked in metal file cabinets and;

(5) recordings so stored shall only be removed pursuant to a court order.

United States v. Abraham, 541 F.2d 624, 628-29 (6th Cir. 1976).

¶14; Note 40: Correction: . . . Mass. Gen. Laws Ann. ch. 272, § 99(M) and (N) (Supp. 1978) . . .

¶14; Note 40: Correction: . . . United States v. Vitello, 367 Mass. 324, 327 N.E.2d 819, 844 (1975).

¶14; Note 41: Correction: United States v. Cantor, 470 F.2d 890, 893 (3d Cir. 1972) (§ 2518(8) designed to insure orders and applications are treated confidentially).

¶14; Note 43: Correction: People v. Nicoletti, 34 N.Y.2d 249, 253, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (1974) . . .

¶14; Note 43a: Compare United States v. Falcone, 505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975) (where trial court found that integrity of tapes is pure, delay in sealing not sufficient

reason to suppress even though no satisfactory explanation given for delay) with United States v. Gigante, 538 F.2d 502 (2d Cir. 1976) (without satisfactory explanation for failure to seal "immediately," tapes not admissible even though no evidence of alteration).

¶15; Note 44: Correction: . . . See also United States v. Fuller, 441 F.2d 755, 762 (4th Cir.), cert. denied, 404 U.S. 830 (1971) . . .

¶15; Note 45: Correction: People v. Blanda, 80 Misc.2d 79, 86, 362 N.Y.S.2d 735, 744 (Monroe County Ct. 1974) (reasonable standards include labeling, initialing, cataloging, and safekeeping).

¶15; Note 46: Correction: S. Rep. No. 1097, 90th Cong., 2d Sess., 104, reprinted in [1968] U.S. Code Cong. & Ad. News 2112, 2193.

¶15; Note 46: Correction: See also 18 U.S.C. §§ 2518 (8)(a) and (b) (1976); Mass. Gen. Laws Ann. ch. 272, § 99(N) (1) (Supp. 1978).

¶16; Note 47a: See generally Shumkler, "Voice Identification in Criminal Cases under Article IX of the Federal Rules of Evidence," 49 Temp. L. Q. 867-79 (1976).

¶16; Note 49: Correction: United States v. Dionisio, 410 U.S. 1 (1973).

¶16; Note 50: Correction: People v. Abelson, . . . 132 N.E.2d 884, 886 (1956).

¶16; Note 51: Correction: . . . Id. at 68, 272 N.E.2d at 336, 323 N.Y.S.2d at 836.

¶16; Note 53: Correction: United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D.Pa.), aff'd, 485 F.2d 682, aff'd, 487 F.2d 1395 (3d Cir. 1973) (agent plus circumstantial), cert. denied, 417 U.S. 918 (1974)

¶17; Note 54: Correction: Carbo v. United States, . . . cert. denied, 377 U.S. 953 . . . ; State v. Molinaro, . . . rev. on other grounds, 122 N.J. Super. 181, 299 A.2d 750 (App. Div. 1973).

¶17; Note 55: Correction: . . . Palos v. United States, 416 F.2d 438, 440 (5th Cir. 1969), cert. denied, 397 U.S. 980 (1970). . . . United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D.Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974) (voice of defendant identified by references to "Frank" on tape of conversations overheard on wire-tap of defendant's phone).

¶17; Note 56: Correction: United States v. McMillan, 508 F.2d 101, 105 (8th Cir. 1974), cert. denied, 421 U.S. 916 (1975) . . . United States v. Alper,

449 F.2d 1223, 1229 (3d Cir. 1971), cert. denied sub nom., 405 U.S. 988 (1972) . . .

¶17; Note 57: Correction: . . . State v. Dye, 60 N.J. 518, 528, 291 A.2d 825, 830, cert. denied, 409 U.S. 1090 (1972) . . .

¶17; Note 57a: In United States v. Hassell, the Eighth Circuit cited several types of circumstantial "clues" in submitting the issue of voice identification to the jury. Specifically, the court focused on three factors:

> (1) the defendant's admission that he had a telephone conversation with the informant on the same morning as the recording in question was made.
>
> (2) the defendant's admission that he discussed the price of heroin with the informant, a discussion which clearly appeared on the recording.
>
> (3) the correlation between the defendant's recorded assent to a meeting with the informant at the defendant's house and his subsequent meeting with the informant at that house.

547 F.2d 1048, 1054-55 (8th Cir. 1977).

¶17; Note 59: Correction: . . . State v. Vanderhave, 47 N.J. Super. 483, 488, 136 A.296, 298 (App. Div. 1957) . . .

¶18; Note 60: Correction: . . . Monroe v. United States, 234 F.2d 49, 54 (D.C. Cir.), cert. denied, 352 U.S. 873, reh. denied, 352 U.S. 937 (1956). . . United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D.Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974) . . .

¶18; Note 62: Correction: United States v. James, 494 F.2d 1007 (D.C. Cir.), cert. denied sub nom., 419 U.S. 1020 (1974) . . .

¶19; Note 65: Correction: Omit Comment, "The Admissibility of Voiceprint Evidence," 14 San Diego L. Rev. 129 (1969).

¶19; Note 66: Correction: United States v. Stifel, 433 F.2d 431, 438 (6th Cir. 1970), cert. denied, 401 U.S. 994 (1971); . . . Commonwealth v. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963).

¶19; Note 66: Add: But cf. United States v. Sample, 378 F. Supp. 44 (E.D. Pa. 1974) (test of general acceptance in scientific community is too strict for purposes of finding fact in parole revocation hearing).

¶19; Note 67: Correction: State v. Cary, 99 N.J. Super. 323, 239 A.2d 680 (App. Div.), aff'd, 56 N.J. 16, 264 A.2d 437 (1968).

¶19; Note 69: Correction: United States v. Baller, 519 F.2d 463, 466 (4th Cir.), cert. denied, 423 U.S. 1019 (1975); United States v. Franks, 511 F.2d 25, 33 (6th Cir.), cert. denied, 422 U.S. 1042 (1975) . . . Commonwealth v. Lykus, 367 Mass. 191, 327 N.E.2d 671 (1975) (lengthy and comprehensive voir dire); State v. Andretta, 61 N.J. 544, 549-51, 296 A.2d 644, 646-48 (1972) . . .

Add at end: United States v. McDaniel, 538 F.2d 408, 413 (D.C. Cir. 1976) (still inadmissible in circuit; bound to follow Addison until clear showing of reliability and scientific acceptance or an en banc reconsideration of Addison); Commonwealth v. Topa, 471 Pa. 223, 369 A.2d 1277 (1977) (spectrograph not yet generally accepted by scientific community; error to admit voiceprint identification).

¶22; Correction: . . . The use of a pen register is not governed by Title III.[76] . . .

¶22; Note 76: Add at end: United States v. New York Telephone Co., 434 U.S. 159, 165-68 (1977).

The defendant refused to comply with a court order directing it to furnish facilities and technical assistance to the F.B.I. It

claimed an authorization for a pen register had to satisfy the statutory requirements of Title III. The Court rejected this argument. It held that Title III is concerned only with the interception of communications and that pen registers do not intercept because "they do not 'acquire' the contents of communications." Whether pen register surveillance is subject to the requirements of the Fourth Amendment was left open. See also Smith v. State, 283 Md. 156, ___ A.2d ___ (1978), cert. granted, ___ U.S. ___, 99 S. Ct. 609 (1979) (held pen registers do not encroach upon any constitutionally protected expectation of privacy and their use cannot be considered a search within the meaning of the Fourth Amendment).

¶22; Note 77: Correction: United States v. Iannelli, 477 F.2d 999, 1002 (3d Cir. 1973), aff'd 420 U.S. 770 (1975).

¶22; Note 78: Correction: United States v. Kohne, 358 F. Supp. 1053, 1058 (W.D. Pa.), aff'd, 495 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974).

¶23; Note 80: Correction: United States v. Fuller, 441 F.2d 755, 758 (4th Cir.), cert. denied, 404 U.S. 830 (1971) . . .

¶23; Note 81: Correction: N.Y.C.P.L.R. 4518(a) (McKinney 1963 and McKinney Supp. 1978).

¶23: Omit second to last sentence and substitute:

> In general, the government must show that the records were "kept in the course of a regularly conducted business activity" and that "it was the regular practice of that business activity" to make the records.[82]

¶23; Note 82: Omit and substitute: Fed. R. Evid. 803(6).

¶24; Note 84: Correction: See generally Zuckerman and Lyons, supra note 1a at 25.

¶25; Note 85: Correction: United States v. Hodges, 480 F.2d 229, 233 (10th Cir. 1973) . . . State v. Dye, 60 N.J. 518, 530, 291 A.2d 825, 831, cert. denied, 409 U.S. 1090 (1972); State v. Driver, 38 N.J. 255, 288, 183 A.2d 655, 672 (1962); People v. Lubow, 29 N.Y.2d 58, 66, 272 N.E.2d 331, 336, 323 N.Y.S.2d 829, 836 (1971) . . .

¶25; Note 86: Correction: . . . in United States v. Schanerman, . .

¶25; Note 88: Correction: . . . United States v. Cooper, 365 F.2d 246, 249 (6th Cir. 1966), cert. denied, 385 U.S. 1030 (1967) . . .

¶27; Note 91: Correction: . . . United States v. Kohne, 358 F. Supp. 1053, 1063 (W.D.Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974).

¶27; Note 96: Correction: 358 F. Supp. 1053 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974).

¶28; Note 98: Correction: 18 U.S.C. § 2418(8)(a) (1976); Mass. Gen. Laws Ann. ch. 272, § 99 (N)(1) (Supp. 1978).

¶28; Note 99: Correction: People v. Nicoletti, 34 N.Y.S.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (1974) . . .

¶28; Note 100: Omit parenthetical and substitute: (where copy was identical and substitution was made solely for listening convenience of jury, court found no infirmity in procedure).

¶28; Note 101: Correction: Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied sub nom., 390 U.S. 1005 (1968) . . . United States v. Knohl, 379 F.2d 427 (2d Cir.), cert. denied, 389 U.S. 973 (1967) . . .

¶28; Note 103: Correction: United States v. Whitaker, 272 F. Supp. 154, 164 (M.D. Pa.), aff'd, 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 1975) . . .

¶28; Note 103: Add after "defendant)": United States v. DiMuro, 540 F.2 503 (1st Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (composite tape within Court's discretion to admit; grouped to facilitate identification; not barred by 18 U.S.C. 2518(8)(a)).

¶28; Note 104: Add at end: United States v. Starks, 515 F.2d 112, 121 (3d Cir. 1975), aff'd sub nom., Abney v. United States, 431 U.S. 651 (1977).

¶28; Note 105: Correction: Fountain v. United States, 384 F.2d 624, 631 (5th Cir. 1967), cert. denied sub nom., 390 U.S. 1005 (1968) . . . United States v. Knohl, 379 F.2d 427, 440 (2d Cir.), cert. denied, 389 U.S. 973 (1967) . . . United States v. Whitaker, 272 F. Supp. 154, 164 (M.D. Pa.), aff'd 503 F.2d 1400 (3d Cir. 1974), cert. denied, 419 U.S. 1113 (1975) . . .

¶28; Note 108: Correction: State v. Dye, 60 N.J. 518, 532, 291 A.2d 825, 832, cert. denied, 409 U.S. 1090 (1972) . . .

¶29; Note 110: Correction: Fountain v. United States, 384 F.2d 624,631 (5th Cir. 1967), cert. denied sub nom., 390 U.S. 1005 (1968) . . .

¶29: Correction: Where there is the requisite showing of accuracy, the best evidence rule will not bar the admission of the duplicate.

¶30; Note 112: Correction: United States v. Jacobs . . . (jury instructed to use transcript only to identify speakers . . .)

¶30; Note 117: Correction: . . . United States v. Bryant, 480 F.2d 785, 790-91 (2d Cir. 1973) . . .

¶30; Note 118: Correction: United States v. Koska, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971) . . .

¶30; Note 118a: If no "stipulated" transcript can be developed, the jury may be given:

(1) a transcript containing both versions;

(2) two transcripts, the reasons for the disputed portions and an instruction to determine which, if either, is accurate; or

(3) the opportunity to hear the disputed tape twice, once with each transcript.

United States v. Oriori, 535 F.2d 938, 948-49 (5th Cir. 1976).

¶30; Note 119: Correction: People v. O'Keefe, 280 App. Div. 546, 551-52, 115 N.Y.S.2d 740, 744-45 (3d Dep't 1952), aff'd, 306 N.Y. 619, 116 N.E.2d 80 (1953), cert. denied, 347 U.S. 989 (1954) . . .

¶31; Note 121: Correction: 339 P.2d 1063 (Okla. 1959).

¶32; Note 123: Correction: People v. Mitchell, 40 App. Div.2d 117, 121, 338 N.Y.S.2d 313, 318 (3d Dep't 1972) . . .

¶32; Note 124: Correction: . . . Lindsey v. United States, 332 F.2d 688, 691 (9th Cir. 1964) . . .

¶32; Note 125: Correction: . . . United States v. Jacobs, 451 F.2d 530, 541 (5th Cir. 1971), cert. denied, 405 U.S. 955 (1972) . . . United States v. Kohne,

358 F. Supp. 1053 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1975) . . .

¶32; Note 126: Correction: United States v. Maxwell, 383 F.2d 437, 443 (2d Cir. 1967), cert. denied, 389 U.S. 1043 (1968).

¶32: Correction: Where there is no contention that the transcript is inaccurate or there is a showing of accuracy, the transcripts are generally admitted into evidence. Nevertheless, the matter is within the court's discretion . . . . But where the tapes have been lost through no fault of the prosecution, the transcripts may be admitted into evidence if a proper foundation of accuracy is made.

¶35; Note 133: Correction: People v. Abelson, 309 N.Y. 643, 650, 132 N.E.2d 884, 888 (1956) . . .

¶36; Note 134: Correction: United States v. Avila, 443 F.2d 792 (5th Cir.), cert. denied, 404 U.S. 944 (1971).

¶36; Note 135: Correction: People v. Abelson, 309 N.Y. 643, 650, 132 N.E.2d 884, 888 (1956) . . .

¶36; Note 136: Correction: Chapman v. United States, 271 F.2d 593, 595 (5th Cir. 1959), cert. denied, 362 U.S. 928 (1960) . . . State v. Malaspina,

120 N.J. Super. 26, 30, 393 A.2d 224, 226 (App. Div. 1972) . . .

¶37; Note 137: Correction: United States v. Gocke, 507 F.2d 820, 823 (8th Cir. 1974), cert. denied, 420 U.S. 979 (1975) . . .

¶38; Note 142: Correction: United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), cert. denied, 329 U.S. 805 (1947) . . .

¶38; Note 143: Correction: Lennon v. United States, 20 F.2d 490, 493 (8th Cir. 1927) . . . People v. Woodrow, 18 App. Div.2d 1050, 238 N.Y.S.2d 555 (4th Dep't 1963) (mem.) . . .

¶38; Note 144: Correction: But see New Mexico Savings and Loan Ass'n v. United States Fidelity and Guaranty Co., 454 F.2d 328, 336-37 (10th Cir. 1972) . . .

¶38; Note 145: Correction: . . . See also Harris v. New York, 401 U.S. 422, 425 (1971) . . . S. Rep. No. 1097 90th Cong., 2d Sess. 96, reprinted in [1968] U.S. Code Cong. & Ad. News 2112, 2185.

¶38; Note 145: Add at end: But see United States v. Manuszak, 438 F. Supp. 613 (E.D. Pa. 1977) (Title III creates a broader exclusionary rule than the judicially-created one).

¶39; Note 146: Correction: Commonwealth v. Harris, 364 Mass. 236, 303 N.E.2d 115 (1973) . . . State v. San Vito, 129 N.J. Super. 185, 133 A.2d 509 (Law Div. 1974), rev'd on other grounds, 133 N.J. Super. 508, 337 A.2d 624 (App. Div. 1975).

¶39; Note 148: Correction: United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975), cert. denied, 424 U.S. 933 (1976) . . .

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Electronic Surveillance: Issues at Trial

Addenda and Errata II

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Addenda and Errata II

(Double underlining indicates corrected material)

¶22; Note 76 Correct and add: See Smith v. Maryland, 283 Md. 156, ___ A.2d ___ (1978), aff'd, 25 Crim. L. Rep. 3192 (U.S. June 20, 1979). (Smith v. Maryland decided after Addenda and Errata went to print.) The phone company complied with a police request to install a pen register on the defendant's phone. At trial, the defendant moved to suppress the evidence because the police failed to obtain a warrant prior to the installation of the device. Both the trial court and the Maryland Court of Appeals held a warrant was not necessary because the use of a pen register did not constitute a search within the protection of the Fourth Amendment. The Supreme Court, in a 5 - 3 decision, affirmed. The majority held that an individual does not have an "actual expectation of privacy in the numbers [he] dial[s]," id. at 3193, because of the public's awareness of the phone company's frequent use and recording of numbers in their billing operations. Id. at 3194. Furthermore, even if an individual had an expectation of privacy, that "expectation is not 'one that

society is prepared to recognize as reasonable.'" Id. at 3194. The Court reasoned that the defendant voluntarily conveyed the information to the phone company and assumed the risk that the information would be revealed to the police. Id. at 3194.

In dissent, Justices Marshall and Brennan argued that there was a reasonable expectation that the information would only be used by the phone company (and not given to the police). Id. at 3195. More importantly, they felt society should recognize the expectation as reasonable because there is no assumption of the risk when there is no choice, and since the telephone has become a necessity there is no choice as to its use. Id. at 3195.

Justices Stewart and Brennan felt the numbers dialed had substantive content, possibly revealing intimate details of the caller's life, which fell under the protection recognized in Katz. Id. at 3196.

A WORD ABOUT THE CORNELL INSTITUTE ON ORGANIZED CRIME

Established in 1975, the Cornell Institute on Organized Crime is a joint program of the Cornell Law School and the Law Enforcement Assistance Administration. Its objective is to enhance the quality of the nation's response, particularly on the state and local level, to the challenge of organized crime by:

1. Establishing training seminars in the area of investigation and prosecution of organized crime, and the development of innovative techniques and strategies for it control;

2. Preparing, updating, and disseminating manuals of investigation and prosecution; the law and procedure relating to organized crime;

3. Sponsoring scholarly and empirical research into organized crime and the techniques of its social control through law, and the publication and dissemination of such research, and

4. developing an organized crime library collection and legal research bank, and creating a comprehensive bibliography and index.

END