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Introduction

The 1978 Hawaii Legislature enacted comprehensive legislation authorizing and regulating the official use of electronic eavesdropping.[1] The preamble to the Act contains the finding that "[o]rganized criminals make extensive use of wire communications in their criminal activities." For this reason, "[t]he 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."[2] The second purpose of the legislation is to safeguard the privacy of spoken communication: "[T]he interception of wire communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court."[3]

The Act generally prohibits the electronic surveillance of conversations, upon pain of substantial criminal penalties,[4] but permits law enforcement agencies to conduct court-approved wiretapping when investigating specified criminal offenses.[5] Applications for court authorization to wiretap must include a showing of probable cause to believe that one of the specified offenses has been or is being committed, the identity of all known perpetrators of the offense, and a description of the communications sought to be intercepted.[6] The court is required to conduct a secret but adversary hearing on the application, and may approve the wiretap if it finds probable cause concerning the offense and the likelihood that the wiretap will produce evidence of the offense, and that other means of criminal investigation are inadequate or impracticable in the case at hand.[7] Court orders denying wiretap authorization are immediately appealable by the prosecution.[8]

The court may authorize wiretapping for up to thirty days, and may approve fifteen-day extensions but only pursuant to new applications and fresh sets of probable cause findings.[9] The court order must direct the wiretap agents to minimize the interception of communications not related to the purpose of the tap, to submit periodic reports to the court on the progress of the tap, and to terminate the tap upon attainment of its

objective.[10] Wiretapped conversations must be recorded and made available to the court.[11] After the surveillance ends an inventory notice is given to all persons whose conversations were intercepted,[12] and accused persons are entitled to have the court suppress unlawfully intercepted communications.[13] In addition, persons subjected to unlawful surveillance can recover civil damages of not less than $100 per day, but good faith reliance on a court order is a complete defense to civil liability.[14] Finally, the Act contains a "sunset" provision which self-terminates the entire legislation six years from the date of official approval, which was June 5, 1978.[15]

Hawaii's wiretap law closely resembles its federal counterpart, which is commonly referred to as Title III of the Omnibus Crime Control and Safe Streets Act of 1968;[16] however, the Hawaii legislation contains several important privacy safeguards not found in the federal law. The purpose of this article is to describe and explain the salient provisions of the Hawaii Act, and to offer interpretive analysis of several such provisions through reference to judicial decisions that have construed textually similar sections of Title III and by analogizing pertinent concepts in conventional search and seizure law.

Title III: The Federal Electronic Eavesdropping Law

Two cases decided by the Supreme Court in 1967, *Berger* v. *New York*[17] and *Katz* v. *United States*,[18] set the stage for the passage of Title III. In *Berger*, the Court struck down as offensive to the fourth amendment's requirement of particularity in search warrants a New York eavesdrop law but provided enough detail regarding that law's deficiencies to offer the beginnings of a blueprint for constitutionally valid electronic surveillance legislation.[19] *Katz* disapproved a warrantless microphone surveillance of a telephone booth, and held squarely, for the first time, that electronic eavesdropping triggers the fourth amendment's search warrant requirement even in the absence of a physical trespass into a constitutionally protected area.[20] "The Fourth Amendment protects people, not places," observed Justice Stewart for the Court in *Katz*, and its protection imposes the requirement of a court order in electronic surveillance cases.[21] The *Katz* decision also contained a significant dictum to the effect that court-approved surveillance of conversations would pass constitutional muster if it comported with the *Berger* criteria.[22] Six months later Congress adopted the suggestion and legitimated electronic surveillance in Title III.

Title III not only establishes a comprehensive regulatory scheme for federal electronic surveillance activities but also sets minimum standards for state statutes. Section 2516(2) specifies that certain state officials may apply to a state court for an eavesdrop order if "authorized by a statute of that State," and that the judge may approve the order so long as his approval is "in conformity with" Title III and the applicable state statute. Title III thus served as a model for the Hawaii legislation, and many parallel sections of these two acts employ identical language.

The *Katz* requirement of advance judicial authorization is the constitutional linchpin in both acts, and the procedures for court approval and specifications for contents of eavesdrop orders bear close resemblance. There are, however, important differences. As the House committee report on the Hawaii legislation points out: "The [Act] is similar to the portion of the Federal Omnibus Crime Control and Safe Streets Act of 1968, as amended, relating to wire interception. However, the [Act] incorporates added safeguards against unwarranted invasions of privacy."[23] Perhaps the

most significant of these is the flat prohibition in Hawaii of the practice known as "bugging," that is, the interception of oral communications by concealed microphones.[24] Wiretapping, which is authorized by both acts, typically involves the surreptitious monitoring of telephone conversations by means of electronic or mechanical devices connected to the telephone wires.

The prohibition of bugging was recommended by the Hawaii Commission on Crime in a comprehensive report on electronic surveillance submitted to the Hawaii Legislature in January, 1978.[25] The crime commission observed that bugging, which is authorized by the federal statute, usually effects a greater invasion of privacy than does wiretapping, because the former typically necessitates surreptitious entry into premises to install a microphone,[26] whereas "[w]iretapping can almost always be achieved by the use of telephone company facilities at telephone company offices."[27] Moreover, noted the commission, the statutory mandate that eavesdroppers minimize the monitoring of communications not properly subject to interception can be more effectively implemented in the wiretapping than in the bugging context.[28] This is because two-party telephone conversations tend to be more distinct and limited in duration and subject matter than the kind of dialogue that occurs in homes, offices or vehicles. Telephonic communication therefore lends itself to more selective monitoring, and selective monitoring is the aim of the minimization requirement.[29] Another more obvious consideration is that persons suspecting that they are targeted for surveillance can curtail the use of the telephone but cannot easily determine the location of a microphone.[30] The bugging ban is thus consistent with the legislative aim of balancing privacy concerns against "the compelling social need to enforce the penal laws in the area of organized crime."[31]

Title III permits forty-eight hours of surveillance without court approval in certain emergency situations involving organized crime or national security;[32] the Hawaii legislation, on the other hand, has no exception to the requirement that a wiretap be authorized in advance by a judge.[33] Court approval under Title III is accomplished by means of an ex parte application to the court, as in the case of arrest and search warrants. In contrast, the Hawaii Act establishes an adversary hearing on the prosecution's wiretap application, with provision for a court-appointed "challenger" attorney to oppose the application and thus protect the public interest in privacy.[34]

The two acts are discussed comparatively throughout this article. The article examines application procedures for wiretap orders, contents of wiretap orders, court supervision of wiretaps, and the remedy of suppression of evidence. A pervasive characteristic of both acts is that they are restrictive in intent and choice of language. Speaking of Title III, Justice White recently observed: "Congress legislated in considerable

detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications."[35] The same can be said of Hawaii's wiretap law.

Application Procedures

The application for a court order for wiretapping in Hawaii must be submitted "to a circuit court judge, designated by the chief justice of the Hawaii supreme court, in the county where the interception is to take place."[36] Section 803-44 of the Act prescribes that the applicant be the state attorney general or the county prosecuting attorney, and deputy attorneys general or prosecutors may apply only when specifically designated and in the "absence or incapacity" of the principal law enforcement officer. As the House committee report observed, "The [Act] contemplates that the prosecuting attorney or attorney general would apply in person for the wiretap order."[37] This requirement should be read in light of a recent Supreme Court decision interpreting a parallel provision in Title III.

In *United States* v. *Giordano*,[38] the Supreme Court examined Title III's command that court applications be made only by the Attorney General or a "specially designated" Assistant Attorney General[39] in a case where the application, although bearing the name of an appropriately designated assistant, had not been reviewed or signed by that individual. Noting that the statute meant precisely what it said, the Court invalidated the surveillance that had been authorized pursuant to the defective application and ordered suppression of the wiretap evidence. The Court reasoned that Title III requires the "mature judgment of a particular, responsible Department of Justice official . . . as a critical precondition to any judicial order," and that this condition was intended to centralize and to limit the wiretap authority.[40]

In thus giving effect to the restrictive intent of Title III, the *Giordano* Court had occasion to discuss state wiretap application procedures. The federal law explicitly authorizes wiretap applications by 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."[41] This provision, observed the Court, was similarly intended by Congress to limit state eavesdropping activity. The Hawaii application limitation of Section 803-44 is therefore animated by Title III itself, and the *Giordano* construction of Title III's parallel provision will have direct

applicability to interpretation of state law. In consequence, prosecutors can expect to be held to a strict standard of compliance with this part of the Act.

Wiretapping in Hawaii will be limited to two classes of offenses: murder, kidnapping, or felony criminal property damage when it involves the danger of serious bodily injury; and certain other felony offenses, including extortion, selected bribery crimes, gambling and drug sales, when a showing of the involvement of organized crime in the particular offense can be made.[42] The House committe report proclaimed: "Since the primary purpose of the [Act] is to fight organized crime, the [Act] requires that court-ordered wiretapping be allowed only in cases where organized crime is involved except for a few very serious offenses."[43] Because the Act defines organized crime as "any combination or conspiracy to engage in criminal activity,"[44] however, this limitation may be largely illusory. Wiretapping would seldom be employed in any event against criminals who operate alone and presumably have little occasion to discuss their crimes on the telephone.

Although the Act contemplates wiretap investigations in cases involving "bribery of a juror, of a witness, or of a police officer," it does not authorize wiretapping for bribery of public officials. This omission was thought appropriate by the Hawaii Commission on Crime to avoid the "abuse of wiretap power for political purposes."[45] The crime commission has recently reported that organized crime flourishes only where it forges a "linkage" with legitimate societal power centers.[46] If this assertion has validity, then pursuit of organized crime's highest echelons would be aided by investigation of all relevant bribery offenses. Moreover, the potential for executive abuse of electronic surveillance may be effectively counterbalanced by the demanding requirements for judicial approval.

The application for a Hawaii wiretap intercept must include details of a particular crime, a description of the facilities or place where the intercept is to take place, a description of the type of communications sought to be intercepted, and "the identity or description of all persons, if known, committing the offense and whose communications are to be intercepted."[47] This requirement that the application name all known perpetrators of the target offense has its Title III counterpart, but the Title III provision requires only the naming of "the person, if known, committing the offense and whose communications are to be intercepted."[48]

In *United States* v. *Donovan*[49] the government argued that this language required the naming of only the contemplated intercept's "principal target," who would be the subscriber or user of the target telephone, as contrasted with other known conspirators who were likely to converse with principal targets from non-targeted telephones. The Supreme Court rejected this argument and held in *Donovan* that the applicant must name every individual reasonably believed to be committing the target offense

and to be communicating from or to the target telephone In underscoring the importance of the naming requirement, the Court pointed out that it triggers two other provisions of Title III: that the application disclose all previous applications "involving any of the same persons . . . specified in the application";[50] and that post-intercept notice be served on persons named in the application.[51]

The *Donovan* holding will apply with like force in Hawaii because Section 803-46(1) envisions the naming of "all persons" believed to be committing and talking about the offense under investigation. Although the legislative history of the Act contains no reference to this provision, it appears to have been drafted with the aim of resolving the very ambiguity addressed in *Donovan.* There is, on the other hand, no requirement that the prosecution investigate all potential users of the target telephone to determine if they are "committing the offense" and hence need to be named. Such a requirement, noted the Supreme Court in *United States* v. *Kahn,*[52] would impose too heavy an investigative burden on the government.

Applications for wiretap authorization must also contain full information relating to all known previous wiretap applications involving the same persons or telephones,[53] facts indicating the necessary period of time for the intercept,[54] and "a full and complete statement of facts 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." This last provision, found in Section 803-46(1), has its Title III counterpart, which the Supreme Court has indicated is "designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime."[55]

Several decisions of the U.S. Court of Appeals for the Ninth Circuit have held that conclusory allegations that other investigative procedures have failed or are unlikely to succeed will not satisfy this requirement: "[T]he affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand," observed Judge Sneed in *United States* v. *Spagnuolo.*[56] More specifically, the application must demonstrate good faith efforts to identify the lawbreakers and to muster evidence to convict. "What is required is a showing that in the particular investigation normal investigative techniques employing a normal amount of resources have failed to make the case within a reasonable period of time."[57] When other techniques have not been attempted the affidavit should set forth "an adequate factual history of the investigation and a description of the criminal enterprise sufficient to enable the [court] to determine, independently of an agent's assertions with respect to his or other agents' experiences, that ordinary investigative techniques very likely will not succeed or that their use will imperil life or in some other specific way be too dangerous."[58] Although unsupported assertions will not suffice, the

ultimate determination of compliance with this part of the statute will necessarily employ a standard of reasonableness, concluded the court.

Following the explication of these guidelines the *Spagnuolo* court disapproved an application that contained only "an informant's description of gambling activities which transpire[d] telephonically," reasoning that approval of such a generalized assertion would "effectively deny the . . . judge his statutory role."[59] The court next sustained a second affidavit that met the test of good-faith exhaustion of normal investigative procedures:

> Posing as a corrupt police officer, [the agent] successfully infiltrated the gambling organization to its highest level, yet he was unable to identify all the participants in the operation or to accumulate sufficient evidence to support all the elements of the offense. His investigation also revealed that these suspects operated in a manner that defied detection by ordinary means. They operated telephonically and were extremely wary of police activity as evidenced by their use of code names and their pattern of changing telephones. Furthermore, his visual surveillance of the principals had been fruitless.[60]

The exhaustion requirement imposes a considerable burden on the police, but is consistent with the restrictive nature of the Act.

A unique feature of the Hawaii legislation is its provision for an adversary hearing to test the sufficiency of the wiretap application. Section 803-46(2) specifies that upon receipt of the application the "judge shall appoint an attorney to oppose the application." The Senate committee report states that this provision "is designed to ensure an informed judicial decision on the probable cause requirement."[61] The statute provides detail regarding the nature of the contemplated hearing.:

> The appointed attorney shall be given at least twenty-four hours notice of the hearing and shall be served with copies of the application, proposed order, if any, and supporting documents with the notice. At the hearing, the attorney appointed may cross-examine witnesses and present arguments in oppostion to the application. The affiant supporting the application shall be present at the hearing. . . . The designated circuit court may require the applicant to furnish additional testimony or documentary evidence under oath or affirmation in support of the application. A transcript of the hearing shall be made and kept with application and orders.[62]

In recommending this adversary hearing procedure, the Hawaii Commission on Crime suggested that "[o]pposition by an attorney representing the public will provide the best possible protection against 'rubber stamping' by judges, or decisions based on a distorted one-sided view of the evidence and arguments supporting an application."[63] Regarding the requirement that the affiant be present at the hearing, the

commission observed that "[t]he attorney should have the right to cross-examine the affiant supporting the application."[64]

It seems clear that the opposition attorney, or "challenger," will function as a public advocate rather than as counsel for the accused, because he plainly cannot communicate with the accused. What, then, should be the function of the challenger? Applications for wiretap orders must persuade the court that there is probable cause to believe that (1) "an individual is committing, has committed, or is about to commit" one of the specified crimes; (2) "particular communications concerning that offense will be obtained through [the] interception"; (3) normal investigative procedures have failed or are unlikely to succeed; and (4) the telephone to be tapped is being used in connection with the crime, or by the person believed to be committing the crime.[65]

This is a substantial burden,[66] and the experience under Title III suggests that the prosecution will likely seek to meet it by presenting, in affidavits, the results of police investigations and information obtained from confidential informants whose reliability must be established but whose identity need not be revealed.[67] The major question relating to the role of the challenger attorney would seem to be whether his challenge is limited to the facial sufficiency of the affidavits, which would essentially confine his role to legal argumentation, or whether an extrinsic investigative function would be appropriate. The Act and its legislative history shed little light on this matter. Section 803-46(2) requires that the adversary hearing be held in camera, and the House committee report notes that the hearing should "be held in secret in the judge's chambers to protect the confidentiality necessary to a successful wiretap."[68]

From this scant evidence it appears that the challenger's function is essentially limited to reading the affidavits, researching the probable cause precedents, cross-examining the affiant, and presenting legal arguments about the probable cause factors. Twenty-four hours is hardly adequate time in which to launch, much less complete, a street investigation. Such an investigation, moreover, would threaten the confidentiality of the proposed wiretap. The Act provides for the compensation of the challenger but not for the appointment or compensation of an investigator. Recognizing this substantial curtailment of the lawyer's traditional adversary fact-mustering function, opponents of the challenger provision have argued that the public privacy protection thus afforded is largely illusory and in any event substantially outweighed by the cost and delay factors involved. Concerns about security have also been voiced.[69]

On the other hand, the arguments in favor of the challenger are impressive. Courts are frequently accused of "rubber-stamping" ex parte arrest and search warrant applications, thereby eviscerating the constitutional warrant requirement. Contemplating even a limited adversary procedure, prosecutors can be expected to exercise care in the preparation of wiretap applications; judges, in turn, will be fully

acquainted with arguable deficiencies in the prosecutorial assertions. The challenger becomes the public's watchdog in a necessarily secret process that should be of significant concern to citizens.

The requirement of exhaustion of normal investigative procedures further underscores the utility of the challenger function. Cross-examination of the affiant may reveal flaws in the prosecution's investigative efforts prior to the application. In addition, where the application is for a wiretap extension or is based on the results of another wiretap,[70] the challenger may be able to pinpoint statutory violations in the earlier surveillance that preclude current authorization. The requirement that wiretap applications reveal all previous applications involving the same named targets or the same telephones, for example, may impose upon the court an obligation to determine the legality of earlier surveillances.[71] Finally, in the event of an appeal from the denial of a wiretap application, the challenger becomes the logical appellate adversary.[72] A basic tenet of the American justice process postulates that the adversary clash promotes better informed judicial decision making,[73] and meaningful judicial control of police activity is the essence of the warrant requirement. Inclusion of a public adversary in this low visibility process raises security problems only to the extent that the challenger attorney, who is to be selected by the judge,[74] disobeys his explicit instruction not to reveal his knowledge and thus commits a punishable contempt of court.

Security arguments have traditionally been a favorite prosecutorial ploy in electronic eavesdropping cases. In a recent national security case, the United States favored an exception to the warrant requirement because judges and their clerks and secretaries could not be trusted. The Supreme Court rejected the argument, noting that "[j]udges may be counted upon to be especially conscious of security requirements in national security cases."[75] The same can be said of court-appointed challengers in organized crime cases. The determination to issue a wiretap authorization is probably the most critical decision in the entire surveillance process, at least from the general public interest standpoint, because it distinguishes the not-so-innocent from the innocent on the basis of probable cause, an evidentiary standard by definition insufficient to sustain a conviction at a trial. Subsequent decisions proceed on the assumption that wiretap targets have been properly identified by application of the probable cause measure as suspected criminals. Hawaii's unique adversary hearing is a worthy experiment in the attempt to implement an important constitutional criterion.

The probable cause requirement in the eavesdropping context does not differ quantitatively from the familiar standard for the issuance of conventional search and arrest warrants.[76] Probable cause for a wiretap, the Supreme Court has reminded, "exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man

of reasonable caution to believe that an offense has been or is being committed."[77] The Hawaii Constitution is explicit: "[N]o warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted."[78] The courts' probable cause precedents will have direct applicability to the issuance of surveillance orders.[79]

Contents of Wiretap Orders

If the court makes the requisite probable cause findings and determines that other investigative procedures are inadequate, it may issue an order authorizing interception "within the county in which the court is sitting."[80] The contents of such orders must meet the exacting specifications of Sections 803-46(4), (5) and (6), which reflect the constitutional command of particularization in warrants. To begin with, wiretap orders must contain: (1) the identity or description of all known persons whose conversations are to be intercepted; (2) the nature and location of the targeted telephone facilities and the means of interception;[81] (3) "[a] particular description of the type of communication sought to be intercepted"[82] and a statement of the related crime for which probable cause has been found; (4) the identity of the agency authorized to conduct the wiretap; and (5) the authorized time period of the intercept, "including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained."[83]

Section 803-46(5) specifies that no order shall permit wiretapping "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days." This section also prescribes:

> Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception . . . and shall terminate upon attainment of the authorized objective, or in any event in thirty days or in fifteen days in case of an extension.

Finally, Section 803-46(6) directs that the order "shall require reports to be made to the court . . . showing what progress has been made toward achievement of the authorized objective and the need for continued interception." The court is given discretion respecting the frequency with which such progress reports shall be required.

Taken together, these specifications have as their goal the maximization

of judicial direction and control of wiretap operations. In *Berger* v. *New York*,[84] the Supreme Court held unconstitutional a state eavesdropping statute mainly because if failed to require such specificity. The New York statute permitted two months of eavesdropping on a determination of probable cause to believe that evidence of crime would be thereby obtained, but it did not require that the court order set forth a particular crime or a description of the communications to be intercepted. The Court stressed these deficiencies: "[T]he statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations."[85] In addition, noted the Court, "authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause." The statute also did not require termination of an intercept "once the conversation sought is seized."[86] For these reasons, the New York statute offended the particularity requirement, which is designed to prevent general searches and "the seizure of one thing under a warrant describing another."[87] The Supreme Court summed up the purpose of this requirement: "As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."[88]

Title III was written to avoid the *Berger* pitfalls, and Sections 803-46(4), (5) and (6) track parallel provisions in Title III.[89] In short, these provisions seek to minimize the wiretappers' discretion by requiring that court orders identify with some precision the conversations to be "seized," mandate reduction of monitoring of conversations not related to the probable cause factors, and enforce termination of monitoring as soon as the desired evidence has been obtained.

The problem is that a certain amount of continuous monitoring of conversations is unavoidable, especially in the early days of an intercept. The size and membership of a criminal conspiracy, for example, may be unknown. Patterns and categories of conversations may need to be established. Speakers must be identified. The subject matter of an apparently innocent conversation may shift at any time to discussion of criminal operations.[90] Criminal conspirators often speak in coded language.[91] In consequence, federal wiretap agents have displayed a tendency to monitor all communications for the maximum period of authorization. After all, how is one to know whether a conversation is pertinent until he listens to it? And why should one suppose that two or three incriminating conversations will be enough to convict? Why not gather as much evidence as possible? The problem is compounded by the inherent vagueness of concepts such as "type of communication" and "attainment of the authorized objective."

In *Scott* v. *United States*,[92] the Supreme Court recently upheld a wiretap where federal agents intercepted all conversations which took place on a given telephone for an entire month, even though sixty percent of the conversations were not incriminating and the order required

minimization of nonpertinent monitoring and termination upon attainment of the objective. Rejecting a challenge based on this apparent minimization failure, the Court reasoned that the need to ascertain the scope of a widespread narcotics conspiracy justified uninterrupted telephone monitoring. The *Scott* decision, which is discussed more fully in the next section of this article,[93] is difficult to reconcile with *Berger*. It seems that Justice Rehnquist, who authored *Scott*, forgot that the particularity requirement not only envisions esthetically satisfying wiretap warrants but has a functional purpose as well. In any event, the upshot of *Scott* and other federal court decisions sustaining undiscriminating wiretap monitoring is that the current vitality of *Berger* v. *New York* is open to serious question.[94]

There is reason to believe that the Hawaii Supreme Court will more strictly scrutinize wiretap operations than has the Burger Court under Title III. The Hawaii court has declined to follow several recent Supreme Court decisions that have diluted fourth and fifth amendment protections,[95] and on one occasion, in *State* v. *Kaluna*,[96] has specifically held that the Hawaii Constitution places greater restrictions on the scope of searches than does the fourth amendment. Moreover, the Hawaii law is more restrictive, especially in the area of minimization, than is Title III. Although Section 803-46(5) requires that court orders direct minimization only in general terms, Subsections 803-46(5)(a) and (b) contain detailed instructions regarding the conduct of minimization efforts, which must include refraining from listening to privileged communications such as those between spouses or with attorneys, physicians or clergymen,[97] and monitoring only "intermittently" conversations that appear unlikely to produce incriminating material.[98]

There is no intermittent monitoring mandate in Title III, and this omission is dramatically highlighted by the continuous intercept validated in the *Scott* decision. Subsection 803-46(5)(b) further clarifies the intermittent monitoring limitation by directing the wiretappers, in their determination whether or not a particular communication is likely to yield incriminating material, to consider the identity of the speakers, the nature of the offense, the hour and day of the conversation, the initial subject matter of the conversation, and the subject matter of previous conversations between the same speakers. Even these statutory guides to wiretap conduct, however, fall considerably short of the kind of impact that could be achieved by a court-ordered minimization instruction tailored to the facts of a particular case.

The most effective means of curtailing the discretion inherent in wiretap operations is a court order that contains individualized instructions to guide the minimization and termination decisions.[99] For minimization, the starting point would be the factors concerning intermittent monitoring found in Subsections 803-46(5)(a) and (b). In addition, the size and suspected membership of the target conspiracy should be a factor, as

would be the use to which a telephone is normally put. The Supreme Court in *Scott* pointed out that a public telephone, for example, would not justify as extensive a surveillance as would a telephone "located in the residence of a person who is thought to be the head of a major drug ring."[100] The model statute proposed by the Hawaii Commission on Crime would have permitted wiretapping only of conversations in which at least one speaker was named or described in the application and order.[101] The Senate committee report mentioned that several committee members had voiced concern about the deletion of this restriction, and predicted "that judges issuing wiretap orders will restore this desirable limitation in appropriate cases to avoid possible constitutional problems in the operation of the wiretap law."[102]

In *United States* v. *Kahn*,[103] the Supreme Court held that, in the case of a conspiracy among one named subject and "others as yet unknown," the monitoring of conversations between unknown speakers is permissible. Rejecting an argument that such a result would confer unfettered discretion on the police, the Court stressed the minimization requirement and added that the court order in *Kahn* allowed only fifteen days of monitoring and required five-day progress reports.[104]

Although Hawaii's Section 803-46(5)(a) contemplates intermittent monitoring of any conversation, court orders should tolerate no more extensive interception than is necessary for reasonable investigation of a given criminal operation. For example, unless the application demonstrates cause to believe that the target conspiracy extends to persons other than those named, there is no constitutional justification for allowing monitoring of conversations of unknown speakers.[105]

Assuming that a wiretap application demonstrates probable cause to believe that two or more named persons "and others unknown" are participating in a conspiracy to commit an offense, it would seem reasonable for a court order to permit total interception of conversations between those named persons during the course of the surveillance. The order could also allow monitoring of conversations between a named target and an unknown or unnamed person, at least during the early days of the wiretap, to determine whether the unknown person is a conspirator.[106] It has been suggested that when conversations between a named target and an unnamed subject produce incriminating evidence, the prosecution should be required to seek an amendment to the original authorization, thereby enabling the court to ascertain whether probable cause exists to name the additional target.[107] Whether or not the original order should permit monitoring of calls between unnamed persons is best determined on a case-by-case basis, taking into account the nature and size of the suspected conspiracy.

Creative particularization of minimization criteria in a court order may be a difficult undertaking, but it seems better designed to produce constitutionally acceptable results than reliance on the judgment of

officers "engaged in the often competitive enterprise of ferreting out crime."[108] The same analysis applies to the termination decision. The federal experience has shown that mere recitation of the statutory directions does not work. In any event, wiretap orders should always be drafted with the mandate of "particularly describing . . . the communications sought to be intercepted" in mind, and this mandate implicitly envisions judicially prescribed restraint with respect to extraneous interceptions and judicially imposed cessation of monitoring as soon as the desired evidence has been acquired.

Court Supervision of Wiretaps

To understand the need for effective, ongoing judicial supervision of eavesdropping operations, it is useful to contrast the execution of conventional search warrants. A warrant authorizing the search of a home, for example, is exhausted when the search, however extensive, is completed. The officers empowered to execute the warrant are not permitted additional searches, even though the authorized search may have failed to produce the sought-after evidence of criminality.[109] There is hence no occasion for court supervision other than to require a report or "return" to the court regarding the results of the search. Since a wiretap operates over an extended period of time and involves a degree of uncertainty with respect to the nature of the conversations to be "seized," supervision is essential.

Section 803-46(5)'s outer limit of thirty days of monitoring is the same as that of Title III.[110] This does not mean that every wiretap can lawfully run for thirty days, because the objective may be attained at any time and termination is then mandatory. Section 803-46(6) prescribes that wiretap orders shall mandate reports to the court that issued the order "showing what progress has been made toward achievement of the authorized objective and the need for continued interception."

Title III, by way of contrast, specifies only that the court "may" order the making of such reports. The reporting requirement is designed to facilitate the court's supervisory function, and the Hawaii Act further specifies that progress reports "shall be made at such intervals as the court may require." Under Title III, it has not been uncommon for federal judges to require reports at five-day intervals,[111] which would seem adequate to satisfy the need for a judicial decision on termination, assuming that the court is ever sensitive to the proper balance between the dual, competing purposes of the legislation. The reports should contain ample detail regarding the nature of the communications being intercepted, because conclusory reports would negate the judicial function.

Periodic progress reports also enable the court to oversee the minimization efforts of the wiretap agents. In *United States* v. *Kahn* Justice Stewart noted approvingly a court order that required reports every five

days "so that any possible abuses might be quickly discovered and halted."[112] In its more recent decision in *Scott* v. *United States*,[113] however, the Supreme Court upheld a wiretap that was operated continuously for an entire month, even though the court order required minimization and the government conceded that the federal agents made no efforts to minimize. The Court said that the failure of the government agents to undertake good-faith efforts at minimization was not dispositive because a reviewing court should undertake "an objective assessment of the officer's actions in light of the facts and circumstances then known to him,"[114] and upon such an assessment the Court decided that the interception of all the conversations was not unreasonable.

On the question of reasonableness, the Court listed a number of factors contributing to decision. The percentage of nonincriminating or nonpertinent conversations intercepted, while relevant, is not determinative because, as the Court observed, some telephone calls may be short in duration, some may be "one-time-only" calls, and some may be ambiguous or involve the possibility of coded language. In such situations "agents can hardly be expected to know that the calls are not pertinent prior to their termination."[115] In *Scott* sixty percent of the calls were considered nonpertinent. Moreover, suggested the Court, when the criminal object of the wiretap is a "widespread conspiracy" more extensive surveillance may be justified to ascertain its scope. Finally, noted the Court, it may be appropriate to view the entire surveillance: "During the early stages of surveillance the agents may be forced to intercept all calls to establish categories of nonpertinent calls which will not be intercepted thereafter."[116]

Applying these criteria, the *Scott* Court sustained the questioned wiretap, notwithstanding that the agents, who made no effort to minimize, concededly employed no criteria. The motivation and intent of the agents, concluded the Court, are not relevant on the question of the reasonableness of their conduct. In dissent, Justice Brennan pointed out that Title III explicitly requires that the surveillance be *conducted* in such a way as to minimize the privacy invasion,[117] and that the Court's holding permitted wiretappers to flout the congressionally imposed duty for which the Court substituted its retrospective conjecture of what might have happened had the agents made the efforts required of them. Moreover, Brennan noted, the *Scott* result failed entirely to take into account the Court's earlier decision in *United States* v. *Kahn*,[118] which sanctioned the surveillance of persons not named in the wiretap order but which relied on the minimization requirement as a counterbalance. Brennan concluded, somewhat rhetorically: "This process of myopic, incremental denigration of Title III's safeguards raises the spectre that, as judicially 'enforced,' Title III may be vulnerable to constitutional attack for violation of Fourth Amendment standards, thus defeating the careful effort Congress made to avert that result."[119]

As suggested in the preceding section of this article, the *Scott* decision seems basically at odds with *Berger* v. *New York*. Although *Berger* decided only the facial invalidity of the New York wiretap statute, the reasoning in support of that decision was that the statute's failure to require particularity could result in the very kind of surveillance revealed in *Scott*. Moreover, *Scott* appears to neglect an essential principle of the Court's fourth amendment jurisprudence, that a search can never be vindicated by what it yields. *Scott* recognized the corollary principle that the permissible scope of a search is determined by viewing each seizure with reference to contemporaneous police knowledge, but applied it only in justification of nonpertinent interception. The Court simply assumed without discussion that the incriminating intercepts were lawful without reference to contemporaneous factors. This reasoning implies a "no-holds-barred" approach to conspiracy cases and an implicit devaluation of the warrant requirement.

On the other hand, the unidentified villain in the *Scott* scenario appears to have been the authorizing judge, who received progress reports at five-day intervals but failed to supervise the tap.[120] The court was therefore equally to blame for the uninterrupted monitoring, and this factor may have influenced decision. In any event, the *Scott* wiretap would likely not be sustained in Hawaii,[121] if only because of Section 803-46(5)'s intermittent monitoring limitation. The case certainly highlights the need for meaningful and continuing judicial supervision of wiretap operations.

The Suppression Remedy

Section 803-46(7)(a) of the Act directs that all intercepted communications "shall, if possible, be recorded on tape or wire or other comparable device" and shall, "[i]mmediately upon the expiration of the period of the order . . . be made available to the court issuing such order and sealed under the court's directions."[122] Section 803-46(7)(d) in turn prescribes that "[w]ithin a reasonable time but no later than ninety days after the termination of the period of an order or extensions thereof" the court shall effect the service of an inventory notice to all persons named in the order, all persons whose conversations were intercepted, and such other persons as to whom notice would be "in the interest of justice."

Notice must include a statement of the period of interception and of whether or not during that period any communications and any incriminating statements were intercepted. This notice requirement is more demanding than that of Title III, which contains no explicit prescription concerning notice to persons not named in the court order but overheard in the wiretap. Such persons, concluded the U.S. Court of Appeals for the Ninth Circuit in its recent decision in *United States* v. *Chun*,[123] are nonetheless entitled to notice if the prosecution intends to indict them. Under the above Hawaii provision, unnamed-but-overheard persons would be entitled to notice in any event.

The notice requirement imposes a troublesome burden on the court because of the difficulty inherent in identifying speakers in the wiretap tapes. The *Chun* court addressed this problem and held that the prosecution must identify or at least "classify all those whose conversations have been intercepted, and . . . transmit this information to the judge" to facilitate the notification process.[124] The Supreme Court explicitly approved this procedure in *United States* v. *Donovan*,[125] and added that where the government chooses to identify intercepted persons, rather than classify, "the list must be complete."[126] Persons served with inventory notice in Hawaii are then entitled, upon motion, to inspect the original application and court order, their own intercepted conversations, "and other evidence obtained as a result of the use of wiretap orders."[127]

Section 803-46(8) provides that no evidence derived from intercepted

communications shall be received in any trial or hearing unless each party has received inventory notice and discovery at least thirty days prior to the trial or hearing. Section 803-46(9) permits "any aggrieved person" to move to suppress the contents of intercepted communications and derivative evidence on the grounds that: "(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."

The question of suppression of evidence has generated considerable case law under Title III, which contains a similar suppression remedy.[128] The first issue concerns standing to move to suppress and that in turn depends upon who is considered an "aggrieved person" under Section 803-46(9). Both acts define "aggrieved person" as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."[129] The Supreme Court addressed the question of standing in the pre-Title III case of *Alderman* v. *United States*,[130] and decided that standing would be limited to persons whose conversations were overheard and persons whose premises were surveilled, whether or not they were present in the premises at the time of surveillance. Title III has been similarly construed, because its legislative history evidences an intent not to broaden conventional standing doctrine.[131] This doctrine denies the suppression remedy to persons whose only grievance is that illegally obtained evidence is used against them at the trial.

Because of the similarity between the two acts, courts construing the Hawaii law will probably adopt the restrictive federal rule on standing.[132] One unresolved issue concerns the meaning of the phrase, "against whom the interception was directed," more specifically, whether this language was intended to confer standing upon individuals named in the application who cannot obtain standing under the other tests. The federal cases have not resolved this point, but it would seem that named targets are within the literal meaning and apparent intent of these words.[133]

The principal suppression problem is the determination of which statutory violations require suppression and which do not. The Supreme Court has addressed this issue in three cases and has adopted a selective approach to suppression under Title III. In *United States* v. *Giordano*,[134] where the wiretap application had not been approved by the Attorney General or his designated assistant, as prescribed by the statute, the Court ordered suppression because of its belief 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 extraordinary investigative device."[135]

But in a companion case, *United States* v. *Chavez*,[136] the Court refused to suppress even though the application, as in *Giordano*, falsely recited that a properly designated assistant had given approval. The factual distinction

justifying this difference in result was that in *Chavez* the Attorney General had in fact approved the application, although it did not recite his approval, whereas in *Giordano* no authorized person had given approval, recitations to the contrary notwithstanding. The upshot is that the communications in *Chavez* were not considered "unlawfully intercepted" under the first of the three above-mentioned suppression grounds, even though the *Chavez* application was at least in technical violation of the statute.

The *Giordano* decision makes clear that Title III's suppression remedy is triggered not only by constitutional violations but also by transgressions of any statutory provisions that play a "central role" in the regulatory scheme.[137] This distinction received further attention in *United States* v. *Donovan*,[138] where the Court found two statutory violations but declined to suppress. In *Donovan* several known surveillance targets for whom probable cause existed were not named in the application, and several persons were not served with mandatory inventory notice because the prosecution had inadvertently failed to advise the court that their conversations had been intercepted. Citing *Giordano* and *Chavez*, the Court reiterated that suppression should be ordered only where the statutory provision that has been violated can be said to play a "substantive" or "central" role in the regulatory system.[139] The Court therefore decided that the *Donovan* wiretap application's failure to name persons required by the statute to be named did not detract from the overall sufficiency of the application. Indeed, observed the Court, nothing in Title III's legislative history suggests that its broad identification requirement was intended to play "a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance."[140]

A similar result was reached on the failure to supply inventory notice: "[W]e do not think that postintercept notice was intended to serve as an independent restraint on resort to the wiretap procedure."[141] It thus appears that whether or not the violation of a particular application provision will lead to suppression of evidence depends, to some extent, on whether or not the order would have issued in the first place had the violation not been committed.

Justice Powell's analysis in *Donovan* on the naming violation, although perhaps flawed, sheds light on how the Court might eye other statutory violations in the suppression context. He stresses initially the critical preconditions to court approval of wiretap applications, including the exhaustion of normal investigative techniques and the probable cause findings that a specific person is committing a specific offense using a specific telephone. The intercept order may issue, notes Powell, only if these preconditions are met, "and the failure to name additional targets in no way detracts from the sufficiency of those factors."[142] He concludes that the naming of "additional targets would [not] have precluded judicial authorization of the intercept."[143] The point of Justice Marshall's dissent

in *Donovan* is that this information might very well have precluded court approval because a "history of recent applications would at the least cause a judge to consider whether the application before him was an attempt to circumvent the restrictive rulings of another judge or to continue an unjustified invasion of privacy."[144]

Given the requirement of disclosure of previous applications involving any of the same named targets, Marshall's point is well taken. The Court's opinion seems to assume, as the government argued, that the named persons were the principal targets and that the persons who should have been named were simply incidental suspects. As if in recognition of this difficulty, the Court observed that there was no showing that the application's omission of the additional targets was intentionally contrived for the purpose of keeping relevant information from the issuing judge. "If such a showing had been made, we would have a different case."[145] The problem is that it is virtually impossible to ascertain which persons might have been the principal targets of a given surveillance except by reliance on governmental assertions. It is therefore arguable that the *Donovan* result on the application point is at odds with the very criterion that the Court purported to employ.

The implications of the *Giordano, Chavez,* and *Donovan* opinions are numerous. Title III's suppression remedy reaches purely statutory as well as constitutional violations, yet the Court seemed to stress that the *Donovan* derelictions were not of constitutional dimension. The general criterion for suppression is the centrality of a particular provision in the overall regulatory system, and that in turn seems to depend on whether the provision was intended to restrain wiretapping procedures. The probable cause factors and the requirement of exhaustion of conventional investigative techniques appear to meet this standard,[146] but post-intercept procedures seem less important. Finally, the degree to which a statutory violation is considered intentional, rather than inadvertent, may tip the suppression balance in any case. The Court expressly declined in *Donovan* to consider how it would have decided the notice violation had the government's omission been deliberate, or if there had been a showing of prejudice.[147]

The Court has not spoken to suppression for a minimization failure, but has suggested in the *Scott* case that the good faith of the wiretappers, although not relevant to decision on the adequacy of their minimization efforts, may have bearing in determining the exclusion remedy.[148] The Court may thus adopt the "double standard" approach developed by several courts that distinguish between outright defiance of the minimization requirement, which calls for total exclusion, and good faith but inadequate minimization efforts, which result in suppression of only the excessive monitoring.[149]

The suppression issue in Hawaii is further complicated by the fact that, although both Title III and Section 803-46(9) provide for suppression

motions by aggrieved persons, Title III contains a provision, not found in the Hawaii legislation, flatly prohibiting the receipt in evidence of any intercepted communication or derivative evidence "if the disclosure of that information would be in violation [of the statute]."[150] The Supreme Court has said that this provision merely implements the suppression remedy,[151] although Justice Douglas, dissenting in the *Chavez* case, chided the majority for its selective suppression approach in the face of such an unambiguous directive. With this background, it may be that the Hawaii Act omitted this provision as surplusage. The House committee report simply mentions that "[e]vidence obtained as the result of an illegal wiretap would be excluded."[152]

The Hawaii Supreme Court will likely be influenced by a number of factors when it confronts suppression issues under the new law. The *Giordano-Chavez-Donovan* analysis may commend itself, but the Hawaii court has been more faithful to the principle of exclusion than has its federal counterpart. The Burger Court has deprecated the exclusionary rule as an ineffective deterrent to police misconduct,[153] whereas the Hawaii court has stressed the imperative of judicial integrity by observing recently that "it is monstrous that courts should aid or abet the lawbreaking police officer [by a failure to suppress]."[154]

On the other hand, the principal characteristic of the wiretap law is judicial authorization and supervision, and judicial mistakes presumably require no greater deterrence than an appellate admonition. Another factor, seldom expressed, is that judges often appear to strain to avoid reversing the convictions of organized criminals, who are the intended targets of the wiretap laws. In the final analysis, the balance to be struck is between effective crime control and individual privacy rights. The Hawaii Act attempts a proper accommodation of these competing values, and wisely envisions reappraisal after six years of experience with a highly controversial technique.

Footnotes

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[1]Haw. Rev. Stat. §§ 803-41 to 803-50 (Supp. 1978).

[2]Act Relating to Electronic Eavesdropping, Pub. L. No. 218, § 1(2) (1978). The quoted language is identical to the congressional finding set forth in the preamble to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 801(c), 82 Stat. 211 (1968), and reaffirmed by the National Commission for the Review of Federal and State Laws Relating to Electronic Surveillance in its report, *Electronic Surveillance* (1976). For a contrary view of the effectiveness of electronic surveillance against organized crime, *see* H. Schwartz, *Taps, Bugs, and Fooling the People* (1977).

[3]Act Relating to Electronic Eavesdropping, Pub. L. No. 218, § 1(3) (1978).

[4]Haw. Rev. Stat. § 803-42 (Supp. 1978) (class C felony punishable by five years imprisonment).

[5]*Id.* §§ 803-42(2)(d), 803-44.

[6]*Id.* §803-46(1)(b).

[7]*Id.* §803-46(2) & (3).

[8]Orders granting motions to suppress wiretap evidence are also appealable, *id.* § 803-46(9)(b).

[9]*Id.* § 803-46(5).

[10]*Id.* § 803-46(5) & (6).

[11]*Id.* § 803-46(7)(a).

[12]*Id.* § 803-46(7)(d).

[13]*Id.* § 803-46(9)(a).

[14]*Id.* § 803-48.

[15]Haw. Rev. Stat. § 803-50 (Supp. 1978).

[16]18 U.S.C. §§ 2510 to 2520 (1976).

[17]388 U.S. 41 (1967).

[18]389 U.S. 347 (1967).

[19]The *Berger* decision is discussed in greater detail at pp. 14-15 *infra*.

[20]This holding overruled Olmstead v. United States, 277 U.S. 438 (1928), which exempted non-trespassory surveillances from constitutional requirements.

[21]389 U.S. at 351, 356-59.

[22]389 U.S. at 354-56.

[23]H.S.C.R. No. 605-78, 9th Legis., 2d Sess. 1 (1978).

[24]"Bugging," which is the interception of an "oral communication" as defined in section 803-41(2), is proscribed in section 803-42. In addition, sections 803-44 and 803-46 authorize the interception only of "wire communications" as defined in section 803-41(1). Section 803-42(2)(c) prohibits the installation of a bugging device in any private place "without consent of the person or persons entitled to privacy therein."

[25]Hawaii Commission on Crime, *Wiretapping: A Report to the Hawaii State Legislature* 101-03 (1978) [hereinafter cited as HCC Wiretap Report]. This report contains a model wiretap statute that served as a basis for the Act.

[26]*See, e.g.*, United States v. Scafidi, 564 F. 2d 633 (2d Cir. 1977), *cert. denied*, 98 S. Ct. 2231 (1978); *In re* Application of United States, 563 F.2d 637 (4th Cir. 1977); McNamara, *The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes,"* 15 Am. Crim. L. Rev. 1 (1977).

[27]HCC Wiretap Report 102. For a description of wiretap methodology and technology, *see* app. III, *State of the Art of Electronic Surveillance, id.* at 180-87.

[28]*Id.* at 102-03; *see* United States v. Ford, 553 F.2d 146, 152 n.23 (D.C. Cir. 1977).

[29]*See* pp. 14-17 *infra*.

[30]*See also* United States v. Volpe, 430 F. Supp. 931, 936 (D. Conn. 1977) (court authorized a bug because the suspect's use of "total telephone service" made it impossible to monitor calls received on his telephone).

[31]H.S.C.R. No. 605-78, 9th Legis., 2d Sess. 2 (1978).

[32]18 U.S.C. § 2518(7) (1976).

[33]Surveillance with consent of one of the parties to the communication apparently does not require court approval, *see* Haw. Rev. Stat. § 803-42(2)(c) (Supp. 1978); *see also* United States, v. White, 401 U.S. 745 (1971); State v. Roy, 54 Haw. 513, 510 P.2d 1066 (1973).

[34]Haw. Rev. Stat. § 803-46(2) (Supp. 1978). The challenger provision is discussed more fully at pp. 9-11 *infra*.

[35]United States v. Giordano, 416 U.S. 505, 515 (1974).

[36]Haw. Rev. Stat. § 803-44 (Supp. 1978).

[37]H.S.C.R. No. 605-78, 9th Legis., 2d Sess. 2-3 (1978). The Senate committee report is to the same effect, S.S.C.R. No. 983-78, 9th Legis., 2d Sess. 3 (1978). In addition, HCC Wiretap Report 108 notes that "[w]iretapping is designed for infrequent use in extraordinary situations so that requiring the applicant to appear in person when not absent from the State or incapacitated should not be an undue burden." The statutory language implementing this intent merely says that the attorney general or the county prosecuting attorney "may make application." Haw. Rev. Stat. § 803-44 (Supp. 1978). This section should be read in light of Title III, which authorizes state wiretap legislation by providing in 18 U.S.C. § 2516(2) (1976) that designated state officials "may apply" to state courts for wiretap orders. In United States v. Tortorello, 480 F.2d 764, 777 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973), the court held that section 2516(2) did not require the personal appearance of the principal prosecuting attorney before the state judge, but observed: "The Act of course does not preclude a state from requiring its principal prosecuting officers to appear personally before the issuing judge." It appears from the legislative history that Hawaii has done just that.

[38]416 U.S. 505 (1974).

[39]18 U.S.C. § 2516(1) (1976).

[40]416 U.S. at 515-16, 523.

[41]18 U.S.C. § 2516(2) (1976).

[42]Haw. Rev. Stat. § 803-44 (Supp. 1978). The Act not only disallows wiretapping in misdemeanor cases, but also prohibits the receipt of wiretap evidence "in support of any misdemeanor charge," *id.* § 803-45(6).

[43]H.S.C.R. No. 605-78, 9th Legis., 2d Sess. 2 (1978).

[44]Haw. Rev. Stat. § 803-41(8) (Supp. 1978). It is unclear why the Legislature eschewed the definition of "organized crime" contained in Hawaii's organized crime legislation, Haw. Rev. Stat. § 842-1 (1976): "any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood. . . ."

[45]HCC Wiretap Report 107.

[46]Hawaii Crime Commission, *1 Organized Crime in Hawaii* 2-3 (1978).

[47]Haw. Rev. Stat. § 803-46(1)(b) (Supp. 1978).

[48]18 U.S.C. § 2518(1)(b)(iv) (1976).

[49]429 U.S. 413 (1977). The *Donovan* case is discussed in the section dealing with evidence suppression, pp. 23-24 *infra*.

[50]18 U.S.C. § 2518(1)(e) (1976); a similar

disclosure requirement is found in Haw. Rev. Stat. § 803-46(1)(f) (Supp. 1978).

[51]429 U.S. at 425-26 n.14.

[52]415 U.S. 143 (1974).

[53]Haw. Rev. Stat. § 803-46(1)(f) (Supp. 1978), requiring "[a] full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to *any* court for authorization to intercept . . . wire communications involving any of the same persons, facilities or places . . . ." (emphasis added). This provision differs from its Title III counterpart, 18 U.S.C. § 2518(1)(e) (1976), in that it omits from the divulgence requirement previous applications to intercept "oral communications." This omission is probably attributable to an apparent effort to effect the bugging proscription by consistently deleting the words "oral communication" throughout the authorization provisions. If so, the provision mistakenly exempts from the divulgence requirement prior federal bugging applications, which cannot be rationally distinguished from prior federal wiretap applications which, if known to the state prosecutor, are apparently included. *Cf.* United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974).

[54]Haw. Rev. Stat. § 803-46(1)(e) (Supp. 1978).

[55]United States v. Kahn, 415 U.S. 143, 153 n.12 (1974).

[56]549 F.2d 705, 710 (9th Cir. 1977).

[57]*Id.*

[58]*Id.*

[59]*Id.* at 711.

[60]*Id.; accord,* United States v. Feldman, 535 F.2d 1175 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

[61]S.S.C.R. No. 983-78, 9th Legis., 2d Sess. 3 (1978).

[62]Haw. Rev. Stat. § 803-46(2) (Supp. 1978).

[63]HCC Wiretap Report 110. The challenger provision was proposed by University of Hawaii Law Professor Jon Van Dyke, *see* Honolulu Star-Bulletin, Nov. 23, 1977, at 2, col. 4-5. Adversary procedure for wiretap authorization is also recommended in Abram, *Foreword* to H. Schwartz, *Taps, Bugs, and Fooling the People* 4 (1977).

[64]HCC Wiretap Report 111.

[65]Haw. Rev. Stat. § 803-46(3) (Supp. 1978).

[66]*See, e.g.,* United States v. Johnson, 539 F.2d 181, 192 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 1061 (1977); *but cf.* United States v. Kirk, 534 F.2d 1262, 1274 (8th Cir. 1976), *cert. denied,* 433 U.S. 907 (1977) (21 day time lapse between prosecution's accumulation of facts and court's issuance of order).

[67]McCray v. Illinois, 386 U.S. 300 (1967); United States v. Capra, 501 F.2d 267 (2d Cir. 1974), *cert. denied,* 420 U.S. 990 (1975); State v. Delaney, 58 Haw. 19, 563 P.2d 990 (1977).

[68]H.S.C.R. No. 605-78, 9th Legis., 2d Sess. 3 (1978).

[69]The challenger provision has been attacked by several Hawaii prosecutors who maintain that they will not seek state wiretaps until this provision is removed from the law. Honolulu Advertiser, July 29, 1978, at 1, col. 2-5.

[70]"Piggyback" taps are common in federal narcotics and gambling investigations, *see, e.g.,* United States v. Armocida, 515 F.2d 29 (3d Cir.), *cert. denied sub nom.* Joseph v. United States, 423 U.S. 858 (1975); United States v. Moore, 513 F.2d 485 (D.C. Cir. 1975); United States v. O'Neill, 497 F.2d 1020 (3d Cir. 1974); United States v. Poeta, 455 F.2d 117 (2d Cir.), *cert. denied,* 406 U.S. 948 (1972).

[71]The appropriateness of such an inquiry was suggested in United States v. Bellosi, 501 F.2d 833, 839 (D.C. Cir. 1974). The function of challenging prior state wiretaps would presumably be a limited one: the previous court order could be tested for facial validity, but to look behind it would unnecessarily duplicate the previous challenger's efforts. Only post-authorization flaws in the prior tap would merit the full attention of the new challenger. Prior federal taps, on the other hand, might warrant more extensive scrutiny. If the adversary hearing is to provide a meaningful safeguard, it seems worthwhile to allow a suppression remedy at the only time when its use may prevent *future* illegal invasions of privacy.

[72]Haw. Rev. Stat. § 803-46(2) (Supp. 1978): "If an interlocutory appeal is taken by the State from the denial of an application, the appointed attorney shall be retained to answer the appeal or another attorney shall be appointed for the appeal." Because the result of an interlocutory appeal is likely, as a practical matter, to settle definitively those issues raised regarding the legality of the application, the appellate challenger, who has no federal counterpart, has a weighty obligation to serve his absent "client" as well as to protect the public interest.

[73]Alderman v. United States, 394 U.S. 165, 183-84 (1969).

[74]Haw. Rev. Stat. § 803-46(2) (Supp. 1978) provides that the challenger "shall be appointed and compensated in the same manner as attorneys are appointed to represent indigent criminal defendants."

[75]United States v. United States District Court, 407 U.S. 297, 321 (1972).

[76]*See, e.g.,* United States v. Fury, 554 F.2d 522, 530 (2d Cir.), *cert. denied sub nom.* Quinn v. United States, 433 U.S. 910 (1977); United States v. Falcone, 505 F.2d 478, 481 (3d Cir. 1974), *cert.denied,* 420 U.S. 955 (1975).

[77]Berger v. New York, 388 U.S. 41, 55 (1967).

[78]Haw. Const. Art. I, § 5. The "communications" clause was intended to subject electronic surveillance to the warrant requirement, *see II Proceedings of the Constitutional Convention of Hawaii of 1968* at 4-9 (1972).

[79]*See generally* State v. Yaw, 572 P.2d 856 (Haw. 1977); State v. Kalai, 56 Haw. 366, 537 P.2d 8 (1975); State v. Davenport, 55 Haw. 90, 92-93, 516 P.2d 65, 68-69 (1973); State v. Delmondo, 54 Haw. 552, 553-55, 512 P.2d 551, 552-53 (1973); State v. Texeira, 50 Haw. 138, 433 P.2d 593 (1967).

[80]Haw. Rev. Stat. § 803-46(3) (Supp. 1978).

[81]*Id.* § 803-46(3) further specifies: "If the order allows physical entry to accomplish the interception, the issuing judge shall find that the interception could not be accomplished by means other than physical entry." As pointed out at p. 4 *supra,* it is unlikely that installation of wiretaps will require the entry of private premises, a prediction bolstered by the fact that every reported federal case which ruled on the issue did so in the context of bugging. United States v. Dalia, 426 F. Supp. 862 (D.N.J. 1977), *aff'd,* 575 F.2d 1344 (3d Cir. 1978), *cert. granted,* 24 Crim. L. Rep. 4002 (1978); United States v. Finazzo, 429 F. Supp. 803 (E.D. Mich. 1977); United States v. Volpe, 430 F. Supp. 931 (D. Conn. 1977); United States v. London, 424 F. Supp. 556 (D. Md. 1976), *aff'd sub nom.* United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977), *cert. denied sub nom.* London v. United States, 98 S. Ct. 2830 (1978); cases cited note 26 *supra.* The extensive case law on the propriety of breaking and entering to install bugs results from Title III's silence on the point.

[82]Haw. Rev. Stat. § 803-46(4)(c) (Supp. 1978); *cf.* United States v. Cohen, 530 F.2d 43, 45 (5th Cir. 1976) (specificity requirement met by court order to wiretap "any and all converssations having discussions related to or concerning sale, possession, smuggling, or unauthorized trafficking in narcotics and dangerous drugs"); United States v. Ripka, 349 F. Supp. 539, 542 (E.D. Pa. 1972), *aff'd mem.,* 480 F.2d 919, 491 F.2d 752 (3d Cir. 1973) (particularity requirement satisfied by order to intercept conversations "relating to the offenses of bookmaking and conspiracy").

[83]Haw. Rev. Stat. § 803-46(4) (Supp. 1978).

[84]388 U.S. 41 (1967).
[85]*Id.* at 59.
[86]*Id.* at 59-60.
[87]*Id.* at 58.
[88]*Id.*
[89]18 U.S.C. § 2518(4), (5) & (6) (1976).
[90]*See, e.g.*, United States v. King, 335 F. Supp. 523 (S.D. Cal. 1971), *rev'd*, 478 F.2d 494 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974) (a 45 page transcript of one intercepted conversation contained two pages of incriminating conversation in the middle).
[91]*See, e.g.*, United States v. Armocida, 515 F.2d 29 (3d Cir.), *cert. denied sub nom.* Joseph v. United States, 423 U.S. 858 (1975) (code words "tires" for narcotics and "shoe salesman" for heroin supplier); United States v. Capra, 501 F.2d 267 (2d Cir. 1974) (code words "christmas present" for heroin, "chess game" for narcotics exchange and "four room house with two stories" for four kilograms of heroin cut twice); United States v. Poeta, 455 F.2d 117 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) (code words "a day at the races" to denote a drug shipment).
[92]98 S. Ct. 1717 (1978).
[93]*See* pp. 19-20 *infra*.
[94]Scott v. United States, 98 S. Ct. 1717, 1728 (1978) (Brennan, J., dissenting).
[95]State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974), disapproving the result in United States v. Robinson, 414 U.S. 218 (1973); State v. Santiago, 53 Haw. 254, 492 P.2d 657 (1971), refusing to follow Harris v. New York, 401 U.S. 222 (1971).
[96]55 Haw. 361, 520 P. 2d 51 (1974).
[97]Haw. Rev. Stat. § 803-46(5)(a)(ii) (Supp. 1978): "Privileged conversations, including those between a person and his spouse, attorney, physician, or clergyman, shall not be intercepted unless both parties to the conversation are named or described in the wiretap application and order." In contrast, 18 U.S.C. § 2517(4) (1976) provides merely that "[n]o otherwise privileged wire or oral communication intercepted . . . [under] this chapter shall lose its privileged character." United States v. Kahn, 415 U.S. 143 (1974), approved the interception of conversations between a named target and his wife where the order referred to conspirators "as yet unknown." The *Kahn* Court did not discuss the privilege point, which had been adjudicated in the lower courts, United States v. Kahn, 471 F.2d 191, 194-95 (7th Cir. 1972), *rev'd on other grounds*, 415 U.S. 143 (1974). *See generally* Note, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 Cornell L. Rev. 92, 115-19 (1975).
[98]According to H.S.C.R. No. 605-78, 9th Legis., 2d Sess. 3 (1978), the provision for intermittent monitoring was intended "to minimize invasion of privacy while at the same time allowing law enforcement officers to maintain reasonable surveillance." The practice of spot checking conversations is endorsed in Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 Stan. L. Rev. 1411 (1974), and the need for intermittent monitoring is suggested in United States v. LaGorga, 336 F. Supp. 190, 197 (W.D. Pa 1971), where the court notes that it is "rather common that a telephone conversation initially between two children will later develop into a discussion between adults."
[99]United States v. Vento, 533 F.2d 838, 852 (3d Cir. 1976) ("the better practice may be to give detailed instructions in each order whenever practicable for minimization"); *see, e.g.*, United States v. Ford, 553 F.2d 146, 149 n.11 (D.C.Cir. 1977) (monitoring permitted only from 6:00 p.m. to 6:00 a.m.); United States v. Principie, 531 F.2d 1132, 1135 (2d Cir. 1976), *cert. denied*, 430 U.S. 905 (1977) (no monitoring after 7:30 p.m.); United States v. Capra, 501 F.2d 267 (2d cir. 1974), *cert. denied*, 420 U.S. 990 (1975) (interception limited to communications of one named subject "with co-conspirators, accomplices and agents"); United States v. George, 465 F.2d 772 (6th Cir. 1972) (monitoring permitted only when named subject "is using the above-described pay telephone"). The order should be written, United States v. Armocida, 515 F.2d 29, 45-46 (3d Cir.), *cert. denied sub nom.* Joseph v. United States, 423 U.S. 858 (1975).
[100]98 S. Ct. at 1725.
[101]HCC Wiretap Report 113, 144.
[102]S.S.C.R. No. 983-78, 9th Legis., 2d Sess. 4 (1978).
[103]415 U.S. 143 (1974).
[104]*Id.* at 154.
[105]*Cf.* State v. Kaluna, 55 Haw. 361, 520 P.2d 51 (1974) (scope of search must be strictly tied to and justified by the circumstances which rendered its initiation permissible).
[106]*See* United States v. Losing, 539 F.2d 1174, 1180 (8th Cir. 1976), *after remand*, 560 F.2d 906, *cert. denied*, 434 U.S. 969 (1977); United States v. Armocida, 515 F.2d 29, 44 (3d Cir.), *cert.denied sub nom.* Joseph v. United States, 423 U.S. 858 (1975); United States v. Quintana, 508 F.2d 867, 874 (7th Cir. 1975).
[107]Note, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing and Inventories*, 61 Cornell L. Rev. 92 (1975); Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 Stan. L. Rev. 1411 (1974). *See* the court order in United States v. O'Neill, 497 F.2d 1020, 1022 (6th Cir. 1974). The importance of the naming provision as a statutory "trigger" is discussed at p. 8 *supra* and pp. 23-24 *infra*.
[108]Johnson v. United States, 333 U.S. 10, 14 (1948).
[109]I J. Varon, *Searches, Seizures and Immunities* 536 (2d ed. 1974).
[110]18 U.S.C. § 2518(5) (1976). United States v. Tortorello, 480 F.2d 764, 773-74 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973), held that the *Berger* requirements for limited duration of wiretaps are met by the combined statutory provisions of 18 U.S.C. § 2518(1)(f), (4)(e) & (5) (1976), which are the equivalents of Haw. Rev. Stat. § 803-46(1)(g), (4)(e) & (5) (Supp. 1978).
[111]*E.g.*, United States v. Kahn, 415 U.S.143 (1974); United States v. Chavez, 533 F.2d 491 (9th Cir.), *cert. denied*, 426 U.S. 911 (1976); United States v. Bynum, 475 F.2d 832 (2d Cir. 1973); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974); United States v. Ford, 414 F. Supp. 879 (D.D.C. 1976), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977). The reports should be in writing, United States v. LaGorga, 336 F. Supp. 190, 194 (W.D. Pa. 1971).
[112]415 U.S. 143, 154 (1974).
[113]98 S. Ct. 1717 (1978).
[114]*Id.* at 1723. For a discussion of this "contemporaneous rule" *see* Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 Stan. L. Rev. 1411 (1974); Note, *Minimization: In Search of Standards*, 8 Suffolk L. Rev. 60 (1973).
[115]98 S. Ct. at 1725.
[116]*Id.* For examples of how such categorization has been accomplished, *see* Note, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 Cornell L. Rev. 92, 114 nn.105 & 106 (1975), citing United States v. Falcone, 364 F. Supp. 877 (D.N.J. 1973), *aff'd mem.*, 500 F.2d 1401 (3d Cir. 1974),and United States v. Focarile, 340 F. Supp. 1033, *aff'd sub nom.* United States v Giordano, 469 F.2d 522 (4th Cir. 1972), *aff'd*, 416 U.S. 505 (1974).
[117]98 S. Ct. at 1726-27, citing 18 U.S.C. § 2518(5) (1976).
[118]415 U.S. 143 (1974).
[119]98 S. Ct. at 1728-29.
[120]*Id.* at 1720. Several courts have appraised the factor of judicial supervision in determining whether there has been a good faith attempt at minimization, United States v. Daly, 535 F.2d 434 (8th Cir. 1976); United States v. Armocida, 515 F.2d 29, 44-45 (3d Cir.), *cert. denied sub nom.* Joseph v. United States, 423 U.S. 858 (1975); United States v. Quintana, 508 F.2d 867, 875 (7th Cir. 1975); *cf.* United States v.

Turner, 528 F.2d 143, 158 (9th Cir.), *cert. denied sub nom.* Lewis v. United States, 423 U.S. 996 (1975) (supervision relevant to termination question); *see generally* Note, *Minimization and the Fourth Amendment*, 19 N.Y.L.F. 861 (1974).

[121]*See* pp. 14-15 *supra*.

[122]18 U.S.C. § 2518(8)(a) (1976) is to the same effect; *see also* Note, *Judicial Sealing of Tape Recordings Under Title III — A Need for Clarification*, 15 Am. Crim. L. Rev. 89 (1977).

[123]503 F.2d 533 (9th Cir. 1974).

[124]*Id.* at 540.

[125]429 U.S. 413, 430-31 (1977).

[126]*Id.* at 432.

[127]Haw. Rev. Stat. § 803-46(5)(d) (Supp. 1978); in contrast, 18 U.S.C. § 2518(8)(d) (1976) relegates inspection to the court's discretion.

[128]18 U.S.C.§ 2518(10)(a) (1976).

[129]*Id.* § 2510(11); Haw. Rev. Stat. § 803-41(9) (Supp. 1978).

[130]394 U.S. 165 (1969).

[131]S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* [1968] U.S. Code Cong. & Ad. News 2112, 2179-80, 2185. In United States v. King, 478 F.2d 494, 506 (9th Cir. 1973), *cert. denied*, 417 U.S. 920 (1974), standing to suppress was extended to one Maack who, although not a party to a conversation, had sent a telephonic message and received a reply through an agent. The interception of those messages, concluded the court, "invaded [his privacy] to the same extent as if he had taken the phone in hand and spoken on the line himself." The "Maack" rule does not apply to one merely referred to in others' conversations, Light v. United States, 529 F.2d 94 (9th Cir. 1976).

The U.S. Court of Appeals for the Second Circuit has reasoned that standing to litigate minimization violations should be accorded only to telephone subscribers, United States v. Fury, 554 F.2d 522, 526 (2d Cir.), *cert. denied sub nom.* Quinn v. United States, 433 U.S. 910 (1977); United States v. Poeta, 455 F.2d 117 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972), but the Supreme Court appears to have rejected this limitation in Scott v. United States, 98 S. Ct. 1717, 1722 n.10 (1978), by accepting the government's concession that the minimization challenge could be pressed by one who "was a party to some non-narcotics related calls." It may be necessary to distinguish between standing to litigate the minimization point and standing to suppress particular intercepts, *see* United States v. Scott, 504 F.2d 194, 197 (D.C. Cir. 1974), because the minimization inquiry requires appraisal of "the totality of the agents' conduct," whereas suppression, in the minimization context, should arguably be limited to those conversations as to which a particular movant is aggrieved.

Courts are also split on whether a defendant can challenge a wiretap on which he was overheard by asserting that the wiretap derived from a prior, illegal tap as to which he lacks standing, *compare* United States v. Wright, 524 F.2d 1100, 1102 (2d Cir. 1975), *and* United States v. Abramson, 553 F.2d 1164 (8th Cir.), *cert. denied*, 433 U.S. 911 (1977) (no suppression), *with* People v. Amsden, 82 Misc. 2d 91, 368 N.Y.S.2d 433, 436 (Sup. Ct. 1975), *and* Bell v. Maryland, 22 Md. App. 496, 323 A.2d 677, 679 (1974), *cert. denied*, 421 U.S. 1003 (1975) (suppression).

[132]The question of standing to suppress the fruits of conventional searches and seizures has not been settled in Hawaii, *see* State v. Dias, 52 Haw. 100, 105, 470 P.2d 510, 513 (1970); however, Haw. R. Penal P. 41(e), which governs conventional search and seizure suppression motions, does not define "aggrieved person," whereas the state wiretap law does provide a definition that is identical to that of Title III. *See* note 129 *supra*.

[133]United States v. Ford, 553 F.2d 146, 179 n.79 (D.C. Cir. 1977).

[134]416 U.S. 505 (1974).

[135]*Id.* at 527.

[136]416 U.S. 562 (1974).

[137]416 U.S. at 528.

[138]429 U.S. 413 (1977).

[139]*Id.* at 434.

[140]*Id.* at 437.

[141]*Id.* at 439; *cf.* State v. Stachler, 570 P.2d 1323, 1330 (Haw. 1977) (no suppression for failure to comply with conventional search and seizure inventory notice requirement in absence of prejudice); *see also* the post-*Donovan* cases of United States v. Harrigan, 557 F.2d 879 (1st Cir. 1977) (no suppression for failure to notify issuing judge of identities of persons overheard); and United States v. Fury, 554 F.2d 522 (2d Cir.), *cert.denied sub nom.* Quinn v. United States, 433 U.S. 910 (1977) (no suppression for failure to comply with requirement of 90-day inventory notice to named target).

The decisions have not ordered suppression when judges fail immediately to seal wiretap recordings delivered by the prosecution, as required by 18 U.S.C. § 2518(8)(a) (1976), which is the equivalent of Haw. Rev. Stat. § 803-46(7)(a) (Supp. 1978). United States v. Angelini, 565 F.2d 469 (7th Cir. 1977), *cert. denied*, 98 S. Ct. 1487 (1978) (delays of 9, 26, 38 days in sealing three wiretaps); United States v. Fury, 554 F.2d 522 (2d Cir.), *cert. denied sub nom.* Quinn v. United States, 433 U.S. 910 (1977) (6 day delay); United States v. Poeta, 455 F.2d 117 (2d Cir.), *cert. denied*, 406 U.S. 948 (1972) (13 day delay); United States v. Caruso, 415 F. Supp. 847, 851 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 94 (2d Cir. 1977) (24 and 42 day delays).

[142]429 U.S. at 435.

[143]*Id.* at 436.

[144]*Id.* at 448.

[145]*Id.* at 436 n.23.

[146]United States v. Spagnuolo, 549 F.2d 705, 711 (9th Cir. 1977) (failure to exhaust normal investigative techniques requires suppression, citing *Donovan*). On violations of duty to disclose previous wiretaps, *compare* United States v. Abramson, 553 F.2d 1164, 1169-70 (8th Cir.), *cert. denied*, 433 U.S. 911 (1977) (no suppression for failure to disclose that previous tap was suppressed, citing *Donovan*), *with* United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974) (pre-*Donovan* suppression for intentional failure to disclose previous application).

[147]429 U.S. at 439 n.26.

[148]Scott v. United States, 98 S. Ct. 1717, 1724 n.13 (1978).

[149]*See, e.g.*, United States v. Mainello, 345 F. Supp. 863, 874-77 (E.D.N.Y. 1972) (partial suppression); United States v. LaGorga, 336 F. Supp. 190, 197 (W.D. Pa. 1971) (partial suppression); United States v. King, 335 F. Supp. 523, 545 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir.), *cert. denied sub nom.* Light v. United States, 414 U.S. 846 (1973) (partial suppression); People v. Brenes, 42 N.Y.2d 41, 364 N.E.2d 1322, 396 N.Y.S.2d 629 (1977) (total suppression). Note, *Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories*, 61 Cornell L. Rev. 92, 122-26 (1975); Note, *Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies*, 26 Stan. L. Rev. 1411, 1435-38 (1974).

[150]18 U.S.C.§ 2515 (1976). This section also prohibits the presentation of illegally intercepted evidence to grand juries, Gelbard v. United States, 408 U.S. 41 (1972).

[151]United States v. Donovan, 429 U.S. 413, 432 (1977); *see* Scott v. United States, 98 S. Ct. 1717, 1724 (1978).

[152]H.S.C.R. No. 605-78, 9th Legis., 2d Sess. 4 (1978). The Senate report is similar, S.S.C.R. No. 983-78, 9th Legis., 2d Sess. 4 (1978).

[153]*E.g.*, Stone v. Powell, 428 U.S. 465, 496 (1976) (Burger, C.J., concurring); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, C.J., dissenting).

[154]State v. Santiago, 53 Haw. 254, 264, 492 P.2d 657, 663 (1971).

END