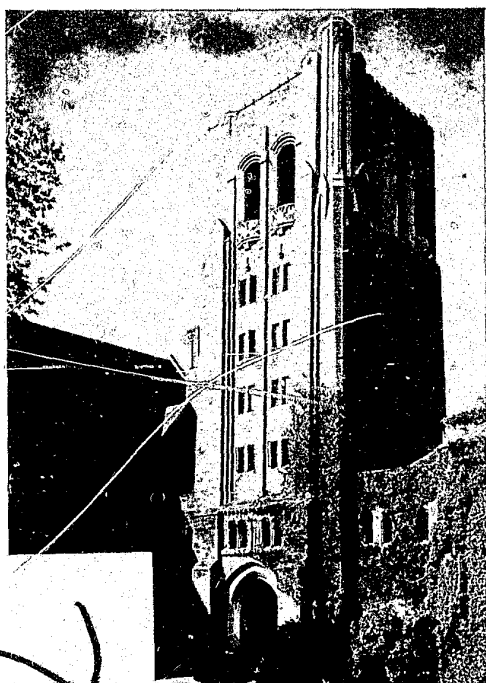


Cornell Institute on Organized Crime  
1976 Summer Seminar Program



## Techniques in the Investigation and Prosecution of Organized Crime

Electronic  
Surveillance:  
Two Views

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G. ROBERT BLAKEY • RONALD GOLDSTOCK



Cornell Institute on Organized Crime

Techniques in the Investigation  
and Prosecution of Organized Crime

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ACQUISITIONS

ELECTRONIC SURVEILLANCE: TWO VIEWS

Based on lectures by  
G. Robert Blakey and  
James J. Hogan delivered  
at the Cornell Institute on  
Organized Crime 1976 Summer  
Seminar.

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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 its second 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 practices 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  
February 1977

Ronald Goldstock  
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## ELECTRONIC SURVEILLANCE

### Law and Strategy (Prosecution)\*

G. Robert Blakey\*\*

What I wanted to chat about with you this afternoon is the scope, development and meaning of Title III.\*\*\* In 1968 Congress passed, over the objections, if not the veto, of President Johnson, Title III of the Omnibus Crime Control Act. It thus broke a legislative log jam of some 40 years. The statute is a complex interrelationship of a series of "do's" and "don't's." The "don't's" are far more important than the "do's." And the "don't's" are more clearly articulated than the "do's." So let me talk to you, for a moment, then about the inarticulate premises of the "do's" of Title III.

If you look at the statute carefully, it says you may; it does not say you must and it does not tell you when. It

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\*Transcript of a lecture delivered, on August 9, 1976, to a seminar offered by the Cornell Institute on Organized Crime on the Techniques in the Investigation and Prosecution of Organized Crime in the area of Theft and Fencing.

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

says you may conduct electronic surveillance. It then tells you all the ways you cannot conduct electronic surveillance. The ways in which you cannot conduct it presuppose a conception of what electronic surveillance is and how it operates. It is not explicitly set down on the face of the statute, or in its legislative history. What I want to do initially with you, therefore, is talk to you about that framework.

#### To wiretap or not to wiretap

Wiretapping, or bugging, is a problem-solving investigative technique. The first thing you have to understand, therefore, is what the problem is. Typically, in the evidence gathering process, that is, when you seek evidence that a particular individual has committed a crime, you will get to an impasse. You will have some evidence but not enough to indict, not enough to convict. You will have alternative ways in which to proceed to gather that evidence. Now, I do not suggest that it always happens this way, where a person sits down and thinks: "Well, what can I do next? I can get a search warrant; I can place an informant in; I can get an immunity order; I can bring the guy before a grand jury; or I can put a wiretap in." Very often the process of investigation is dynamic and all the alternatives come to you and you decide without ever really thinking what you are going to do. Nevertheless, the process itself may be analyzed in terms of thinking about alternatives: what works best.

### Wiretapping: Defined\*

Wiretapping is one method of getting evidence against a person. It will convert hearsay information possessed by an informant into an admission of the defendant himself. In other words, it changes radically the character of the evidence or information you have: it takes information and makes it evidence. You ought to look at it in that way.

It may serve as a predicate for additional evidence. Put a wire in--you will get probable cause that will lead to a search warrant. Put a wire in--you will get information that will identify a witness who can then be called before the grand jury. The wire information will allow you to interrogate that witness under [an] immunity grant in such a way that you can jump a gap . . . [and] secure the cooperation of the witness . . . because he faces the very difficult dilemma of perjury [and/or] contempt.

Wiretapping is also a means of identifying an unknown party. If you are dealing with a sophisticated conspiracy in which you see part of the iceberg, wiretapping is a technique that will help you fill out the other people. . . . Once it identifies the other people, it then enlarges the group of targets which you can aim for.

Much of the literature about wiretapping discusses it as if it were only, or even primarily, a means of piercing deeply into conspiracies, of getting the top man.

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\*See Appendix "A", §§A.1-A.43 and Appendix "B", §§B.1-B.79, infra.

Largely unnoticed [in] the effect of wiretapping 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

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



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

#### THE OBJECTIVE-CENTERED APPROACH OF TITLE III\*

That gets down to the central, underlying, unexpressed notion behind Title III: what is your investigative objective? Interestingly enough, the word only appears in Title III once, in reference to time. Look at the various provisions-- why must you exhaust alternative investigative techniques? In terms of what standard do you measure those alternative investigative techniques? It is in terms of your objectives. Therefore, you must have a very clear notion as to why you are conducting the wire. It is in terms of that, that you must exhaust. Why do you have to identify known parties, if you know them? In terms of what do you know them? It is in terms of [the] probable cause outline of your investigative objective. How long can you conduct a tap? Here is where the statute explicitly says: "as long as necessary to achieve the objective." That means you have to understand precisely what

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\*See Appendix "C", §§C.15-C.32, infra.

your objective is in order to [answer the question]: "How long am I going to keep the tap in?"

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 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

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\*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).

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.

## LIMITATIONS

Not only should you have a very clear notion of your objectives, you ought also to have a very clear notion of your limitations. I am saying this as frankly and sincerely as I can. Do not put in wires if you cannot man them, and I mean in fact man them with the [necessary] manpower. If you cannot supervise them as a lawyer, to make sure that minimization, amendment, and sealing is being done, [do not put in tap.] You cannot expect the police to do wiretapping without close legal supervision. If I only said that to you and left you alone, it would have been worth the price of admission. They will "screw it up" by themselves. . . not because they are malicious, but because they are not as trained in law as you are. Your role is to see that they do it legally, which means you must, early on, if necessary, intrude into the investigation. Do not be a "can't-do" lawyer; be a "can-do" lawyer. The statute works if it is worked carefully. If it is not worked carefully, it will chew the policeman up, it will chew you up, and you will end up with criminal liability or civil liability. When I say it is a very sophisticated series of "don't's," I mean precisely that. You can live with them. Every place in the statute that says "don't" gives you an alternative "do." And it simply says: "Do it this way and not that way"; it does not say: "Don't do it."

When I am talking about manpower, particularly, for example, in the fencing area, [you must] recognize [this] right at the beginning

--if you begin to do sophisticated fencing surveillance, you are going to face, early on, a dilemma that you do not face [or do not often face in gambling or narcotics]: a hijacking. You are going to lay that wire in and, if you get a good fence, particularly a broker fence, you are going to overhear a real hijacking [not a "give-up"; you can live with a give-up] being planned. Then what are you going to do? If you do not have adequate manpower, are you going to be able to intervene to prevent that hijacking? Had you thought beforehand [whether] you are going to terminate the wire and step in? You have some very sophisticated problems that put the prosecutor in something [of] a position of playing God with people's lives and people's safety. One of the key drawbacks with fencing surveillance is that you may not be able to leave it in long enough to achieve your investigative objective without "blowing" it. At some stage of the game preventing a truckdriver from getting killed is more important than making a fencing case.

#### GETTING A WIRETAP: BASIC RULES\*

Let us [focus on] how [to] get a wiretap and how [to] execute it. I am going to tread lightly over the legal issues. You have been given detailed legal memoranda in the backup materials on how to get a wiretap, how to

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\* See Appendix "C", infra.

execute a wiretap [and] how to get wiretap evidence before a jury. I do not want to focus on trial problems. What I want to focus on are some of the major dimensions of [the] developing legal problems in getting wiretaps and in executing them.

#### Prosecutorial Discretion.

Let me talk about several basic rules as they apply to getting a wiretap. The first problem, the first element, the first rule in Title III, is that the decision to wiretap is not a police decision; it is a prosecutive decision. You cannot get a wiretap without the permission of the prosecutor, meaning the local prosecutor, the statewide prosecutor, or the federal prosecutor. Why? Because the people [who] drafted Title III recognized the abuses of police decision in the area of wiretapping. Let us be candid with one another. The policeman's primary focus, traditional primary focus, is "collars": arrests not convictions. If you want to make the suppression rule work, and I am not so terribly sure it does work when it deals primarily with police conduct, you have to deal with somebody who is conviction-minded, not arrest-minded. The only person in the process of the investigation who is conviction-minded is the prosecutor. That is precisely why Congress said: "No longer is this a police decision. It is going to be a prosecutive decision, because the prosecutive officer is law-trained and he is concerned about conviction. He is, therefore, concerned about the suppression of evidence. We wanted to motivate at the highest level the person most

susceptible to motivation." It is not because you are better--it is because institutionally that is the role you play. If you do not have prosecutor approval, you will do to the wiretap statute on the local level what John Mitchell did to it on the national level.

#### A Last Resort

Second major rule: wiretapping is a technique of last resort. Congress does not like wiretapping; the American people do not like wiretapping; if you have any concern for privacy, you do not like wiretapping. It is like major surgery; if you can avoid it, avoid it. 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 wiretapping, do it. It is cheaper. The average wiretap, according to the National Commission's studies, cost about \$8,000. 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 National 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.

The [main] problem in this area has [been] explaining to judges why you are doing it. [This] is not something that prosecutors have been familiar with. Everybody knows what probable cause is. We have filled out hundreds of probable cause affidavits. How many affidavits have you filled out where you explain "why I did it this way, and why I did it that way"? Because it is unfamiliar, it has not been done well. There has been a tendency toward boilerplate.

Now let us be candid with one another. The last bookmaking case that you tried or investigated looks like the preceding bookmaking case that looked like the preceding bookmaking case. Unless you are really an artist with words, your ability to describe bookmaking case B in terms different from case A, C different from B or A, is limited. Nevertheless, while a certain amount of boilerplate is appropriate, the lawyer's tendency is "if you ever said it once, grab the old thing and throw it in the typewriter." You [usually] say "I want paragraph A"; paragraph A goes in without even thinking about the appropriateness of paragraph A in this investigation. Specify it. Particularize it to this case. The legislative history is clear that this is a common sense rule. You do not have to prove beyond a reasonable doubt that you could not do it in any other way. Indeed, the statutory language is very clear. You do not even have to show it to a probability. What you have to do is share with the judge your process of



reasoning: why this objective cannot be obtained by doing such things as search warrants, immunity, informants, etc. You do it [and] specify to the judge--you will not have problems. In fact, in my judgment, the courts have been altogether too generous in allowing boilerplate to go by.

### Probable Cause

Next, you [must] have probable cause. The probable cause must link up the person, the place or phone, and the offense. You have to get all three in. Note that this is a little different from the traditional search warrant. Typically, the traditional search warrant linked up place and offense. With a wiretap warrant, you have to link up all three: person, place, and offense. Sometimes in a fencing investigation it is easy to have probable cause as to person [and] probable cause as to an offense. But when they put a wire in you have to link up those two people on the phone. Remember [that] the phone is an instrument of communication on which a lot of people talk. The phone is like a house; to say that you know he is doing certain bad things in one house does not mean you know he is doing them in another. The unit of the thing being searched is the phone, which means you have to link up that phone to person and offense. [If] you want to bug a room or a place, then you have to link up that place and the people. You cannot just say: "Hey, there are three phones there."

[We must] be realistic: sometimes this is a question of artful draftsmanship. This is [actually] a question of

artful interpretation of your probable cause. There is no higher standard of probable cause for wiretapping than there is for search and seizure generally. It would have been reasonable had the legislature imposed a higher standard. Theoretically, the courts, too, have not; in practice, they may have done so. But you have to have probable cause for each element.

Note that there is also a designated defense problem. You cannot wiretap for everything. One of the issues obviously raised is: if your statute is not adequate or if you do not have a statute, maybe someone else with jurisdiction does--to wit, the feds. The same thing goes with the federal people; this is a two-way street. The wiretapping standards under the Fourth Amendment, the wiretapping standards under Title III, and the wiretapping standards under most state statutes--underline most, not all--are roughly the same. This means [that] there is no reason why, in a joint investigation, you cannot put wires in under the federal statute and try the cases locally; there is no reason why you cannot put the wires in locally and try the cases federally. Some of the people in the Joint Strike Force in New York have found that state wires are easier to get. [They are] not easier in the sense that you can circumvent constitutional legal restrictions, but just [that] the people who have to approve it are in New York. The judges are more easily available. So [in a] joint investigation, they put in a state wire. But trials are quicker in the federal courts. The evidentiary rules,

particularly dealing with accomplices, are more generous to the prosecutor's perspective in the federal courts. So what you set is a state wire and a federal trial--jointly planned from the very beginning. You ought to look at the law, not only of your own jurisdiction, but of the jurisdictions which have some power over the investigation, some authority over the investigation, and pick the one that works the best. It makes sense, in short, to have joint cooperation.

#### The "If-Known" Problem

The next problem, and one of the developing problems in the statute, is the so-called "if-known" problem. You must, under the wiretap statute, identify in the application [and] in the order, the name of the person that you expect to conduct surveillance of, if you know him. This creates one of the classic dilemmas in the statute. If you have probable cause, you must include him. If you do not have probable cause, you cannot include him. [In other words], the cop is in an insoluble dilemma. The lawyer has a better chance of working it out. My suggestion to you is to do as follows: very clearly figure out, at the early stages of the investigation, all of the probable parties. Get their names out on the table--who they are, what relationships they have to one another, and evaluate each one individually. [Ask yourself], "Do I have probable cause as to him, as to person, phone, and subject matter?" Break each one out separately. If you have probable cause as to them, you must put them in.

If you have suspicion that you will overhear them but you do not think that you have probable cause that you will overhear them, bring them to the attention of the judge. Say "Your Honor, I do not think I have probable cause. I'm telling you that I have reasonable suspicion that I will overhear them and consequently you tell me if you think that there ought to be any special minimization rules as to this person."

Why did Congress [include] the phrase "if known?" [Many] people can fall into a wiretap. Therefore, the prosecutor must share with the court what he is doing and why. The court might very well decide that, if you have probable cause as to A and reasonable suspicion as to B, that B is never to be listened to. If you do not disclose to the judge the reasonable suspicion that B is a party to it, the judge cannot develop special minimization rules dealing with such things as lawyer-client problems, or otherwise. It is true: your obligation and the consequent failure to include only carries an adverse result when you had probable cause. But remember what probable cause is. It is a standard, not a rule, which means your judgment one time may not be the one held by a judge later. So, therefore, if you have probable cause, you must include the person. If you do not have probable cause, you think you only have suspicion, disclose. I am not saying you have to--I am saying it is a good idea. Ask for any special minimization or other rules in reference to the person.

If you do not include a person and you do have probable cause, there is a conflict as to whether, as a consequence,

that must be suppressed. It is probably going to be decided by the Supreme Court next term in Donovan\* and Doolittle\*\*. Donovan says one thing, several other cases say another. The Supreme Court will tell us which way to go.

It is my judgment that the way the "if known" will [be resolved in] the Supreme Court is: if you have probable cause, [the person] is known and you do not include him, they will suppress only where the failure to include was prejudicial.\*\*\* They will not apply a per se rule. That is what I hope for. The potentiality is there that they will do it automatically. One of the interesting conflicts that is developing in the circuits is whether a mistake under the statute is per se suppression or suppression only with prejudice. The "if-known" [problem] is one of the cases that is going to settle it, I think--clearly settle it. When it does settle it, it will settle it for sealing, inventory and several other things.

#### Disclosure

You must tell the judge about previous applications. The deeper you get into the surveillance process, the more

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\*United States v. Donovan, 513 F.2d 337 (6th Cir., 1975), cert. granted 424 U.S. 907 (1976) reversed 20 Crim. L. Rptr. 3043 (Jan. 19, 1977).

\*\*United States v. Doolittle, 507 F.2d 1368 (5th Cir.), aff'd. en banc 518 F.2d 500 (1975), cert. dismissed 423 U.S. 1008 (1975).

\*\*\*In fact, the Court held that suppression might be appropriate only where the failure to include was "knowingly." See 20 Crim L. Rptr. 3049 n.23.

you are going to have to know about previous surveillance[s]. If you do not include the previous surveillance in your application, you do not give the judge the opportunity to decide that you are harrassing the guy. [If] you have laid four wires on the guy in four different crimes and you get nothing in the first three, the judge is entitled to the opportunity to say, "Enough is too much--stop." Therefore, you must tell the judge about the previous applications. The dilemma, and it is an interesting dilemma, is: if you tell the judge about a prior illegal tap, do you taint the current tap because the judge now has been informed about illegally obtained evidence? There is some language in the Giordano\* opinion that seemingly indicates a per se "fruit of the poisonous tree" rule. If you have an illegal tap followed by another tap, and the illegal tap is disclosed to the judge and forms part of the probable cause statement, must you suppress the second one? My suggestion to you is, if you have suspicion about a prior tap, or if you know it to be illegal, and you have sufficient probable cause without the prior tap, all the statute requires is that you disclose the prior tap. You can then specifically tell the judge: "I have problems with this prior tap," or "I don't need that prior tap. I want you to find my probable cause independent of that." Get him to make the finding of probable cause independent of the prior tap. Thus, you slip right around, I hope, the potential problem of Giordano.

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

The statute says "known to the applicant" which means, I take it, [that it] can read [in] two ways: actually known, or could [or should] be known as a result of the reasonable inquiry. One thing that is going to happen to the statute is that it is going to be interpreted. The most reasonable construction of it is "if actually known to the applicant." That would probably [encompass] those agencies over which [the applicant] has some reasonable control. [Assume] you are in Kings County and [are therefore] reasonably expected to know your own racket people. [Perhaps] you can be reasonably expected to ask the city police, but the state police, upstate police barracks? It is obvious that people are going to have to develop indices of people on taps. This means you are going to have to have better records than you have now. If anything was clear in the National Wiretapping Commission Study it is that you people do not have adequate records of what you do. If you do not have adequate records, you cannot find out about prior taps.

#### Length of the Tap: Staleness

You cannot figure out how long you have to conduct surveillance unless you know what you are after, until you have an objective. The statute says "Don't conduct any more surveillance than what is necessary to achieve the objective." This means you have to figure out what your objective is. If you have to cover one meeting, you are only allowed the time appropriate to cover that meeting. [Assume] you have probable cause to believe the meeting will occur sometime in the next

three days. You cannot get a 30-day tap. You get a three-day tap. If you get the meeting on the first day, you must shut down; you cannot listen in on the second two days--even though the order reads, "Listen for the next three days for the meeting A." If you are looking for a series of meetings, you may listen as long as you have probable cause, but not longer than 30 days. The reasons for the 30-day limitation is staleness. It is not, as sometimes conceived, a question of general searches. The only reason behind the 30-day limit is staleness. On the 29th day, the probable cause supporting that surveillance is 29 days [old] plus whatever length of time between the last information and the application and the day of installation. This means you are pressing it on the 29th day as to staleness. The question of general exploratory searches is not a question of time--it is a question of minimization which I will get to in a moment.

#### 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.

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\*See Appendix "C", §§C.35-C.88, infra.



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 problem 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

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\*In Donovan, the Supreme Court refused to order suppression for failure to identify. See 20 Crim L. Repr. at 3047-48, 3050.

\*\*See Appendix "C", §§C.73-C.75, and Appendix "D", §§D.61-D.63, infra.

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 wiretap 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 is coming up to the Supreme Court is: "Does a failure to [give] notice constitute grounds for suppression?" There are two ways to read it. [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 good argument is no prejudice--no suppression. If the courts decide to get tight because prosecutors are not supervising [their taps] and [are] not giving notices, [prosecutors] are in trouble. There is a conflict as to whether absence of notice [constitutes] prejudice.

## 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 wiretap, 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

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\*See Appendix "C", §§C.36-C.49 and Appendix "D," §§D.44-D.47, *infra*.

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 wiretapping, 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 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 babysitter, 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. 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, homicide, 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 wiretaps 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.<sup>\*</sup> 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

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<sup>\*</sup>United States v. Kahn, 415 U.S. 143 (1974).

privacy. Stewart [is the author of] the opinion; [he is not well known for favoring intrusions]. [The Court is] is going to look at the statute in a balanced way and it is going to say: "Hey, wiretapping 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.

#### 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

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\*See Appendix "C", §§C.50-C.72, and Appendix "D", §§D.48-D.60, infra.



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 Rabinowitz-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 wiretap 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,

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

\*\*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).

depending on whether you buy the plurality opinion in the Coolidge case\*, permits pretty wide incidental seizure. When the wiretap statute was drafted, it was pre-plain view. What we had to get around was this. If you go in for narcotics and overhear narcotics, you may take it. If you overhear 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]. 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. The Seventh Circuit, in what in my mind was a wooden opinion, decided that, although it was lawfully seized under §1952, since it was going to be used at trial for another offense, [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. If

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

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

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

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

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. Wiretapping 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, and what I think the future is. (Which I do not think is very good for us.)

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\*Transcript of a lecture delivered, on August 9, 1976, to a seminar offered by the Cornell Institute on Organized Crime on the Investigation and Prosecution of Organized Crime in the area of Theft and Fencing.

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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.

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. At this time I generally move, pursuant to Section 2518(8)\*\* (which is the inventory provision in the federal code which allows the judge to give you, at that time, the papers: the order, the affidavit, the application, and the transcripts of the conversation which

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\*See Appendix "C", ¶¶C.76-C.88, infra.

\*\*18 U.S.C. §2518(8) (1970).

[the judge] deems are in the interest of justice [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, [for 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 with an inventory, he knows he has been the subject of electronic surveillance but [was] never indicted, and then is subsequently searched and articles [seized] from him. He could file a motion for return of the

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

articles and [the cases] provide for that. The case that [holds] that you have no right to the return of the tapes of 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 you file a motion for discovery or you file 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. At that time, we move for the transcripts, we move for the orders, we move for the affidavits, we move for the applications. We

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

\*\*United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976).

\*\*\*See Appendix "D", ¶¶D.1-D.19, infra.

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 first time a client of mine is going to be a [grand jury] witness, I file a motion to record the grand jury testimony. The Strike Forces which I deal with in probably 75% of [my] cases generally always record the grand jury testimony. But if they do not, then I file a motion with the grand jury asking for a hearing. I tell the court that I will be happy to pay to have a reporter present to record the grand jury testimony. That has been the rule [in the Ninth Circuit], under United States v. Thoresen,\* where if you offered to pay for [the reporter] and [it is not] record[ed] anyway, there is a chance that you might be able to get the indictment dismissed; [but] only a chance. I also, [at this time], file a motion for the transcript of the grand jury testimony, [under] Persey 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

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\*428 F.2d 654 (9th Cir. 1970).

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

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 imagine [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 witness. The D.C. Circuit,\* in [a] grand jury investigation, [has] 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 Fifth Amendment knowing that he is going to be a

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\*In Re Grand Jury Investigation, 17 Crim L. Repr 2398 (D.C. Cir 1975).

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 Fifth Amendment, 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 type-written 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.<sup>\*</sup> The most recent case, U.S. v. Moore,<sup>\*\*</sup>

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<sup>\*</sup>524 F.2d 421 (D.C. Cir. 1975).

<sup>\*\*</sup>513 F.2d 485 (D.C. Cir. 1975).

[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 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."

### 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

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\*See Appendix "D", ¶¶ D.20-D.153, infra.

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

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\*18 U.S.C. §2517(5)(3) (1970).

\*\*United States v. Campagnuolo decided Dec. 31, 1975, S.D. Fla.

violation and you inadvertently overhear gambling conversations relating to interstate gambling, 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 judgment 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 judgment 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 Fifth. So we want to find out, as 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 a wiretap case. In the

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

\*\*Fed. R. Crim. §41

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 \$8,000 to develop the wiretap and to execute it. Well, I could not try a case properly for \$8,000. 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 for one to be able 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.

#### Authorization

The authorization problem is the Giordano\*\* problem which

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\*See Appendix "D", ¶¶D.20-D.153, infra.

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

has been gone over many times. The only question here is who [do] you subpoena? I had the problem as to 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 as to a person named Greene who was giving a line out to

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

\*\*518 F.2d 496 (5th Cir. 1975).



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.

### Minimization

[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. When I was testifying for the Wiretap Commission, they asked me: "Do you mean do 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 can not 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 minimization 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 just 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. 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

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\*United States v. Gigante, 19 Crim L. Repr. 2223 (2d Cir. 1976).

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

#### Illegal Entry

Now the illegal entry, or what I call an illegal entry: a trespass or breaking and entering to install a bug or take

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

out a bug. The Eighth Circuit just decided that it was legal, under exigent circumstances, for the government to go in and install the bug by breaking and entering.\* [The] dissent said that it was unreasonable per se. We 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 you going to get in? But [the judge] suppressed, saying: "They didn't tell me they 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.

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\*United States v. Agrusa, 528 F.2d 944 (8th Cir., 1976).

### Other Surveillance Techniques\*

[As to] the other surveillance techniques that Professor Blakey has brought up: first, the pen register. The Second Circuit\*\* just recently ruled that when you have a pen register, without a wiretap order, there can be no compulsion on the phone company. In other words, you cannot 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 phone company] cannot be forced, at least according to the Second Circuit, to cooperate with you to install the pen register.

The bumper beeper cases, although I do not honestly understand them, have said that [the] Fourth Amendment 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 of Hawaii concerns binoculars. This surveillance was used to obtain a wire tap. It was a gambling investigation where

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\* See Appendix "B", ¶¶B.1-B.79, infra.

\*\* In Re Applications, 19 Crim L. Repr. 2370 (2d Cir. August 4, 1976).

\*\*\* United States v. Frazier 19 Crim L. Repr 2372 (8th Cir., 1976).



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. [If] the fellow picks up the phone and you are allowed to intercept over that phone,

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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).

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 [also present a problem]. We had an interesting [problem] in the

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\*18 U.S.C. H. §2511(2)(d) (1970).

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 not 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. That is presently on appeal.

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 as 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 to introduce besides the general ones I attempt to introduce [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 questions 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 recently 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 wiretap 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

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

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. There were 5,000 pages of testimony. There were 40 witnesses called [in] the motion to suppress. I simply went to the prosecutor and said, "Let me out; give me a deal," and he was willing to do so. But if a defense attorney really does his work and really puts you people to task and you have to do your homework, then the ones [who] do the work generally better get a better deal.

#### THE TRIAL OF THE CASE\*\*

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

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

\*\*See Appendix "D", ¶¶D.154-D.192, infra.

and they will curse and have a unique way to express 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 prejudicial 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.

#### 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 asked]: "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 witnesses 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

to not have the tapes played and to not 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.

FROM WHENCE WE CAME: THE FUTURE

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

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\*Fed. R. Crim. P. 45



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 31 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.



APPENDIX A

CONSENSUAL ELECTRONIC SURVEILLANCE



## APPENDIX "A" - CONSENSUAL ELECTRONIC SURVEILLANCE

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## Summary

¶A.1 Electronic surveillance<sup>1</sup> 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.

¶A.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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<sup>1</sup>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). For other devices used under the generic heading of electronic surveillance, see Appendix "B", infra, ¶¶B.1-B.80.

## I. Introduction

¶A.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 and transmitting with the consent of one of the participants of 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.

¶A.4 Electronic surveillance, but particularly consensual surveillance, offers law enforcement personnel several advantages.<sup>2</sup> 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

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<sup>2</sup>See ¶A.43, *infra*, 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.

a recording can also supply the corroboration often required for an accomplice's testimony.<sup>3</sup> 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.<sup>4</sup> 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.

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<sup>3</sup>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 exonerate the innocent victim of the irrational or political grudge accusation and prevent an unjust indictment.

<sup>4</sup>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

¶A.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.<sup>5</sup> Consensual surveillance, therefore, is an exception to the general federal rule which imposes warrant and other requirements on electronic surveillance.<sup>6</sup>

¶A.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.<sup>7</sup>

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<sup>5</sup>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.

<sup>6</sup>18 U.S.C.A. §2516(1970), as amended, (Supp. 1976).

<sup>7</sup>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., 2d 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).

¶A.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

¶A.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,<sup>8</sup> 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,<sup>9</sup> 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.<sup>10</sup> On Lee also

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<sup>8</sup>343 U.S. 747 (1952).

<sup>9</sup>277 U.S. 438 (1928); subsequently overruled in Katz v. United States, 389 U.S. 347 (1967), discussed infra, ¶A.11.

<sup>10</sup>343 U.S. at 751-52.

contains language suggesting that the legality of the agents' monitoring was based on On Lee's indiscretion with one he mistakenly trusted.<sup>11</sup>

¶A.9 Rathbun v. United States<sup>12</sup> 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.<sup>13</sup>

¶A.10 The "misplaced trust" rationale of Rathbun appeared again in 1963 in Lopez v. United States.<sup>14</sup> Lopez was convicted

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<sup>11</sup>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, ¶A.21.

<sup>12</sup>355 U.S. 107 (1957).

<sup>13</sup>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 ¶A.38 infra, concerning the individual's expectations when using a party line.

<sup>14</sup>373 U.S. 427 (1963).



**CONTINUED**

**1 OF 6**

of attempted bribery of an Internal Revenue agent 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.<sup>15</sup>

¶A.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.<sup>16</sup> Finally, in Katz v. United States,<sup>17</sup> the Supreme Court overruled the Olmstead "trespass" doctrine and

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<sup>15</sup>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.

See also United States v. Miller, 425 U.S. 435, 442 (1976).

<sup>16</sup>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).

<sup>17</sup>389 U.S. 347 (1967).

concluded that electronic surveillance without the consent of 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.<sup>18</sup>

¶A.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.

¶A.13 This uncertainty was subsequently faced in United States v. White.<sup>19</sup> In a plurality opinion,<sup>20</sup> Mr. Justice White concluded that Katz did not impose a warrant requirement

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<sup>18</sup>Id. at 353.

<sup>19</sup>401 U.S. 745 (1971).

<sup>20</sup>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.

where one of the parties to the conversation voluntarily consented to the monitoring of the communication by law 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.<sup>21</sup>

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

### C. Post-White Problems

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

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<sup>21</sup>401 U.S. at 751-52.

<sup>22</sup>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.

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

<sup>24</sup>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].

## 1. The Problem of Consent

¶A.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.

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

¶A.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.<sup>28</sup> 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

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<sup>25</sup>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).

<sup>26</sup>47 U.S.C.A. §605 (1962), as amended (Supp. 1976).

<sup>27</sup>308 U.S. 321, 330 (1939).

<sup>28</sup>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).

v. Bonanno, where the consenting party was incompetent to testify at the time of trial, the court stated:

[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.<sup>29</sup>

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.

¶A.18 The most difficult consent problem for the government is shown by United States v. Napier.<sup>30</sup> 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.<sup>31</sup> While real, the Napier problem is of limited applicability, since few consenting parties are incompetent.

¶A.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

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<sup>29</sup>487 F.2d 654, 658 (2d Cir. 1973).

<sup>30</sup>451 F.2d 552 (5th Cir. 1971).

<sup>31</sup>Id. at 553.

overcome by threats or improper inducement amounting to coercion or duress."<sup>32</sup> Promises or hopes of leniency,<sup>33</sup> immunity,<sup>34</sup> or the receipt by the consenting party of "special considerations" from the government<sup>35</sup> are all insufficient to vitiate voluntariness.

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

¶A.20 Most electronic surveillances are challenged on Fourth Amendment grounds, but Fifth and Sixth Amendment objections may also be raised.<sup>36</sup> The Fifth Amendment protection against self-incrimination, enunciated in Miranda v. Arizona<sup>37</sup> prevents an individual's statements from being used against him, if they are obtained after his freedom of

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

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

<sup>34</sup>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).

<sup>35</sup>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].

<sup>36</sup>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).

<sup>37</sup>384 U.S. 436 (1966).

movement is restrained and he does not receive the Miranda warnings. Courts, however, 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.<sup>38</sup> 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.<sup>39</sup>

¶A.21 The Sixth Amendment objection to electronic surveillance is an outgrowth of Massiah v. United States.<sup>40</sup> 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

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<sup>38</sup>United States v. Bastone, 526 F.2d 971, 977-78 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976); Koran v. United States, 469 F.2d 1071, 1072 (5th Cir. 1972).

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

<sup>40</sup>377 U.S. 201 (1964).

v. Keen,<sup>41</sup> considered a situation where recordings were made 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.<sup>42</sup>

¶A.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.<sup>43</sup> 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.<sup>44</sup>

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<sup>41</sup>508 F.2d 986 (9th Cir. 1974), cert. denied, 421 U.S. 929 (1975).

<sup>42</sup>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].

<sup>43</sup>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).

<sup>44</sup>United States v. Russell, 411 U.S. 423, 433 (1973); Hampton v. United States, 425 U.S. 484 (1976).

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 entrapment.<sup>45</sup> To defeat an entrapment defense, law enforcement agents should always caution the consenting

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44 (continued)

There is similar defense not based on the suspect's predisposition to commit a crime. In United States v. Russell 411 U.S. 423, 431-2 (1973) Justice Rehnquist stated:

...we 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, 788-9 (1976) the Ninth Circuit recognized, as it had to, the existence of the "objective approach," but found that the government's actions in particular case 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) informant was repeatedly told he would go to jail for 10 years if he did not cooperate;
- 2) informant was told not to get an attorney, or he would no longer be useful as an informer;
- 3) informant was told that his health would deteriorate in jail;
- 4) informant was promised that his friends would be "kept out of it;" and
- 5) 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.

<sup>45</sup>United States v. Greenberg, 445 F.2d 1158, 1161-62 (2d Cir. 1971).

party not to suggest a criminal act.<sup>46</sup>

D. The Limits of White

¶A.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,<sup>47</sup> 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 violated by the government surveillance, was not "justifiable." The interception occurred in an apartment of complete strangers that was entered under suspicious

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<sup>46</sup>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).

<sup>47</sup>483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974).



circumstances.<sup>48</sup> 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.<sup>49</sup> Thus, Pui Kan Lam may be limited to its unusual factual circumstances.

¶A.24 The First Circuit, however, took a more limited view of White in United States v. Padilla.<sup>50</sup> 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.<sup>51</sup> It refused to extend White to allow such a procedure. The court observed:

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<sup>48</sup>Id. at 1206.

<sup>49</sup>Id. at 1206-07.

<sup>50</sup>520 F.2d 526 (1st Cir. 1975).

<sup>51</sup>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.<sup>52</sup>

E. Miscellaneous Federal Regulations

¶A.25 Federal Communications Commission Regulation No. 132<sup>53</sup> 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.<sup>54</sup> The purposes of sections 2511(2)(c) and 2518(8)(a) of Title III<sup>55</sup> (requiring, if possible, the recording of intercepted communications) are seen as overriding the purposes of the

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<sup>52</sup>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.

<sup>53</sup>Noted in Alonzo v. State, 283 Ala. 607, 619, 219 So.2d 858, 870 (1969).

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

<sup>55</sup>18 U.S.C.A. §§2511(2)(c) and 2518(8)(a) (1970).

F.C.C. order, which otherwise would negate the congressional intent.<sup>56</sup>

¶A.26 Section 301 of the Federal Communications Act<sup>57</sup> 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.<sup>58</sup>

¶A.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.<sup>59</sup>

### III. State Law

¶A.28 Section 2515 of Title III<sup>60</sup> 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 political subdivision, if the disclosure of that information would be in violation of Title III.

<sup>56</sup>United States v. Buckhanon, 374 F. Supp. 611 (D. Minn. 1973).

<sup>57</sup>47 U.S.C.A. §301 (1962).

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

<sup>59</sup>47 C.F.R. §15.11 (March 4, 1966).

<sup>60</sup>18 U.S.C.A. §2515 (1970).

¶A.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.<sup>61</sup>

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

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

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<sup>61</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 98 (1968).

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

United States v. Infelice, 506 F.2d 1358, 1365 (7th Cir. 1974), cert. denied, 419 U.S. 1107 (1975). United States v. Testa, 548 F.2d 847, 855-6 (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); United States v. Hall, 543 F.2d 1279, 1232-3 (9th Cir. 1976) (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).

For a discussion of DiRe, Turner (note 66 *infra*), and the interrelation of state and federal law on the question of search and seizure, see Doppelt and Karaczynski, "Standards for the Suppression of Evidence Under the Supreme Court's Supervisory Power," 62 Cornell L. Rev. 364 (1977).

<sup>63</sup>United States v. Armocida, 515 F.2d 49, 52 (3d Cir. 1975), cert. denied, 423 U.S. 858 (1976).

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,<sup>64</sup> interpreted New York statutes then in force not to apply to federal law enforcement officers. The court observed:

[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. . . .<sup>65</sup>

Some states, by statute, explicitly exclude officers of federal investigative and law enforcement agencies from the coverage of their wiretap laws.<sup>66</sup>

A. New York

¶A.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" to exclude consensual surveillance:

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<sup>64</sup>348 F.2d 316 (2d Cir.), cert. denied, 382 U.S. 944 (1965).

<sup>65</sup>Id. at 323.

<sup>66</sup>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).

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). Where Federal officers are not specifically exempted under Cal. Penal Code, §631 (West 1970), the Ninth Circuit has held that conversations are nevertheless not to be excluded under 18 U.S.C. §2514(4) (exclusion of privileged communications). United States v. Feldman, 535 F.2d 1175 (9th Cir. 1976). See also United States v. Turner, 528 F.2d 143 (9th Cir. 1975), and Note 62 supra.

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 threat, 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 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 threat, by means of any instrument, device, or equipment.<sup>67</sup>

¶A.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,<sup>68</sup> 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.<sup>69</sup> Subsequent New York court decisions cite both White and Gibson for the proposition that Fourth Amendment guarantees are not

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<sup>67</sup>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).

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

<sup>69</sup>Id. at 620, 298 N.Y.S.2d at 498, 246 N.E.2d at 351.

infringed where one party voluntarily consents to the electronic surveillance of a conversation.<sup>70</sup>

B. Massachusetts

¶A.33 The Massachusetts statute governing consensual electronic 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.<sup>71</sup>

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

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<sup>70</sup>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).

<sup>71</sup>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.

<sup>72</sup>Mass. Gen. Laws Ann. ch. 272, §99(B) (7) (1975):

The term "designated offense" shall include the

¶A.34 The leading Massachusetts decision to address the legality of consensual surveillance is the 1968 case of Commonwealth v. Douglas.<sup>73</sup> 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."<sup>74</sup> 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,

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<sup>72</sup>continued.

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, subordination or 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).

<sup>73</sup>354 Mass. 212, 236 N.E.2d 865 (1968), cert. denied, 394 U.S. 960 (1969).

<sup>74</sup>Id. at 222-23, 236 N.E.2d at 872.



385 U.S. 293, 302-03) or that the conversation (as in the Rathbun case) may be overheard on an extension telephone. In the interest 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. . . .<sup>75</sup>

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

C. New Jersey

¶A.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 requires such interception.<sup>76</sup> 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

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<sup>75</sup>Id. at 221-22, 236 N.E.2d at 871-72.

<sup>76</sup>N.J. Stat. Ann. §2A:156A-4(b) (1975):

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.

there exists "a reasonable suspicion that evidence of criminal conduct will be derived from such interception."<sup>77</sup>

¶A.36 A recent New Jersey Superior Court case, State v. McCartin,<sup>78</sup> 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 conversations. 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.<sup>79</sup> Consequently, the recordings were admissible.

¶A.37 In reaching its decision, the court carefully distinguished the United States Supreme Court case of Lee v.

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<sup>77</sup>N.J. Stat. Ann. §2A:156A-4(c) (1975):

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. . . .

<sup>78</sup>135 N.J. Super. 81, 342 A.2d 591 (1975).

<sup>79</sup>Id. at 87-88, 342 A.2d at 595.

Florida.<sup>80</sup> 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.<sup>81</sup> There was neither consent of any parties to the telephone conversation, nor a regularly used telephone. Unlike Rathbun, the phone in McCartin was installed solely for the purpose of surveillance.<sup>82</sup> The New Jersey court distinguished McCartin from Lee as not being a case of a deliberate interception.<sup>83</sup>

D. Other States

¶A.38 Other states, either legislatively or judicially, have not reached terribly different conclusions in the consensual surveillance area. What follows is a consideration of several of the more important statutes and decisions which depart from the national pattern.

¶A.39 The Michigan Supreme Court was faced with a situation almost identical to that in White in People v. Beavers.<sup>84</sup> In Beavers, the defendant engaged in a drug sale with a police informer, who simultaneously transmitted the conversation to

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<sup>80</sup>392 U.S. 378 (1968).

<sup>81</sup>47 U.S.C.A. §605 (1962), as amended (Supp. 1976).

<sup>82</sup>392 U.S. at 381-82.

<sup>83</sup>135 N.J. Super. at 86, 342 A.2d at 594.

<sup>84</sup>393 Mich. 554, 227 N.W.2d 511 (1975), cert. denied, 423 U.S. 878 (1975).

police officers a short distance away. The court held inadmissible the testimony of the police officers pertaining to the overheard conversations, relying on the "search and seizure" clause of the Michigan Constitution.<sup>85</sup> While finding that a party's recording of a conversation was not a search and seizure the court, unconvinced by White, found that the transmitting of the same conversation was a search and seizure. Consequently, a search warrant is required in Michigan for the testimony or recordings of the monitoring agent to be admissible.

¶A.40 The Wisconsin Supreme Court adopted a unique analysis of the section of the Wisconsin statute allowing consensual surveillance,<sup>86</sup> the language of which is identical to §2511(2)(c) of Title III.<sup>87</sup> Both sections provide that electronic surveillance is "not unlawful" where a person acting under color of law is a party to the communication. In State ex rel. Arnold v. County Court,<sup>88</sup> the 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 held that the conversations were not admissible as evidence. The

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<sup>85</sup>Mich. Const. Art. I, §11.

<sup>86</sup>Wis. Stat. Ann. §968.31(2)(b)(1971). See also State v. Wahrow, 20 Crim L. Repr 2400 (Feb. 9, 1974) holding that Washington law permits recording but not evidentiary use of incoming police emergency calls.

<sup>87</sup>18 U.S.C.A. §2511(2)(c)(1970).

<sup>88</sup>51 Wis.2d 434, 187 N.W.2d 354 (1971).

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.<sup>89</sup>

¶A.41 Pennsylvania and Washington have restrictive statutes controlling consensual surveillance. In both states, the consent of all parties to the communication is required before electronic surveillance can be used.<sup>90</sup> Both states do allow limited exceptions. In Pennsylvania, law enforcement officers acting pursuant to a court order, may intercept a conversation when the personal safety of the officers is in jeopardy. The officers may not record any of the intercepted conversations, and any such recordings are inadmissible as evidence.<sup>91</sup> Washington allows interceptions where a court order is issued, but only in certain cases of grave danger.<sup>92</sup> The police may

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<sup>89</sup>Id. at 442-43, 187 N.W.2d at 358-59. The court felt that such conversations were privileged unless a warrant is obtained.

<sup>90</sup>Wash. Rev. Code Ann. §9.73.030(1) (Supp. 1976); Pa. Stat. Ann. tit.18, §5702 (1973), as construed in Commonwealth v. Papszycki, 442 Pa. 234, 238-39, 275 A.2d 28, 30 (1971). Pa. Stat. Ann. tit. 18, §5701 (Supp. 1976) was amended in 1974, adding a definition of "eavesdropping," and defining it to be without the knowledge of the person whose voice is being monitored or recorded. The 1974 amendments, adding the above definition and §5705, were intended to broaden the scope of the Pennsylvania statute to include "eavesdropping" as well as wiretapping. The statute, as in force prior to the amendments, was construed to apply only to wiretapping. Commonwealth v. Donnelly, 233 Pa. Super. 396, 336 A.2d 632, 639 (1975).

<sup>91</sup>Pa. Stat. Ann. tit. 18, §5705(c) (3) (Supp. 1976).

<sup>92</sup>Where national security or human life is endangered, or arson or a riot is about to be committed. Wash. Rev. Code Ann. §9.73.040 (Supp. 1976). See supra note 86.

record incoming phone calls to police and fire stations, without the consent of the caller, but only for the purpose of verifying the accuracy of emergency calls.<sup>93</sup>

¶A.42 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.<sup>94</sup>

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.<sup>95</sup>

There is a provision for "emergency situations," which allows interception without prior judicial authorization where there is insufficient time 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.<sup>96</sup>

IV. Excepts: 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).

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<sup>93</sup>Wash. Rev. Code Ann. §9.73.090(1) (Supp. 1976). See supra note 86.

<sup>94</sup>Ill. Rev. Stat. ch. 38, §14-2 (Supp. 1976).

<sup>95</sup>Ill. Rev. Stat. ch. 38, §108A (Supp. 1976).

<sup>96</sup>Ill. Rev. Stat. ch. 38, §108A-6 (Supp. 1976).

## 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

1. 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 non-telephone 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 use 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 consensu- als 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 con-

sensual 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





## APPENDIX "B" - SPECIALIZED FORMS OF ELECTRONIC SURVEILLANCE

### 1) ELECTRONIC TRACKING DEVICES

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## 1) ELECTRONIC TRACKING DEVICES

### Summary

¶B.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.

¶B.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. Merely because it is electronic, it should not be confused with wiretaps.

### I. Introduction

¶B.3 Electronic tracking devices (ETD's) 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.

¶B.4 Although visual surveillance of a motor vehicle on a public street does not constitute a search within the meaning of the Fourth Amendment,<sup>1</sup> 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.

## II. Scope of the Fourth Amendment

### A. Reasonable expectation of privacy

¶B.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.<sup>2</sup> In Katz, government agents attached an electronic listening device to the outside of a public

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<sup>1</sup>See discussion in text, infra at ¶B.32.

<sup>2</sup>389 U.S. 347 (1967).

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.<sup>3</sup> 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.<sup>4</sup> 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 willing to recognize as "reasonable."<sup>5</sup>

Since the reasonableness of an expectation of privacy will most likely influence the determination of whether the

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<sup>3</sup>Id. at 351, 353.

<sup>4</sup>Id. at 351-52.

<sup>5</sup>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, 251-52 (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.

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.

¶B.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 the booth was not the intruding eye--it was the uninvited ear."<sup>6</sup>

¶B.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

¶B.8 Traditionally, courts have held that the observation of an

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<sup>6</sup>389 U.S. at 352.

object or activity in "plain view" does not constitute a search within the Fourth Amendment. In Harris v. United States,<sup>7</sup> 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.<sup>8</sup>

¶B.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.<sup>9</sup> 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

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<sup>7</sup>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.

<sup>8</sup>United States v. Holmes, 521 F.2d 859, 866 (5th Cir. 1975), reh. granted, 525 F.2d 1364, not disturbed by equally divided court, 537 F.2d 227 (5th Cir. 1976); United States v. Martyniuk, 395 F. Supp. 42, 44 (D. Ore. 1975), rev'd in part sub nom. United States v. Hufford, 539 F.2d 32 (9th Cir. 1976), cert. denied, (1976). See discussion in text, infra, ¶¶B.34-B.44

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

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.<sup>10</sup> (emphasis added)

¶B.10 Courts also consistently have held 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,<sup>11</sup> 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."

¶B.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.<sup>12</sup> Despite these suggestions, the Supreme Court

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<sup>10</sup>403 U.S. 443, 466 (1971) [plurality opinion]. See also United States v. Holsey, 414 F.2d 458 (105h Cir. 1969).

<sup>11</sup>265 U.S. 57, 59 (1924).

<sup>12</sup>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).



in Air Pollution Variance Board of Colorado v. Western Alfalfa Corp., reaffirmed the validity of the "open fields" doctrine.<sup>13</sup> In so doing, the Court concluded that conducting an air quality test without consent or warrant<sup>14</sup> 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 was "abstract and theoretical."<sup>15</sup> 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.<sup>16</sup>

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<sup>13</sup> 416 U.S. 861, 865 (1974). Accord, United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976) (Given Katz, the Hester "Open Field" doctrine has no independent meaning, but now means under Katz that a person has no reasonable expectation of privacy with regard to open fields).

<sup>14</sup> 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.

<sup>15</sup> Id. at 865.

<sup>16</sup> Cf. In Gedko v. Heer, 406 F. Supp. 609 (W.D.Wis. 1975), the court held that police eavesdropping and observation of marijuana, conducted on defendant's fenced "open field" bearing a no trespass 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.

C. Constitutionality of various surveillance techniques augmented by mechanical aids

1. Aural amplification and recording devices

¶B.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,<sup>17</sup> 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"<sup>18</sup> 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."

. . . .

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<sup>17</sup>474 F.2d 1071 (9th Cir. 1971), cert. denied, 41<sup>st</sup> U.S. 921 (1973).

<sup>18</sup>Id. at 1076.

. . . 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."<sup>19</sup>

Thus, one of the factors that will determine the reasonableness of an expectation of privacy is the type of information obtained by the surveillance.<sup>20</sup>

¶B.13 In United States v. Dionisio,<sup>21</sup> 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

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<sup>19</sup>Id. at 1077-79 (footnotes omitted).

<sup>20</sup>See also U.S. v. McLeod, 493 F.2d 1186 (7th Cir. 1974).

<sup>21</sup>410 U.S. 1 (1972).

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.<sup>22</sup>

¶B.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

¶B.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.

¶B.16 In United States v. Lee,<sup>23</sup> 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

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<sup>22</sup>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"].

<sup>23</sup>274 U.S. 559 (1927).

prohibited by the Constitution."<sup>24</sup>

¶B.17 Despite the uncertainty caused by Katz,<sup>25</sup> 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,<sup>26</sup> the Tenth Circuit observed that any warrantless surveillance within the area immediately surrounding a dwelling house, i.e., the curtilage,

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<sup>24</sup>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 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].

<sup>25</sup>The Supreme Court, in United States v. White, 401 U.S. 745 (1971) [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.

<sup>26</sup>392 F.2d 432 (10th Cir.), cert.denied, 393 U.S.830 (1968).

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 observe the defendant operating a still within the curtilage, did not render illegal the otherwise lawful observations:<sup>27</sup>

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. 597, 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.<sup>28</sup>

¶B.18 Other decisions uniformly uphold the warrantless use of binoculars. In United States v. Minton,<sup>29</sup> for example, binocular observation of the defendant unloading illicit

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<sup>27</sup>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.

<sup>28</sup>392 F.2d at 434-35 (footnotes omitted).

<sup>29</sup>488 F.2d 37 (4th Cir. 1973), cert. denied, 416 U.S. 936 (1974).

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 a "reasonable" expectation of privacy, since he could not justifiably believe that he would not be observed unloading the illicit whiskey.<sup>30</sup>

¶B.19 The impact of Katz upon the constitutionality of binocular observation was also directly addressed by the Pennsylvania Superior Court in Commonwealth v. Hernley.<sup>31</sup> 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

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<sup>30</sup>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.

<sup>31</sup>216 Pa. Super. 177, 263 A.2d 904 (1970), cert. denied, 401 U.S. 914 (1971).

activity outside the sphere of possible governmental intrusion.

. . . .

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.<sup>32</sup>

¶19A Doubts have recently been expressed about the warrantless use of binoculars and telescopes as aids to visual surveillance.<sup>32a</sup> The court held that the use of artificial aids ("special equipment not generally in use") to observe activity in a person's home intrudes on privacy and constitutes a search.<sup>32b</sup> The court felt that if 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" and the defendant's subjective expectation of privacy is irrelevant to the test under Katz. Here, the defendant left his curtains open and himself used binoculars to check if he was under surveillance. The court refused to follow Fullbright and Hernley<sup>32c</sup> and stated:

It is inconceivable that the government can intrude so far into an individual's home that it can detect the material he is reading and still not be considered to have engaged in a search.<sup>32d</sup>

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<sup>32</sup>Id. at 181-82, 263 A.2d at 907 (footnote omitted).

<sup>32a</sup>United States v. Kim, 415 F. Supp. 1252 (D. Hawaii 1976).

<sup>32b</sup>Id. at 1256.

<sup>33c</sup>Discussed at ¶¶17, 19, supra.

<sup>33d</sup>Id.



¶19B        Kim raises legitimate concerns, but the precise and reasonable holding in the case is not as broad as the court's statements above would indicate. First, the court ruled that there is no reasonable expectation of privacy regarding shared public areas in apartments or condominiums or regarding open balconies. What the court found objectionable was the use of high powered telescopes to view the interior of the apartment. Another crucial fact relied on by the court was that the apartment, located many stories up in a high rise building, was only open to visual surveillance by telescopic means. In fact, the court suggests that the case might be different where other private parties have a plain (unaided) view of the defendant's premises, but agents forced to use visual aids because they can't get as close as the other private parties. Here, no such plain unaided view was available.<sup>32e</sup>

### 3. Airborne observation

¶B.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,<sup>33</sup> 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

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<sup>32e</sup>Id. at 1256 n.4.

<sup>33</sup>32 Cal. App.3d 535, 108 Cal. Rptr. 146 (5th Dist. 1973).

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 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.<sup>34</sup>

In Dean v. Superior Court,<sup>35</sup> 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 expectation of privacy could ascent 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,

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<sup>34</sup>Id. at 542, 108 Cal. Rptr. at 150-51 [emphasis added].

<sup>35</sup>35 Cal. App.3d 112, 110 Cal. Rptr. 585 (3d Dist. 1973).

there is not search in a 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.<sup>36</sup>

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.

¶B.21 Similarly, in People v. Superior Court ex rel. Stroud,<sup>37</sup> 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 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

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<sup>36</sup>Id. at 117-18, 110 Cal. Rptr. at 589-90 (footnotes omitted).

<sup>37</sup>37 Cal. App.3d 836, 112 Cal. Rptr. 764, \_\_\_ P.2d \_\_\_ (2d Dist. 1974).

identifiable as an automobile hood in a residential yard hardly can be regarded as hidden from such a view.<sup>38</sup>

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

¶B.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.<sup>39</sup>

¶B.23 Despite the uncertainty caused by Katz, lower federal courts continue to hold that flashlight illumination does not render an otherwise legal search violative of the Fourth Amendment. In United States v. Hood,<sup>40</sup> 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,<sup>41</sup> the

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<sup>38</sup>Id. at 839, 112 Cal. Rptr. at 765.

<sup>39</sup>See discussion in text, supra, at ¶B.16.

<sup>40</sup>493 F.2d 677, 680 (9th Cir.), cert. denied, 419 U.S. 852 (1974).

<sup>41</sup>379 F. Supp. 1287, 1292, n.3 (W.D. Mo. 1974).

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.

Recent cases continue to uphold the warrantless use of flashlights and other lights.<sup>41a</sup>

#### 5. Mail covers

¶B.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.<sup>42</sup> This means of visual surveillance enables the police to learn the names, addresses, or approximate geographical location of the people corresponding with a person.

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<sup>41a</sup>United States v. Coplen, 541 F.2d 211 (9th Cir. 1976), cert. denied (1976) (agent shined flashlight into the back of private plane parked in hangar area); 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, 386 N.Y.S.2d 408 (App. Div. 1st Dep't 1976) (shining flashlight into front seat of car is not a search); People v. Wesley, 387 N.Y.S.2d 34 (App. Term, Sup. Ct. 1976) (fire chief's shining ultraviolet light on defendant's hands to check for type of paste placed on fire alarm box handles was not a search).

<sup>42</sup>United States v. Balistrieri, 403 F.2d 472 (7th Cir. 1968), cert. denied, 402 U.S. 953 (1971).

¶B.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,<sup>43</sup> 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.<sup>44</sup>

¶B.26 Other circuit courts similarly uphold the constitutionality of mail covers.<sup>45</sup> In addition, 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.

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<sup>43</sup>386 F.2d 132, 139 (9th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

<sup>44</sup>Id. at 139.

<sup>45</sup>United States v. Leonard, 524 F.2d 1076 (2d Cir. 1975), cert. denied, 425 U.S. 958 (1976); United States v. Van Leeuwen, 397 U.S. 249 (1970); Canada v. United States, 354 F.2d 849,

¶26A A recent case, United States v. Choate,<sup>45a</sup> raises questions about the legality of warrantless mail covers. The court suppressed all evidence derived from a mail cover on the defendant. In an opinion by Ferguson, District Judge, two independent grounds were given for suppression: (1) The mail cover failed to comply with the governing postal regulation and so was not legally authorized; (2) Defendant's Fourth Amendment rights were violated where the government's only stated basis for the cover was that agents "felt" that the defendant was smuggling narcotics.

¶26B The postal regulation governing mail covers states in relevant part:

(e) (1) All Postal Inspectors in Charge . . . may order mail covers within their districts under the following circumstances: . . . .

(ii) Where written request is received from any law enforcement agency of the Federal, State, or local governments, wherein the requesting authority stipulates and specifies the reasonable grounds that exist which demonstrate the mail cover would . . . assist in obtaining information concerning the commission or attempted commission of a crime.<sup>45b</sup>

Focusing on the italicized language above, the court found insufficient the following statement in a letter of request from government narcotics agents:

The above named subject [Choate] is currently under investigation by this office for the

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45 (continued)

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.

<sup>45a</sup> 422 F. Supp. 261 (C.D. Cal. 1976).

<sup>45b</sup> 39 C.F.R. §233.2(3)(1)(ii) (1975) (emphasis added).

suspected smuggling of large quantities of narcotics into the United States. CHOATE is currently organizing a large narcotic smuggling ring with the primary source located in South America. It is felt that CHOATE and the source in South America correspond by mail. Return addresses would be of aid in identifying the source in South America and other members of the smuggling ring . . . .

CHOATE is not under indictment as a result of any investigation conducted by this office nor does this office have any knowledge of any indictments pending against CHOATE.<sup>45c</sup>

¶26C The court's argument can be summarized as follows. A bare statement from government agents that they "feel" that the defendant is involved in smuggling and corresponds with a source in South America does not constitute a specification of reasonable grounds that the mail cover would reveal information about the commission of a crime.<sup>45d</sup> The "reasonable grounds" provision was added to postal regulations by congressional investigations concerning the invasion of privacy by government agencies. Abuse of mail covers was a topic discussed in hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary. Senator Edward Long, Chairman of the Subcommittee, had introduced a bill which would have barred warrantless use of mail covers, but did not press the measure in light of the amendment to the regulation.<sup>45e</sup> To allow government agents to obtain mail covers without a proper specification of reasonable grounds would rob the amendment

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<sup>45c</sup>Choate, supra at 264-65 note 5.

<sup>45d</sup>Id. at 265.

<sup>45e</sup>Id.



of all significance and run counter to congressional intent. The mail cover on the defendant was not legally authorized. Consequently, evidence derived from the cover must be suppressed.

¶26D The argument summarized above, which was actually presented by the court in Choate, can draw support from the Supreme Court's treatment of provisions of the Federal wiretap law.<sup>45f</sup> The Court laid down a two-question test for dealing with suppression problems regarding the wiretap law. First question: Does the statutory provision violated "directly and substantially" implement the legislative scheme to prevent abuse of wiretaps?<sup>45g</sup> If not, then suppression is never an appropriate remedy. If the answer is yes, then the second question must be asked: Has the purpose of the provision been satisfied despite the violation?<sup>45h</sup> If the answer is yes, then suppression is still inappropriate. If not, then suppression is appropriate.<sup>45i</sup> If the postal regulation amendment is viewed as part of a legislative scheme to prevent the abuse of mail covers, the analogy is clear.

¶26E: Is the argument presented in Choate sound? The question is difficult, but the answer is probably no. There

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<sup>45f</sup>18 U.S.C. §§2510-20 (1971).

<sup>45g</sup>United States v. Giordano, 416 U.S. 505, 527 (1974).

<sup>45h</sup>United States v. Chavez, 416 U.S. 562, 574-75 (1974).

<sup>45i</sup>In United States v. Donovan, 97 S.Ct. 658, 673-4 note 26 (1977), the Supreme Court left open the question of whether any intentional government violation of a statutory provision would warrant suppression.

is no indication that the government intentionally sought to bypass the "reasonable ground" provision. If there was a violation of the regulation, it was either inadvertent or due to an inadequate understanding of the regulation. That the letter dealt with the possibility that Choate might be under indictment tends to show good faith on the government's part regarding constitutionally sensitive matters. Second, it is not clear that the regulation was violated. The government letter stated clearly the nature of the crime under investigation and the general situation. Why could this not count as a specification of reasonable grounds? The only thing lacking is a disclosure to postal authorities of investigative leads and information already uncovered. The danger of disclosing such matters to postal authorities regarding an ongoing investigation is obvious. Such disclosure would be necessary to meet the constitutional requirement relating to applications for search warrants, that is, that the government must not merely assert that it has probable cause, but must introduce concrete facts from which a "neutral magistrate" could draw his own conclusion.<sup>45j</sup> Yet there is nothing in the 1965 amendment to indicate that Congress meant to apply Fourth Amendment standards to mail cover authorizations. The Postal Service does not interpret its own regulation that way.<sup>45k</sup> It would be implausible to think that Congress and the Postal Service so completely misunderstood each

<sup>45j</sup>Spinelli v. United States, 393 U.S. 410 (1969).

<sup>45k</sup>United States v. Leonard, 524 F.2d 1076, 1088 (2d Cir. 1975).

other. That Senator Long introduced a bill which would have applied Fourth Amendment standards, yet finally accepted the amendment, may indicate only that he got the best compromise he could.

¶26F It is implausible to think that the "reasonable grounds" provision was meant to incorporate something like a Spinelli requirement. That would require postal officials to play the role of judged passing on questions of probable cause. Did Congress assume that postal officials have adequate knowledge of the criminal law or would act like "neutral magistrates?" If that is the effect Congress wanted, why did it not simply require judicial approval for mail covers?

¶26G There is also no indication that Congress intended that suppression would be required for violation of the regulation. The amendment says nothing about suppression. The amendment says nothing about suppression. The most plausible reading of the amendment is that it represents an inter-agency check on the use of mail covers designed to insure that proper records of requests were made and that the power of authorization was limited to responsible officials.

¶26H Finally, even assuming, implausibly, that Congress intended suppression as a remedy for violations of the amendment, the government may well have met the test laid down by the Supreme Court in Giordano and Chavez. Assume that the "reasonable grounds" provision was central to the legislative scheme. Since the government violation was not

intentional, one may ask the second Giordano question: Was the purpose of the "reasonable grounds" provision satisfied despite the violation? Was not the purpose of the provision met if the government in fact had reasonable grounds for requesting the mail cover? The letter the government actually sent does constitute a record which shows the general contours of suspected criminal activity. Were a question raised about the propriety of that request, the government would have to show that, prior to making the request, it had reasonable grounds relating to that particular criminal activity. In other words, the letter serves to make specific what the government would have to show and provides Congress and the courts with a record. Since postal officials cannot reasonably be expected to make quasi-judicial evaluations (in light of Spinelli-type requirements) or government mail cover requests, the government's having reasonable grounds and being able to show that it had them should satisfy any purpose within effective reach of the regulation.

¶26I        This same argument tends to show that the government did not violate the regulation at all. If making a full disclosure of the particular facts constituting reasonable grounds could serve no purpose under the regulation, there is little reason to suppose that it requires such disclosure. The court in Choate did not even consider the question of whether the government in fact had reasonable grounds for requesting the mail cover. That the government agent who wrote the letter the words "it is felt that" does

not show that reasonable grounds did not exist. Government statements and affidavits used to initiate investigative procedures should be judged in a commonsense and realistic fashion.<sup>45l</sup>

¶26J The court in Choate also based its suppression decision on constitutional grounds: The mail cover violated defendant's "reasonable expectation of privacy" under Katz v. United States.<sup>45m</sup> The court rejects prior prior cases (discussed and cited at ¶24-5 supra) upholding the warrantless use of mail covers because they were decided without the benefit of the Katz holding or because their application of Katz was inadequate.<sup>45n</sup>

¶26K The court does try to distinguish Leonard on the ground that in that case the mail cover was on incoming international mail. In Leonard, the Second Circuit, per Judge Friendly, thought that there was no reasonable expectation of privacy with respect to the outside of international mail especially since such mail is subject to customs inspection. In Choate, although the government request was predicated on tracing the defendant's narcotics source in South America, the incriminating evidence which led to his indictment for tax evasion derived from interstate mail.<sup>45o</sup> The court then states that general searches are

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<sup>45l</sup>United States v. Ventresca, 380 U.S. 102, 108 (1965); United States v. Harris, 403 U.S. 573, 579 (1971).

<sup>45m</sup>389 U.S. 347 (1967).

<sup>45n</sup>Choate, supra at 267.

<sup>45o</sup>Choate, supra at 268 note 12.

regarded as inherently unreasonable.<sup>45p</sup> This, of course, begs the question at issue: Are mail covers searches at all within the meaning of the Fourth Amendment?

¶26L The court refers to a recent case which held that opening first class international mail was a search and required a warrant.<sup>45q</sup> Presumably, the Choate court referred to Ramsey to show that the law may be changing even with regard to mail covers related to customs inspections. In Ramsey, the decision was squarely based on the ground tht the opening of first class mail without a warrant would routinely reveal the contents of private communications to government authorities. This brings First Amendment rights into play in that such practice might tend to chill the exercise of those rights even though the government procedure was not to read the mail. No overriding government interest was shown to justify the possible interference with the First Amendment freedoms especially since requiring a warrant for opening incoming mail would not unduly hinder the government's attempts to detect contraband. The court in Ramsey listed a number of procedures that could be employed without a warrant in order to establish the probable cause necessary to secure a warrant: noting the size of the letter, the country of origin, unusual or suspicious address or return address, an unusual number of letters sent from or to the same address in a short period of time; x-ray examination;

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<sup>45p</sup>Id.

<sup>45q</sup>United States v. Ramsey, 538 F.2d 415 (D.C. Cir. 1976), cert. granted, 97 S.Ct. 56 (1976).

feeling the letter from the outside; sniffing of the letter by trained dogs.<sup>45r</sup> Obviously, the D.C. Circuit did not feel that mail covers required a warrant.

¶26M In Leonard, one fact relied on by the court in unholding mail covers was the serious problem caused by the use of foreign bank accounts to evade income taxes. In light of the government's legitimate interest in preventing tax evasion, Judge Friendly found that the mail cover was reasonable under the circumstances.<sup>45s</sup> The Choate court, however, found that the government had no interest which would sustain the mail cover on the defendant.<sup>45t</sup> It is hard to understand how prevention of tax evasion may justify a warrantless mail cover, but prevention of the large-scale smuggling of illegal narcotics will not.

¶26N The Choate court attempts to give a direct constitutional argument that warrantless mail covers violate a person's reasonable expectation of privacy. The court cited United States v. United States District Court,<sup>45u</sup> for the propositions that (1) the dangers of administratively ordered searches in the absence of judicial warrant have long been recognized, and (2) that those charged with investigative and prosecutorial duty should not be the sole judge

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<sup>45r</sup> Id. at 421 note 8.

<sup>45s</sup> Leonard, supra at 1087.

<sup>45t</sup> Choate, supra at 270.

<sup>45u</sup> 407 U.S. 297 (1972).

of when to utilize constitutionally sensitive means in pursuing their tasks.<sup>45v</sup> Although true, both these contentions beg crucial questions in the present context. Are mail covers "searches" and are they "constitutionally sensitive means"?

¶260 Does the Choate court have a substantive argument that warrantless mail covers violate one's reasonable expectation of privacy? It does.

It cannot be denied that a reasonable person's expectation of privacy with regard to return addresses on mail is a somewhat limited one. He understands that this information is necessary to postal operations and will be examined and utilized in order to route items when the name and address of the addressee is incorrect, absent, or illegible. But the disclosure mandated by these circumstances is not broad or for all purposes: a reasonable person still expects (1) that the information contained in the return address will only be used for postal purposes, and (2) that it will be utilized only in a mechanical fashion without any records being kept. The recording and disclosure to non-postal authorities for non-postal purposes that results from a mail cover extends far beyond these narrow bounds.<sup>45w</sup>

This argument is not sound, legally or otherwise. The court is clearly interpreting the phrase 'reasonable expectation of privacy' to mean that a reasonable person could rationally believe or predict that the relevant information, here return addresses, will not in fact become known to law enforcement agencies. Precisely the same thing can be said, a fortiori, about a person's bank records (checks and deposit slips). Given the relevant probabilities, a person can rationally believe that such information will not be made

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<sup>45v</sup> Choate, supra at 270.

<sup>45w</sup> Id.



known to law enforcement agencies. But this cannot be, under current law, what is meant by a 'reasonable expectation of privacy.' The Supreme Court has flatly held that a person has no legitimate expectation of privacy regarding bank records because they are not "private papers" or "confidential communications."<sup>45x</sup> Return address inscriptions on the outside of envelopes are in no sense confidential communications.

¶26P        What the reasonable expectation or privacy test under Katz means is not a function of what a person expects will remain undisclosed, though this is a factor to take into consideration in applying the test. Rather, the test turns on what a person may reasonably expect to have kept private, i.e., turns on what ought to be kept private. The test implies a balancing between the constitutional interest in keeping private information of a certain kind and quality and legitimate government interests in controlling crime. When the balance is tipped in favor of the first interest, then by definition, one has a reasonable expectation of privacy regarding the kind of information in question. Given the Supreme Court's holding in Miller, there is no constitutional ground for the view that mail covers violate reasonable expectations of privacy.<sup>45y</sup>

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<sup>45x</sup>United States v. Miller, 425 U.S. 435 (1976).

<sup>45y</sup>Cf. Fisher v. United States, 425 U.S. 391 (1976).

D. Unreasonable searches of automobiles: A significant constitutional distinction

¶B.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,<sup>46</sup> 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 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.<sup>47</sup>

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

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<sup>46</sup>267 U.S. 132 (1925).

<sup>47</sup>Id. at 153.

subject all persons lawfully using the highways to the inconvenience and indignity of such a search . . .<sup>48</sup>

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.<sup>49</sup>

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

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<sup>48</sup>267 U.S. at 153-54.

<sup>49</sup>267 U.S. at 155-56.

<sup>50</sup>388 U.S. 160 (1949).

<sup>51</sup>391 U.S. 216, 221 (1968).

<sup>52</sup>399 U.S. 42 (1970).

a warrant is obtained. The same consequences may not follow where there is unforeseeable cause to search a house.<sup>53</sup>

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.<sup>54</sup>

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.<sup>55</sup>

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.<sup>56</sup>

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.

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<sup>53</sup>Id. at 52; accord, Texas v. White, 423 U.S. 67, (1975) (per curiam), reh. denied, 423 U.S. 1081 (1976)

<sup>54</sup>Id. at 52, n.10.

<sup>55</sup>Id. at 51.

<sup>56</sup>Id. at 51, n.9.

even though the car could be effectively immobilized until a search warrant was procured.

¶B.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).

. . . .

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.<sup>57</sup>

¶B.30 Finally the Supreme Court, in Cardwell v. Lewis,<sup>58</sup> 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 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.<sup>59</sup>

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<sup>57</sup>403 U.S. at 460-62 (footnote omitted).

<sup>58</sup>417 U.S. 583 (1974) [plurality opinion].

<sup>59</sup>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.), (continues)

E. Suggested Fourth Amendment analysis of electronic tracking devices: A summary

¶B.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.<sup>60</sup> 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 considered an unreasonable search within the scope of the Fourth Amendment.

¶B.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.<sup>61</sup> Society is generally not willing to subordinate the public interest in law enforcement to the individual's subjective expectation

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<sup>59</sup>(continued) 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. Accord, United States v. Sherriff, 546 F.2d 604 (5th Cir. 1977).

<sup>60</sup>Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>61</sup>Id. at 351-52. Cf. Johnson v. United States, 367 A.2d 1316 (D.C. Ct. App. 1977) (decision to place a car under surveillance does not invoke Fourth Amendment standards; there is no invasion of constitutionally protected privacy in observing what is visible for all to see).

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.

¶B.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.<sup>62</sup> Electronic tracking 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 will 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 would not be deemed a search within the Fourth Amendment. Such tracking devices are no more intrusive than the use of high powered

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<sup>62</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968):

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.



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.<sup>63</sup>

### III. Recent Decisions Analyzing Electronic Tracking Devices

¶B.34 Several 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, initially held that the warrantless use of a "bumper beeper" violates the Fourth Amendment; a rehearing en banc resulted in the the decision being undisturbed by a divided court.

¶B.35 In Holmes, state police attached an electronic

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<sup>63</sup>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).

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.

¶B.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. . . ." <sup>64</sup>

¶B.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, <sup>65</sup> 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

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<sup>64</sup>521 F.2d at 864.

<sup>65</sup>526 F.2d 859 (5th Cir. 1976), cert. denied (1976).

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."<sup>66</sup> 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."<sup>67</sup>

¶B.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 the second "beeper" malfunctioned, the agents obtained another court order to repair or replace the device. The defendant,

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<sup>66</sup>Id. at 862-63.

<sup>67</sup>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.

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]." <sup>68</sup> 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. <sup>69</sup> Nevertheless, it concluded that a person could entertain a reasonable expectation of privacy concerning his movement and location:

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<sup>68</sup>395 F. Supp. at 44.

<sup>69</sup>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.

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.<sup>70</sup>

¶B.39 The court identified three significant factors:

1. the Fourth Amendment's protection against unreasonable searches and seizures should be liberally construed;<sup>71</sup>
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
3. the absence of any "exigent circumstances" that would have prevented the agents from obtaining a search warrant.<sup>72</sup>

¶B.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 airborne 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 better protected if one hundred skilled officers trailed him,

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<sup>70</sup>Id.

<sup>71</sup>Citing Boyd v. United States, 116 U.S. 616 (1886).

<sup>72</sup>395 F. Supp. at 43.

instead of one agent equipped with electronic tracking equipment.

¶B.41 Both Holmes and Martyniuk recognize that unaided visual surveillance is not proscribed by the Fourth Amendment.<sup>73</sup> 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.

¶B.42 The Holmes decision is partially attributable to its reliance upon the "trespass doctrine." Instead of comparing the use of an electronic tracking device 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.<sup>73a</sup>

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.

¶B.43 Holmes's equating the electronic tracking device with an unauthorized wiretap was rejected in Martyniuk. An electronic tracking device conveys information comparable

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<sup>73</sup>521 F.2d at 866; 395 F. Supp. at 44.

<sup>73a</sup>521 F.2d at 865 note 11.

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?

¶B.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 cases 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 traditionally accorded vehicles and other mobile objects. Consequently, it is suggested that a more complete analysis might have yielded different results.<sup>74</sup>

#### IV. Court Order to Install Electronic Tracking Devices

¶B.45 These materials argue that the use of electronic tracking devices does not constitute a search within the meaning of the Fourth Amendment. There should be no requirement therefore, that law enforcement officials obtain a warrant,

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<sup>74</sup>For other recent cases, see United States v. Frazier, 19 Crim. L. Repr. 2372 (8th July 16, 1976) (upheld as emergency); United States v. Hufford, 19 Crim. L. Repr. 2446 (9th July 26, 1976) (upheld no expectation of privacy); United States v. Emery, 20 Crim. L. Repr. 2044 (1st Cir. Sept. 24, 1976) (upheld).

for example, under Rule 41 of the Federal Rules of Criminal Procedure.<sup>75</sup> An investigating officer may, however, secure a judicial order<sup>76</sup> sanctioning the use of a "bumper beeper," authorized under Rule 57(b).<sup>77</sup> 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.<sup>78</sup>

¶B.46 If the analysis of these materials were 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.

¶B.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 might then hold them to that

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<sup>75</sup>Fed. R. Crim. P. 41.

<sup>76</sup>See Osborn v. United States, 385 U.S. 323 (1966).

<sup>77</sup>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.

<sup>78</sup>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. Ferrigan, 459 F.2d 81 (6th Cir. 1972); Hill v. Rowland, 474 F.2d 1374 (4th Cir. 1973).



policy.<sup>79</sup> 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.

¶B.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 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

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<sup>79</sup>In United States v. Martyniuk, 395 F. Supp. at 44, 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.

jurisdiction is comparable to police officers chasing a fleeing felon out of the jurisdiction of their commission as officers.<sup>80</sup> 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.

¶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 in Fourth Amendment terms.<sup>80a</sup> Others reject the view that mere exterior attachment constitutes a "search."<sup>80b</sup> These courts rely on the Supreme Court's holding in Cardwell v. Lewis that a warrantless examination of a car's exterior was not unreasonable under the Fourth Amendment.<sup>80c</sup> There is general agreement, however, that placing a beeper inside a vehicle or opening a closed package over which the suspect has constructive or actual possession constitutes a "search."<sup>80d</sup>

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<sup>80</sup>Cf. United States v. Bishop, 530 F.2d 1156 (5th Cir. (1976), cert. denied (1976).

<sup>80a</sup>Holmes, supra at 865-6; United States v. Bobisink, 415 F. Supp. 1334, 1336 (D. Mass. 1976).

<sup>80b</sup>United States v. Pretzinger, 542 F.2d 517, 520 (9th Cir. 1976); United States v. Frazier, 538 F.2d 1322, 1326 (8th Cir. 1976).

<sup>80c</sup>417 U.S. 583, 592 (1974) (discussed supra at ¶30).

<sup>80d</sup>United States v. Hufford, 539 F.2d 32, 34 (9th Cir. 1976); United States v. Emery, 541 F.2d 887, 888 (1st Cir. 1976); United States v. French, 414 F. Supp. 300, 803 (W.D. Okla. 1976).

¶48B Warrantless use of beepers has been sustained by applying traditional exceptions to the Fourth Amendment warrant requirement. Where a package has been opened by customs agents and a beeper inserted, the "border search" exception has excused a preinstallation warrant.<sup>80e</sup> Where a beeper has been placed into a container or object before its delivery to the suspect, the consent exception has been applied.<sup>80f</sup> Warrantless installation has also been upheld where exigent circumstances foreclosed the opportunity to secure prior judicial approval.<sup>80g</sup>

¶48C In Hufford,<sup>80h</sup> the court upheld warrantless monitoring of beepers attached to cars on the ground that one has no reasonable expectation of privacy while driving on public roads. The court in Frazier,<sup>80i</sup> reached the same conclusion. The court in Hufford also found persuasive the argument (discussed supra at ¶32, 40) that ETD's merely serve to augment visual surveillance.

¶48D There is also a divergence of opinion regarding the installation and monitoring of beepers in packages and other items. On the one hand, it is asserted that a citizen

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<sup>80e</sup>Emery, supra at 888-89; French, supra at 803.

<sup>80f</sup>Hufford, supra at 34. Contra, Bobisink, supra at 1338 note 5.

<sup>80g</sup>French, supra at 804; Frazier, supra at 1324-25.

<sup>80h</sup>Supra at 33-34.

<sup>80i</sup>Supra at 1324. Cf. Johnson v. United States, 367 A.2d 1316 (D.C. Ct. App. 1977).

may reasonably assume that what he buys will not contain an "electronic spy,"<sup>80j</sup> and that a seller of an item cannot waive the purchaser's rights by consenting to the beeper's installation.<sup>80k</sup> In response, other courts have asserted that a purchaser or recipient of contraband,<sup>80l</sup> or items used in criminal activity,<sup>80m</sup> does not have the right to expect that his activities will remain concealed from electronic detection.<sup>80n</sup>

¶48E A recent case involved use of a device somewhat different from a beeper.<sup>80o</sup> The device, known as a transponder or "blipper," generates a special coded radar signal which appears on radar screens as a "blip" distinctly different from ordinary radar blips. One very useful property of the device is that its signal will show up on a radar screen even when the plane carrying it is flying below radar cover. In Smith, police and DEA agents persuaded the owner of the plane to install the device without the defendant's knowledge. This occurred after the plane had

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<sup>80j</sup>Bobisink, supra at 1338.

<sup>80k</sup>Id. note 5.

<sup>80l</sup>French, supra at 803-04.

<sup>80m</sup>United States v. Perez, 536 F.2d 859, 863 (5th Cir. 1976).

<sup>80n</sup>For a fuller discussion of these cases see generally, Carr, "Electronic Beepers," Search and Seizure Law Report, vol. 4, no. 4, 1-4 (April 1977). These comments are based directly on that discussion.

<sup>80o</sup>People v. Smith, 21 Crim. L. Rptr. 2078 (Cal. Ct. App. Feb. 28, 1977).

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 did unlock the aircraft and install the transponder for the police, the fact remains that the airplane was rented to the defendant Smith and was under his possession and control when the transponder was installed. Clearly the owner had no authority to install the device for the police. Moreover, since the officers were aware of the rental agreement, the good faith mistake rule cannot apply here.<sup>80p</sup>

¶48F One useful approach in analyzing Fourth Amendment problems regarding beepers is that taken above in paragraphs 26O and 26P. For example, consider the monitoring of beepers attached to a car. The beeper does indirectly give agents information about part of what the driver of the car is thinking. As one monitors the progress of a car over public roads, the inference is inescapable that the driver is thinking things like: "turn left here," "stop here," "get on to highway 56 here," etc. This is the only kind of information which the beeper by itself will give. This sort of information represents a very limited form of access to the thoughts of the individual and is quite far from the "confidential communications" referred to by the Supreme Court in Miller. If so, this would seem to be a clear case in which the Katz's balance tips in favor of legitimate law enforcement interests, especially since unaided visual surveillance on public roads has not traditionally been subject to the full panoply of Fourth Amendment protections.

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<sup>80p</sup>Id. at 2078-79.

## 2) PEN REGISTERS AND IN-PROGRESS TRACES

### Summary

¶B.49 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 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 authority 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 co-operation), 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

¶B.50 A pen register logs numbers dialed from a

particular telephone.<sup>81</sup> 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.<sup>82</sup> 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,<sup>83</sup> to check for a defective dial,<sup>84</sup> to check for overbilling,<sup>85</sup> or to document wire fraud violations.<sup>86</sup> 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

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<sup>81</sup>United States v. Giordano, 416 U.S. 505, 549 n.1 (1974) (Powell, J., concurring in part, dissenting in part).

<sup>82</sup>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].

<sup>83</sup>Schmukler v. Ohio-Bell Tel. Co., 66 Ohio L. Abs. 213, 116 N.E.2d 819 (Common Pleas, Cuyahoga Co. 1953).

<sup>84</sup>United States v. Dote, 371 F.2d 176, 181 (7th Cir. 1966).

<sup>85</sup>Id.

<sup>86</sup>United States v. Clegg, 509 F.2d 605 (5th Cir. 1975) [use of "blue box"].

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.<sup>87</sup> Questions concerning the pen register are answered in different ways by different courts or are often not answered at all.

¶B.51 An in-progress trace complements the pen register and identifies the numbers from which incoming calls originate.<sup>88</sup> The trace is often used in tracking down the source of annoying or obscene telephone calls.<sup>89</sup> The device, however, like the pen register, is also useful in electronic surveillance.<sup>90</sup> Litigation over the use of in-progress traces, unlike the pen register, is scant. Reflecting the similarity of the intrusions, treatment of these devices will probably be similar.

## II. Is a Court Order Necessary to Authorize a Pen Register?

### A. Federal Constitutional Constraints

¶B.52 The relation of the pen register to search and

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<sup>87</sup>National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, Report on Electronic Surveillance 120 (1976).

<sup>88</sup>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).

<sup>89</sup>Id.: see also State v. Vogt, 130 N.J. Super. 465, 327 A.2d 672 (App. Div. 1974).

<sup>90</sup>See In re In-Progress Trace, 138 N.J. Super, 404, 351 A.2d 356 (App. Div. 1975).



seizure within the Fourth Amendment is unsettled in the courts.<sup>91</sup> For the most part, courts only state that the pen register is not a general search and seizure.<sup>92</sup>

¶B.53 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.

¶B.54 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.<sup>93</sup> By analogy to the recent cases involving bank records,<sup>94</sup> the pen register tapes appear to be the property of the telephone company and not of the subscriber. A typical defendant, therefore, will be without standing to complain.<sup>95</sup>

¶B.55 Second, the Fourth Amendment protects the information that a reasonable and prudent man would consider

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<sup>91</sup>See United States v. Giordano, 416 U.S. 505, 554 n.4 (1974) [dissenting opinion of four Justices].

<sup>92</sup>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, 421 (D. Fla. 1972).

<sup>93</sup>See Wong Sun v. United States, 371 U.S. 471 (1963).

<sup>94</sup>United States v. Miller, 425 U.S. 435 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

<sup>95</sup>But cf. Mancusi v. Deforte, 392 U.S. 364 (1968).

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.<sup>96</sup>

¶B.56 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 system, will remain a secret from the telephone company.<sup>97</sup> Once this is accepted, it is clear that based on the 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

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<sup>96</sup>United States v. White, 401 U.S. 745 (1971) [plurality opinion]; Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J. concurring).

<sup>97</sup>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); DiPiazza v. United States, 415 F.2d 99, 103-04 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971).

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.<sup>98</sup>

Thus, under a "shared privacy analysis," if the telephone company reveals the information, with or without legal process, the subscriber cannot complain.<sup>99</sup>

¶B.57 It is also well settled that toll call records are not within the scope of reasonable expectation of privacy.<sup>100</sup> 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.

¶B.58 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

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<sup>98</sup>United States v. Miller, 425 U.S. 435, 436 (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].

<sup>99</sup>In United States v. Matlock, 415 U.S. 164, 171, note 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).

<sup>100</sup>See Baxter and DiPiazza cases in note 97 supra.

when no substantial delay in delivery is involved.<sup>101</sup> 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.

¶B.59 Other commonly encountered constitutional objections are not present with respect to the pen register. There is no violation of the Fifth Amendment privilege against compulsory self-incrimination because there is no compulsion upon a subscriber to dial.<sup>102</sup> 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 be 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.<sup>103</sup> Moreover, in a criminal law

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<sup>101</sup>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) cert. denied, 426 U.S. 922 (1976) [mechanically assisted mail cover upheld].

<sup>102</sup>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, 425 U.S. 391 (1976); Hoffa v. United States, 385 U.S. 293, 303-04 (1966).

<sup>103</sup>See Laird v. Tatum, 408 U.S. 1 (1971); Donohue v. Duling, 330 F. Supp. 308 (E.D. Va. 1971), aff'd, 465 F.2d 196 (4th Cir. 1972).

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

¶B.60 It is well-settled that Title III<sup>104</sup> is not applicable to pen registers.<sup>105</sup> 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."<sup>106</sup> 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."<sup>107</sup>

¶B.61 A pen register used concurrently with a wiretap, however, is subject to Title III.<sup>108</sup> In this situation

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<sup>104</sup>Public Law 90-351, 82 Stat. 197, 18 U.S.C. §§2510-20 (1970).

<sup>105</sup>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).

<sup>106</sup>18 U.S.C. §2510(4) (1970).

<sup>107</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 90 (1968).

<sup>108</sup>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); (continues)



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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 order for the latter is necessary."<sup>109</sup> 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

¶B.62 In essence, section 605<sup>110</sup> 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:

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<sup>108</sup>(continued) 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.

<sup>109</sup>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)

<sup>110</sup>47 U.S.C. §605 (1970).



1. Supreme Court---United States v. Giordano:<sup>111</sup>  
"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 goes 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.<sup>112</sup>

2. Third Circuit--United States v. Falcone:<sup>113</sup> pen registers are not within section 605 after 1968.

3. Fifth Circuit--United States v. Clegg:<sup>114</sup> pen register probably not within section 605; United States v. Lanza,<sup>115</sup> (dictum): pen register probably not within section 605 after 1968.

4. Sixth Circuit--United States v. Caplan:<sup>116</sup> 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:<sup>117</sup> 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:<sup>118</sup> pen register violates section 605; search warrant is sufficient "lawful authority." See also Korman v. United

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<sup>111</sup>416 U.S. 505, 553-54 (1974) (dissenting opinion).

<sup>112</sup>Id. at 554 n.4.

<sup>113</sup>505 F.2d 478 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

<sup>114</sup>509 F.2d 605, 611 (5th Cir. 1975).

<sup>115</sup>341 F. Supp. 405, 422 (M.D. Fla. 1972) [dictum].

<sup>116</sup>255 F. Supp. 805 (E.D. Mich. 1966).

<sup>117</sup>415 F.2d 99 (6th Cir. 1969), cert. denied, 402 U.S. 949 (1971).

<sup>118</sup>502 F.2d 938 (7th Cir. 1974).

States; <sup>119</sup> United States v. Dote. <sup>120</sup>

6. Eighth Circuit--United States v. Brick: <sup>121</sup> pen register not controlled by section 605.

7. Ninth Circuit--United States v. King: <sup>122</sup> 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 sufficient for disclosure of toll records under section 605.)

8. State Law-- (a) Commonwealth v. Coviello: <sup>123</sup> pen register violates section 605 without warrant; (b) People v. Fusco: <sup>124</sup> pen register along with wiretap permissible; (c) Commonwealth v. Stehley: <sup>125</sup> use of pen register not prohibited by state wiretap statute; (d) Bixler v. Hille: <sup>126</sup> (same).

¶B.63 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.

¶B.64 The pen register, unlike conventional electronic surveillance, does not divulge the existence of a communication. It records only a subscriber's efforts to

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<sup>119</sup>486 F.2d 926 (7th Cir. 1973).

<sup>120</sup>371 F.2d 176 (7th Cir. 1966). Note that Dote was overruled in part by Korman, supra note 119 at 931-32 n.11.

<sup>121</sup>502 F.2d 219, 224 (8th Cir. 1974).

<sup>122</sup>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).

<sup>123</sup>362 Mass. 722, 291 N.E.2d 416 (1973).

<sup>124</sup>75 Misc.2d 981, 348 N.Y.S.2d 858 (Nassau Co. Ct.1973).

<sup>125</sup>235 Pa. Super. 150, 338 A.2d 686 (1975).

<sup>126</sup>80 Wash.2d 668, 497 P.2d 594 (1972).

establish a communication.<sup>127</sup> Its use should not, therefore, be governed by section 605, which limits the interception of "communications."

¶B.65 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]....<sup>128</sup>

Thus, as amended in 1968, the sole subject of section 605 is radio communication.

¶B.66 Finally, the section regulates 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."<sup>129</sup> It should not, therefore, include a telephone company employee acting as an agent of the government.

¶B.67 Even assuming that the pen register is within

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<sup>127</sup>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. Ref. 1028, 1039-41 (1975); In re In-Progress Trace, 138 N.J. Super. 404, 412, 351 A.2d 356, 364 (App. Div. 1975).

<sup>128</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 107 (1968). See also United States v. Hall, 488 F.2d 193, 195 (9th Cir. 1973).

<sup>129</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 108 (1968). Compare Nardone v. United States, 302 U.S. 378, 381 (1937).

section 605, the "demand of lawful authority" exception need not necessarily be limited to subpoenas, summonses, or search warrants. There is no reason to exclude an official request of a police officer involved in a legitimate criminal investigation.<sup>130</sup>

### III. Can a Court Order be Obtained to Authorize a Pen Register?

¶B.68 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

¶B.69 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.<sup>131</sup> (A contrary holding would, if such an order

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<sup>130</sup>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).

<sup>131</sup>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 (continues)

were required, effectively eliminate the use of the pen register outside of Title III, which does provide for orders authorizing pen registers accompanying wiretaps.)

¶B.70 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<sup>132</sup> or contempt orders.<sup>133</sup> 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.<sup>134</sup>

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<sup>131</sup>(continued) 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 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. Ref. 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 §606], or 47 U.S.C. §605 was not to obtain under the substitute section 605 [law enforcement officer not a person within §605].

<sup>132</sup>Cf. Entick v. Carrington, 95 Eng. Rep. 807 (K.B. 1765) (dicta).

<sup>133</sup>See Fisher v. Pace, 336 U.S. 155, 159 (1949).

<sup>134</sup>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-part-consent surveillance sustained].

B. Procedural mechanism

¶B.71 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.

¶B.72 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,<sup>135</sup> 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.<sup>136</sup> 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. Unlike Title III, Rule 41 on its face makes no provision for an order of postponement of the inventory

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<sup>135</sup>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).

<sup>136</sup>United States v. Eastman, 465 F.2d 1057 (3d Cir.1972).

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.

¶B.73 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.

¶B.74 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).<sup>137</sup>

¶B.75 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 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

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<sup>137</sup>See In re In-Progress Trace, 138 N.J. Super. 404, 413, 351 A.2d 356, 366 (App. Div. 1975).

civil litigation, should it arise, by according the officer a per se good faith defense.<sup>138</sup>

#### IV. Is a Collateral Order Available to Compel Telephone Company Cooperation?

¶B.76 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."<sup>139</sup> 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 and operate the device, an order compelling the company to assist is usually helpful.

¶B.77 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

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<sup>138</sup>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).

<sup>139</sup>In re Joyce, 506 F.2d 373, 375 (5th Cir. 1975).



assistance.<sup>140</sup> 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."<sup>141</sup> The court noted that such an order would be a complete defense in any criminal or civil suit.<sup>142</sup>

¶B.78 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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<sup>140</sup>United States v. Illinois Bell Telephone Co., 531 F.2d 809, 814 (7th Cir. 1976). 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 (wd 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).

<sup>141</sup>Id.

<sup>142</sup>Id. at 814-15.

¶B.79 The Second Circuit, however, disagrees. In In re Application,<sup>143</sup> it held that it was an abuse of discretion to issue an order requiring phone company assistance and called for remedial legislation. It also felt pen registers should be based on probable cause.

¶B.80 In areas other than the Second Circuit in place of an order authorizing the pen register and an order compelling cooperation, the prosecution, when assisting a grand jury investigation, may also be able to use a grand jury subpoena to require the telephone company to install and maintain a pen register.<sup>144</sup> The standards for the issuance of a grand jury subpoenas 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."<sup>145</sup>

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<sup>143</sup>19 Crim L. Repr. 2370 (2d Cir. August 4, 1976).

<sup>144</sup>In re In-Progress Trace, 138 N.J. Super. 404, 407-08, 351 A.2d 356, 359-60 (App. Div. 1975).

<sup>145</sup>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).

APPENDIX C  
ELECTRONIC SURVEILLANCE COURT ORDER

APPENDIX "C" - COURT ORDER ELECTRONIC SURVEILLANCE

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## 1) AUTHORIZATION FOR A COURT ORDER

### Summary

¶C.1 Law enforcement agencies may obtain a warrant allowing the use of electronic surveillance<sup>1</sup> 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

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<sup>1</sup>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. [For other forms of surveillance, see Appendix "B", ¶¶B.1-B.80, supra.] 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 also Appendix "A", ¶¶B.1-A.43, supra.

See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance xiii (1976).

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 state statute may authorize the principal prosecuting attorney of the state or of any political subdivision to authorize applications.

¶C.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

¶C.3 The United States Supreme Court redefined the constitutional premises for electronic surveillance in two 1967 cases, Katz v. United States<sup>2</sup> and Berger v. New York.<sup>3</sup> 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.<sup>4</sup>

¶C.4 The federal electronic surveillance statute prohibits all willful interception or use of wire or oral

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<sup>2</sup>389 U.S. 347 (1967).

<sup>3</sup>388 U.S. 41 (1967)

<sup>4</sup>The courts hold electronic eavesdropping constitutional under federal and state constitutions. See, e.g., Commonwealth v. Vitello, Mass., 327 N.E.2d 819 (1976); 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).



communications,<sup>5</sup> with certain designated exceptions.<sup>6</sup>

Exceptions relevant to law enforcement include interception made with the consent of one of the parties to the conversation<sup>7</sup> and interception made pursuant to a valid electronic surveillance warrant. These materials will focus on the law governing warrants.

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<sup>5</sup>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.]

<sup>6</sup>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.

<sup>7</sup>U.S.C.A. §2511(2) (c) and (2) (d), as amended (Supp. 1977).

(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.

¶C.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 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.<sup>8</sup> A law enforcement agency's failure to

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<sup>8</sup>The jurisdictions and their respective statutes are:

Ariz. Rev. Stat. Ann. §§13-1051 to 1061 (Supp. 1973); Colo. Ref. Stat. A-n. §§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. §§133.723 to .727 (1975); 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. §§19.2-66 to -70 (1976); Wash. Rev. Code Ann. §§99.73.030-.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, n.9 (1975).]

meet the federal and state standards enables the aggrieved person to suppress evidence obtained through the faulty surveillance.<sup>9</sup>

¶C.6 Title III and the state statutes provide certain basic safeguards against 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; this 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.

## II. Agents Authorized to Obtain Warrants

### A. Giordano and Chavez

¶C.7 Congress restricted the power to obtain warrants to certain highly placed, politically responsible

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<sup>9</sup>18 U.S.C.A. §§2414, 2418 (10 (1970)).

officials.<sup>10</sup> 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 or 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 . . . .<sup>11</sup>

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. . . .<sup>12</sup>

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<sup>10</sup>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).

<sup>11</sup>18 U.S.C.A. §2516 (1), as amended (Supp. 1976).

<sup>12</sup>18 U.S.C.A. §2516 (s) (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.

An "applicant" is defined as a:

district attorney or the attorney general [or 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" (continues)

The questions of what officer must actually authorize the application, and what officer must in fact appear before the court to make the application, have been widely litigated.<sup>13</sup>

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<sup>12</sup>(continued) 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 ch. 272, §99 (F)(1) (Supp. 1977); grants the power to apply as follows:

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. . . .

<sup>13</sup>See, e.g., United States v. Tortorello, 40 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973); United States v. Iannelli, 339 F. Supp. 171 (W.D.Pa. 1972), motion for new trial denied without prejudice for claim under 28 U.S.C. 2255, 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).

The Supreme Court took up these questions in United States v. Giordano.<sup>14</sup>

¶C.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"<sup>15</sup> 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.<sup>16</sup> The Fourth Circuit affirmed,<sup>17</sup> and the Supreme Court granted certiorari.

¶C.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.<sup>18</sup> The Court, however, found that

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<sup>14</sup>416 U.S. 505 (1974).

<sup>15</sup>18 U.S.C.A. §2516 (1), as amended (Supp. 1976).

<sup>16</sup>340 F. Supp. 1033 (D.Md. 1972).

<sup>17</sup>469 F.2d 522 (4th Cir. 1972).

<sup>18</sup>United States v. Giordano, 416 U.S. 505, 513-14 (1974).

Congress intended to make Title III an exception to section 509;<sup>19</sup> Title III's enumeration of empowered officials is 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."<sup>20</sup> Applying this rule, the Court found approval by the proper senior official in the Justice Department to be such an essential requirement,<sup>21</sup> and held that its violation required suppression of the wiretap evidence.

¶C.10 In a companion case to Giordano, United States v. Chavez,<sup>22</sup> 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

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<sup>19</sup>"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).

<sup>20</sup>United States v. Giordano, 416 U.S. 505, 527 (1974).

<sup>21</sup>Id. at 527-28.

<sup>22</sup>416 U.S. 562 (1974).

effect the validity of the order.<sup>23</sup> Chavez, in short, holds that proper approval in fact must exist, but that failure to state such approval accurately does not necessarily destroy the validity of the order.<sup>24</sup> 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.

B. Vacancy in the Attorney General's office

¶C.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

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<sup>23</sup>Id. at 570. United States v. DiMuro, 540 F.2d 503, 509 (1st Cir. 1976). (Where words "specially delegated" were used instead of "specially designated," transfer of authority was nevertheless valid.)

<sup>24</sup>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.]) United States ex rel. Machi v. U.S. Dept. of Prob. and Par., 536 F.2d 179 (7th Cir. 1976) (Assistant placed Attorney General's signature on memorandum of approval after telephone approval was received). 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 319, 825 (1975) [authority to apply for each wiretap must be specifically granted in writing by the Attorney General or the District Attorney].

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).



until confirmation.<sup>25</sup> 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.<sup>26</sup> An Acting Attorney General may thus authorize applications during the vacancy while an Attorney General may not until he is confirmed.<sup>27</sup>

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<sup>25</sup>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).

<sup>26</sup>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].

<sup>27</sup>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)

C. State authorization procedures

¶C.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. . . . 28

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 surveillance order.<sup>29</sup> The state statutes in Massachusetts,<sup>30</sup>

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[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].

<sup>28</sup>18 U.S.C.A. §2516(2) (1971).

<sup>29</sup>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].

<sup>30</sup>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.

New Jersey,<sup>31</sup> and New York<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup>

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<sup>31</sup>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 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 . . . .

<sup>32</sup>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].

<sup>33</sup>N.J. Stat. Ann. §2A:156A-8, as amended New Jersey Statutes §2A:156A-8 (1975). This provision survived the 1975 revision.

<sup>34</sup>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 (continues)

¶C.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.<sup>35</sup> Under the provision an agent in New Jersey may authorize an application which can actually be made by another.<sup>36</sup> 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.<sup>37</sup>

¶C.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

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<sup>34</sup>(continued) 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.

<sup>35</sup>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).

<sup>36</sup>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)

<sup>37</sup>State v. Dye, 60 N.J. 518, 291 A.2d 825, cert. denied, 409 U.S. 1090 (1972).

provisions for such substitution have been sustained as consistent with the purposes of Title III.<sup>38</sup> The prosecutor should take care, however, that the delegation of authority be in writing.<sup>39</sup> He should also provide a statement in detail of why the delegation is necessary.<sup>40</sup>

### III. Information Requirements

#### A. Crimes

¶C.15 Title III allows the use of electronic surveillance in the investigation of certain crimes. Section 2516(1)<sup>41</sup> describes the federal offenses which are included, and

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<sup>38</sup>See e.g., Commonwealth v. Vitello, \_\_\_Mass\_\_\_, 327 N.E.2d 819, 837-38 (1975); State v. Travis, 129 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).

<sup>39</sup>Commonwealth v. Vitello, \_\_\_Mass\_\_\_, 327 N.E.2d 819, 838-39 (1975).

<sup>40</sup>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 Cto. 1973) where such a showing was not required.

<sup>41</sup>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.

section 2516(2)<sup>42</sup> lists those crimes for which the states may authorize electronic surveillance.

¶C.16 The federal crimes included under section 2516(1) are described by specific reference to the various sections of the United States Code.<sup>43</sup> On the other hand, the state offenses listed in section 2516(2) are described in generic terms and have been construed broadly.<sup>44</sup> The New York electronic surveillance statute is much more specific, enumerating a long list of crimes by reference to sections of the penal law.<sup>45</sup> In contrast, the Massachusetts<sup>46</sup> and New Jersey<sup>47</sup> statutes make almost no reference to statutory crimes, but rather use the generic descriptions. The Florida electronic surveillance statute<sup>48</sup> also uses the generic

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<sup>42</sup>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.

<sup>43</sup>18 U.S.C.A. §2516(1) (1970), as amended (Supp. 1976).

<sup>44</sup>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, 975-65, 385 N.Y.S.2d 858, 864-85 (Nassau County Ct. 1973) [bookmaking offenses under N.Y. Penal Law §§225.05-225.20 (McKinney 1967) as gambling].

<sup>45</sup>N.Y. Crim. Pro. Law §700.05(8) (McKinney 1971), as amended (Supp. 1976).

<sup>46</sup>Mass. Gen. Laws Ann. ch. 272, §§99 (B) (7) (Supp. 1977).

<sup>47</sup>N.J. Stat. Ann. §2A:156A-8 (1971), as amended New Jersey Statutes §2A:156A-8 (1975).

<sup>48</sup>Fla. Stat. Ann. §934.07 (1973), as amended (Supp. 1976).

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.<sup>49</sup> 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.

¶C.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) applies to the entire list of crimes against which states may authorize electronic surveillance, or only the preceding phrase, "other crime[s] dangerous to life, limb, or property."<sup>50</sup> Two New York courts, among others, recently came out on opposite sides of the question.<sup>51</sup> A federal district court in Florida also analyzed this issue.<sup>52</sup> The

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<sup>49</sup>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.

<sup>50</sup>18 U.S.C.A. §2516(2) (1970).

<sup>51</sup>People v. Amsden, 82 Misc.2d 91, 93-94, 368 N.Y.S.2d 433, 436-437 (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). But see People v. DiFiglia, 50 A.D.2d 709, 374 N.Y.S.2d 891 (1975) (Enumerated offenses need not be felonies).

<sup>52</sup>United States v. Lanza, 341 F. Supp. 405 (M.D. Fla. 1972).

court concluded, in dictum, 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."<sup>53</sup> 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 to modify "other crime[s] dangerous to life, limb, or property."<sup>54</sup>

¶C.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

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<sup>53</sup>Id. at 413.

<sup>54</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 99 (1968):

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 crugs, marijuana, 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)



committed.<sup>55</sup> The application must state the "details as to the particular offense that has been, is being, or is about to be committed,"<sup>56</sup> and the order itself must specify "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates."<sup>57</sup> 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.<sup>58</sup>

B. Particularity as to conversations sought

¶C.19 An application for an electronic surveillance order, and the order itself, must include "a particular description

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<sup>55</sup>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 sub nom. Joseph v. United States, 423 U.S. 858 (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 C.19 of text]; third: the premises where the interception will be made are being used in connection with the charged offense [see ¶C.20 of text].

See 18 U.S.C.A. §§2518 (3)(b), (d) (1970).

<sup>56</sup>18 U.S.C.A. §2518 (1)(b)(i) (1970).

<sup>57</sup>18 U.S.C.A. §2518(4)(c) (1970).

<sup>58</sup>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 447, 563 (Sup. Ct. Nassau County 1972).

of the type of communication sought to be intercepted."<sup>59</sup>  
Most courts, conscious of the difficulty of particularizing  
a future conversation, take a pragmatic approach in their  
examination of the sufficiency of applications and orders

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<sup>59</sup>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).

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).

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.)

The application must contain the following:

\* \* \* \*

d. A particular description of the nature of the oral  
or wire communications sought to be overheard.

in meeting this requirement.<sup>60</sup>

C. Particularity as to place

¶C.20 The application and order must also describe the location of the facilities or the place where the communications are to be intercepted.<sup>61</sup>

¶C.21 There is a special concern shown in some statutes where the surveillance involves public facilities or where it threatens privileged communications. New Jersey requires that the court determine that there is a "special need" for the interception of the communications.<sup>62</sup> No similar federal

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<sup>60</sup>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 58, at 871-72; People v. Holder, supra note 58, at 868, 331 N.Y.S.2d at 563.

<sup>61</sup>Mass. Gen. Laws Ann. ch. 272, §99(I)(3) (Supp. 1976).

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 intercepted . . . .

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.

<sup>62</sup>N.J. Stat. Ann. §2A:156A-11 (1971), as amended New Jersey Statutes §2A:156A-11 (1975).

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.

(continues)

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62 (continued)

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, how 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.

18 U.S.C.A. §2518(1)(b)(ii) (1970).

18 U.S.C.A. §2518(4)(b) (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.

N.Y. Crim. Pro. Law §§700.20(2)(ii) and 700.30(3) (McKinney 1971) are identical to the federal provisions.

N.J. Stat Ann. §2A:156A-9(c)(4) (1971).

Each application . . . shall state:

(continues)

requirement exists,<sup>63</sup> although New York and Massachusetts require a statement in the application that the communications to be intercepted are not legally privileged.<sup>64</sup>

D. Particularity as to persons

¶C.22 Title III requires that applications and orders identify the person, if known, whose communications are

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<sup>62</sup>(continued)

\* \* \* \*

(4) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be intercepted.

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N.J. Stat. Ann. §2A:156A-12(c) (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.

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Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(c) (Supp. 1976).

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.

<sup>63</sup>See United States v. Rizzo, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 944 (1974).

<sup>64</sup>N.Y. Crim. Pro. Law §700.20(2)(c) (McKinney 1971); Mass. Gen. Laws Ann. ch. 272, §§99(F)(2)(e) (Supp. 1976).

to be intercepted.<sup>65</sup> These provisions have not been read, however, to require the government to name every participant

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<sup>65</sup>18 U.S.C.A. §2518(1)(b)(iv) (1970).

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.

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18 U.S.C.A. §2518(4)(a) (1970).

Each order . . . shall specify --

a. the identity of the person, if known, whose communications are to be intercepted.

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 n.61, supra.

in communications to be monitored.

¶C.23 One of the leading Supreme Court cases in this area is United States v. Kahn.<sup>66</sup> 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 cause to name Mrs. Kahn in the application for the warrant, she fell within the category of "other persons as yet unknown."<sup>67</sup> 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.<sup>67</sup>

¶C.24 The Supreme Court recently faced the issue of whether the government must name a known person where it has probable cause to believe that the individual is committing a specified offense in United States v. Donovan.<sup>69</sup> 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

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<sup>66</sup>415 U.S. 143 (1974).

<sup>67</sup>Id. at 155.

<sup>68</sup>Id.

<sup>69</sup>97 S.Ct. 658 (1977).

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) and 2518 (4)(a).<sup>70</sup>

The court held in relevant part:

1. §2518(1)(b)(iv) requires the government to name all individuals it has probable cause to believe are involved in the suspect activities.<sup>70a</sup>

2. Failure to notify the issuing judge of respondents' identities did not warrant suppression under §§2518(10)(a)(i).<sup>71</sup>

Although suppression was not warranted in this case, the court followed the Eighth Circuit's suggestion<sup>71a</sup> that if the government agents deliberately withheld information that would lead the court to the conclusion that probable cause was lacking, suppression might be warranted.<sup>72</sup>

The court further emphasized that strict compliance with Title III requirements is "more in keeping" with Congressionally imposed duties.<sup>72a</sup>

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<sup>70</sup>Id. at 664-65.

<sup>70a</sup>Id. at 661.

<sup>71</sup>Id.

<sup>71a</sup>United States v. Civella, 533 F.2d 1395 (1976).

<sup>72</sup>97 S.Ct. at 672.

<sup>72a</sup>Id. at 674.



¶C.25 In United States v. Votteller,<sup>73</sup> the trial judge was properly presented with a "factual issue" as to probable cause to believe defendant Karem was involved. The standard of review of this decision is "clear error" or "abuse of discretion." This same standard was applied by the Eighth Circuit in United States v. Costanza.<sup>74</sup> In Costanza, the court noted that the defendants there were served with inventories (as was the case in Donovan) and would not be prejudiced by admission of the intercepted conversations.

E. Inadequacy of investigative alternatives

¶C.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.<sup>75</sup>

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<sup>73</sup>544 F.2d 1355, 1360 (6th Cir. 1976).

<sup>74</sup>549 F.2d 1126, 1134 (1977) (citing Donovan and Civella). See also United States v. Scibelli, 549 F.2d 222 (1st Cir. 1977) (Review of authorization not de novo, but based on minimal adequacy, tested in commonsense fashion).

<sup>75</sup>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.

New York, New Jersey, and Massachusetts all have similar provisions in their statutes.<sup>76</sup>

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<sup>76</sup>N.Y. Crim. Pro. Law §700.20(2)(d) (McKinney 1971):

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.

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N.Y. Crim. Pro. Law §700.15(4) (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.

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N.J. Stat. Ann. §2A:156A-9(c)(6) (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-10(c) (1971), as amended New Jersey Statutes §2A:156A-10(c) (1975):

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.

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Mass. Gen. Laws Ann. ch. 272, §99(E)(3) (Supp. 1976):

A warrant may issue only:

\* \* \* \*

¶C.27 The Senate Report accompanying Title III discusses the intent of this provision:

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 of 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 common sense fashion.<sup>77</sup>

¶C.28 Most courts, reading 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.<sup>78</sup>

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76 (continued)

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.

<sup>77</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968).

<sup>78</sup>See United States v. Armocida, 515 F.2d 29, 37-38 (3d Cir. 1975), cert. denied 423 U.S. 858 (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). For recent circuit decisions requiring minimal showing, see, e.g., United States v. Fury, Nos. 76-1506, 76-1512, slip op. at 3208 (2nd Cir. Feb. 8, 1977) (Detectives stated that the suspects were "difficult to tail . . . very careful and . . . constantly changing routes." They had been successfully "bugged" before, and were consequently wary.); United States v. Landmesser, No. 76-1540, slip op. at 5 (6th Cir. April 18, 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.) See United States v. Abramson, Nos. 76-1583, 76-1588, 76-1589, slip op. at 15-16 (8th Cir. April 26, 1977).

The Ninth Circuit, on the other hand, in United States v. Kerrigan,<sup>79</sup> showed a greater degree of willingness to examine the application's statements that other investigative techniques have not worked 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 wiretap order." More

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78 (continued)

The Ninth Circuit has indicated that a general statement of the insufficiency of investigative alternatives in gambling cases is not sufficient to satisfy the requirements of §2518(1)(c); the insufficiency must be related to the particular matter under investigation. In United States v. Feldman, 535 F.2d 1175 (9th Cir. 1976), the court found "interesting" and "persuasive" the argument "That law enforcement agencies may not rely upon the general difficulty of apprehending and convicting bookmakers to justify the use of wiretapping." Id. at 1178. The court did not reach this issue because the affidavit clearly indicated that alternative procedures had failed in this particular case. The court also indicated, citing United States v. Kerrigan, 514 F.2d 35, 38 (9th Cir. 1975), cert. denied, 423 U.S. 924 (1975), that a wiretap need not be used only as a "last resort." See United States v. Smith, 519 F.2d 516 (9th Cir. 1975).

<sup>79</sup>514 F.2d 35, 38 (9th Cir. 1975), cert. denied, 423 U.S. 924 (1976). In United States v. Spagnuolo, the Ninth Circuit attempted "once more to promulgate a manageable standard between the Kerrigan and Kalustian decisions." It held:

1. To show "other investigative procedures have been tried and failed" 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."

recently, in United States v. Kalustian,<sup>80</sup> 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."<sup>81</sup>

¶C.28A In a recent New York case, however, the court displayed a willingness to look at the record in this issue, People v. Brenes.<sup>81a</sup>

In the instant case People failed to establish that 'normal investigative procedures' were unavailing. (CPL §700.15[4]). The police officers as well as the informers gained access to the building and actually observed alleged couriers entering and exiting 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 tool. Accordingly, it should never have been authorized.<sup>81b</sup>

¶C.29 The purpose of section 2518(1)(c)<sup>82</sup> is to ensure that electronic surveillance is not used "casually or with

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<sup>80</sup> 529 F.2d 585 (9th Cir. 1976), reh. and reh an banc denied, Id.

<sup>81</sup> 18 U.S.C.A. §2518(1)(c) (1970).

<sup>81a</sup> 53 A.D.2d 78, 385 N.Y.S.2d 530 (1st Dept. 1976).

<sup>81b</sup> Id. at 531-32.

<sup>82</sup> 18 U.S.C.A. §2518(1)(c) (1970).

indifference to its risks."<sup>83</sup> 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.<sup>84</sup>

¶C.29A On appeal, the courts have generally used a "commonsense" approach to the affidavit. In United States v. De La Fuente,<sup>84a</sup> the Fifth Circuit tested the affidavit "in a commonsense fashion" and found that it "alleged sufficient facts to support the court's finding that more traditional investigative procedures were both more dangerous and unlikely to succeed."

F. Period of time surveillance is to be authorized

¶C.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."<sup>85</sup>

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<sup>83</sup>Electronic Surveillance; Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance 67 (1976).

<sup>84</sup>Id.

<sup>84a</sup>548 F.2d 528, 538 (1977). Accord, United States v. Woods, 544 F.2d 242, 256 (6th Cir. 1976); United States v. Anderson, 542 F.2d 428, 431 (7th Cir. 1976); United States v. Daly, 535 F.2d 434 (8th Cir. 1976).

<sup>85</sup>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:156A09(c)(5) (1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(f) (Supp. 1976) [Massachusetts] requires the application, if practicable, to designate hours of the day or night during which interception may reasonably be expected to occur.

The order itself must specify "the period of time during which such interception is authorized. . . ."86 In no case can an order authorize an interception for a period in excess of thirty days, unless an extension is granted.<sup>87</sup> The thirty-day period is an absolute maximum, and the intent of Title III is to limit interception to a period no "longer than is necessary to achieve the objective of the authorization. . . ."88

¶C.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

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<sup>86</sup>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).

<sup>87</sup>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 day. 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).

<sup>88</sup>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) (1975). The Massachusetts statute has no comparable language; see Commonwealth v. Vitello, Mass. , 327 N.E. 2d 819, 841-44 (1975).

thereafter."<sup>89</sup> 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."<sup>90</sup> The actual period of authorization in a particular case depends on the facts of that case.<sup>91</sup> 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.<sup>92</sup>

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<sup>89</sup>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. §24:156A-9(c)(5) (1971); Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(f) (Supp. 1976).

<sup>90</sup>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) (McKinndy 1971); N.J. Stat. Ann. §24A: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).

<sup>91</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 101, 103 (1968).

<sup>92</sup>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. 285, 300-10 (E.D.Pa.), aff'd mem., 517 F.2d 1399 (3d Cir. 1975).



G. Prior applications

¶C.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.<sup>93</sup>

A court may suppress evidence obtained pursuant to a surveillance warrant where the application fails to disclose

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<sup>93</sup>18 U.S.C.A. §2518(1)(e) (1970). The provisions for New York, New Jersey, and Massachusetts are substantially similar.

N.Y. Crim. Pro. Law §700.20(2)(f) (McKinney 1971):

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.

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N.J. Stat. Ann. §2A:156A-9(e) (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.

the existence of previous applications.<sup>94</sup>

#### IV. Formal Requirements: Swearing, Signing, and Dating

¶C.33 Each application must be in writing and upon oath or affirmation.<sup>95</sup> Each order authorizing electronic surveillance must actually be signed by the judge, and failure to do so can lead to suppression of evidence.<sup>96</sup> Finally, each order must be dated, or, again, suppression can result.<sup>97</sup>

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93 (continued)

Mass. Gen. Laws Ann. ch. 272, §99(F)(2)(h) (Supp. 1976):

The application must contain the following:

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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.

<sup>94</sup>In United States v. Bellosi, 501 F.2d 833 (D.C. Cir. 1974), a warrant was issued authorizing a wiretap of the defendant in a gambling investigation; 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. Kilogore, 518 F.2d 496, 500 (5th Cir. (1975)), cert. denied, 425 U.S. 950 (1975).

<sup>95</sup>18 U.S.C.A. §2518(1) (1970); N.Y. Crim. Pro. Law §700.20(1) (McKinney 1971); N.J. Stat. Ann. §2A:15609(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).

<sup>96</sup>United States v. Ceraso, 355 F. Supp. 126 (MD.DPa.1973).

<sup>97</sup>United States v. Lamonge, 458 F.2d 197 (6th Cir.), cert. denied, 409 U.S. 863 (1972).

## V. What Court May Issue a Warrant

¶C.34 Applications for electronic surveillance warrants must be presented to a "judge of competent jurisdiction."<sup>98</sup>

This is "a judge of a United States district court or a United States court of appeals"<sup>99</sup> on the federal level, and at the state level it is "a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications."<sup>100</sup> The intent of this section is to limit the judges who can authorize electronic surveillance warrants, and "to guarantee responsible judicial participation in the decision to use these techniques."<sup>101</sup> New York permits all trial judges down to county court level to issue warrants,<sup>102</sup> while Massachusetts permits any justice of the state superior court to do so.<sup>103</sup> 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.<sup>104</sup>

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<sup>98</sup>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.

<sup>99</sup>18 U.S.C.A. §2510(9)(a) (1970).

<sup>100</sup>18 U.S.C.A. §2510(9)(b) (1970).

<sup>101</sup>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."

<sup>102</sup>N.Y. Crim. Pro. Law §700.05(4) (McKinney 1971)

<sup>103</sup>Mass. Gen. Laws Ann. ch. 272, §99(B)(9) (supp. 1976).

<sup>104</sup>N.J. Stat. Ann. §2A:156A-2(i) (1971).

## 2) EXECUTION OF THE ORDER

### Summary

¶C.35 Law enforcement officers engaged in electronic surveillance<sup>105</sup> 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

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<sup>105</sup>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. [For other forms of surveillance, see Appendix "B", ¶¶B.1-B.80, supra.] 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 also Appendix "A", ¶¶A.1-A.43, supra. See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance xiii (1976).

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

¶C.36 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.<sup>106</sup> 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.<sup>107</sup>

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<sup>106</sup>See generally comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories," 61 Cornell L. Ref. 92, 94-106 (1975). These materials are based largely on that comment.

<sup>107</sup>18 U.S.C. §2518(5) (1970).

¶C.37 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.<sup>108</sup> The New York Statute adopts this definition.<sup>109</sup> 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.<sup>110</sup>

A. What may be intercepted?

¶C.38 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.<sup>111</sup> Under the New York statute, monitors must minimize interception of communications that are "not otherwise subject to eavesdropping under this article."<sup>112</sup> A communication is subject to interception if it "concern(s)" a designated

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<sup>108</sup>See, Comment, supra n.106, at 99-105; Note, "Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies," 26 Stan.L.Rev. 1411, 1415-17 (1974).

<sup>109</sup>N.Y. Crim. Pro. Law §700.05(3) (McKinney 1971). N.J. Stat. Ann. §24:156A-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, §99B(4) (1976), however, follows the New York rule.

<sup>110</sup>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"].

<sup>111</sup>Id. §2516(1).

<sup>112</sup>N.Y. Crim. Pro. Law §700.30(7) (McKinney 1971).

list of offenses.<sup>113</sup> Under the New Jersey statute, monitors must "minimize or eliminate" interceptions of conversations "not otherwise subject to interception under this act."<sup>114</sup>

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.

¶C.39 A conversation providing information useful and

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<sup>113</sup>Id. §700.15 (2)..

<sup>114</sup>N.J. Stat. Ann. §2A:156A-12(f) (as amended, New Jersey Statutes §2A:156A012(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) (f) (1976) [designation of specific listening periods], §99.F(2) (e) [particular description in the authorization order of communications to be intercepted], and §99.M(e) [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.

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 (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).<sup>115</sup> 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

¶C.40 Because the monitors never know exactly what they

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<sup>115</sup>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).



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 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.<sup>116</sup> 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.<sup>117</sup> 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.<sup>118</sup> When the objective is more modest, such as conviction of a

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<sup>116</sup>See United States v. Armocida, 515 F.2d 29, 42-43 (3d Cir. 1975), cert. denied, 423 U.S. 858 (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.]

<sup>117</sup>See United States v. Bynum, 360 F. Supp. 400, 412-13 (S.D.N.Y. 1973).

<sup>118</sup>See, e.g., United States v. Manfredi, 488 F.2d 588, 600 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

known individual, the courts enforce minimization much more literally.<sup>119</sup>

2. Location of the telephone: When the telephone is located in a known criminal headquarters, the courts allow interception of almost any conversation.<sup>120</sup> 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.<sup>121</sup>

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.<sup>122</sup> Where the subject is simpler, such as in a low-level gambling case, the courts allow fewer improper interceptions.<sup>123</sup>

4. Use of code: When the suspects use code or guarded and ambiguous language, the courts allow a wider margin of error.<sup>124</sup>

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

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<sup>119</sup>See, e.g., United States v. George, 465 F.2d 772 (6th Cir. 1972).

<sup>120</sup>See, e.g., United States v. James, 494 F.2d 1007, 1021-23 (D.C. Cir. 1974), cert. denied, 419 U.S. 1020 (1975).

<sup>121</sup>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).

<sup>122</sup>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).

<sup>123</sup>See, e.g., United States v. George, 465 F.2d 772 (6th Cir. 1972).

<sup>124</sup>See, e.g., United States v. Bynum, 360 F. Supp. 400, 412-13 (S.D.N.Y. 1973).

attorney must thereafter try to devise a set of screening rules to guide the monitors in their minimization efforts.<sup>125</sup>

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.<sup>126</sup> The prosecutor who secures the judge's approval of an ongoing minimization plan has a powerful defense at a subsequent suppression hearing.

¶C.41 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.

¶C.42 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

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<sup>125</sup>See, e.g., United States v. Falcone, 364 F. Supp. 877, 880-81 (D.N.J. 1973). See also United States v. Chavez, 533 F.2d 491 (9th Cir. 1976), cert. denied, 96 S.Ct. 2237 (1976).

[limiting of tap to nine and one-half days sufficient minimization; supervising attorney showed good faith in instructing monitors in a screening method]. United States v. Abascal, No. 75-1093 (9th Cir. March 1977) (interception of all calls during twelve day wiretap was not a failure to minimize; tap was of short duration, suspects used guarded language, identities of suspects were uncertain, and object of investigation was a large scale drug ring).

<sup>126</sup>See, e.g., United States v. Bynum, 360 F. Supp. 414-15 (S.D.N.Y. 1973).

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 down on all such calls. These instructions should constantly be re-evaluated and revised throughout the duration of the tap. Regular written reports to the 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

¶C.43 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.<sup>127</sup> Calls concerning ongoing criminal activity are not privileged, but a call requesting advice concerning past criminal activity is privileged.<sup>128</sup> The lawyer may not claim the

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<sup>127</sup> Id. at 417.

<sup>128</sup> 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).

privilege to shield his incriminating statements, for the privilege is for the client's benefit only.<sup>129</sup> Where the lawyer is a conspirator, his incriminating calls may be intercepted. Any calls 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.<sup>130</sup> Unless the lawyer is a conspirator, the most prudent course is to instruct the monitors not to intercept any conversation involving a lawyer.

¶C.44 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.<sup>131</sup> It is unclear how far this holding might

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<sup>129</sup> 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).

<sup>130</sup> 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.

<sup>131</sup> 377 U.S. 201 (1964). But see United States v. Hinton, 543 F.2d 1002 (2d Cir. 1976), cert. denied, 97 S.Ct. 796 (1977) (agents intercepted communications between a government informer and defendant who was under indictment and represented by counsel in an unrelated state prosecution; wiretap evidence held admissible in the later federal prosecution which resulted from a wiretap; Massiah held to apply 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).

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.

¶C.45 In one case, husband and wife defendants contended that conversations between them were protected by the marital privilege.<sup>132</sup> The Seventh Circuit disagreed 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

¶C.46 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,<sup>133</sup> and limiting interception to certain periods of the day.<sup>134</sup> 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

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<sup>132</sup>United States v. Kahn, 471 F.2d 191, 194-95 (7th Cir. (1972)), rev'd on other grounds, 415 U.S. 143 (1974).

<sup>133</sup>See, e.g., Katz v. United States, 389 U.S. 347, 354 n.14 (1967).

<sup>134</sup>See, e.g., State v. Dye, 60 N.J. 518, 527, 291 A.2d 825, 829, cert. denied, 409 U.S. 1090 (1972).

specific hours. If neither condition obtains, extrinsic methods will be almost useless. New Jersey has adopted extrinsic minimization by statute.<sup>135</sup>

¶C.47        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.<sup>136</sup> If the conversation becomes pertinent, the monitor resumes continuous interception.

¶C.47A       In United States v. Hinton,<sup>136a</sup> the Second Circuit held that monitoring all calls in whole or in part does not itself show a failure to minimize. Overhearing and recording ceased as soon as a call was determined to be personal in

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<sup>135</sup> N.J. Stat. Ann. §2A: 156A-12(f) (as amended, New Jersey Statutes §2A: 156A012(f) [1976]) [amended to add the extrinsic minimization rule]. The New Jersey statute now requires that interception of communications be minimized

... by making reasonable efforts, whenever possible, to reduce the hours of interception authorized by [the wiretap] order.

Id.

<sup>136</sup> Sampling is necessary to thwart wary criminals who slip a short, incriminating segment into a long, chatty personal call. For a classic example of this strategem, see United States v. King, 335 F. Supp. 523, 541 (S.D. Cal. 1971).

<sup>136a</sup> 543 F.2d 1002 (2d Cir. (1976), cert. denied, 97 S.Ct. 493 (1976), 97 S.Ct. 796 (1977).

nature and only spot checks were later made to insure that the conversation did not turn to narcotics. To determine whether a call was nonpertinent, monitors listened to the first five minutes of each conversation. The court thought that a five minute ascertainment period on each call was rather long, but found no failure to minimize. The suspects used code language and the government, by having a minimization plan in effect, showed a good faith effort to minimize.

¶C.48 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.<sup>137</sup> If the agent records without overhearing, he is intercepting without minimizing and so leaves the surveillance vulnerable to motions for suppression.<sup>138</sup>

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<sup>137</sup> 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.

<sup>138</sup> People v. Castania, 73 Misc.2d 166, 172, 340 N.Y.S. 2d 829, 835 (Moore County Ct. 1973). See also People v. Brenes, 53 App. Div.2d 78, 385 N.Y.S.2d 530 (1st Dep't. 1976) (wiretap evidence was suppressed where all calls over designated phones were intercepted and recorded; although agents turned down volume on earphones when non-pertinent calls were intercepted, tape recorder was never turned off during twenty day tap).



¶C.48A In United States v. Daly,<sup>138a</sup> 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. The authorizing judge required and received 5 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.

¶C.49 The intrinsic method is usually the most effective, and is accordingly the rule in New York and federal courts.<sup>139</sup> 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 will be no risk of suppression.

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<sup>138a</sup>535 F.2d 434 (8th Cir. (1976)).

<sup>139</sup>See, e.g., United States v. Askins, 351 F. Supp. 498, 415 (D. Md. 1972). For a recent development in the Chavez case, see United States v. Chavez, 533 F.2d 491 (9th Cir. 1976), cert. denied, 96 S.Ct. 2237 (1976). The Court approved a kind of extrinsic minimization, holding that a tap limited to one 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.

## II. Amendment

¶C.50 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.<sup>140</sup> Quite frequently, the intercepted communications provide evidence of a crime not mentioned 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.<sup>141</sup> Disclosure or use as evidence at trial or before a grand jury requires that a retroactive amendment be sought as soon as practicable.

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<sup>140</sup>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).

<sup>141</sup>See United States v. Vento, 533 F.2d 838 (3rd Cir. 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]. See also 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

A. New crime

¶C.51 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 the order of authorization."<sup>142</sup> The New York and New Jersey statutes similarly allow use of intercepted communications which were not otherwise sought.<sup>143</sup> 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

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141 (continued)

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); United States v. Hall, 543 F.2d 1229 (9th Cir. 1976), cert. denied, 97 S.Ct. 814 (1977) (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 officers" within the meaning of sections 2510(7) and 2517(1), (2) of the federal wiretap law); Fleming v. United States, 547 F.2d 872 (5th Cir. 1977) (FBI disclosure to the IRS of information obtained from wiretap authorized for investigation of gambling offenses is a legitimate law enforcement use of wiretap evidence, even where the IRS wants to base civil or criminal tax suit on the information).

<sup>142</sup> 18 U.S.C. §2517(5) (1970).

<sup>143</sup> N.Y. Crim. Pro. Law §700.65(4) (McKinney 1971); N.J. Stat. Ann. §2A:156-18 (West 1971).

as practicable."<sup>144</sup>

¶C.52 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.<sup>145</sup> The heroin is, however, inadmissible if the officers had expected to find it from the beginning but had not applied for a warrant covering it.<sup>146</sup> 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).<sup>147</sup>

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<sup>144</sup>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.

<sup>145</sup>Cady v. Dombrowski, 413 U.S. 433 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

<sup>146</sup>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).

<sup>147</sup> 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.

¶C.53      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 related 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<sup>148</sup> 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 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."<sup>149</sup> The court held that

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<sup>148</sup>513 F.2d 485, 500-03 (D.C. Cir. 1975).

<sup>149</sup>Id. at 501.

since the intercepted conversation did relate to the specified D.C. gambling offenses, it was immaterial that they also "constituted evidence of federal offenses."<sup>150</sup>

¶C.54 The Seventh Circuit, in United States v. Brodson,<sup>151</sup> 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 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.

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<sup>150</sup>Id. at 502.

<sup>151</sup>528 F.2d 214 (7th Cir. 1975).

¶C.55 The Second Circuit recently followed Brodson. In United States v. Marion,<sup>152</sup> 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 alleged state offense, which formed the basis of the original wiretap order, and that it thus fell within section 2517(5), citing Brodson.<sup>153</sup> Again, it is doubtful that an amendment was needed.

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<sup>152</sup> 535 F.2d 697 (2d Cir. 1976).

<sup>153</sup> 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, Judge Anderson had the better of the argument, but Judge Kaufmann had the votes.

¶C.55A 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,<sup>153a</sup> the court ruled that a wiretap order which 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. The reason given 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.

¶C.55B 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

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<sup>153a</sup>535 F.2d 434 (8th Cir. 1976).



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.

¶C.55C In Daly, the Eighth Circuit found that certain offenses were implicitly within the scope of the original wiretap order. How far a court will go to find offenses implicitly authorized is not clear. Daly did not address the central question posed by Moore and Brodson: if investigation of an offense is not authorized (expressly or implicitly) in a wiretap order, is an amendment or special application required to use wiretap evidence in prosecutions of that offense where such evidence was also relevant to crimes that were authorized?

¶C.56 The law on this issue remains in doubt. Brodson and Marion may point to a trend but Moore and Judge 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.

¶C.57 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 before any grand jury or at any trial he may disregard it.<sup>154</sup> If he wants to preserve his ability to use the conversation at 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.

¶C.58 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.<sup>155</sup>

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<sup>154</sup>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. 1971), cert. denied, 406 U.S. 934 (1972); United States v. Denisio, 360 F. Supp. 715, 719 (D.MD.1973).

<sup>155</sup>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, ¶¶C.63-C.65, infra.

¶C.59 The most common error in the use of this procedure 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,"<sup>156</sup> 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.

¶C.60 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

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<sup>156</sup> See, e.g., United States v. Deniso, 360 F. Supp. 715 (D.M.D. 1973); People v. Ruffino, 62 Misc. 2d 653, 309 N.Y.S.2d 805 (Sup. Ct. Queens County 1970).

amendment. The safest course, however, is to apply for an amendment as soon as the conversation appears to pertain to a new crime.

¶C.61 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.<sup>157</sup>

¶C.62 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 statutes nowhere mention this procedure for a prospective amendment, but it is clearly a constitutional requirement

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<sup>157</sup> See, e.g., People v. DiLorenzo, 69 Misc. 2d 645, 652, 330 N.Y.S.2d 720, 727 (Rockland County Ct. 1971).

where the supervising attorney or officer seeks to continue intercepting new conversations.<sup>158</sup>

¶C.63 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 be unable to 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.

¶C.64 The prosecution faced this dilemma in People v. DiStefano.<sup>159</sup> Eleven days after the first cryptic conversation the monitors intercepted four similar detailed

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<sup>158</sup>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).

<sup>159</sup>People v. DiStefano, 38 N.Y.2d 640, 345 N.E.2d 548 382 N.Y.S.2d 5 (1976).

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."<sup>160</sup>

¶C.65 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<sup>161</sup> 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 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 inadvertently overheard and, thus, were discovered in "plain view."<sup>162</sup>

¶C.66 In most cases this holding will solve the problem by defining the first new conversations as being overheard

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<sup>160</sup>45 App. Div. 2d 56, 60-61, 356 N.Y.S.2d 316, 320-21 (1st Dept. 1974).

<sup>161</sup>People v. Spinelli, 35 N.Y.2d 77, 315 N.E.2d 792, 358 N.Y.S.2d 743 (1974).

<sup>162</sup>People v. DiStefano, 38 N.Y.2d 640, 649, 345 N.E.2d 548, 553, 382 N.Y.S.2d S, 10 (1976).

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

¶C.67 There appears to be no constitutional requirement that the authorization order name the persons whose communications are to be intercepted.<sup>163</sup> The federal and New York statutes therefore require only specification of persons "if known."<sup>164</sup> The interception of communications 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

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<sup>163</sup>See Comment, supra, n.106, at 137-38, for a discussion of this point.

<sup>164</sup>18 U.S.C. §2518(1)(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 spersons "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.

new names.

¶C.68 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.<sup>165</sup> 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.<sup>166</sup>

¶C.69 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."<sup>167</sup> 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 different crimes are disclosed."<sup>168</sup>

¶C.70 The last sentence of this quotation indicates that the court probably would never require a special application

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<sup>165</sup> 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. La Gorga, 336 F. Supp. 190, 192-93 (W. D. Pa. 1971).

<sup>166</sup> 18 U.S.C. §2517(5) (1970).

<sup>167</sup> N.Y. Crim. Pro. Law §700.65(4) (McKinney 1971).

<sup>168</sup> 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).



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.

¶C.71 The New York picture is somewhat complicated by the Second Circuit's interpretation of New York law in United States v. Capra.<sup>169</sup> The order in that case authorized interception of "communications of Joseph DellaValle with co-conspirators."<sup>170</sup> 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 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.<sup>171</sup> Presumably this

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<sup>169</sup>501 F.2d 267 (2d Cir. 1974 ), cert. denied, 420 U.S. 990 (1975).

<sup>170</sup>Id. at 273 (emphasis added).

<sup>171</sup>Id. at 276-77.

entire problem could have been avoided if the original order had authorized interception of "communications of DellaValle and others as yet unknown."<sup>172</sup>

¶C.72 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

¶C.73 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."<sup>173</sup> The presence of the seal, "or a satisfactory explanation for the absence thereof," is a prerequisite to the use of the tapes in evidence.<sup>174</sup> Applications and orders must also be "sealed by the judge."<sup>175</sup>

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<sup>172</sup>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).

<sup>173</sup>18 U.S.C. §2518(8)(a) (1970).

<sup>174</sup>Id.

<sup>175</sup>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).

¶C.74 Delays in sealing have been permitted in several cases.<sup>176</sup> 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.<sup>177</sup>

¶C.75 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.<sup>178</sup> In a more recent case,<sup>179</sup> it was emphasized that section 2518 (8) would be strictly construed so that conversations and evidence should be suppressed, when, in preparation for trial, officers unseal tapes in the absence of a judicial order.

¶C.75A 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 section 2518(8)(a). The

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<sup>176</sup>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. 1971), 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).

<sup>177</sup>United States v. Falcone, 505 F.2d 478, 483-84 (3d Cir. 1974), cert. denied, 420 U.S. 955 (1975).

<sup>178</sup>People v. Nicoletti, 34 N.Y.2d 249, 313 N.E.2d 336, 356 N.Y.S.2d 855 (1974).

<sup>179</sup>People v. Sher, 38 N.Y.2d 600, 345 N.E.2d 314, 381 N.Y.S.2d 843 (1976).

Second Circuit held that unexplained delays in sealing ranging from eight to twelve months required suppression of wiretap evidence.<sup>179a</sup> That a district judge 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 section 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.<sup>179b</sup>

¶C.75B 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

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<sup>179a</sup> United States v. Gigante, 538 F.2d 502 (2d Cir. 1976). See also People v. Saccia, \_\_\_ App. Div.2d \_\_\_, 390 N.Y.S.2d 743 (4th Dep't. 1977).

<sup>179b</sup> But see United States v. Caruso, 415 F.Supp. 847 (S.D.N.Y. 1976) (delays of 24 and 42 days in sealing state wiretap tapes arising from police effort to ready tapes for sealing and make duplicates was justified 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). But see United States v. Ricco, 421 F. Supp. 401 (S.D.N.Y. 1976) (unexplained sealing delay of 12 days in wiretap under New York law required suppression).

obtained through the second tap.<sup>179c</sup> Most courts so far have rejected this view. The D.C. Circuit held that failure to properly seal tapes as required by section 2518(8)(a) does not affect further investigative use of the tapes.<sup>179d</sup> In a recent case, United States v. Fury,<sup>179e</sup> 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, i.e., derived from a primary illegality.

¶C.75C In Fury, the court dealt with another sealing requirement issue. Federal and New York law requires that tapes be sealed immediately upon the expiration of an eavesdropping warrant (state law) or upon expiration of the period of the wiretap order, or extensions thereof (federal law).<sup>179f</sup> State officials had obtained two thirty day

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<sup>179c</sup> United States v. Ricco, 421 F.Supp. 401 (S.D.N.Y. 1976).

<sup>179d</sup> United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976).

<sup>179e</sup> No. 76-1506 (2d Cir. April 1977) (interpreting N.Y. Crim. Proc. Law §700.50(1), (2) (McKinney 1971)).

<sup>179f</sup> 18 U.S.C. §2518(8)(a) (1970); N.Y. Crim. Proc. Law §700.50(2) (McKinney 1971).

extensions of 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 government need not seal tapes upon expiration of the period of the original order and again after each extension. The court suggested 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.

¶C.75D In United States v. Abraham,<sup>179g</sup> the Sixth Circuit dealt with two sealing requirement issues: (1) Whether section 2518(8)(a) requires that tapes be sealed by the judge or in his presence; (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 tapes. Without requiring that the tapes be brought to him or viewing them at the FBI office, the judge ordered that the tapes be 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 where the cabinet was located was limited. The court found that sealing requirements were met. The court also set down minimum standards to govern sealing and custody in future cases:

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<sup>179g</sup> 541 F.2d 624 (6th Cir. 1976).

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 separate 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.<sup>179h</sup>

#### IV. Inventories

##### A. In general

¶C.76 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

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<sup>179h</sup> Id. at 628-29.

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.<sup>180</sup> Further, mere service of a post-authorization inventory does not give the party served the right to jeopardize the secrecy of on-going investigations or grand jury proceedings by filing a motion for disclosure under section 2518(8)(d) to gain access to transcripts of recorded conversations.<sup>180a</sup>

¶C.77 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

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<sup>180</sup>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 has 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).

<sup>180a</sup>Application of United States Authorizing Interception of Wire Communications, 413 F. Supp. 1321 (E.D. Pa. 1976).



this detail once the tap is complete and the tapes have been sealed.

¶C.78 A preliminary issue is whether defendants have a constitutional right to post-wiretap notice. The early inventory cases ignored this possibility, but language from an earlier Supreme Court opinion seems to make notice a constitutional necessity.<sup>181</sup> A Ninth Circuit case also held squarely that the Constitution did require post-wiretap notice.<sup>182</sup> The Supreme Court, however, in Donovan, treated failure to file notice as little more than a non-essential statutory requirement of Title III.<sup>183</sup>

B. Problems with the service of inventories

1. Lengthy postponements

¶C.79 In some cases defendants have requested suppression on the ground that the judge unjustifiably exercised his discretion to postpone repeatedly the deadline for serving the inventory.<sup>184</sup> So far, however, the appellate courts have refused to find an abuse of discretion and have agreed that

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<sup>181</sup>Berger v. New York, 388 U.S. 41, 60 (1967).

<sup>182</sup>United States v. Chun, 503 F.2d 533, 536-37 (9th Cir. 1974). But see United States v. Donovan, 97 S.Ct. 658 (1977) (discussed infra).

<sup>183</sup>United States v. Donovan, 97 S.Ct. 658 (1977). See also United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976) (interpreting provisions of D.C. wiretap law (D.C. Code §23-500 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 address where telephone was registered in defendant's name was sufficient inventory notice).

<sup>184</sup>See, e.g., United States v. Manfredi, 488 F.2d 588, 601 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

the delay was justified.<sup>185</sup> The reason for lengthy delays most frequently cited is that an ongoing investigation necessitates continued secrecy.

¶C.80 Excessive postponement for no good cause, however, might well induce a court to find an abuse of discretion and order suppression. The Third Circuit in United States v. Cafero<sup>186</sup> warned that judges "should exercise great care" in granting extensions beyond the 90-day period.<sup>187</sup>

## 2. Late service

¶C.81 Frequently the inventory is served beyond the 90-day limit or the eventual limit established by judicial postponements. This clearly violates the statute, but it probably does not violate the Constitution or require suppression.

¶C.82 The early cases simply called the inventory a ministerial duty that could not affect substantial rights.<sup>188</sup>

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<sup>185</sup>See, e.g., United States v. Dafero, 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).

<sup>186</sup>473 F.2d 489 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974).

<sup>187</sup>Id. at 500.

<sup>188</sup>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.

The Ninth Circuit, however, found that the inventory satisfies a constitutional requirement. The court in United States v. Chun<sup>189</sup> applied an analysis developed by the United States Supreme Court in a pair of cases dealing with a suppression remedy.<sup>190</sup> When dealing with a suppression problem, the Supreme Court ruled, one should ask several questions. First, does the statutory section violated "directly and substantially"<sup>191</sup> implement the legislative scheme to prevent abuse of wiretaps? If not, then suppression is not an appropriate remedy. The Chun court ruled that the inventory provisions are a central safeguard. Nevertheless, the Chun analysis was rejected by the Supreme Court in Donovan,<sup>192</sup> and the court refused to suppress in the absence of a showing that the violation was intentional. Even where such a showing could be made, it would not necessarily follow that suppression was appropriate. Other questions would have to be asked. Has the purpose of the section been satisfied despite the violation?<sup>193</sup> In case of late service,

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<sup>189</sup>503 F.2d 533 (9th Cir. 1974).

<sup>190</sup>United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974).

<sup>191</sup>United States v. Giordano, 416 U.S. at 527.

<sup>192</sup>United States v. Donovan, 97 S.Ct. 658 (1977).

<sup>193</sup> United States v. Chavez, 416 U.S. 562, at 574-5 (1974). See also United States v. Civella, 533 F2d 1395 (8th Cir. 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 (continues)

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 knowledge and prejudice, then the statutory purpose has not been fulfilled, and suppression might be appropriate.

### 3. No service

¶C.83 When no inventories at all are served, the defendant has received no actual notice, and the statutory purpose has not been met. If the defendant can show an intentional failure, suppression will follow unless the government can show that the defendant has actual notice from some other source.<sup>194</sup> Actual notice, even from a source other than the formal inventory, satisfies the statutory purpose and

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<sup>193</sup>(continued)

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 has 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.

<sup>194</sup>See United States v. Wolk, 466 F.2d 1143, 1144 (8th Cir. 1972).

should prevent suppression.<sup>195</sup>

¶C.84 No formal inventories were ever served in Chun. The Ninth Circuit remanded to the district court to determine whether the defendants had actual notice.<sup>196</sup> The district court found that they did, but not within the 90-day limit, and so ordered suppression.<sup>197</sup> The conclusion of the district court seems plainly wrong on two grounds. First, of course, under Donovan intent would have to be shown. But more is at issue. Actual notice is a substitute for an inventory. If the inventory is late, the evidence should not be 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 intent and prejudice, yet the court found explicitly that the defendants had not been prejudiced.<sup>198</sup> The lesson is nevertheless clear: inventories should be served on time.

#### 4. Deliberate failure to serve

¶C.85 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

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<sup>195</sup>Id. at 445-46.

<sup>196</sup>503 F.2d at 536, 542.

<sup>197</sup>386 F. Supp. 91, 95-96 (D. Hawaii 1974).

<sup>198</sup>Id. at 94.

completely.<sup>199</sup> 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 requirement, 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

¶C.86 Under the federal and New York statutes inventories are mandatory only as to persons named in the authorization order.<sup>200</sup> 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.<sup>201</sup>

¶C.87 The Ninth Circuit's opinion in Chun raises the possibility that all prospective defendants may have a right

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<sup>199</sup>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)

<sup>200</sup>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.

<sup>201</sup>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).

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.<sup>202</sup> The prosecutor must revise and update this information in order to keep the judge correctly informed.

¶C.88 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.<sup>203</sup> 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.

¶C.88A A recent Supreme Court case, United States v. Donovan,<sup>203a</sup> dealt with the inventory-notice provision in the federal wiretap statute, section 2518 (8)(d). The government 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

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<sup>202</sup>503 F.2d at 540. Accord, United States v. Donovan, 513 F.2d 337, 342-43 (6th Cir. 1975), cert. granted, 421 U.S. 907 (1976), reversed, 97 S.Ct. 658 (1977).

<sup>203</sup>503 F.2d at 537.

<sup>203a</sup>97 S.Ct. 658 (1977)





**CONTINUED**

**3 OF 6**

wiretap evidence suppressed. The government view was that inventory notice was not mandatory since the defendants were not named in the original wiretap order. This was correct. The government then argued 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. If the judge wanted more information he could ask for it.

¶C.88B The Supreme Court rejected this view and held that section 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.<sup>203b</sup> 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.

¶C.88C The Court then considered the question 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.<sup>203c</sup> The inadvertent government omissions did not make the interception of the defendants' communications retroactively unlawful. Applying the test laid down in Giordano and Chavez<sup>203d</sup> the Court found that section 2518(8)(d) was not intended by Congress to play a substantial role in limiting the abuse of wiretapping.

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<sup>203b</sup>Donovan, 97 S.Ct. at 669-70.

<sup>203c</sup>Id. at 674.

<sup>203d</sup>See discussion ¶48 supra.

¶C.88D 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.<sup>203d</sup>

¶C.88E Several circuits have recently followed and applied Donovan. In United States v. Landmesser,<sup>203e</sup> the defendant was not served within the ninety day period under section 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. The district court had ordered service within the ninety day period and defendant had not shown prejudice due to the delay. In United States v. DiGirolomo,<sup>203f</sup> the Eighth Circuit 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,<sup>203g</sup> holding that where the defendant eventually received actual notice, the burden was on him to show that he was prejudiced.

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<sup>203e</sup>No. 76-1540 (6th Cir. April 1977).

<sup>203f</sup>550 F.2d 464 (8th Cir. 1977).

<sup>203g</sup>No. 76-1506 (2d Cir. April 1977).

¶C.88F      Donovan also dealt with section 2518(1)(b)(iv) which requires that applications for wiretaps and orders authorizing them identify the person, if known, committing the offense and whose communications are to be intercepted. The Court ruled that this requires identification of all persons (if known) where there is probable cause to believe that the person is committing the offense under investigation, and the person's communications will be intercepted over the target phones. Failure to comply would not warrant suppression unless intentional.<sup>203h</sup>

### 3) SAMPLE PROCEDURES FOR ELECTRONIC SURVEILLANCE

#### Introduction

¶C.89      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.

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<sup>203h</sup> See also United States v. Jackson, 549 F.2d 517 (8th Cir. 1977); United States v. Costanza, 549 F.2d 1126 (8th Cir. 1977).

## I. New York County (Manhattan)

### ¶C.90 Rackets Bureau Manual Electronic Eavesdropping 204

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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204 National Wiretap Commission Staff Studies and Surveys,  
311-20 (1976).

## 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 critical 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, prepare 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 affected 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

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.

## 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, keep 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. Tortorella*

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 permissible, 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.

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 \_\_\_\_\_

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  
APPLI-  
CATION

A. THE OFFICIAL MAKING APPLICATION		B. OFFICIAL AUTHORIZING APPLICATION	
PERSON	NAME	SHOW "SAME" IF SAME AS "A"	
	TITLE		
AGENCY	NAME		
	ADDRESS		

OFFENSES

DURATION  
OF  
INTERCEPT

PLACE

APPLICATION			ORDER OR EXTENSION		
OFFENSES SPECIFIED			DENIED	GRANTED	GRANTED WITH THESE CHANGES
Type of Intercept <input type="checkbox"/> Phone Wiretap <input type="checkbox"/> Other (Specify) _____ <input type="checkbox"/> Microphoning/Eavesdrop			<input type="checkbox"/>	<input type="checkbox"/>	
DATE OF APPLICATION					DATE OF ORDER
PERIOD ORIGINALLY REQUESTED			<input type="checkbox"/>	<input type="checkbox"/>	
LENGTH OF EXTENSIONS REQUESTED	1st		<input type="checkbox"/>	<input type="checkbox"/>	
	2nd		<input type="checkbox"/>	<input type="checkbox"/>	
	3rd		<input type="checkbox"/>	<input type="checkbox"/>	
<input type="checkbox"/> SINGLE FAMILY DWELLING <input type="checkbox"/> MULTIPLE DWELLING <input type="checkbox"/> OTHER (Specify) _____ <input type="checkbox"/> APARTMENT <input type="checkbox"/> BUSINESS LOCATION (Specify) _____					

COMMENTS

DATE OF  
REPORT

SIGNATURE

TO DIRECTOR, ATTENTION OPERATIONS BRANCH, DLS  
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 AUTHOR- IZING THE INTERCEPT	NAME OF JUDGE
	COURT
	ADDRESS

PERSON MAKING THIS REPORT  
AND WHO AUTHORIZED THE INTERCEPTION APPLICATION

NAME & AGENCY OF PERSON MAKING AP- PLICATION FOR INTERCEPTION (IF DIFFERENT FROM —)	NAME
	TITLE
	AGENCY
	ADDRESS

APPLICATION		ORDER OR EXTENSION		
OFFENSES SPECIFIED		DENIED	GRANTED	GRANTED WITH THESE CHANGES
Type of <input type="checkbox"/> Phone Wiretap <input type="checkbox"/> Other (Specify)		<input type="checkbox"/>	<input type="checkbox"/>	
Intercept <input type="checkbox"/> Microphone/Earried	DATE OF APPLICATION			DATE OF ORDER
PERIOD ORIGINALLY REQUESTED		<input type="checkbox"/>	<input type="checkbox"/>	
LENGTH OF EXTENSIONS REQUESTED		<input type="checkbox"/>	<input type="checkbox"/>	
		<input type="checkbox"/>	<input type="checkbox"/>	
<input type="checkbox"/> SINGLE FAMILY DWELLING <input type="checkbox"/> MULTIPLE DWELLING <input type="checkbox"/> OTHER (Specify)				
<input type="checkbox"/> APARTMENT <input type="checkbox"/> BUSINESS LOCATION (Specify)				

DESCRIP- TION OF INTER- CEPTS	TYPE OF INTERCEPTION	NUMBER OF DAYS IN ACTUAL USE	AVERAGE FREQUENCY OF INTERCEPT	NUMBER OF		
				PERSONS WHOSE COMMUNICA- TIONS WERE INTERCEPTED	COMMUNICA- TIONS INTERCEPTED	INCRIMINATING COMMUNICA- TIONS INTERCEPTED

COST	NATURE AND QUANTITY OF MANPOWER USED	Manpower Cost	TOTAL COST
		\$	
	NATURE OF OTHER RESOURCES	Resource Cost	
		\$	

RESULTS	NUMBER OF ACTIONS RESULTING FROM INTERCEPTIONS					
	NUMBER OF PERSONS ARRESTED BY TYPE OF OFFENSE	TRIALS COMPLETED	MOTIONS TO SUPPRESS			NUMBER OF PER- SONS CONVICTED BY TYPE OF OFFENSE
			MADE	GRANTED	DENIED	

AN ASSESSMENT OF THE IMPORTANCE OF THE INTERCEPTIONS IN OBTAINING SUCH CONVICTIONS

DATE OF REPORT \_\_\_\_\_ SIGNATURE \_\_\_\_\_

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)

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.

[illegible]

\*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.

## JURISDICTION

NAME \_\_\_\_\_

DATE \_\_\_\_\_

ADDRESS \_\_\_\_\_

If you have any questions concerning this form, please call:

CITY, STATE \_\_\_\_\_

Mr. James A. McCafferty  
Chief, Operations Branch,  
Division of Information Systems  
Area Code 202, 393-1640, Ext. 3A3

ZIP \_\_\_\_\_

AREA CODE \_\_\_\_\_ TELEPHONE \_\_\_\_\_

**MAIL TO:** Director - Detention Operations Branch  
D.I.S. - Administrative Office of  
the United States Courthouse  
Supreme Court Building,  
Washington, D.C. 20544

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  
¶C.91 Sample Instructions Given to Police Officer Monitoring  
Plant<sup>205</sup>

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.

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<sup>205</sup>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.

**PARISHONER-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 category 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 Tresfer has my home telephone number if that becomes necessary.

GOOD LUCK.

ROBERT P. LA RUSSO  
ASSISTANT DISTRICT ATTORNEY



III. New Jersey

¶C.92 Instructions and Forms for Electronic Surveillance<sup>206</sup>

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)

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<sup>206</sup>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 SURVEILLANCE 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/ \_\_\_\_\_

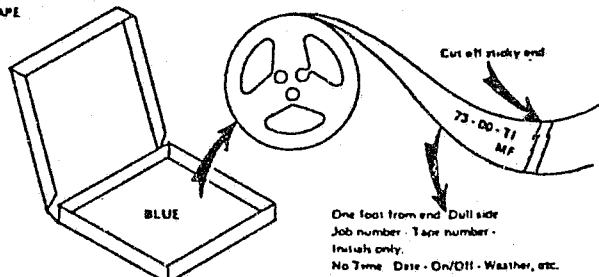
TAKE-UP REEL



Only job and tape number  
No initials Time Date

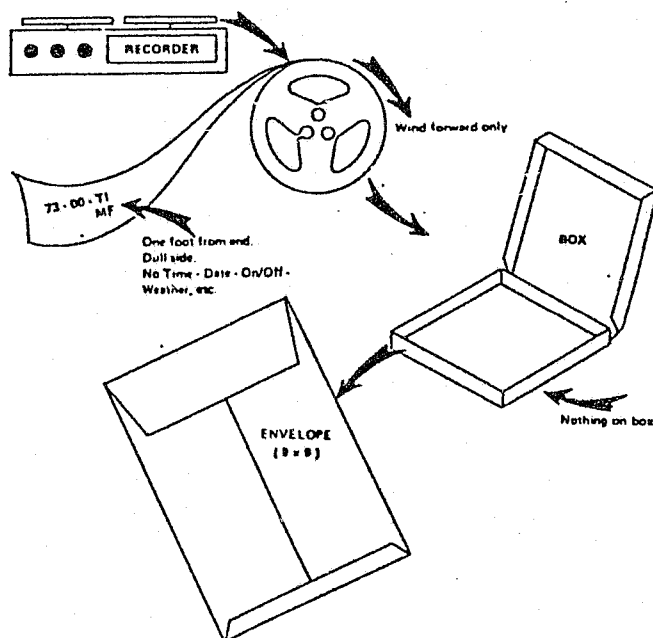
## OFFICIAL ELECTRONIC SURVEILLANCE TAPE HANDLING PROCEDURE

NEW TAPE



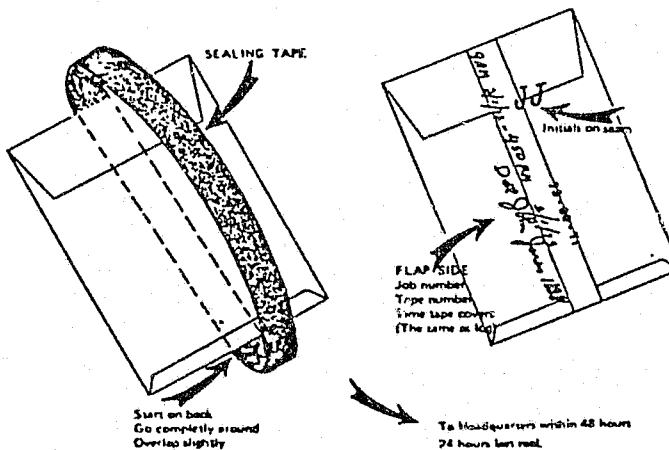
One foot from end 'Dull side'  
Job number - Tape number -  
Initials only.  
No Time Date - On/Off - Weather, etc.

REMOVAL



One foot from end.  
Dull side.  
No Time - Date - On/Off -  
Weather, etc.

SEALING ENVELOPE



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 \_\_\_\_\_

	AM												PM												
	12	1	2	3	4	5	6	7	8	9	10	11	12	1	2	3	4	5	6	7	8	9	10	11	12
1																									
2																									
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31																									

LEGEND:  $\frac{1}{2}$  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 hr

NOTE: — EVALUATE FOR REDUCTION OF MONITORING TIME

EXPLORATORY

SUBSCRIBER (NAME) \_\_\_\_\_ EXPLORATORY TAKEN BY \_\_\_\_\_  
ADDRESS (STREET) \_\_\_\_\_ TELEPHONE COMPANY NOTIFIED \_\_\_\_\_  
(CITY) \_\_\_\_\_ WHO \_\_\_\_\_ DATE \_\_\_\_\_ TIME \_\_\_\_\_  
TELEPHONE NUMBER \_\_\_\_\_ MAIN ☐ AUX. ☐ UNKNOWN ☐  
REQUESTING TROOPER \_\_\_\_\_ UNIT \_\_\_\_\_  
LEAD INFO \_\_\_\_\_ CRIME \_\_\_\_\_ PAPER ANTICIPATED \_\_\_\_\_

RETURN  
CHP

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 # _____		<u>COURT ORDER</u>	
SUBSCRIBER'S NAME _____		JUDGE _____	
ADDRESS _____		DATE ISSUED _____	
_____		DURATION ( ) DAYS BETWEEN _____	
CRIME _____		RESTRICTIONS _____	
-----		TAPE # 1 BEGAN-DATE _____ TIME _____	
EQUIPMENT USED _____		MONITORING ENDS-DATE _____ TIME _____	
_____		SEALED BY & DATE _____	
_____		<u>RENEWALS</u>	
_____		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 # _____		_____	
_____		-----	
_____		REMOVED BY & DATE _____	
_____		REMOVAL MANHOURS _____	
SLAVE # _____		ENTIRE JOB MANHOURS _____	
PLANT # _____		_____	
INVEST.# _____		_____	





State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF STATE POLICE

COLONEL D. B. KELLY  
SUPERINTENDENT

POST OFFICE BOX 88  
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 6  
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*  
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-

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

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

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 adhered 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 proceedings 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.

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 admissible 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 re-viewing 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 erasing 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. H. Black and J. White.

Example 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.

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					
<b>ABBREVIATIONS:</b> <span style="margin-left: 20px;">UM - UNIDENTIFIED MALE</span> <span style="margin-left: 20px;">UF - UNIDENTIFIED FEMALE</span> <span style="margin-left: 20px;">D/e - DIAL CALL</span> <span style="margin-left: 20px;">NP - CONVERSATION NOT PERTINENT</span> <span style="margin-left: 20px;">NA - NO ANSWER</span> <span style="margin-left: 20px;">TR - TRANSCRIBE</span> <span style="margin-left: 20px;">TT/e - TOUCH TONE</span>							
(13) NAME		(14) BADGE NO.		(15) PAGE ____ OF ____ PAGES		NUMBER OF CONVERSATIONS (16) TOTAL	
						(17) INCRIMINATING	



**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		
<b>ABBREVIATIONS:</b> <span style="margin-left: 20px;">UM - UNIDENTIFIED MALE</span> <span style="margin-left: 20px;">UF - UNIDENTIFIED FEMALE</span> <span style="margin-left: 20px;">D/# - DIAL CALL</span> <span style="margin-left: 20px;">NP - CONVERSATION NOT PERTINENT</span> <span style="margin-left: 20px;">NA - NO ANSWER</span> <span style="margin-left: 20px;">TR - TRANSCRIBE</span> <span style="margin-left: 20px;">TT/# - TOUCH TONE</span>				
(12) DATE	(13) NAME		(14) BADGE NO.	(15) PAGE <div style="text-align: right; font-size: small;">_____ OF _____ PAGES</div>

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 total number of people whose conversations were heard.  
Example: In a bookmaking operation, the bookmaker is one and each of his customers are counted once, 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		Application Order or Extension			
			(6) Crime specified			
	Name and address of person authorizing interception application		(7) Period originally requested	Date of application	Date of order	
			(8) LENGTH OF EXTENSIONS REQUESTED	1st →		
(9) Type of interceptions <input type="checkbox"/> Wire tap <input type="checkbox"/> Microphone / evesdrop <input type="checkbox"/> Other (specify)			2nd →			
			3rd →			
(10) Location of interception <input type="checkbox"/> Resident <input type="checkbox"/> Apartment <input type="checkbox"/> Multiple dwelling <input type="checkbox"/> Business location <input type="checkbox"/> Other (specify)						
(11) Description of Intercepts	Duration			(12) Number of days in actual use	Number of	(16) Average frequency of intercepts per day
	Between and	Month	Day	Year	(13) Persons whose communications were intercepted	
(15) Incriminating communications intercepted						
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				(20) Does name appear on any other final report		
NAMES AND ADDRESSES						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.



APPENDIX D

ELECTRONIC SURVEILLANCE AT THE ADJUDICATIVE STAGE



APPENDIX D - ELECTRONIC SURVEILLANCE IN THE  
ADJUDICATIVE STAGE

1) FEDERAL PRIVILEGE IN THE GRAND JURY

SUMMARY-----	¶D.1
A. Grand Jury Background-----	¶D.2
B. Existence of Federal Privilege for Unlawful Surveillance-----	¶D.4
1. <u>Adequacy of witness's claim</u> -----	¶D.5
2. <u>Adequacy of denial</u> -----	¶D.7
3. <u>Refusal to testify after an adverse finding</u> -----	¶D.12
4. <u>Disclosure</u> -----	¶D.13
5. <u>Wiretap privilege in New York</u> -----	¶D.16
6. <u>Wiretap privilege in New Jersey</u> -----	¶D.18
7. <u>Wiretap privilege in Massachusetts</u> -----	¶D.19

2) SUPPRESSION FOR NON-COMPLIANCE WITH THE TITLE III

INTRODUCTION-----	¶D.20
A. Who May Obtain Surveillance Warrants-----	¶D.21
1. <u>What officer must apply for the warrant</u> ----	¶D.21
2. <u>Application by an acting federal officer</u> ---	¶D.23
3. <u>Restrictions on state officers</u>	
a. <u>What officer must apply for the warrant</u> -----	¶D.24
b. <u>Delegation in case of vacancy</u> -----	¶D.25
B. Contents of the Application for Surveillance---	¶D.26
1. <u>Enumerated crimes</u>	
a. <u>Federal crimes</u>	
b. <u>State crimes</u>	

- c. Limitation to crimes punishable by imprisonment for more than one year-----¶D.26
  - 2. Particularity as to conversations sought
  - 3. Particularity as to place-----¶D.27A
  - 4. Particularity as to persons-----¶D.28
    - a. Failure to identify known parties-----¶D.28
  - 5. Inadequacy of investigative alternatives--¶D.31
  - 6. Period of time surveillance to be authorized
  - 7. Prior applications-----¶D.34
- C. Contents of the Surveillance Order
  - 1. Determination of probable cause
    - a. Taint of evidence from prior illegal wiretaps-----¶D.35
  - 2. Directives limiting scope of the surveillance-----¶D.39
    - a. Identification of speakers
    - b. Duration and termination directives
      - (i) Failure to include a directive requiring termination upon attainment of the objective of the order-----¶D.39
      - (ii) Failure to date the order-----¶D.41
    - c. Minimization directives
  - 3. Signature of the court-----¶D.42
- D. Execution of the Surveillance Order
  - 1. Who may execute surveillance-----¶D.43
  - 2. Avoidance of excessive surveillance
    - a. Failure to minimize intercepted conversations-----¶D.44
      - (i) Failure to make any attempt to minimize-----¶D.45

(ii)	<u>Failure to minimize despite a good faith effort</u>	-----¶D.46
b.	<u>Interception of privileged communications</u>	
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## 1) FEDERAL PRIVILEGE IN THE GRAND JURY

### SUMMARY

¶D.1 Prosecutors can immunize witnesses before grand juries and compel testimony over a claim of self-incrimination. Reluctant grand jury witnesses, therefore, seek other means of avoiding testimony. Where unlawful electronic surveillance was conducted and questions are asked based upon it, the grand jury witness has a limited privilege not to testify based upon a federal statute. Complicated procedures are involved in asserting and responding to claims of unlawful surveillance before the grand jury. The Supreme Court has not recognized a constitutional privilege to refuse to testify based upon general search and seizure claims. Other constitutional or common law privileges such as attorney-client, husband-wife, and priest-penitent may be asserted by grand jury witnesses with success. These privileges, however, are not absolute, and the courts will, in certain instances, refuse to recognize them.

#### A. Grand Jury Background

¶D.2 The power to compel persons to appear and testify before grand juries is firmly established. Its roots are deep in history and the importance of the grand jury is reflected in the Fifth Amendment. The duty to testify, too, is recognized as a basic obligation that every citizen owes to

his government.<sup>1</sup> Such testimony is a primary source of the information needed to bring criminal sanctions to bear. The duty to testify is so necessary that a witness's personal privacy must yield to the public's overriding interest in the administration of justice.<sup>2</sup>

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<sup>1</sup>Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

<sup>2</sup>Blair v. United States, 250 U.S. 273, 279 (1919):

Long before the separation of the American Colonies from the mother country, compulsion of witnesses to appear and testify had become established in England. By Act of 5 Eliz., c. 9, §12 (1562), provision was made for the service of process out of any court of record requiring the person served to testify concerning any cause or matter pending in the court, under a penalty of ten pounds besides damages to be recovered by the party aggrieved. See Havithbury v. Harvey, Cro. Eliz. 130; 1 Leon. 122; Goodwin (or Goodman) v. West, Cro. Car. 522, 540; March, 18. When it was that grand juries first resorted to compulsory process for witnesses is not clear. But as early as 1612, in the Countess of Shrewbury's case, Lord Bacon is reported to have declared that 'all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and hand, but of their knowledge and discofery.' 2 How. St. Tr. 769, 778. And by Act of 7 & 8 Wm. III, c. 3, §7 (1695), parties indicted for treason or misprision of treason were given the like process to compel their witnesses to appear as was usually granted to compel witnesses to appear against them; clearly evincing that process for crown witnesses was already in familiar use.

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

¶D.3 But the power to compel testimony is not absolute. Its most important limitation is the Fifth Amendment privilege against compulsory self-incrimination. No man can be forced

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<sup>2</sup>(continued)

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, 169, witnesses required to attend any term of the district court on the part of the United States may be subpoenaed to attend to testify generally; and under such process they shall appear before the grand or petit jury, or both, as required by the court or the district attorney. By the same Act of 1853 (10 Stat. 167, 168), fees for the attendance and mileage of witnesses were regulated; and it was provided that where the United States was a party the marshal on the order of the court should pay such fees. Rev. Stats., §§848, 855. And §§879 and 881, Rev. Stats., contain provisions for requiring witnesses in criminal proceedings to give recognizance for their appearance to testify, and for detaining them in prison in default of such recognizance.

In all of these provisions, as in the general law upon the subject, it is clearly recognized that the giving of testimony and the attendance upon court or grand jury in order to testify are public duties which every person within the jurisdiction of the Government is bound to perform upon being properly summoned, and for performance of which he is entitled to no further compensation than that which the statutes provide. The personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public. The duty, so onerous at times, yet so necessary to the administration of justice according to the forms and modes established in our system of

to testify against himself. But those capable of giving the most useful testimony are often those implicated in the crime. Without their testimony, the ability of the grand jury to function would be seriously impaired. To balance the needs of the grand jury with the rights of the individual, a prosecutor may, therefore, immunize witnesses before grand juries and compel testimony.<sup>3</sup>

B. Existence of Federal Privilege For Unlawful Surveillance  
¶D.4 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.<sup>4</sup> When the witness makes this claim,

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<sup>2</sup>(continued)

government (Wilson v. United States, 221 U.S. 361, 372, quoting Lord Ellenborough), is subject to mitigation in exceptional circumstances; there is a constitutional exemption from being compelled in any criminal case to be a witness against oneself entitling the witness to be excused from answering anything that will tend to incriminate him (see Brown v. Walker, 161 U.S. 591); some confidential matters are shielded from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.

<sup>3</sup>See, e.g., Kastigar v. United States, 406 U.S. 441 (1972) (18 U.S.C. §6001).

<sup>4</sup>Omnibus Crime Control and Safe Streets Act, Title III, §802, 18 U.S.C. §2515 (1968):

the government must affirm or deny the alleged unlawful act under 18 U.S.C. §3504(a).<sup>5</sup> If the government meets this burden and adequately denies that the questions are based upon unlawful electronic surveillance, the witness must testify or

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<sup>4</sup> (continued)

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 any 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 (1968). "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 subpoenaed and the government 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.

<sup>5</sup>Organized Crime Control Act, Title VII, §702(a), 18 U.S.C. §3504(a) (1970):

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 an 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 ¶¶D.16-D.19

be subject to a contempt proceeding.<sup>6</sup> If the government concedes that the questions are based upon an unlawful electronic surveillance or fails to meet this burden, the witness may not be compelled to testify.<sup>7</sup>

1. Adequacy of witness's claim

¶D.5 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.

In In re Evans,<sup>8</sup> 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.<sup>9</sup> It was argued that to require no more than a

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<sup>6</sup>See, e.g., In re 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]; In re Toscanino, 500 F.2d 267 (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 (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].

<sup>7</sup>Gelbard v. United States, 408 U.S. 41 (1972).

<sup>8</sup>452 F.2d 1239 (D.C. Cir. 1971), cert. denied, 408 U.S. 930 (1972).

<sup>9</sup>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).

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 upon defendants and witnesses that could rarely be met.<sup>10</sup> This argument is not always persuasive. In In re Vigil,<sup>11</sup> 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.<sup>12</sup>

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<sup>10</sup>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 computers 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.

<sup>11</sup>524 F.2d 209 (10th Cir. 1975), cert. denied, 425 U.S. 927 (1976).

<sup>12</sup>See also In re Milloy, 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].



¶D.6 When a grand jury witness claims that the basis of the questions he is being asked is an unlawful electronic surveillance of a third party (i.e., an attorney), the adequacy of the claim is generally measured 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.<sup>13</sup>

The witness does not, of course, have to plead or prove his entire case, but he must make a prima facie showing that good cause exists to believe that there was an unlawful electronic surveillance.

## 2. Adequacy of denial

¶D.7 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:

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<sup>13</sup>482 F.2d 1016, 1026 (9th Cir. 1972). 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 In re Vielguth, 502 F. 2d 1257, 1259 (9th Cir. 1974).

1. deny that there was any surveillance;
2. deny that there was any unlawful surveillance;<sup>14</sup> 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.

When the government denies the existence of surveillance, the practical difficulties of proving a negative arise.<sup>15</sup>

This dictates a practical rather than a technical approach.

The problem is ascertaining a minimum standard. Fortunately, there is a trend towards flexibility, and the necessary scope and specificity of a denial are tied to the concreteness of the claim.<sup>16</sup> As the specificity of the claim increases, the

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<sup>14</sup>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 were a surveillance unless he has received a section 2518(8)(d) inventory notice.

<sup>15</sup>See In re Weir, 495 F.2d 879, 881 (9th Cir. 1974):

Proving a negative is, at best, difficult and in our review, a practical, as distinguished from a technical, approach is dictated.

<sup>16</sup>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 attorney to affirm or deny, information tendered by prosecutor under oath to the court sufficient to

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.

¶D.8 Although this is the trend, some courts still adhere to the standards set out by the court in Alter for the government's response.<sup>17</sup> 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

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<sup>16</sup>(continued)

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, 508 F.2d 845 (9th Cir. 1974), 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].

<sup>17</sup>482 F.2d at 1026. See also In re Vigil, 524 F.2d 209, 214 (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 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].

factual, unambiguous, and unequivocal.<sup>18</sup> 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 investigation<sup>19</sup> have been checked, summarizing the respective responses.<sup>20</sup> 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.<sup>21</sup>

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<sup>18</sup>482 F.2d at 1027.

<sup>19</sup>In re Quinn, 525 F.2d 222 (1st Cir. 1975).

<sup>20</sup>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).

<sup>21</sup>In re Persico, 491 F.2d 1156 (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:

Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency or 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 communications, or evidence derived therefrom, 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.

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:

¶D.9 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.<sup>22</sup> 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 courts accept the government's position.<sup>23</sup> The proper procedure is described by Judge Gee in In re Grand Jury Proceedings (Worobyt):<sup>24</sup>

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<sup>21</sup>(continued)

Because no person is a party 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., 2d Sess. 106 (1968).

<sup>22</sup>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].

<sup>23</sup>In re Grand Jury Proceedings (Worobyt), 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]; In re Droback, 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 Presico, 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.]

<sup>24</sup>522 F.2d 196 (5th Cir. 1975) cert. denied, 425 U.S. 911 (1976).

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 tap, 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 court judge's in camera determination.<sup>25</sup>

This procedure, however, is not universally followed. The First Circuit, in In re Lochiatto,<sup>26</sup> 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.

¶D.10 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.<sup>27</sup>

¶D.11 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.<sup>28</sup> The problem then arises: how is the privilege vindicated?

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<sup>25</sup>Id. at 197-98. Such a procedure protects the privacy of all parties while still protecting the interest of the grand jury witness.

<sup>26</sup>497 F.2d 803 (1st Cir. 1974).

<sup>27</sup>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).

<sup>28</sup>Gelbard v. United States, 408 U.S. 41 (1972).

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.<sup>29</sup>

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<sup>29</sup>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 questioning. See United States v. Seale, 461 F.2d 345, 365 (7th Cir. 1972) [sworn testimony, subject to cross-examination, of relevant government officials 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 nor 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 questions posed].

### 3. Refusal to testify after an adverse finding

¶D.12 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.<sup>30</sup> At this 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:

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<sup>30</sup>28 U.S.C. §1862(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--

- (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. Schnackenburg, 384 U.S. 373 (1966).



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.<sup>31</sup>

#### 4. Disclosure

¶D.13 18 U.S.C. §§2518(8)(d), (9), and (10)<sup>32</sup> give an aggrieved party only limited pretrial disclosure of papers and

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<sup>31</sup>408 U.S. 41, 70-71 (1972).

<sup>32</sup>18 U.S.C. §2518(8)(d) (1968):

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 intercepted 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 inspection such portions of the intercepted communications, applications and orders as the judge determined to be in the interest of justice.

18 U.S.C. §2518(9) (1968):

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 10 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. (footnote continues)

the product of surveillance. A grand jury witness objecting to questioning and seeking to see the underlying documents or intercepted communications, therefore, will find himself with highly limited rights.<sup>33</sup> 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.<sup>34</sup> If there is a conceded illegality or a finding by the presiding judge that the surveillance was unlawful, it is unclear as to what type of disclosure the aggrieved witness is entitled to.<sup>35</sup> But this will be a rare situation. Normally there will be limited disclosure, if any, in connection with the grand jury proceeding.

¶D.14 If the contumacious grand jury witness is prosecuted for criminal contempt, he is entitled to

1. full disclosure under section 2518(9); and
2. a plenary suppression hearing.

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<sup>32</sup>(continued)

18 U.S.C. §2518(10) (1968):

. . . 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.

<sup>33</sup>In re Grand Jury Proceedings (Worobyzt), 522 F.2d 196 (5th Cir. 1975) cert. denied, 425 U.S. 911 (1976).

<sup>34</sup>In re Persico, 491 F.2d 1156 (2d Cir.), cert. denied, 419 U.S. 924 (1974).

<sup>35</sup>See supra, n. 29.

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.<sup>36</sup>

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<sup>36</sup>394 U.S. 165 (1969). United States v. Fox, 455 F.2d 131 (5th Cir. 1972) elaborated upon Alderman; it granted an aggrieved party:

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:

(footnote continues)

¶D.15 In sum, a grand jury witness is not entitled to a hearing to determine if surveillance was conducted or to test

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<sup>36</sup>(continued)

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 propriety of the interception of an aggrieved person's communications.

S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968).

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).

(footnote continues)

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, e.g., 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

¶D.16 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.<sup>37</sup> Since section 3504 is not

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<sup>36</sup>(continued)

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).

<sup>37</sup>People v. Einhorn, 35 N.Y.2d 948, 324 N.E.2d 551, 365 N.Y.S.2d 171 (1974).

applicable to the states,<sup>38</sup> a slightly different procedure follows a recalcitrant witness's claim of unlawful interception. Upon the request of the witness<sup>39</sup> (which must be respected), he is to be brought before the presiding judge 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 judge 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.<sup>40</sup> If the presiding judge finds that there

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<sup>38</sup>H. Rept. No. 1549, 91st Cong., 2d Sess. 3 (1970):

As amended by the committee, the application of Title VII is limited to Federal judiciary and administrative proceedings.

<sup>39</sup>People v. Breindel, 73 Misc.2d 734, 739, 342 N.Y.S.2d 428, 434 (New York County 1973), aff'd, 35 N.Y.2d 928, 365 N.Y.S.2d 163 (1974).

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.

<sup>40</sup>People v. Mulligan, 40 App. Div.2d 165 (1st Dept. 1972); In re O'Brien, 76 Misc.2d 303, 350 N.Y.S.2d 498 (Rockland County Court 1973).

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.

¶D.17 A prosecution for contempt in New York is generally criminal in nature.<sup>41</sup> Because it is, the witness being

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<sup>41</sup>N.Y. Penal Law §215.50 (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 §215.50, 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.

prosecuted is entitled to all applicable procedural safeguards, most importantly, a plenary suppression hearing.<sup>42</sup> To guard against vague and unsupported allegations, the Court of Appeals has established a set of criteria to be met by a defendant making such a claim. In People v. Cruz,<sup>43</sup> the court said:

The defendant has the burden of coming forward with facts which reasonably lead him to believe that he or his counsel have been subjected to undisclosed electronic surveillance. The defendant's allegations 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.<sup>44</sup>

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 occurred;
2. the persons contacted;
3. the substance of the inquiries and replies; and
4. the dates of the claimed surveillance to which the inquiries were addressed.<sup>44a</sup>

These guidelines are to apply only in the context of a criminal trial, not in the context of a grand jury

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<sup>42</sup>18 U.S.C. §2518(10) and N.Y. Crim. Pro. Law art. 710 (McKinney, 1971).

<sup>43</sup>34 N.Y.2d 362, 314 N.E.2d 39, 357 N.Y.S.2d 709 (1974).

<sup>44</sup>Id. at 369, 314 N.E.2d at 43, 357 N.Y.S.2d at 714.

<sup>44a</sup>Id.



proceeding.<sup>45</sup> 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.<sup>46</sup> The right to object is not absolute and multiple challenges serve only to disrupt and delay the proceedings. The right is waivable.<sup>47</sup> 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

¶D.18 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

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<sup>45</sup>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).

<sup>46</sup>People v. Langella, 82 Misc.2d 410, 370 N.Y.S.2d 381 (New York County 1975).

<sup>47</sup>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.

will have obvious advantages in its future application and construction.<sup>48</sup>

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.<sup>49</sup> In response to a motion to suppress at trial, the court fashioned a procedural remedy to protect Fourth Amendment rights. The court said:

In making a motion to suppress, a defendant must

- (1) make a claim that he is aggrieved by an unlawful search and seizure; and
- (2) show reasonable grounds to believe that the evidence will be used against him in some penal proceeding.

In determining the reasonableness of the defendant's belief

- (1) Defendant'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.<sup>50</sup>

No standards were established defining the specificity required by the people's response, but in light of the heavy

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<sup>48</sup>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.

<sup>49</sup>135 N.J. Super. 179, 342 A.2d 897 (App. Div. 1975).

<sup>50</sup>Id. at 187-88, 342 A.2d at 902.

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.

#### 7. Wiretap privilege in Massachusetts

¶D.19 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.<sup>51</sup>

#### 2) SUPPRESSION FOR NON-COMPLIANCE WITH THE STATUTE

##### INTRODUCTION

¶D.20 The purpose of these materials is to provide a brief outline of some of the 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

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<sup>51</sup>In Commonwealth v. Vitello, \_\_\_ Mass. \_\_\_, 327 N.E.2d 819 (1975), the Massachusetts wiretap statute, Mass. Gen. Laws Ann. ch. 272, §99 (1975), 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).

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 this catalogue of mistakes will facilitate avoidance of further problems.

A. Who May Obtain Surveillance Warrants

1. What officer must apply for the warrant

¶D.21 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.

¶D.22 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 erroneous 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.

Under Giordano and Chavez suppression is proper only if there is a failure to satisfy 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 device.

Giordano, 416 U.S. at 527.

2. Application by an acting federal officer

¶D.23 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)).

3. Restrictions on state officers

a. What officer must apply for the warrant

¶D.24 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).

b. Delegation in case of vacancy

¶D.25 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.

B. Contents of the application for surveillance

1. Enumerated crimes

a. Federal crimes

b. State crimes

c. Limitation to crimes punishable by imprisonment for more than one year

¶D.26 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.

¶D.27 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).

2. Particularity as to conversations sought

3. Particularity as to place

¶D.27A Calhoun v. State, 20 Crim. L. Rptr. 2418, (Md. Ct. Spec. App. Jan. 3, 1977).

The court suppressed evidence from a wiretap where the application for the order merely incorporated prior affidavits concerning other locations. Probable cause must be established for each particular place.

4. Particularity as to persons

a. Failure to identify known parties

¶D.28 United States v. Donovan, 97 S. Ct. 658 (1977).

The government must identify all individuals where there is probable cause to believe that they are engaged in the activity under investigation and that their conversations will be intercepted. But inadvertent failure to name such an individual is not grounds for automatic suppression. The court, applying the Giordano test, held that failure to identify a known party in the application did not make the wiretap illegal under 18 U.S.C. §2518(10) (a). The decision is limited to the facts of the case and the court left open the question of knowing omission of identification or failure to provide the mandatory inventory notice.

¶D.29 Similarly, United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), cert. denied, 45 U.S.L.W. 3586 (1976); United States v. Doolittle, 507 F.2d 1368 (5th Cir.), aff'd en banc, 518 F.2d 500 (1975), cert. dismissed, 423 U.S. 1008 (1975); United States v. Kilgore, 518 F.2d 496 (5th Cir.), reh. en banc denied, 524 F.2d 957 (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 App. Div.2d 224, 227, 353 N.Y.S.2d 987, 989 (4th Dept. 1974). Contra, United States v. Bernstein, 590 F.2d 996 (45h Cir. 1975), cert. denied, 45 U.S.L.W. 3416 (1976); United States v. Moore, 513 F.2d 485, 495-98 (D.C. Cir. 1975).

¶D.30 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.

5. Inadequacy of investigative alternatives

¶D.31 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. See also Calhoun v. State, 20 Crim. L. Rptr. 2418 (Md. Ct. Spec. App. Jan. 3, 1977).

¶D.32 United States v. Kalustian, 529 F.2d 585 (9th Cir. 1976).

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." But see United States v. Matya, 20 Crim. L. Rptr. 2074 (8th Cir. Sept. 9, 1976) (The government does not have to exhaust or explain away all other possible investigating techniques in an application for an order.).



¶D.33      Contra, United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976).

6.    Period of time surveillance to be authorized

7.    Prior applications

¶D.34      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 ¶D.30, at 500.

C.      Contents of the Surveillance Order

1.    Determination of probable cause

a.    Taint of evidence from prior illegal wiretaps

¶D.35      United States v. Houlton, 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. But see United States v. Caruso, 415 F. Supp. 847 (S. D.N.Y. 1976).

¶D.36      State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975), cert. denied, 44 U.S.L.W. 3738 (1976).

The Supreme Court of Kansas ordered suppression of wiretap



**CONTINUED**

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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.

¶D.37 Contra, United States v. McHale, 495 F.2d 15, 17 (7th Cir. 1974) (wiretap was upheld because there were sufficient untainted sources in the application).

¶D.38 See also United States v. Cotroni, 527 F.2d 708 (2d Cir. 1975), cert. denied, 426 U.S. 906 (1976) (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).

2. Directives limiting the scope of the surveillance

a. Identification of speakers

b. Duration and termination directives

(i). Failure to include a directive requiring termination upon attainment of the objective of the order

¶D.39 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.

¶D.40 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. Christie 112 N.J. Super. 48, 270 A.2d 306 (Essex County Crim. Ct. 1970).

(ii) Failure to date the order

¶D.41 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.

c. Minimization directives

3. Signature of the court

¶D.42 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.

D. Execution of the Surveillance Orders

1. Who may execute surveillance orders

¶D.43 People v. Lossinno, 38 N.Y.2d 316, 379 N.Y.S.2d 777 (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.

2. Avoidance of excessive surveillance

a. Failure to minimize intercepted conversations

¶D.44 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps: Minimization, Amendment, Sealing, and Inventories," 61 Cornell L. Rev. 92, 94-126 (1975).

(i) Failure to make any attempt to minimize

¶D.45 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.

(ii) Failure to minimize despite a good faith effort

¶D.46 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.

¶D.47 But see United States v. Armocida, 515 F.2d 29, 42-46 (3d Cir. 1975), cert. denied, 423 U.S. 858 (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, 533 F.2d 491 (9th Cir. 1976), cert. denied, 426 U.S. 911 (1976).

b. Interception of privileged communications

3. Amending the surveillance order

¶D.48 See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶D.44, at 126-39.

a. Failure to amend retrospectively for crimes not specifically designated but related to designated offenses and therefore legally intercepted

(i) Federal crimes and federal orders

¶D.49 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."

¶D.50 See also United States v. Campagnuolo, \_\_\_\_ F. Supp. \_\_\_\_ (S.D. Fla. Dec. 31, 1975). But see United States v. Moore, 513 F.2d 485, 500-03 (D.C. Cir. 1975).

(ii) Federal crimes and state orders

¶D.51 United States v. Marion, 535 F.2d 697 (2d Cir. 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.

¶D.52      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, 533 F.2d 838 (3d Cir. 1976) (no authorization needed to use wiretap evidence to secure another wiretap).

b. Failure to amend in a prompt fashion for unrelated crimes

¶D.53      United States v. Brodson, supra ¶D.50; United States v. Marion, supra ¶D.51; United States v. Campagnuolo, supra ¶D.50.

¶D.54      See 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).

c. Failure to amend prospectively

(i) Persons

¶D.55 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.

¶D.56 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,  
¶28.

¶D.57 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."

¶D.58      See also People v. DiStefano, supra ¶D.54, 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.

(ii) Crimes

¶D.59      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.

¶D.60      Contra, United States v. Denisio, 360 F. Supp. 715, 720 (D. Md. 1973).

4. Extension of the surveillance period
5. Termination of the surveillance

## E. Post-Surveillance Requirements

### 1. Delivery, sealing, and storage of applications, orders, and recordings

¶D.61        See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶D.44, at 139-41.

¶D.62        United States v. Abraham, 541 F.2d 624 (6th Cir. 1976).

The court vacated an order suppressing contents of tapes, holding that statutory provisions were satisfied where tapes were sealed in file cabinet drawers, but not in the judge's presence, pursuant to the order for sealing. The court also set forth minimum requirements for sealing and custody regarding:

1. Sealing in identified cartons;
2. inventory;
3. storage room;
4. locking in metal cabinets; and
5. removal for trial.

¶D.63        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. See also 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).

2. Delivery of notice of the surveillance

¶D.64      See generally Comment, "Post-Authorization Problems in the Use of Wiretaps," supra ¶D.44, at 141-54.

¶D.65      United States v. Chun, 503 F.2d 533 (1974).

Post-tap identification of every party intercepted is not required. But, in order for the judge to give discretionary notice, the government is required to give a description of the general classes of intercepted parties. This holding was cited with approval by the Supreme Court in United States v. Donovan, 97 S.Ct. 658 (1977).

¶D.65A      United States v. Donovan, 97 S.Ct. 658 (1977).

Failure to inform so as to enable the judge to give discretionary inventory notice is not grounds for automatic suppression. The court seems to require prejudice, or intentional omission, or knowingly preventing service of notice for suppression.

¶D.66      Similarly, United States v. Civella, 533 F.2d 1395 (8th Cir. 1976), cert. denied, 45 U.S.L.W. 3586 (1976).

(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); United States v. Principie, 531 F.2d 1132 (2d Cir. 1976) (requiring a showing of prejudice by defendant for suppression for failure to give notice); United States v. DiGirolomo, 20 Crim. L. Rptr. 2516 (8th Cir. March 1, 1972) (Court remand for determination on question of prejudice under Donovan). Contra, (Note: All decisions made before Donovan should be viewed in light of that decision.), 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. of App. 1972).

¶D.67      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, 116 N.H. 41, 352 A.2d 737 (1976).

### 3) DEFENDING ILLEGALITY: SUPPRESSION HEARING

#### SUMMARY

¶D.68 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.

¶D.69 Generally, motions to suppress evidence are made before trial, unless the defendant shows a compelling reason for failing to make a pretrial motion.

¶D.70 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.

¶D.71 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.

¶D.72 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.

¶D.73 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.

A. Sources of the Power to Suppress

1. Constitutional

¶D.74 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.<sup>52</sup> Federal courts later expanded the rule to exclude evidence obtained in violation of the Fourth Amendment's search and seizure clause.<sup>53</sup>

¶D.75 Over the years several justifications for this expansion evolved. The most debatable of these is that the rule deters unlawful police conduct.<sup>54</sup> The courts also uphold

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<sup>52</sup>Boyd v. United States, 116 U.S. 616, 634-35, 638 (1896). 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).

<sup>53</sup>Weeks v. United States, 232 U.S. 383, 393 (1914).

<sup>54</sup>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).



the rule as an essential guarantee of constitutional rights.<sup>55</sup> Finally, it is justified as the imperative of judicial integrity.<sup>56</sup>

¶D.76 In 1961, despite continual debate over the utility of the rule, the Supreme Court applied it to state criminal proceedings through the Fourteenth Amendment.<sup>57</sup> Currently, evidence obtained in violation of other constitutional provisions is also rendered inadmissible by the exclusionary rule.<sup>58</sup>

## 2. Supervisory

¶D.77 Federal courts also exclude evidence on the basis of their supervisory authority, regardless of constitutional

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<sup>55</sup>United States v. Calandra, 414 U.S. 338, 347 (1974); Mapp v. Ohio, 367 U.S. 643, 648 (1961) (quoting Weeks).

<sup>56</sup>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 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.

<sup>57</sup>Mapp v. Ohio, 367 U.S. 643, 655 (1961).

<sup>58</sup>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].

violations.<sup>59</sup> 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, continued to suppress evidence on the basis of their supervisory powers.

### 3. Statutory

¶D.78 Suppression of evidence may be required by statute. Before current wiretap legislation was passed, the Court implemented statutory suppression in Nardone v. United States.<sup>60</sup> 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.<sup>61</sup>

¶D.79 In 1974, the Supreme Court handed down two decisions discussing violations of the federal electronic surveillance statute that require suppression.<sup>62</sup> Approval of tap

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<sup>59</sup>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].

<sup>60</sup>308 U.S. 338 (1939).

<sup>61</sup> 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), as amended, (Supp. 1977). Mass. Gen. Laws Ann. ch. 272, §99 (1968), as amended, (Supp. 1977).

<sup>62</sup>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), as amended, (Supp. 1977); Mass. Gen. Laws Ann. ch. 272, §99F(2)(a), (3) (Supp. 1976);

(footnote continues)

applications by an official not designated by the statute rendered the product of the tap suppressible in United States v. Giordano.<sup>63</sup> The Court reasoned that "pre-application approval was intended to play a central role in the statutory scheme. . . ." <sup>64</sup> Mere misidentification of the proper

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<sup>62</sup>(continued)

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);
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) Mass. Gen. Laws Ann. ch. 272, §99E(3) (Supp. 1976);
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, §990(1) (2) (Supp. 1976).

<sup>63</sup>416 U.S. 505 (1974).

<sup>64</sup>416 U.S. at 528.

official who approved a tap application, however, does not rise to these standards according to United States v. Chavez.<sup>65</sup> Consequently, violations of the wiretap statute may or may not require suppression depending on how they are categorized under Giordano-Chavez.

¶D.80 Likewise, minor irregularities in procedure or insignificant violations of administrative regulations generally do not mandate exclusion.<sup>66</sup> 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.<sup>67</sup> Theoretically, courts could exercise their supervisory powers to exclude such evidence, but this is seldom done.

## B. Motion to Suppress: Authority

### 1. Federal

¶D.81 Fed. R. Crim. P. 41(f) provides for a pretrial motion to suppress evidence. The motion may be made in the

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<sup>65</sup>416 U.S. 562, 569 (1974). But courts are careful to assure proper authorization, see United States v. Iannelli, 528 F.2d 1290 (3rd Cir. 1976).

<sup>66</sup>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) cert. denied, 419 U.S. 857 (1976); 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).

<sup>67</sup>Olmstead v. United States, 277 U.S. 438, 467-68 (1928).

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.<sup>68</sup> But if the opportunity to move 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.<sup>69</sup>

¶D.82 Fed. R. Crim. P. 41(e) deals specifically with the return and inadmissibility of illegally seized property.<sup>70</sup> Motions to suppress unconstitutionally obtained confessions are treated analogously, except that these motions are

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<sup>68</sup>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.) cert. denied, 419 U.S. 857 (1974).

<sup>69</sup>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].

<sup>70</sup>Fed. R. Crim. P. 41(f) governs motions to suppress evidence. Prior to 1972 Rule 41(e) set out grounds for such motions (illegal seizure, insufficient warrant, seizure of wrong property, lack of probable cause, illegal execution); however, Rule 41(f) as amended does not state grounds.

commonly made during trial.<sup>71</sup>

¶D.83 The federal wiretap statute specifically provides for a motion to suppress.<sup>72</sup> Defense attorneys must make such motions before trial.<sup>73</sup> This provision was included to prevent defeat of the government's right to appeal under subparagraph 10(b) of the same section.<sup>74</sup>

## 2. New York

¶D.84 In New York, motions to suppress evidence are governed by N.Y. Crim. Pro. Law art. 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.<sup>75</sup> 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: Motions to suppress unconstitutionally obtained confessions are treated analogously, except that these motions are

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<sup>71</sup>Pinto v. Pierce, 389 U.S. 31, 32-33 (1967). But see Hickman v. Sielaff, 521 F.2d 378, 386 (7th Cir. 1975), cert. denied, 419 U.S. 857 (1974) [if a motion to suppress is made at trial, the defendant has a right not to have the hearing before the jury].

<sup>72</sup>18 U.S.C.A. §2518(10) (a) (1970).

<sup>73</sup>United States v. Sisca, 503 F.2d 1337, 1348-49 (2d Cir. 1974), cert. denied, 419 U.S. 1008 (1975).

<sup>74</sup>S. Rep. No. 1097, 90th Cong., 2d Sess. 106 (1968).

<sup>75</sup>N.Y. Crim. Pro. Law §710.50 (McKinney Supp. 1975).

1. the defendant was unaware of the facts;<sup>76</sup> or
2. the defendant had no reasonable opportunity to make the motion before trial.

Article 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.

¶D.85 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.<sup>77</sup>

### 3. Massachusetts

¶D.86 Massachusetts provides for the suppression of evidence through rules of its District and Superior Courts.<sup>78</sup> An unjustified failure by the defense to make a motion within ten days of pleading constitutes a waiver.<sup>79</sup> Exceptions are recognized when there is no opportunity to make the motion or when the defendant is unaware of the grounds for such a

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<sup>76</sup>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).

<sup>77</sup>People v. McCall, 19 App. Div.2d 630, 631, 241 N.Y.S.2d 439 (2d Dept. 1963).

<sup>78</sup>See Mass. Super. Ct. R. 8, 61 and Mass. Dist. Ct. R. 73-A.

<sup>79</sup>Commonwealth v. Hanger, 357 Mass. 464, 468, 258 N.E.2d 555, 558 (1970).

motion.<sup>80</sup> Generally, motions to suppress confessions are made at trial.<sup>81</sup>

¶D.87 The Massachusetts wiretap statute permits the defendant to suppress the contents of intercepted wire or oral communications for the reasons noted below.<sup>82</sup> In practice, Massachusetts courts look to the rule of court governing regular motions to suppress for procedure requirements.

#### 4. New Jersey

¶D.88 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 or in the county court of the county where the evidence was obtained.<sup>83</sup> Failure to make a pretrial

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<sup>80</sup>Commonwealth v. Bottiglio, 357 Mass. 593, 595, 259 N.E. 2d 570, 572 (1970). See also Mass. Super. Ct. R. 61.

<sup>81</sup>Commonwealth v. Campbell, 352 Mass. 387, 403, 226 N.E. 2d 211, 220-21 (1967).

<sup>82</sup>Mass. Gen. Laws Ann. ch. 272, §99P (Supp. 1976):

1. That the communication was unlawfully intercepted.
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.

<sup>83</sup>N.J. Rules of Criminal Practice 3:5-7(a).



motion waives the right,<sup>84</sup> but an exception is granted when the defendant was unaware of grounds for the motion at that time.<sup>85</sup>

¶D.89 New Jersey rules distinguish a motion to suppress from an objection to the admissibility of a confession.<sup>86</sup>

Objections to confessions may be raised during the trial.

¶D.90 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.<sup>87</sup> The law enumerates the grounds on which evidence from a tap may be challenged.<sup>88</sup>

### C. Initial Showing

¶D.91 All four jurisdictions require a defendant to make a minimal initial showing of fact with his motion to obtain a

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<sup>84</sup>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).

<sup>85</sup>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).

<sup>86</sup>State v. Hale, 127 N.J. Super. 407, 412, 317 A.2d 731, 733 (App. Div. 1974).

<sup>87</sup>N.J. Stat. Ann. §2A:156A-21 (1971) as amended, (Supp. 1977).

<sup>88</sup>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, or in accordance with the requirements of N.J. Stat. Ann. §2A-156A-12 (1971), as amended, (Supp. 1977).

pretrial 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.<sup>89</sup>

¶D.92 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.<sup>90</sup> For 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.<sup>91</sup>

¶D.93 Massachusetts requires a written motion with verification by affidavit. The motion is readily dismissed for lack of specificity about the evidence to be excluded.<sup>92</sup> In contrast, a defendant may obtain a hearing on the voluntariness of a confession upon request.<sup>93</sup>

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<sup>89</sup>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).

<sup>90</sup>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).

<sup>91</sup>People v. Spartarella, 34 N.Y.2d 157, 162, 313 N.E.2d 38, 40-41, 356 N.Y.S.2d 566, 569 (1974).

<sup>92</sup>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).

<sup>93</sup>Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E.2d 630, 639 (1943).

¶D.94 In New Jersey, any motion to suppress must be accompanied by a full brief on the facts and the law.<sup>94</sup> A defendant shall get a hearing upon request in confession cases.<sup>95</sup>

¶D.95 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 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 pretrial motions.<sup>96</sup> In Federal courts the initial showing required for a suppression hearing on wiretap evidence is the same as that for other types of evidence.<sup>96a</sup>

#### D. Hearing

##### 1. Nature of proceedings

¶D.96 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

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<sup>94</sup>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), cert. denied, 63 N.J. 258 (1973).

<sup>95</sup>N.J. Rules of Evidence 8(3):

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.

<sup>96</sup>Alderman v. United States, 394 U.S. 165, 182 (1969). See also Taglianetti v. United States, 394 U.S. 316, 317 (1969). ["... 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."].

<sup>96a</sup>United States v. Losing, 539 F.2d 1174 (8th Cir. 1976).

is given.<sup>97</sup> On the other hand, New York and Massachusetts courts hold that the defendant has the right to be present upon his request.<sup>98</sup>

¶D.97 All four jurisdictions agree that admissibility of evidence is an issue for the court.<sup>99</sup> The presence of a jury

<sup>97</sup>Fed. R. Crim. p.43, as amended, 416 U.S. 1016 (1974) provides:

. . . The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impanelling 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).

<sup>98</sup>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).

<sup>99</sup>United States v. Whitaker, 372 F. Supp. 154, 161 (M.D. Pa.), aff'd, 503 F.2d 1412 (34d Cir. 1974), cert. denied, 419 U.S., 1113 (1975). 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 933, 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]; State v. Hampton, 61 N.J. 250, 294 A.2d 93 (1972) (The judge alone determines compliance with and/or waiver of Miranda rights and makes the initial determination of voluntariness, but if the judge decides in favor of the State, the ultimate determination of voluntariness 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, 396, 225 N.E.2d 360, 364, cert. granted, 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].

is not, however, reversible error. The rules of evidence are usually relaxed or inapplicable at these hearings.<sup>100</sup>

## 2. Standing

¶D.98 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.<sup>101</sup> The Court recognized this rationale, too, in 1969 in the wiretap area.<sup>102</sup> As a consequence, defendants must have standing to complain about unconstitutionally acquired evidence before it can be suppressed on their request.

¶D.99 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

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<sup>100</sup>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). 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).

<sup>101</sup>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, 425 U.S. 391 (1976). Fourth Amendment rights are personal, as set forth in United States v. Miller, 425 U.S. 435 (1976). The Sixth Amendment right to counsel may be raised only by the individual whose right was violated. Massiah v. United 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), aff'd., 23 N.Y.2d 719, 244 N.E.2d 364, 296 N.Y.S.2d 57 (1969), cert. denied, 394 U.S. 953 (1969).

<sup>102</sup>Alderman v. United States, 394 U.S. 165, 176 (1969).

is currently defined by privacy and property rights.<sup>103</sup> Katz found eavesdropping in a public telephone booth a violation of the defendant's "reasonable expectation of privacy."<sup>104</sup> 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.<sup>105</sup>

a. Search and Seizure

¶D.100 The concept of standing is most fully developed in search and seizure cases. In Jones v. United States,<sup>106</sup> the Supreme Court recognized traditional ideas of standing based on the ownership or possession of the premises searched.<sup>107</sup> 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.

¶D.101 In practice, federal courts grant standing to:

1. a tenant complaining about an illegal search of his apartment;<sup>108</sup>

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<sup>103</sup>See infra ¶D.109 and 132.

<sup>104</sup>Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

<sup>105</sup>Alderman, 394 U.S. at 179-80.

<sup>106</sup>362 U.S. 257 (1960).

<sup>107</sup>This concept was reaffirmed in Brown v. United States, 411 U.S. 223 (1972). See infra ¶D.107.

<sup>108</sup>Chapman v. United States, 365 U.S. 610, 617-18 (1961).

2. an occupant of a hotel room whose room was illegally searched;<sup>109</sup>
3. a guest or licensee of the owner or tenant of the premises searched;<sup>110</sup> and,
4. one of the users of an office that was illegally searched.<sup>111</sup>

Federal courts refuse to grant standing to:

1. one who had assumed rent payments for the leased building before the search occurred;<sup>112</sup>
2. a business associate of the co-defendant and owner of the property searched;<sup>113</sup>
3. a tenant who willfully abandoned the premises before the illegal search occurred;<sup>114</sup> and,
4. a trespasser who merely used the premises searched.<sup>115</sup>

¶D.102 Generally, New York, Massachusetts, and New Jersey follow federal guidelines where standing is governed by the defendant's relationship to the property searched.<sup>116</sup>

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<sup>109</sup>Stoner v. California, 376 U.S. 483, 488-90 (1964); United States v. Anderson, 453 F.2d 174 (9th Cir. 1971).

<sup>110</sup>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).

<sup>111</sup>Mancusi v. DeForte, 392 U.S. 364, 368-69 (1968).

<sup>112</sup>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).

<sup>113</sup>United States v. Grosso, 358 F.2d 154, 161 (3d Cir. 1966).

<sup>114</sup>Feguer v. United States, 302 F.2d 214, 248-49 (8th Cir.), cert. denied, 371 U.S. 872 (1962).

<sup>115</sup>United States v. Watt, 309 F. Supp. 329, 331 (N.D. Cal. 1970).

<sup>116</sup>Defendants had standing to protest as guests of the lessee of an apartment where incriminating narcotics were

(footnote continues)

¶D.103 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<sup>117</sup> or possessory interest<sup>118</sup> establish standing to complain. Possessory interest is broadly defined in the federal courts to include constructive possession of property.<sup>119</sup>

¶D.104 If a defendant relinquishes his interest in property before the illegal search, he has no standing to complain.<sup>120</sup> Likewise, a defendant has no standing to object to the

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<sup>116</sup>(continued)

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).

<sup>117</sup>Schwimmer v. United States, 232 F.2d 855, 860061 (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].

<sup>118</sup>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].

<sup>119</sup>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].

<sup>120</sup>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), aff'd, 47 App. Div.2d 814 (1975) [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).



seizure by federal officers of papers filed with a state court.<sup>121</sup>

¶D.105 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.<sup>122</sup> There it held that where "possession both convicts and confers standing" the defendant need not allege an interest in the premises or property.

¶D.106 The scope of Jones may well have been narrowed in Simmons v. United States.<sup>123</sup> 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.<sup>124</sup> The court added,

. . . when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be

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<sup>121</sup>United States v. Silverman, 449 F.2d 1341, 1345 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1971).

<sup>122</sup>362 U.S. 257, 261 (1960).

<sup>123</sup>390 U.S. 377 (1967).

<sup>124</sup>Id. at 389-93.

admitted against him at trial on the issue of guilt unless he makes no objection.<sup>125</sup>

¶D.107 Consequently, under Simmons it could be argued that the need for automatic standing was removed. Indeed, in Brown v. United States,<sup>126</sup> the court held that defendants in a possession crime had to allege possession to establish standing to suppress.<sup>127</sup> 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.'"<sup>128</sup>

b. Electronic surveillance

¶D.108 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.

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<sup>125</sup>Id. at 394.

<sup>126</sup>411 U.S. 223 (1972).

<sup>127</sup>Id. at 228.

<sup>128</sup>Id. at 228, quoting Simmons v. United States, 390 U.S. at 390.

¶D.109 Katz v. United States<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup>

¶D.110 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.<sup>132</sup>

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<sup>129</sup>389 U.S. 347, 361 (1967).

<sup>130</sup>394 U.S. 165 (1969).

<sup>131</sup>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), aff'd, 28 N.Y.2d 499, 267 N.E.2d 943, 318 N.Y.S.2d 943 (1971). A person who was not party to conversations intercepted under an originally defective wiretap order lacked standing to attack conversations intercepted under the order. State v. Cocuzza, 123 N.J. 14, 301 A.2d 204 (Law Div. 1973).

<sup>132</sup>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); Wong Sun v. United States, 371 U.S. 471 (1963). S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968).

c. Confessions

¶D.111 In general, a defendant only has standing to suppress his own confession, if it was obtained by unconstitutional methods.<sup>133</sup> Nevertheless, he may suppress the confession of his co-defendant in particular circumstances.<sup>134</sup>

3. Illegality: allocation of burdens

¶D.112 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.<sup>135</sup>

¶D.113 New York places the initial burden of coming forward with a showing of legality upon the state. When that is met,

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<sup>133</sup>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.

<sup>134</sup>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.

<sup>135</sup>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].

the ultimate burden of persuasion rests on the moving party.<sup>136</sup>

a. Search with warrant

¶D.114 In a marginal case, the courts tend to sustain a search under a warrant, where without one it would fail.<sup>137</sup>

If the violation is technical or clerical, proof of illegality does not mandate suppression.<sup>138</sup> To suppress evidence, then, the defendant must show bad faith, prejudice, or infringement

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<sup>136</sup>People v. Malinsky, 15 N.Y.2d 86, 91, 204 N.E.2d 188, 192, 255 N.Y.S.2d 850, 856 (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).

<sup>137</sup>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 Prearrest Procedure, Tent. Draft No. 4 (1971) §8.02.

<sup>138</sup>United States v. Hall, 505 F.2d 961, 968 (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.'

See also People v. Mallard, 79 Misc.2d 270, 359 N.Y.S.2d 622 (Sup. Ct. Queens County, 1974); Commonwealth v. Cromer, 365 Mass. 519, 521-22, 313 N.E.2d 557, 559 (1974).

of substantial rights. Further, if the prosecutor makes a showing of substantial compliance or good faith, the suppression motion may often be defeated.<sup>139</sup>

¶D.115 In contrast, if the violation is constitutional and the burden is carried, suppression is required.<sup>140</sup>

¶D.116 The jurisdictions handle attacks on supporting affidavits differently.<sup>141</sup> Despite diversity in

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<sup>139</sup>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) cert. denied, 400 U.S. 834 (1970) [nighttime search of unoccupied room]; United States v. Sturgeon, 501 F.2d 1270, 1275 (8th Cir. 1974) cert. denied, 419 U.S. 1071 (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 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, 365 Mass. 519, 521-22, 313 N.E.2d 557, 561 (1974) [seven day delay in execution of warrant]; State v. Bisaccia, 58 N.J. 586, 279 A.2d 674 (1971) [erroneous address in affidavit and warrant].

<sup>140</sup>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].

<sup>141</sup>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--4 (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,

(footnote continues)

approach,<sup>142</sup> each places a heavy burden on a defendant who wishes to go behind an affidavit in a suppression hearing.<sup>143</sup>

a. Search without a warrant

¶D.117 Searches conducted outside the judicial process on

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<sup>141</sup>(continued)

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), cert. denied, 55 N.J. 450, 262 A.2d 704 (1970). 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).

<sup>142</sup>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. Dunning, 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).

<sup>143</sup>United States v. Carmichael, 489 F.2d 983, 988 (7th Cir. 1973) [defendant must show recklessness regarding a material error or intentional untruthfulness].

a defendant's property are per se unreasonable.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup>

¶D.118 Exceptions to the prohibition of warrantless searches present variations to the general rule.<sup>147</sup> These exceptions and their procedural implications are treated in the following sections.

(i) Search incident to arrest

¶D.119 When the government asserts that a warrantless search was incident to an arrest, it must show a lawful arrest.

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<sup>144</sup> Coolidge v. New Hampshire, 403 U.S. 443, 474 (1971).

<sup>145</sup> Id. at 453; People v. Berrios, 28 N.Y.2d 361, 367, 270 N.E.2d 709, 712, 321 N.Y.S.2d 884, 888-889; 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.

<sup>146</sup> 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); State v. Whittington, 142 N.J. Super. 45, 51-52, 359 A.2d 881, 885 (App. Div. 1976).

<sup>147</sup> United States v. Jeffers, 342 U.S. 48, 51 (1951)  
(citations omitted:

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 . . . .



The arrest must conform both to the requirements of state law;<sup>148</sup> and to the mandates of the federal Constitution.<sup>149</sup> 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.<sup>150</sup>

(ii) Plain view

¶D.120 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

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<sup>148</sup>United States v. Montos, 421 F.2d 215, 224 (5th Cir. 1970).

<sup>149</sup>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.

<sup>150</sup>The Supreme Court set out the factors that determine the scope of a search in Chimel v. California, 395 U.S. 752, 763 (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.

The decision also permitted a search of the area into which the defendant might reach for weapons or evidence. For examples, see Collidge 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].

of the officer. It must also prove that the officer had a right to be where he was when he saw the object.<sup>151</sup>

¶D.121 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.

¶D.122 Federal courts also require the prosecution to prove that the discovery was inadvertent.<sup>152</sup> A recent Fourth Circuit decision, however, indicates that lower courts do not always require a showing of inadvertence.<sup>153</sup>

(iii) Consent

¶D.123 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.<sup>154</sup> Clear and convincing proof of consent must be offered.<sup>155</sup> Lower federal

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<sup>151</sup>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. Super. 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.

<sup>152</sup>Coolidge v. New Hampshire, 403 U.S. at 469.

<sup>153</sup>United States v. Bradshaw, 490 F.2d 1097, 1101, n. 3 (4th Cir. 1974).

<sup>154</sup>Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

<sup>155</sup>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).

courts distinguish between consent given in custody and consent given out of custody.<sup>156</sup> 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.<sup>157</sup> In general, a slightly higher standard of proof is required in cases where consent was given while the defendant was in police custody.<sup>157A</sup> Some courts use the language of presumption to describe this standard,<sup>158</sup> but it would be more accurate to think of it as a "favored inference."

¶D.124 While New York and New Jersey clearly follow federal practice, the situation in Massachusetts is not clear. The Autobenedetto decision, in 1974, required the prosecution to

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<sup>156</sup>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.

<sup>157</sup>Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

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.

<sup>157A</sup>United States v. Abbott, 20 Crim. L. Rptr. 2343 (10th Cir. Jan. 6, 1977) (The court applied a waiver test to consent searches while ignoring Schneckloth).

<sup>158</sup>United States v. Elrod, 318 F. Supp. 524, 526 (E.D. La. 1970), aff'd, 441 F.2d 353 (5th Cir. 1971).

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.<sup>159</sup> Now, this would probably not be sufficient.

(iv) Stop and frisk

¶D.125 All four jurisdictions require the prosecution to justify a "frisk" preceded by a temporary detention.<sup>160</sup> Massachusetts has a statutory provision governing "stop and frisk." The courts construe it to conform with requirements set out in federal cases.<sup>161</sup>

(v) Exigent circumstances

¶D.126 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 seized immediately.<sup>162</sup>

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<sup>159</sup>Commonwealth v. Garrefffi, 355 Mass. 428, 431, 245 N.E.2d 442, 445 (1969).

<sup>160</sup>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).

<sup>161</sup>Mass. Gen. Laws Ann. ch. 41, §98 (1973). Commonwealth v. Anderson, \_\_\_ Mass. \_\_\_, 318 N.E.2d 834 (1974).

<sup>162</sup>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].

¶D.127 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.<sup>163</sup>

c. Electronic surveillance

¶D.128 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.<sup>164</sup> 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.

¶D.129 The defendant must prove that the government failed to minimize the interceptions.<sup>165</sup> This is rather difficult because the courts apply a general good faith test to

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<sup>163</sup>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).

<sup>164</sup>See ¶D.79, n. 62, supra, for a list of issues.

<sup>165</sup>United States v. Cox, 462 F.2d 1293, 1300-01 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974).

establish proper minimization.<sup>166</sup>

¶D.130 Failure to notify the defendant after a tap may be grounds for suppression.<sup>167</sup> Where this is an accepted basis for suppression, the defendant is usually required to show failure to notify plus resulting prejudice.<sup>168</sup>

d. In-court identification

¶D.131 To defeat a motion to suppress an in-court

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<sup>166</sup>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 sub nom. Tantillo v. United States, 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, 363 Mass. 229, 231 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).

<sup>167</sup>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).

<sup>168</sup>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); 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).

identification, based upon a prior illegal identification,<sup>169</sup> the prosecution must show that the in-court testimony comes from a legal source.<sup>170</sup> The burden of persuasion is met by a preponderance of the evidence.<sup>171</sup>

e. Confessions

¶D.132 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.<sup>172</sup>

¶D.133 The Supreme Court approved the practice of New Jersey and Massachusetts when it found proof by a preponderance of

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<sup>169</sup>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).

<sup>170</sup>United States v. 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).

<sup>171</sup>Factors to consider in determining independence are:

1. prior opportunities to observe the defendant;
2. discrepancies between a pre-line-up description and the actual 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.

<sup>172</sup>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).

the evidence on this issue passes constitutional muster.<sup>173</sup>  
New York goes beyond this standard to require proof beyond a reasonable doubt.<sup>174</sup>

¶D.134 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.<sup>175</sup>

¶D.135 Arriving at a suitable definition for "voluntary" has caused the most confusion in this area of law. "Voluntary"

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<sup>173</sup>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). However, 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).

<sup>174</sup>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).

<sup>175</sup>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; '88 A.2d 406, 411-12 (1963); Commonwealth v. Sheppard, 313 Mass. 590, 604, 48 N.E.2d 630, 639 (1943). 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).



can mean "trustworthy"; it can also mean "given with full understanding of the consequences." The crux of the issue has come to mean--did the defendant know about his rights to remain silent and to have counsel? Case law has 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.<sup>176</sup> 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.<sup>177</sup>

f. Harmless error<sup>178</sup>

¶D.136 Not all violations of the Constitution mandate suppression or retrial where illegally obtained evidence is

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<sup>176</sup>United States v. Cox, 487 F.2d 634, 636 (5th Cir. 1973) [defendant was informed of rights, signed waiver, and officers testified 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 416 (2d Dept. 1970), aff'd, 29 N.Y.2d 848, 277 N.E.2d 923, 328 N.Y.S.2d 2 (1972). [despite low IQ, capacity shown by level of education, employment, and service in the army].

<sup>177</sup>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.

<sup>178</sup>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).

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."<sup>179</sup> At the same time, courts recognize, "that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error. . . ." <sup>180</sup>

¶D.137 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,<sup>181</sup> despite language in Chapman indicating that if it had any influence at all there was reversible error.<sup>182</sup>

¶D.138 The federal wiretap statute requires suppression on specified grounds.<sup>183</sup> In addition, other violations of the

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<sup>179</sup>Chapman v. California, 386 U.S. 18, 24 (1967).

<sup>180</sup>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."

<sup>181</sup>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 challenged materials, was presented]; People v. Crimmins, 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). See also United States v. Hunt, 20 Crim. L. Rptr. 2381 (9th Cir. Jan. 6, 1977).

<sup>182</sup>Chapman v. California, 386 U.S. at 23-24.

<sup>183</sup>18 U.S.C.A. §2518(1)(c) (1970).

statute have been held bases for suppression.<sup>184</sup> 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.<sup>185</sup>

#### E. Fruit of the Poisonous Tree

¶D.139 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 Silverthorne Lumber Co. v. United States.<sup>186</sup> 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."<sup>187</sup>

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<sup>184</sup>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.

<sup>185</sup>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].

<sup>186</sup>251 U.S. 385 (1920).

<sup>187</sup>Id. at 393.

¶D.140 Since Silverthorne, evidence derived from illegal wiretaps,<sup>188</sup> illegal entry and arrest,<sup>189</sup> and illegal line-ups<sup>190</sup> has been excluded from trial.

¶D.141 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. . . ." <sup>191</sup>

1. Standing

¶D.142 The Supreme Court determined the standing issue by analogy to simple search and seizure cases.<sup>192</sup> To suppress derivative evidence, a defendant must be the victim of the primary illegality.

2. Attenuation

¶D.143 From the outset, courts recognized that although derived from illegal acts some evidence would be admissible.

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<sup>188</sup>Nardone v. United States, 308 U.S. 338 (1939).

<sup>189</sup>Wong Sun v. United States, 371 U.S. 471 (1963).

<sup>190</sup>United States v. Wade, 388 U.S. 218 (1967).

<sup>191</sup>Wong Sun v. United States, 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).

<sup>192</sup>Goldstein v. United States, 316 U.S. 114, 121 (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.

If the knowledge was gained from an independent source,<sup>193</sup> or if the connection between the acts and the evidence becomes "so attenuated as to dissipate the taint,"<sup>194</sup> it may be introduced at trial.<sup>195</sup>

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<sup>193</sup>Silverthorne Lumber Co. v. United States, 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), cert. denied, 414 U.S. 1033 (1974). The Fifth Circuit recently rejected this view. United States v. Castellana, 488 F.2d 325 (5th Cir. 1974).

<sup>194</sup>Nardone v. United States, 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 v. United States, 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).

<sup>195</sup>Nardone v. United States, 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 Leonard 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 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

(footnote continues)

### 3. Allocation of burdens

¶D.144 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.

### 4. Collateral uses

¶D.145 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.<sup>196</sup> Further, illegally seized evidence may be admitted during trial to refresh a witness's memory.<sup>197</sup>

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<sup>195</sup>(continued)

the discovery of any of the evidence used upon the trial, or to break down the resistance of any unwilling witnesses, the prosecution had purged itself of its unlawful conduct. Id. at 523.

Also, in Brown v. Illinois, 422 U.S. at 604, 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 flagrancy of official misconduct.

<sup>196</sup>Monroe v. United States, 234 F.2d 49, 56-57 (D.C. Cir.), cert. denied, 352 U.S. 873 (1956).

<sup>197</sup>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, 67 N.J. 229, 337 A.2d 36 (1975). The impeachment exception is also applicable to wiretaps. United States v. Caron, 474 F.2d 506 (5th Cir. 1973).

¶D.146 In Gilbert v. California,<sup>198</sup> the Supreme Court excluded from a penalty hearing testimony derived from an illegal line-up identification.<sup>199</sup> Some lower courts admit such evidence at sentencing hearings for various reasons.<sup>200</sup>

¶D.147 Involuntary confessions are treated differently. Some courts reject them because admission conflicts with fundamental fairness.<sup>201</sup>

¶D.148 Finally, illegally obtained evidence is admissible at parole revocation proceedings, so long as it is reliable.<sup>202</sup>

#### F. Appeal

¶D.149 In federal courts, a defendant may raise the suppression decision during his appeal after conviction. In contrast, the government may appeal the ruling directly under

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<sup>198</sup>388 U.S. 263 (1967).

<sup>199</sup>Id. at 272-74.

<sup>200</sup>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]; Armstrong 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].

<sup>201</sup>United States ex rel. Brown v. Rundle, 417 F.2d 282, 284-85 (3d Cir. 1969).

<sup>202</sup>United States ex rel. Sperling v. Fitzpatrick, 426 F.2d 1161, 1163 (1970).

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.

¶D.150 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.<sup>203</sup>

¶D.151 New York's Criminal Procedure Law permits defendants to appeal the denial of a motion to suppress upon an appeal of the conviction.<sup>204</sup> 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.<sup>205</sup>

¶D.152 In New Jersey, both the State and the defendant may appeal a suppression decision with leave of the Appellate Division.<sup>206</sup> The state wiretap statute specifically provides for an immediate appeal by the State provided the officer who

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<sup>203</sup>18 U.S.C.A. §2518(10)(b) (1970)

<sup>204</sup>N.Y. Crim. Pro. Law §710.70(2) (McKinney 1971).

<sup>205</sup>N.Y. Crim. Pro. Law §§450.20(8), 450.50 (McKinney 1971).

<sup>206</sup>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].



authorizes the tap certifies that the appeal is not taken for purposes of delay.<sup>207</sup>

¶D.153 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.<sup>208</sup>

#### 4) ISSUES AT TRIAL

##### SUMMARY

¶D.154 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 includes the use of ear phones, public address systems, and transcripts.

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<sup>207</sup> N.J. Stat. Ann. §2A-156A (1971), as amended, (Supp. 1977).

<sup>208</sup> Mass. Gen. Laws Ann. ch. 278, §28E (Supp. 1976).

## A. Introduction

¶D.155 The great weight of authority sanctions the use of sound recordings obtained through electronic surveillance<sup>209</sup> where the matters recorded are competent and relevant,<sup>210</sup>

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<sup>209</sup>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. [For other terms of surveillance, see Appendix "B," ¶¶B.1-B.80, supra.] 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 also Appendix "A", ¶¶A.1-A.43, supra.

See Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance xiii (1976).

<sup>210</sup>Only evidence that 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 as Commission Studies].

and the recordings were made in compliance with the various wiretap statutes.<sup>211</sup> 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.<sup>212</sup> 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,<sup>213</sup> but they may also be used to corroborate

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<sup>211</sup>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. §§133.73 to .727 (1975); 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. §§19.2-66 to -70 (1976); Wash. Rev. Code Ann. §§9.73.030 to .100 (Supp. 1974); Wis. Stat. Ann. §§968.27 to .33 (Supp. 1975).

<sup>212</sup>See ¶D.169, infra.

<sup>213</sup>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].

other evidence,<sup>214</sup> to impeach the credibility of a witness,<sup>215</sup> or to refresh the memory of a witness.<sup>216</sup> Before a sound recording may be used, however, a proper foundation must be laid.<sup>217</sup> 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.<sup>218</sup>

B. Objections to the Tape Recording as a Whole

¶D.156 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 a careful examination of the facts, for while the tape cannot be cross-examined, its operator may be, and the rule against

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<sup>214</sup>Kilpatrick v. Kilpatrick, 123 Conn. 218, 225, 193 A. 765, 768 (1937) [conversation testified 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].

<sup>215</sup>See ¶D.191, infra.

<sup>216</sup>See ¶D.192, infra.

<sup>217</sup>See ¶D.160, infra.

<sup>218</sup>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).

hearsay itself is fraught with exceptions and qualifications.<sup>219</sup>

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,<sup>220</sup> statements of co-conspirators which incriminate the defendant are admissible.<sup>221</sup>

These statements, however, must be made during the course of the conspiracy;<sup>222</sup> they also must be made in the furtherance of the conspiracy.<sup>223</sup> Any other statements do not fall within the exception.

¶D.157 If the recorded statement was made by the defendant, it is an admission, and it can be used against him.<sup>224</sup> If

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<sup>219</sup>See generally J. Wigmore, Evidence §§669, 1420-27 (Chadbourn rev., 1970).

<sup>220</sup>In instances where a wiretap is being employed one of the charges for which the defendants are indicted is usually conspiracy.

<sup>221</sup>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.

<sup>222</sup>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).

<sup>223</sup>Commonwealth v. McDermott, 255 Mass. 575, 152 N.E. 704 (1926); People v. Ryan, 263 N.Y. 298, 305, 189 N.E. 225, 227 (1934).

<sup>224</sup>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.

the recorded statement was made by another party, i.e., a mere witness, it may also be admissible as a declaration against interest. This is a limited exception to the hearsay rule. The statement must be harmful to the speaker's pecuniary or penal interest. In most instances, the speaker must also be unavailable to testify.<sup>225</sup>

¶D.158 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.<sup>226</sup> The new Federal Rules of Evidence have, in part, adopted this position.<sup>227</sup> This position should also be adopted when a 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

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<sup>225</sup> See Fed. R. Evid. 804(b)(3).

<sup>226</sup> See Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396 (5th Cir. 1961) [newspaper in library]; United States v. Iaconetti, 406 F. Supp. 554 (E.D. N.Y. 1971), cert. denied, 45 U.S.L.W. 3463, reh. denied, 45 U.S.L.W. 3587 (Jan. 1, 1977); [evidence more probative than anything else and it deals with an important matter]; United States v. Barbati, 284 F. Supp. 409 (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 (S.Ct. 1969) [businessman's statements to an attorney]; Woll v. Dugas, 104 N.J. Super. 586, 250 A.2d 775 (App. Div. 1969) [dicta].

<sup>227</sup> See Fed. R. Evid. 803(24), 804(b)(5) [allowing the use of hearsay evidence that is as reliable as the other listed exceptions].

is a need to receive them, they should be admitted.<sup>228</sup>

¶D.159 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.<sup>229</sup> A tape recording, if authentic, is clearly more accurate than the memory of a witness.<sup>230</sup> 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 parts of a conversation.<sup>231</sup>

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<sup>228</sup>In wiretap cases, the need to receive the material is great. Without it, convictions of members of the higher 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).

<sup>229</sup>United States v. Jacobs, 451 F.2d 530, 542 (5th Cir.1971), cert. denied, 405 U.S. 955, reh. denied, 405 U.S. 1049 (1972). [re-collection 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 witness's credibility]; People v. Mitchell, 40 App. Div.2d 117, 118, 338 N.Y.S.2d 313, 315 (3d Dept. 1972) [generally admissible].

<sup>230</sup>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).

<sup>231</sup>United States v. Klosterman, supra n. 229.

C. Laying the Foundation

¶D.160 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.<sup>232</sup>

These facts must be shown in order to prove that the recording accurately demonstrates what it purports to demonstrate.<sup>233</sup>

1. Credibility of device

¶D.161 Before any evidence obtained through the use of

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<sup>232</sup> See, e.g., United States v. McKeever, 169 F. Supp. 426, 430 (S.D. N.Y. 1958), rev. on other grounds, 271 F.2d 669 (2d Cir. 1959) [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 precise 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 489 (App. Div. 1975).

<sup>233</sup> See e.g., 3 J. Wigmore, Evidence, §790 (Chadbourn rev., 1970).



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<sup>234</sup> or where there is general scientific acceptance of the device as a reliable means of ascertaining the truth.<sup>235</sup> The Second Circuit, in United States v. Sansone,<sup>236</sup> took judicial notice of the general public's familiarity with the use of tape recorders and admitted the tape recording being offered.<sup>237</sup> Taking judicial notice is a matter within the judge's discretion. If the judge resists, proof is required.

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<sup>234</sup>Varcoe v. Lee, 180 Cal. 338, 181 P. 223 (1919).

<sup>235</sup>State v. Cary, 99 N.J. Super. 323.

<sup>236</sup>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].

<sup>237</sup>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.

¶D.162 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.<sup>238</sup>

The operator may then testify to the results of these tests and satisfy the requirement.

2. Competency of operator

¶D.163 The person who operates the recording device must be competent.<sup>239</sup> There is no licensing requirement to operate a recording device,<sup>240</sup> but if the agent has any special

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<sup>238</sup>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].

<sup>239</sup>United States v. McKeever, supra, n. 232, 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].

<sup>240</sup>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].

training or experience qualifying him to operate the device, he should include it in his testimony.<sup>241</sup> If the agent lacks training or experience, however, he must present evidence of his competence.<sup>242</sup>

### 3. Authenticity of recording

¶D.164 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 conversation overheard by the monitors.<sup>243</sup> A party or a witness to the conversation may also testify that the tape accurately recorded the conversation he heard.

¶D.165 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.<sup>244</sup> The potential for abuse with skillful editorial manipulation can be great.<sup>245</sup> The manipulation can, at times,

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<sup>241</sup>State v. Dye, supra, n. 238, at 527, 291 A.2d at 835.

<sup>242</sup>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).

<sup>243</sup>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. 1009 (1971) [no abuse of discretion where judge found tape to be on the whole accurate and complete].

<sup>244</sup>People v. Nicoletti, 34 N.Y.2d 249, 252, 313 N.E.2d 336, 338, 356 N.Y.S.2d 855, 857-58 (1958).

<sup>245</sup>Id. See generally Weiss and Hecker, "The Authentication of Magnetic Tapes: Current Problems and Possible Solutions," Commission Studies 216-40 (1976).

be undetectable, but the presence of unusual or unexpected sounds or the absence of expected sounds may be an indication of falsification.<sup>246</sup> If a challenge 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.<sup>247</sup> It is not unusual, however, for the accuracy of the tapes to be stipulated by the defendant after constitutional and other objections are overcome.<sup>248</sup>

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<sup>246</sup>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, n. 245, at 216, 220-21. These signs may be innocuous, the product of environmental conditions, instrument malfunctions, or improper recording technique. Id. at 222. But they may also be the sign of purposeful falsification by means of:

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.

<sup>247</sup>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].

<sup>248</sup>See, e.g., United States v. James, 494 F.2d 1107 (D.C. Cir.), cert. denied sub nom. Tantillo v. United States, 419 U.S. 1020 (1974).

4. Preservation of recording

¶D.166 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.

¶D.167 The purpose of the sealing requirements<sup>249</sup> is to

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<sup>249</sup>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.

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 (6th Cir. 1976). 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).

ensure the integrity of the tapes and to preserve the confidentiality of sensitive information.<sup>250</sup> 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.<sup>251</sup> But if there is no explanation, the tape recordings are not admissible.<sup>252</sup>

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<sup>250</sup>United States v. Cantor, 470 F.2d 890, 893 (3d Cir. 1972) [section 2518(8) designed to ensure orders and applications are treated confidentially].

<sup>251</sup>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) 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].

<sup>252</sup>People v. Nicolletti, 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]. Compare United States v. Falcone, 505 F.2d 478 (3rd 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).

¶D.168 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.<sup>253</sup> The custodial care of the tape recordings must at all times be reasonable.<sup>254</sup> 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.<sup>255</sup> The same standard of care applies to the

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<sup>253</sup>See ¶D.164, supra. Sealing itself helps to establish claim of custody. People v. Nicoletti supra n. 252 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 claim of custody from the time of seizure to the time of trial].

<sup>254</sup>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].

<sup>255</sup>Congress recognized this possibility. S. Rep. No. 1097, 90th Cong., 2d Sess. 104 (1968) states:

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 place 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].

custody of the tapes during the investigation and prior to sealing even though this time period is not dealt with in the various wiretap statutes.<sup>256</sup>

5. Identification of speakers

¶D.169 The identity of the speakers on a recording is essential.<sup>256a</sup> Ultimately it is a fact question to be decided by the jury.<sup>257</sup> 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

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<sup>256</sup>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].

<sup>256a</sup>See generally Shumkler, "Voice Identification in Criminal Cases under Article IX of the Federal Rules of Evidence," 49 Temp. L. Q. 867-79 (1976).

<sup>257</sup>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).



the tape.<sup>258</sup> 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.<sup>259</sup>

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.<sup>260</sup>

Where several possible methods of identification are available<sup>261</sup> they should all be used, particularly if the

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<sup>258</sup>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, also, the defendant recognizes that there is no constitutional objection to taking a voice exemplar. United States v. Dionisio, 410 U.S. 1 (1973).

<sup>259</sup>People v. Abelson, 309 N.Y. 643, 649, 132 N.E.2d 884, 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].

<sup>260</sup>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.

<sup>261</sup>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.<sup>262</sup>

¶D.170 Generally, the most effective means of voice identification is through the use of circumstantial evidence.<sup>263</sup> The most direct source of evidence is, of course, those tape recordings in which the parties to the conversations identify themselves by name.<sup>264</sup> The tapes may also reveal a planned course of action. Where the plan is later carried out by the defendants, this is circumstantial evidence identifying the

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<sup>262</sup>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 682, aff'd, 487 F.2d 1395 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974) [agent plus circumstantial]. See generally, Zuckerman and Lyons, supra, n. 210, at 45-46.

<sup>263</sup>Carbo v. United States, 314 F.2d 718, 738 (9th Cir. 1963), cert. denied, 377 U.S. 953, 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, 299 A.2d 750 (App. Div. 1973) [non-criminal conversation circumstantial evidence tending to establish identity].

<sup>264</sup>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 682, aff'd, 487 F.2d 1395 (3d Cir. 1973) cert. denied, 417 U.S. 918 (1974) [voice of defendant identified by references to "Frank" on tape of conversations overheard on wiretap of defendant's phone].

defendants as the speakers.<sup>265</sup> The defendant's voice may also be identified by evidence linking him to placing a phone call at the time the monitors were activated.<sup>266</sup> 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.

¶D.171 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.<sup>267</sup> Such testimony may be given by a witness who was acquainted with the speaker,<sup>268</sup> a government agent, including one who

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<sup>265</sup>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].

<sup>266</sup>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].

<sup>267</sup>Fed. R. Evid. 901(b)(5).

<sup>268</sup>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,<sup>269</sup> or a party to the tapped conversation who consented to the wiretap.<sup>270</sup> Familiarity with the voice may be acquired before<sup>271</sup> or after<sup>272</sup> the wiretap. Familiarity with the voice may be acquired differently from the way in which the voice was recorded. Any

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<sup>269</sup>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 682, aff'd, 487 F.2d 1935 (3d Cir. 1973) cert. denied, 417 U.S. 918 (1974) [testimony by agents corroborated by circumstantial evidence].

<sup>270</sup>People v. Brannaka, 46 App. Div.2d 929, 361 N.Y.S.2d 434 (3d Dept. 1974).

<sup>271</sup>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].

<sup>272</sup>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].

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.<sup>273</sup>

¶D.172 At times, an attempt may be made to show voice identification through spectrographic analysis.<sup>274</sup> 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.<sup>275</sup> Most of the early cases excluded such analysis because the technique had not been adequately tested under field conditions.<sup>276</sup>

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<sup>273</sup>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].

<sup>274</sup>See Kamine, "Voiceprint Technique: Its Structure and Reliability," 16 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).

<sup>275</sup>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. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963).

<sup>276</sup>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).

But after extensive experiments<sup>277</sup> there seems to be a trend favoring admissibility.<sup>278</sup> 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.<sup>279</sup> At the present time, spectrographic analysis may best be employed as a means of corroborating other identification evidence.<sup>280</sup>

¶D.173 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.<sup>281</sup> In addition, the jury may also compare

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<sup>277</sup>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%.]

<sup>278</sup>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 644, 656-48 (1972) [mandates voir dire]. But see United States v. Addison, 498 F.2d 741, 743-45 (D.C. Cir. 1974). United States v. McDaniel, 538 F.2d 408 (D.C. Cir. 1976) (still inadmissible in circuit; bound to follow Addison until clear showing of reliability and scientific acceptance or en banc reconsideration of Addison); Commonwealth v. Topa, 21 Crim. L. Rptr. 2014 (Pa. Sup. Ct. Feb. 28, 1977) (spectrograph not yet generally accepted by scientific community; error to admit voiceprint identification).

<sup>279</sup>Commonwealth v. Lykus, supra note 278, 327 N.E.2d at 679.

<sup>280</sup>United States v. Sample, supra note 278, at 51-54.

<sup>281</sup>People v. Hornbeck, 277 App. Div. 1136, 101 N.Y.S.2d 182 (2d Dept. 1950) [jury instructed to compare after defendant testified].

the voices on the tape with a voice exemplar of the defendant.<sup>282</sup>  
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.<sup>283</sup>

6. Identification of conversation

¶D.174 The particular conversation may be identified by showing:

1. the monitor's logs;
2. evidence derived from a pen register, number recorder, or technewriter 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
7. the time monitoring began and ended each day.<sup>284</sup>

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<sup>282</sup>Requiring a defendant to submit 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).

<sup>283</sup>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 invalidate voice exemplar].

<sup>284</sup>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  
(footnote continues)

¶D.175 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.<sup>285</sup> The foundation required for its introduction is within the court's discretion.<sup>286</sup> 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,<sup>287</sup> and that the calls were made at the time the calls were monitored.<sup>288</sup> The weight to be given to this evidence is, of course, a matter for the jury.

¶D.176 Phone company records may also be used to identify a conversation. The records can show what calls were made from one phone.<sup>289</sup> The admissibility of business records is governed by statute.<sup>290</sup> In general, the government must show

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<sup>284</sup>(continued)  
these records are kept in anticipation of a criminal prosecution.

<sup>285</sup>See, e.g., S. Rep. No. 1097, 90th Cong. 2d Sess. 90 (1968).

<sup>286</sup>United States v. Ianelli, 477 F.2d 999, 1002 (3d Cir. 1973), aff'd, 420 U.S. 770 (1975).

<sup>287</sup>United States v. Kohne, 358 F. Supp. 1053, 1058, (W.D. Pa.), aff'd, 485 F.2d 682, aff'd, 487 F.2d 1935 (3d Cir. 1973) cert. denied, 417 U.S. 918 (1974).

<sup>288</sup>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).

<sup>289</sup>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].

<sup>290</sup>Fed. R. Evid. 803(6) (1975); N.J. Rules of Evid. 63 (13) (West 1971); N.Y. Civ. Prac. Law 4518 (a) (McKinney 1963).



that such 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.<sup>291</sup> Once admitted, the weight to be given these records is a fact question for the jury.<sup>292</sup>

D. Presentation of the Recording

¶D.177 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.<sup>293</sup> These problems must be anticipated before trial. If they are not, a successful prosecution is not likely.

1. Problems of audibility

¶D.178 The admissibility of a tape recording is always within the sound discretion of the court.<sup>294</sup> The tape

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<sup>291</sup>United States v. Whitaker, supra, note 288.

<sup>292</sup>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].

<sup>293</sup>See generally Zuckerman and Lyones, supra, note 210, at 25.

<sup>294</sup>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);

(footnote continues)

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 as to render the recording as a whole untrustworthy.<sup>295</sup> 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.<sup>296</sup> Although substantial portions of the tape may

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294 (continued)

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); State 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].

<sup>295</sup>Monroe v. United States, supra, n. 294 at 54-55:

No all-embracing rule on admissibility 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.

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].

<sup>296</sup>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

(footnote continues)

be inaudible, it can be admitted into evidence<sup>297</sup> if the jury would not be forced to speculate as to the content of the inaudible portions.<sup>298</sup> A factor often given great weight in determining audibility and intelligibility is the ability of the court reporter to make a transcript of the tape.<sup>299</sup>

## 2. Efforts to mitigate the effects of inaudibility

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<sup>296</sup>(continued)

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].

<sup>297</sup>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.), cert. denied, 385 U.S. 1030 (1966) [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].

<sup>298</sup>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].

<sup>299</sup>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].

¶D.179 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.

¶D.180 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.<sup>300</sup> The objection has been raised to this procedure that it denies the defendant his constitutional right to a public trial. This problem may be overcome by anticipating the objection and employing other means to ensure a public trial. In D'Aquino v. United States,<sup>301</sup> forty sets of earphones were installed, allowing the testimony to be heard by the judge, jury, clerk, reporter, counsel, defendant, and press.<sup>302</sup> In Gillars v. United States,<sup>303</sup>

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<sup>300</sup>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 682, aff'd, 487 F.2d 1395 (3d Cir. 1973) cert. denied, 417 U.S. 918 (1974) [records are exhibits which are not passed around to spectators in courtroom].

<sup>301</sup>192 F.2d 338 (9th Cir. 1951).

<sup>302</sup>Id. at 365.

<sup>303</sup>182 F.2d 962 (D.C. Cir. 1950).

spectators were also given the opportunity to hear by having the court supply extra headphones.<sup>304</sup> In United States v. Kohne,<sup>305</sup> a public address system was employed in conjunction with the headphones.<sup>306</sup>

¶D.181 The wiretap statutes recommend that a duplicate or work copy of a tape recording be made.<sup>307</sup> The sealing requirements of the wiretap statutes practically necessitate this procedure.<sup>308</sup> The work copies may be used to:

1. maximize volume by recording on a larger tape;<sup>309</sup>
2. filter out background noises on the tape;<sup>310</sup>

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<sup>304</sup>Id. at 977.

<sup>305</sup>358 F. Supp. 1053 (W.D. Pa.), aff'd, 485 F.2d 679, aff'd, 487 F.2d 1394 (3d Cir. 1973).

<sup>306</sup>358 F. Supp. at 1063.

<sup>307</sup>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).

<sup>308</sup>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].

<sup>309</sup>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].

<sup>310</sup>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 427 (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,

3. preserve the original during preliminary proceedings;<sup>311</sup> or

4. edit to include only relevant conversations.<sup>312</sup>

An inherent problem, however, is the inability to distinguish the duplicate from the original.<sup>313</sup> For the duplicate copy to be admissible, there must be a substantial showing of accuracy.<sup>314</sup> This showing may not be required if the defense will stipulate to its accuracy.<sup>315</sup> The defense counsel must be given an opportunity to compare the copy with the

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<sup>310</sup>(continued)

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].

<sup>311</sup>United States v. Knohl, 379 F.2d at 440-41.

<sup>312</sup>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 testified 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 ¶D.23, supra. United States v. DiMuro, 540 F.2d 503 (1st Cir. 1976), cert. denied, 45 U.S.L.W. 3463 (Jan. 1. 1977) (composite tape within Court's discretion to admit; grouped to facilitate identification; not barred by 18 U.S.C. 2518 [8][a]).

<sup>313</sup>United States v. Starks, 515 F.2d 112, 121 (3d Cir. 1975).

<sup>314</sup>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) [not necessary to establish physical defect first]; United States v. Knohl, 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].

<sup>315</sup>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].

original,<sup>316</sup> but failure on his part to make a comparison will preclude his objections to its admission.<sup>317</sup>

¶D.182 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.<sup>318</sup> Where there is the requisite showing of accuracy, the best evidence rule will not be a bar to the admission of the duplicate.<sup>319</sup>

¶D.183 A tape transcript is usually made. It serves:

1. as an aid in trial preparation;<sup>320</sup>

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<sup>316</sup>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. Braeunig, 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].

<sup>317</sup>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].

<sup>318</sup>See 4 J. Wigmore, Evidence §§1173-75 (Chadbourn 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].

<sup>319</sup>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. Knoch, 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 ¶D.23, supra; Annot., "Admissibility in Evidence of Sound Recording as Affected by Hearsay and Best Evidence Rules," 58 A.L.R.3d 598 (1974).

<sup>320</sup>Zuckerman and Lyons, supra n. 210, at 25.

2. as a listening aid;<sup>321</sup>
3. to identify speakers for the jury;<sup>322</sup>
4. to aid appellate courts where an appeal is taken;<sup>323</sup>
5. to avoid the necessity of repetitive playing.<sup>324</sup>

The transcripts, regardless of whether they are introduced into evidence or not, must be shown to be accurate,<sup>325</sup> usually by the person who prepared the transcripts.<sup>326</sup> The parties

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<sup>321</sup>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 transcript 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].

<sup>322</sup>See ¶D.186, infra.

<sup>323</sup>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].

<sup>324</sup>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].

<sup>325</sup>United States v. Bryant, 480 F.2d 785, 790-91 (2d Cir. 1973)[agent testified 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).

<sup>326</sup>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).



may also stipulate to accuracy after comparison with the tapes.<sup>327</sup> A failure to present any evidence of accuracy may be reversible error.<sup>328</sup>

¶D.184 Occasionally a written transcript is objected to as violative of the hearsay rule. In Duggan v. State<sup>329</sup> and Bonicelli v. State,<sup>330</sup> 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.

¶D.185 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 transcripts are generally admitted into

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<sup>327</sup>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, 443 F.2d 1167, 1169 (2d Cir.), cert. denied, 404 U.S. 852 (1971) [proper limiting instructions despite stipulation]. 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. Onori, 535 F.2d 938 (5th Cir. 1976).

<sup>328</sup>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].

<sup>329</sup>189 So.2d 890 (Fla. 1966).

<sup>330</sup>339 P.2d 1063 (Okla. 1959).

evidence.<sup>331</sup> Nevertheless, the matter is within the court's discretion.<sup>332</sup> The courts have usually required both the tapes and the transcripts to be admitted into evidence if the transcripts are to be in evidence at all.<sup>333</sup> The courts, however, will still generally limit the use of the transcripts, directing the jury to rely upon what is heard on the tapes, not on what is read.<sup>334</sup> But where the tapes have been lost through no fault of the prosecution, the transcripts may be admitted

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<sup>331</sup>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].

<sup>332</sup>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].

<sup>333</sup>United States v. Carson, supra, n. 331, at 437; Lindsey v. United States, 332 F.2d 688, 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].

<sup>334</sup>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 682, aff'd, 487 F.2d 1395 (3rd Cir. 1973), cert. denied, 417 U.S. 918 (1974) [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].

into evidence if a proper foundation of accuracy is laid.<sup>335</sup>

¶D.186 The general rule is that transcripts are not to be used by the jury during deliberation.<sup>336</sup> But the Second Circuit does not follow this rule; the decision is left to the discretion of the judge.<sup>337</sup>

### 3. Voice identification

¶D.187 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.<sup>338</sup> Most trial courts are now using transcripts to identify the voices.<sup>339</sup> The possibility of overemphasis and prejudice is outweighed by the inconvenience and confusion caused by stopping the tape

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<sup>335</sup>United States v. Maxwell, *supra* note 332, at 443. See also United States v. Knohl, 379 F.2d 427, 441 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967).

<sup>336</sup>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).

<sup>337</sup>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).

<sup>338</sup>United States v. Hall, 342 F.2d 849, 853 (4th Cir.), *cert. denied*, 382 U.S. 812 (1965).

<sup>339</sup>*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].

to identify each speaker.<sup>340</sup> Care must be taken in the preparation of these transcripts so that they accurately designate the speakers and correctly transcribe the conversation.<sup>341</sup>

#### 4. Completeness

¶D.188 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. Similarly, what is presented by the tapes will often have to be corroborated to obtain a conviction.<sup>342</sup>

¶D.189 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.<sup>343</sup> Failure to do this may be ground for

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<sup>340</sup>United States v. Hall, supra note 338, at 833.

<sup>341</sup>Fountain v. United States, supra note 339, at 632. [preparer personally familiar with voices of each party to the conversation].

<sup>342</sup>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].

<sup>343</sup>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  
(footnote continues)]

reversal.<sup>344</sup> 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.

¶D.190 The tapes may also contain irrelevant, obscene, or prejudicial material. The court may instruct the jury to disregard this material.<sup>345</sup> Without this instruction, the playing of the tapes may be reversible error.<sup>346</sup> The prosecution may also aid in this by examining the possible jurors for possible prejudice because of the use of this type

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<sup>343</sup>(continued)  
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 languages allowed].

<sup>344</sup>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].

<sup>345</sup>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].

<sup>346</sup>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].

of material.<sup>347</sup> The materials may also be edited.<sup>348</sup> Editing, though, does present the problem of creating jury speculation.

#### E. Alternative Uses

¶D.191 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 memory if it in fact revives the witness's recollection.<sup>349</sup> The materials may even be illegally obtained.<sup>350</sup> 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.<sup>351</sup> 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 properly to

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<sup>347</sup>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].

<sup>348</sup>See ¶D.168, supra.

<sup>349</sup>United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946), cert. denied, 329 U.S. 805 (1947).

<sup>350</sup>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].

<sup>351</sup>357 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.

cross-examine the witness to establish whether the witness did in fact remember.<sup>352</sup> 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.<sup>353</sup>

¶D.192 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.<sup>354</sup> A defendant is allowed to deny

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<sup>352</sup>Lennon v. United States, 20 F.2d 490, 493 (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.2d 1050, 238 N.Y.S. 2d 555 (4th Dept. 1963) (mem). See also 3 J. Wigmore, Evidence §762 (Chadbourn rev., 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].

<sup>353</sup>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].

<sup>354</sup>Walder v. United States, 347 U.S. 62, 64 (1954). See also Harris v. New York, 401 U.S. 222, 225 (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

(footnote continues)

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.<sup>355</sup> 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 its accuracy and authenticity must be laid.<sup>356</sup> 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

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<sup>354</sup>(continued)

rejected in United States v. Caron, 474 F.2d 506, 509 (5th Cir. 1973). The legislative history clearly provides otherwise:

It [section 2115] 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).

<sup>355</sup>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, 364 Mass. 236, 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].

<sup>356</sup>United States v. McKeever, 169 F. Supp. 426, 431 (S.D. N.Y. 1958)[impeachment by tape recording of prior inconsistent statements].



requirement sought to avoid, e.g., 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.<sup>357</sup>

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<sup>357</sup>United States v. Pandilidis, 524 F.2d 644, 650 (6th Cir. 1975), cert. denied, 424 U.S. 933 (1976). But see Fed. R. Evid. 801(d)(1)(A)(1975) [prior inconsistent statement as substantive evidence].



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## 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 the investigation and prosecution of organized crime, and the development of innovative techniques and strategies for its 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**