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Electronic Surveillance and Conversations in Plain View: Admitting Intercepted Communications Relating to Crimes Not Specified in the Surveillance Order

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NOTE

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Introduction

"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 in evidence."[1] Police officers properly executing a lawfully issued search warrant may, therefore, seize incriminating evidence not described in the warrant if they discover the item in plain sight. When gathered during the course of a conventional search, such plain view evidence is admissible at trial.[2] If investigators determine that a conventional search will be ineffective, federal law[3] and statutes in thirty-two states and the District of Columbia[4] authorize investigators to turn to electronic surveillance as an evidence-gathering tool. When plain view

1 Harris v. United States, 390 U.S. 234, 236 (1968); *see infra* notes 16-35 and accompanying text.

2 Coolidge v. New Hampshire, 403 U.S. 443, 465, 515 (1971). *See also* Texas v. Brown, 460 U.S. 730 (1982). *See infra* notes 26-35 and accompanying text.

3 *See infra* note 11.

4 *See infra* note 190.

evidence is gathered during electronic surveillance, however, the evidence may or may not be admissible in a subsequent judicial proceeding.[5]

In 1968, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act.[6] Title III permits law enforcement officers to intercept communications by means of electronic surveillance pursuant to a properly issued court order authorizing the surveillance, but it requires compliance with its strict statutory guidelines concerning the execution of the order.[7] Under Title III, states wishing to grant authority to conduct electronic surveillance must enact specific statutes that meet the minimum privacy protections set by Title III.[8] One of the statutory requirements of a properly issued surveillance order is that the order contain "a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates."[9] In executing a surveillance order, however, law enforcement officers commonly intercept incriminating communications that are unrelated to the crimes described in the order.[10] Both Congress[11] and a

5 *See infra* notes 128-88, 196-204 and accompanying text (discussing federal and state law governing the admissibility of plain view evidence gathered by electronic surveillance).

6 Pub. L. No. 90-351, 82 Stat. 212 (codified at 18 U.S.C. §§ 2510-2520 (1988)) [hereinafter Title III or by section]. The legislative history of Title III is found in S. REP. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. CODE CONG. & ADMIN. NEWS 2180 [hereinafter S. REP. No. 1097]. Important general background is also found in NAT'L COMM'N, ELECTRONIC SURVEILLANCE, REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE (1976) [hereinafter 1976 REPORT]; AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO ELECTRONIC SURVEILLANCE (1968) [hereinafter 1968 ABA STANDARDS]. *See also* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE (1977) [hereinafter CARR]; Goldsmith, *The Supreme Court and Title III Rewriting The Law of Electronic Surveillance*, 74 J. CRIM. L. & CRIMINOLOGY 1 (1983) [hereinafter Goldsmith]; C. FISHMAN, EAVESDROPPING AND WIRETAPPING (1978 & Supp. 1989) [hereinafter FISHMAN].

7 *See* 18 U.S.C. §§ 2511-2519 (1988). *See also infra* notes 36-127 and accompanying text.

8 *See infra* notes 189-95 and accompanying text.

9 18 U.S.C. § 2518(4)(c) (1988).

10 *See, e.g.*, United States v. Williams, 737 F.2d 594 (7th Cir. 1984); United States v. Depolina, 461 F. Supp. 800 (S.D.N.Y. 1978); People v. DiStefano, 38 N.Y.2d 640, 382 N.Y.S.2d 5, 345 N.E.2d 548 (1976); United States v. Sklaroff, 323 F. Supp. 296 (S.D. Fla. 1971), *aff'd*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975); United States v. Denisio, 360 F. Supp. 715 (D.Md. 1973); United States v. Tortorello, 342 F. Supp. 1029 (S.D.N.Y. 1972), *aff'd*, 480 F.2d 764 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); United States v. Escandar, 319 F. Supp. 295 (S.D. Fla. 1970). Two types of plain view evidence may be discovered during electronic surveillance: evidence incriminating a *person* not named in the original surveillance order and evidence of a *crime* not specified in the original surveillance order. This Note considers the admissibility of only the later type of electronically gathered plain view evidence.

11 18 U.S.C. § 2517(5) (1988). *See also* S. REP. No. 1097, *supra* note 6, at 2189; United States v. DePalma, 461 F. Supp. 800, 825 n.32 (S.D.N.Y. 1978) (applying § 2517(5) of Title III to admit intercepted information relating to several offenses not included in any of five original surveillance orders authorizing wiretaps to obtain evidence of various state and federal crimes constituting a "pattern of racketeering activity" in violation of the federal Racketeering Influenced and Corrupt Organization Act of 1970 and securities fraud and bankruptcy fraud conspiracies); United States v. Skarloff, 323 F. Supp. 296, 307 (S.D. Fla. 1971), *aff'd*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 847 (1975) (upholding against fourth amendment challenge, the constitutionality of Title III's extension of the plain view doctrine to electronic surveillance: "It is settled law in search and seizure cases that certain items not named in the search warrant may be seized if discovered in the course of a lawful search. . . . [Section 2517(5)] is only a re-statement of existing case law adapted to fit the electronic surveillance situation." (citations omitted)); United States v. Escandar, 319 F. Supp. 295, 300-01 (S.D. Fla. 1970) (upholding the constitutionality of § 2517(5), Title III's plain view provision).

number of the state legislatures[12] have, in varying degrees, extended the plain view doctrine to electronic searches by enacting provisions that authorize the disclosure of the contents of such incriminating communications as evidence in criminal proceedings.

Nonetheless, Title III and the majority of state statutes impose procedural prerequisites upon the admissibility of electronically-intercepted plain view evidence beyond fourth amendment requirements for the admissibility of plain view evidence seized in a conventional search. Further, due to the intrusive nature of electronic surveillance, some federal courts[13] and some commentators[14] question whether the plain view doctrine should be applied to electronic searches at all. Accordingly, electronic surveillance law in several states further restricts the admissibility of electronically-gathered plain view evidence. These states provide that such evidence is *per se* inadmissible or limit admissibility to communications involving only certain crimes.[15]

Part I of this Note discusses the development and present state of the plain view doctrine. Parts II and III examine the admissibility of intercepted conversations relating to crimes not described in the surveillance order (plain view interceptions) under federal and state law. Part IV argues that these conversations should be admissible as evidence in court without unnecessary procedural prerequisites or restrictions. It asserts that such procedures and restrictions further no significant fourth amendment or individual privacy concerns, considering the current state of the plain view doctrine and the substantial privacy safeguards required of all surveillance statutes. Therefore, electronic surveillance statutes that impose limits on the admissibility of plain view interceptions place unnecessary burdens on law enforcement and should be reformed. Part V concludes that these legislative reforms are especially necessary in light of the contemporary prevalence of organized, narcotics-related crime.

I. The Plain View Doctrine

For many years, the Supreme Court held that plain view seizures violated the fourth amendment's particularity requirement and were prohibited as "unreasonable" seizures.[16] According to the Court, "a cardi-

12 *See infra* notes 196-204 and accompanying text.

13 *See e.g.*, United States v. Williams, 737 F.2d 594, 605 (7th Cir. 1984); United States v. Cox, 449 F.2d 679, 686 (10th cir.), *cert. denied*, 406 U.S. 934 (1971).

14 *See, e.g.*, Note, *Subsequent Use of Electronic Surveillance Interceptions and the Plain View Doctrine: Fourth Amendment Limitations on the Omnibus Crime Control Act*, 9 MICH. J.L. REF. 529, 540-53 (1976); CARR, *supra* note 6, § 5.9(b).

15 *See infra* notes 196-204 and accompanying text.

16 The fourth amendment of the Constitution protects against unreasonable searches and seizures. It reads as follows:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and *particularly describing the place to be searched, and persons or things to be seized.*

nal principle"[17] of fourth amendment law is that "searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[18] In order to meet fourth amendment requirements, a judicially approved search warrant must contain language "particularly describing the place to be searched, and persons or things to be seized."[19] In its 1927 decision in *Marron v. United States*,[20] the Supreme Court held that the fourth amendment's particularity requirement restricted seizures made while executing a search warrant to only those particular items described in the warrant.[21]

Proponents of *Marron* felt that the opinion stated an integral component of the fourth amendment's proscription of general searches.[22] They argued that, but for *Marron*, there would be no incentive for officers to stop searching even after seizing all the items described in the warrant.[23] Nonetheless, as years passed, the Court upheld several plain view seizures made in the course of lawful *warrantless* searches.[24] These cases raised doubt as to the continued validity of *Marron*.[25] Eventually, in *Coolidge v. New Hampshire*,[26] it was recognized that "[i]t is at least odd to . . .

U.S. CONST. amend. IV. (emphasis added) (the italicized language contains the "particularity" requirement).

The remedy for unreasonable searches and seizures in violation of the fourth amendment is exclusion of evidence seized or derived from the unreasonable search. The Supreme Court created the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914), and extended the fourth amendment right of privacy to the states through the fourteenth amendment in Wolf v. Colorado, 338 U.S. 25 (1949), and extended the exclusionary rule to the states in Mapp v. Ohio, 367 U.S. 643 (1961).

17 Mincey v. Arizona, 347 U.S. 385, 390 (1978).

18 Katz v. United States, 389 U.S. 347, 357 (1967). The "specifically established and well-delineated exceptions" include: hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); exigent circumstances, United States v. Jeffers, 342 U.S. 48, 51-52 (1951); automobile searches, United States v. Ross, 456 U.S. 798 (1982); search of the person and surrounding area incident to arrest, Chimel v. California, 395 U.S. 752 (1969), United States v. Robinson, 414 U.S. 218 (1973), and New York v. Belton, 453 U.S. 454 (1981); search at the U.S. border or a "functional equivalent," Almeida-Sanchez v. United States, 413 U.S. 266 (1973); and consent, Zap v. United States, 328 U.S. 624, 630 (1946).

19 U.S. CONST. amend. IV.

20 275 U.S. 192 (1927).

21 The *Marron* majority stated that "[t]he requirement that warrants shall particularly describe that thing to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officers executing the warrant." *Id.* at 196.

22 *See, e.g.*, Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455, 465-66 (1969).

23 *Id.*

24 *See* Harris v. United States, 331 U.S. 145, 153-54 (1947); Abel v. United States, 362 U.S. 217, 238-40 (1960); United States v. Eisner, 297 F.2d 595, 597 (6th Cir.), *cert. denied*, 396 U.S. 859 (1962); Harris v. United States, 390 U.S. 234, 235-36 (1968).

25 *See*, Goldsmith, *supra* note 6, at 141 & n.843.

26 403 U.S. 443 (1971). Justices Douglas, Brennan, and Marshall joined in Justice Stewart's plurality opinion. In *Coolidge*, police went to Coolidge's home to arrest him for murder. They had previously obtained a warrant to search Coolidge's automobile. The police chief applied for the warrant and the warrant was issued by the Attorney General who was in charge of the investigation and was to be the chief prosecutor of the case against Coolidge. When the police arrived at the Coolidge house to arrest the suspect, his car was parked in the driveway. The police arrested Coolidge and towed his car to the police station where the car was subsequently searched. The prosecution offered vacuum sweepings from the car as evidence at the trial. The vacuum sweepings were

permit plain-sight seizures arising in connection with warrantless arrests . . . and yet forbid the warrantless seizure of evidence in plain sight when officers enter a house under a search warrant that is perfectly valid but does not cover the items actually seized."[27]

Justice Stewart's plurality opinion in *Coolidge* held that plain view seizures, including those made pursuant to a warrant, comply with the fourth amendment when three conditions are met: (1) the seizing officer had prior justification for the initial intrusion;[28] (2) "it is immediately apparent to the police that they have evidence before them;"[29] and (3) the discovery of the evidence in plain view is inadvertent.[30] The courts

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accepted into evidence over the defendant's pretrial suppression motion and Coolidge was convicted. The New Hampshire Supreme Court affirmed the conviction and Coolidge appealed. The U.S. Supreme Court granted certiorari and reversed and remanded. A plurality of the Court held that the search warrant was invalid under the fourth amendment because it was not issued by a neutral and detached magistrate. After discussing the requirements for a search and seizure under the plain view doctrine, the plurality concluded that the seizure and subsequent search of Coolidge's car could not be justified under the plain view doctrine because the discovery of the car at Coolidge's home was not "inadvertent."

27 *Id.* at 515 (White, J., concurring in part and dissenting in part) (citations omitted).

28 *Id.* at 466. "The [plain view] doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure." *Id.*; Cady v. Dombrowski, 413 U.S. 433 (1973). In *Cady,* the Court upheld the plain view seizure of some blood-stained garments later used to convict the defendant of murder. The defendant was a policeman who was involved in an auto accident, arrested for drunk driving and taken to a hospital for treatment. The defendant's car was towed to a private garage where police searched the car for the defendant's service revolver to prevent it from falling into the hands of vandals. During the search for the pistol, the police discovered and seized the blood-stained garments. The Court held that the initial intrusion was justified as a "community caretaking function." Therefore, the seizure of the garments was also justified.

29 Coolidge v. New Hampshire, 403 U.S. at 466. Justice Stewart emphasized that "the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerged." *Id.*

"Immediately apparent" means that the police officer has probable cause to believe that the item in plain view is incriminating in nature. Texas v. Brown, 460 U.S. 730, 741-43 (1982). *See also* Arizona v. Hicks, 480 U.S. 321, 326-28 (1987) (holding that probable cause is required to invoke the plain view doctrine to justify a seizure).

30 Coolidge v. New Hampshire, 403 U.S. at 469. Commentators have noted that this third requirement implies good faith as a fourth requirement. *See, e.g.*, Goldsmith, *supra* note 6, at 146 & n.870. Support for this proposition is found in *Coolidge*:

> The rationale of the exception to the warrant requirement, [*see infra* text accompanying notes 32-34], is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none of which is constitutionally cognizable in a legal system that regards warrantless searches as "*per se* unreasonable" in the absence of "exigent circumstances."

Coolidge v. New Hampshire, 403 U.S. at 469-71. In a footnote, Justice Stewart explained further that: "This Court has never permitted the legitimation of a planned warrantless seizure on plain-view grounds. . . . [T]he mere fact that the police have legitimately obtained a plain view of a piece of incriminating evidence is not enough to justify a warrantless seizure." *Id.* at 471 n.27. Addressing the plurality's concern for "planned warrantless searches," Justice White stated that:

> If the police have probable cause to search for a photograph as well as a rifle and they proceed to seek a warrant, they could have no possible motive for deliberately including the rifle but omitting the photograph. Quite the contrary is true. Only oversight or careless mistake would explain the omission in the warrant application if the police were convinced they had probable cause to search for the photograph. Of course, they may misjudge the facts and not realize they have probable cause for the picture, or the magistrate may find

have applied requirements (1) and (2) in subsequent plain view cases, but have questioned the necessity of the inadvertent discovery requirement.[31] The *Coolidge* plurality rationalized the plain view doctrine as an

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against them and not issue a warrant for it. In either event [under the inadvertent discovery rule] the officers may validly seize [a second] photograph for which they had no probable cause to search [but discovered inadvertently] but [the original] photograph [discovered in plain view] is excluded from evidence [if] the court subsequently determines that the officers, after all, had probable cause to search for it.

Id. at 517 (White, J., concurring in part and dissenting in part). Justice White called the situation described above, "a punitive and extravagant application of the exclusionary rule." *Id.*

31 In *Coolidge*, only a plurality of the Court recognized the inadvertent discovery requirement. Justices Black and White criticized the inadvertency requirement in their respective concurring and dissenting opinions. Justice Black attacked the plurality's basis for the inadvertent discovery requirement:

> The majority [sic] confidently states: "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." But the prior holdings of this Court not only fail to support the majority's statement, they flatly contradict it. One need look no further than the cases cited in the majority opinion to discover the invalidity of that assertion.

Id. at 506 (Black, J., concurring and dissenting). Justice White took an even stronger opposition to the inadvertency requirement, writing that "the inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish nothing." *Id.* at 517 (White, J., concurring and dissenting). Justice White supports his assertion with a well reasoned argument:

> Police with a warrant for a rifle may search only places where rifles might be and must terminate the search once the rifle is found; the inadvertence rule will in no way reduce the number of places into which they may lawfully look. So, too, the areas of permissible search incident to arrest are strictly circumscribed by [Chimel v. California, 395 U.S. 752 (1969)]. Excluding evidence seen from within these areas can hardly be effective to operate to prevent wider unauthorized searches. If the police stray outside the scope of an authorized . . . search they are already in violation of the Fourth Amendment, and evidence so seized will be excluded; adding a second reason for excluding evidence hardly seems worth the candle.

Id.

In subsequent cases, members of the Court have questioned the continued validity of the inadvertent discovery requirement. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 737, 743-44 (1982); Arizona v. Hicks, 480 U.S. 321, 329-30 (1987) (White, J., concurring). Some lower federal courts have also noted the uncertain status of the inadvertent discovery requirement and refused to accept it as a constitutional element of the plain view doctrine. *See, e.g.*, United States v. Morell, 524 F.2d 550, 555 (2d Cir. 1975); United States v. Santana, 485 F.2d 365, 369-70 (2d Cir. 1973); United States v. Bradshaw, 490 F.2d 1097, 1101 n.3 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974). *Cf.* United States v. Ladson, 774 (11th Cir. 1985); United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979).

Given the criticism of the inadvertent discovery requirement, it is probably safe to assume that future plain view seizures will be upheld when there is a valid initial intrusion and the officers have probable cause to believe that the item in plain view is incriminating in nature, even if officers had a reasonable suspicion or probable cause to believe they would find the item in plain view. Only in cases where there was a clear lack of good faith on the part of the officer, and the original search warrant was a mere pretext to allow police to make a plain view discovery is a court likely to find a plain view seizure unreasonable.

For further discussion of the inadvertent discovery requirement see *The Supreme Court: 1970 Term*, 85 HARV. L. REV. 3 (1971) (stating that the most serious problem with the plurality's opinion in *Coolidge* was the absence of an explanation of the degree of expectation of discovery that would violate the inadvertence requirement and discussing the implications of the requirement when the prohibited degree of expectation is set at probable cause and at something less than probable cause) and Lewis & Mannle, *Warrantless Searches and the "Plain View" Doctrine: Current Perspective*, 12 CRIM. L. BULL. 5 (1976) (warning that uncertainty of the requirements of the plain view doctrine and especially the inadvertence requirement has left the law in a state that invites subterfuge searches and false testimony by police).

For a more recent discussion of the inadvertency requirement, see United States v. Liberti, 616 F.2d 34 (2d Cir. 1980). In *Liberti*, the majority held that a plain-view seizure is "inadvertent" when the officer lacks probable cause to search for and seize the item. In his concurring opinion, Judge Newman wrote:

exception to the fourth amendment's warrant requirement, similar to the "hot pursuit" and search incident to lawful arrest exceptions.[32]

Nonetheless, in *Texas v. Brown*,[33] Chief Justice Burger and Justices White and O'Connor joined in Justice Rhenquist's plurality opinion to

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The "inadvertence" qualification to the doctrine of "plain view" seizures was endorsed in [*Coolidge*] by only four Justices and was rejected as unsound in that same case by four Justices. The uncertain status of the "inadvertence" notion has been noted by this Court . . . and others. . . .

The majority [rests its] decision on the ground that a "plain view seizure" of an item not covered by a search warrant is "inadvertent" when officers *lack* probable cause to search for and seize that item. That approach creates the anomaly that a householder's interest in protecting his goods from seizure is made to turn on his ability to prove that the officers *had* probable cause, while the officers authority to seize depends upon their successful *disclaimer* of probable cause. The reversal of traditional roles on the issue of probable cause suggests that making "inadvertence" turn on the absence of probable cause may be unsound. Moreover, this approach places the householder in the position of probing for law enforcement information and thereby risking the integrity of continuing criminal investigations in order to prove the presence of probable cause, a matter not normally within his knowledge.

Perhaps these anomalies put in issue the basic soundness of the "inadvertence" qualification.

Id. at 38.

32 Coolidge v. New Hampshire, 403 U.S. at 467-68. Justice Stewart wrote that:

The rationale for the "plain view" *exception* is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. . . . The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion *per se*, but of a general, exploratory rummaging in a person's belongings. . . . The warrant accomplishes this second objective by requiring a "particular description" of things to be seized.

The "plain view" doctrine does not conflict with the first objective because plain view does not occur until a search is in progress. In each case, this initial intrusion is justified by a warrant or by an exception such as "hot pursuit" or search incident to a lawful arrest, or by an extraneous valid reason for the officer's presence. And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. As against the minor peril to Fourth Amendment protections, there is a major gain in effective law enforcement. Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.

Id. (citations omitted) (emphasis added).

33 460 U.S. 730 (1982). In *Brown*, a Fort Worth, Texas police officer stopped Brown's car at a routine driver's license checkpoint. It was about midnight and Brown was alone in the car. As the officer stood alongside the driver's window of the car and shined his flashlight into the car, he asked to see Brown's driver's license. The officer noticed that a green party balloon, knotted about one-half inch from the tip, had caught between Brown's two middle fingers as he withdrew his right hand from his right pants pocket. Brown let the balloon fall on the seat beside him as he reached into the glove compartment. The police officer recognized the balloon as the type commonly used to package narcotics. When Brown opened the glove compartment, the officer adjusted his flashlight so that he could see inside. He noticed that the compartment contained several small plastic vials, some loose white powder, and an open bag of party balloons. After looking in his glove compartment, Brown told the officer that he did not have his driver's license. The officer instructed Brown to get out of the car. When Brown got out, the officer reached into the car and picked up the green balloon that seemed to contain a powdery substance. The officer then arrested Brown, conducted an on-the-scene inventory search of the car, and seized the other items. Brown's motion to suppress the evidence was denied, and Brown was convicted. The Texas Court of Criminal Appeals reversed the conviction, holding that the plain view doctrine could not justify the seizure of the balloon because the police officer did not *know* that he had incriminating evidence before him when he seized it. Therefore, the incriminating nature of the balloon was not "immediately apparent" as required by the plain view doctrine enunciated in *Coolidge*. The U.S. Supreme Court reversed and remanded holding that the "immediately apparent" language of *Coolidge* requires only that the police have

delineate a different rationale for the plain view doctrine. After pointing out that the *Coolidge* plurality's formulation of the plain view doctrine "has never been expressly adopted by a majority of [the] Court," the *Brown* plurality stated that:

> "[P]lain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment. *"Plain view" is perhaps better understood, therefore, not as an independent "exception" to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be. . . .* [O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately. . . . This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizure of property.[34]

The plurality opinions in *Coolidge* and *Brown*, taken together, constitute the modern formulation of the plain view doctrine.[35] These decisions establish that plain view seizures comply with the fourth amendment if the officer's initial access to the item seized is constitutionally valid and the officer has probable cause to believe the item in plain view is incriminating in nature.

II. 18 U.S.C. § 2517(5): Federal Law Governing the Admissibility of Plain View Evidence Derived Through Electronic Surveillance

Before examining the interplay between the plain view doctrine and electronic searches and seizures, a general understanding of the body of law pertaining to electronic surveillance is necessary. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 is a comprehensive federal statute governing the authorization and execution of electronic surveillance orders and the admissibility of evidence derived from electronic surveillance. This Part provides an overview of the major provisions of Title III that are relevant to plain view interceptions. These provisions establish substantial privacy safeguards against the inherent intrusiveness of electronic surveillance. This Part also examines 18 U.S.C. § 2517(5), Title III's provision governing the admissibility of communications relating to crimes not described in the surveillance order.

A. *Title III Generally*

Title III is the product of extensive debate concerning the utility of electronic surveillance in criminal investigations and the merits of vari-

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probable cause to believe that the item in plain view is of an incriminating nature; "immediately apparent" does not require that the officer "know" the item in plain view is incriminating.

34 *Id.* at 737-39 (emphasis added).

35 The most recent Supreme Court case to address the plain view doctrine is Arizona v. Hicks, 480 U.S. 321 (1987). *Hicks* held that probable cause is required to invoke the plain view doctrine as a justification for the seizure of property. *Hicks* reinforced by majority opinion the *Brown* plurality's definition of "immediately apparent" as an equivalent to a requirement of probable cause. Beyond that holding, however, *Hicks* appeared to merely recognize the plain view doctrine as formulated by *Coolidge* and *Brown*.

ous legal controls.[36] The statute is best characterized as "a conscious compromise forged by Congress between competing privacy and law enforcement concerns."[37] Generally, Title III permits law enforcement officers to use wiretaps and bugs[38] in criminal investigations pursuant to a properly issued court order authorizing the surveillance, and requires officers to comply with the statute's guidelines concerning the execution of the order.[39] Thus, Title III serves two purposes. First, it enhances law enforcement by permitting the use of electronic surveillance as an investigatory tool. Second, Title III protects individual privacy by imposing strict limitations on the permitted use of electronic surveillance. In 1976, the Wiretap Commission concluded that, with respect to law enforcement, electronic surveillance is:

> (1) an indispensable aid to law enforcement, (2) primarily useful in investigation of organized-crime-type offenses, including narcotics and gambling, (3) not used, but should be, in theft and fencing and other "creative investigations," and (4) best used by experienced prosecutors and well-trained criminal investigators.[40]

One of the most feared results of legalizing electronic surveillance is the creation of an Orwellian society in which "Big Brother" monitors our every move. However, statistics compiled by the Administrative Office of the United States Courts pursuant to 18 U.S.C. § 2519(1) consistently show that the extent of law enforcement agencies' use of electronic surveillance is far from Orwellian. In fact, the 1987 statistics indicate that law enforcement agencies across the country have largely neglected this "indispensable aid."[41]

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36 CARR, *supra* note 6, § 2.1.

37 Goldsmith, *supra* note 6, at 3.

38 "*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 consent of any of the participants." 1976 REPORT *supra*, note 6. *See also* CARR, *supra* note 6, §§ 1.1(a), 1.1(b). Interestingly, the constitutional basis for federal regulation of wiretapping and bugging are different. The commerce clause of the Constitution provides authority for federal control of wiretapping, apparently due to the interstate nature of telephone communications. *Id.* § 2.3(a). Federal authority to control bugging, however, originates in the fourth amendment's protections against unreasonable searches and seizures made applicable to the states through the fourteenth amendment by Wolf v. Colorado, 338 U.S. 25 (1949) and Mapp v. Ohio, 367 U.S. 643 (1961). *Id.* § 2.3(b).

39 *See* 18 U.S.C. §§ 2511-2519 (1988) and *infra* notes 97-116 and accompanying text.

40 1976 REPORT, *supra* note 6, at 3-6. *See also* CARR, *supra* note 6, § 4.1, at 4-3 n.2; W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 4.2 (Supp. 1987) [hereinafter LAFAVE & ISRAEL].

41 A total of only 673 surveillance orders were authorized by the 33 jurisdictions which had enacted surveillance statutes during or before calendar year 1987. Two-hundred and thirty-six of those orders were authorized by the federal government, and approximately 80% of the remaining 437 surveillance orders were authorized by only nine of the 32 other jurisdictions having surveillance statutes: New Jersey (144 orders authorized), New York (88 orders authorized), Pennsylvania (44 orders authorized), Massachusetts (28 orders authorized), Connecticut (21 orders authorized), Maryland (20 orders authorized), Texas (18 orders authorized), Florida (18 orders authorized), and Nebraska (13 orders authorized). Perhaps the most startling statistic from 1987 is that 11 of the 33 jurisdictions in which electronic surveillance is a lawful investigatory tool did not even authorize a single surveillance order. Among these 11 jurisdictions was the District of Columbia. REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS ON APPLICATIONS FOR ORDERS AUTHORIZING OR APPROVING THE INTERCEPTION OF WIRE, ORAL, OR ELECTRONIC COMMUNICATIONS FOR THE PERIOD JANUARY 1, 1987 TO DECEMBER 31, 1987. [hereinafter 1987 REPORT]. Considering the findings stated in the 1976 REPORT and the recent rise in narcotics-related crime, the failure to fully utilize electronic surveillance in criminal investigations is disturbing.

Title III subjects the authorization and execution of electronic surveillance to a much more demanding degree of judicial scrutiny than the authorization and execution of a conventional search receives. Title III is codified at 18 U.S.C. §§ 2510-2520. Four general categories of its provisions are relevant here: (1) provisions effecting the statute's scope; (2) provisions governing the authorization of electronic surveillance; (3) provisions regulating the execution of electronic surveillance; and (4) provisions establishing suppression as a remedy for violations of the statute. The main thrust of these provisions is to establish restrictions on the employment of electronic surveillance as a check against its inherent intrusiveness.

1. The Scope of Title III

The scope of federal and state electronic surveillance statutes is established by their often ambiguous definitions, specific provisions pertaining to certain uses of electronic surveillance, and interpretative case law. Methods outside the surveillance statute's scope may be used to gather evidence without a court order and without fear of criminal or civil penalties under the statute. Nonetheless, these methods are subject to constitutional and any other applicable statutory provisions pertaining to privacy, search and seizure, trespass, etc. Since Title III serves as the model for state electronic surveillance statutes, the provisions of Title III provide a logical starting point for considering the scope of electronic surveillance law generally.

a. *Scope as Determined by Statutory Definitions*

Title III prohibits interception and disclosure of any wire, oral, or electronic communications, except as provided within 18 U.S.C. § 2511. Section 2510(4) defines "intercept" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device."[42] Interception involves use of any electronic, mechanical, or other device by an individual to overhear any communication in which he is neither a participant nor an intended listener.[43] "[E]lectronic, mechanical, or other device" means "any device or apparatus which can be used to intercept a wire, oral, or electronic communication other than" any of the following: a telephone or telegraph instrument furnished to the user by a provider of wire or electronic communication service in the ordinary course of business; such an instrument used by a communications common carrier in the ordinary course of business, or by investigative or law enforcement officers in the ordinary course of their duties; or, a hearing aid used to correct subnormal hearing.[44]

Activities that do not constitute "the aural acquisition of the contents of any wire, electronic, or oral communication" are outside the scope of Title III and may be conducted without a Title III court order or

42 18 U.S.C. § 2510(4) (1988).
43 United States v. Banks, 374 F. Supp. 321, 326 (D.S.D. 1974).
44 18 U.S.C. §§ 2510(5)(a), (b) (1988).

fear of Title III sanctions. Such activities include examination of toll or similar records compiled by phone companies, including their disclosure[45], or use of a pen register.[46] Trap and trace devices[47] are outside the scope of Title III,[48] as are beepers or "mobile tracking devices"[49] used by law enforcement officers as an aid to physical surveillance of suspects and moving vehicles,[50] unaided overhearing,[51] monitoring of incoming calls by police,[52] inadvertent interception,[53] and replay of previously recorded communications.[54]

As defined in section 2510(1), "wire communications" means:

> any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or like connection between the point of origin and the point of reception (including the use of such connection in a switching station) furnished or operated by any person engaged in providing or operating such facilities for the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce and such term includes any electronic storage of such communication, but does not include the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.[55]

An aural transfer is "a transfer containing a human voice at any point between and including the point of origin and the point of reception."[56]

45 United States v. Baxter, 492 F.2d 150, 167 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); Nolan v. United States, 432 F.2d 1031, 1044 (10th Cir.), *cert. denied*, 400 U.S. 848 (1970); CARR, *supra* note 6, § 3.2(c)(2)(A).

46 A pen register is a device that "records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such a device is attached." 18 U.S.C. § 3126(3) (1988). *See* S. REP. No. 1097, *supra* note 6, at 2178; Smith v. Maryland, 442 U.S. 735, 736 n.1 (1979); United States v. New York Telephone Co., 434 U.S. 159, 161 n.1, 162 (1977).

47 These are devices that "capture the incoming electronic or other impulses which identify the originating number of the instrument or device from which a wire or electronic communication was transmitted." 18 U.S.C. § 3126(4) (1988).

48 "[I]n light of *Smith v. Maryland* and *United States v. New York Telephone Co.*, no prior court order appears constitutionally mandated before a trap and trace device can be installed at the request of law enforcement officers, [and] Congress enacted legislation in 1986 . . . establishing procedures for obtaining judicial approval for installation of a trap and trace." CARR, *supra* note 6, § 3.2(c)(3)(C), at 3-26 (footnotes omitted).

49 18 U.S.C. § 3117(b) (1988).

50 United States v. Moore, 562 F.2d 106, 110 (1st Cir. 1977) (holding that since tracking devices broadcast only a radio signal and cannot transmit speech they do not intercept communication); CARR, *supra* note 6, § 3.2(c)(2)(D).

51 Unaided overhearing is "not within proposed legislation." S. REP. No. 1097, *supra* note 6, at 2178.

52 Commonwealth v. Smith, 186 Pa. Super. 89, 140 A.2d 347, 350 (1958) (holding that the speaker chose to talk to the person who answered the phone and thereby assumed the risk that it was someone other than the person whom he thought it was; consequently, the speaker does not have a reasonable expectation of privacy). *See* OHIO REV. CODE ANN. § 2933.52(b)(8) (Baldwin 1987) and WYO. STAT. § 7-3-602(b)(vii) (1987), both of which expressly permit warrantless monitoring of incoming calls.

53 *See* CARR, *supra* note 6, § 3.2(c)(2)(G), at 3-32.

54 United States v. Felton, 753 F.2d 256, 260 (3d Cir. 1985); United States v. Whitten, 706 F.2d 1000, 1011 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); Brown v. Superior Court, 127 Cal. App. 3d 155, 180 Cal. Rptr. 206, 214 (1981).

55 18 U.S.C. § 2510(1) (1988).

56 18 U.S.C. § 2510(18) (1988).

According to Title III's legislative history, "[t]he coverage is intended to be comprehensive."[57]

Section 2510(2) defines "oral communication[s]" as those "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such an expectation, but such term does not include any electronic communication."[58] Thus, to fall within the scope of this definition, oral communication must be (1) spoken by a person exhibiting an expectation that his words are not subject to interception; and (2) spoken in circumstances making the speaker's expectation reasonable. The legislative history provides that the definition of oral communication is "intended to reflect existing law."[59] Therefore, section 2510(2) must be read in the context of *Katz v. United States*[60] and other federal cases interpreting the fourth amendment. In *Katz*, the Supreme Court held that the fourth amendment protects persons against unreasonable searches and seizures when they are exhibiting a subjective expectation of privacy that society recognizes as reasonable.[61] *Katz* was obviously the basis for Title III's definition of oral communication. The statute excludes from its scope any communication not meeting the statutory/*Katz* test and "any electronic communication," as defined at section 2510(12) and section 2510(2).

Section 2510(12) defines "electronic communications" as "any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce . . . ."[62] According to the legislative history, "a communication is an electronic communication if it is not carried by sound waves and cannot fairly be characterized as containing the human voice. Communication consisting solely of data, for example, and all communications transmitted only by radio are electronic communications, as are electronic mail, digitalized transmissions, and video teleconferences."[63] The statutory definition goes on to exclude:

57 S. REP. No. 1097, *supra* note 6, at 2178.

58 18 U.S.C. § 2510(2) (1988).

59 S. REP. No. 1097, *supra* note 6, at 2178 (citing Katz v. United States, 389 U.S. 347 (1967)).

60 389 U.S. 347 (1967). Katz was convicted of a federal offense for transmitting wagering information by telephone from Los Angeles to Miami and Boston. Over Katz's objection, the District Court considered evidence of Katz's end of telephone conversations, which the FBI had, without prior judicial authorization, intercepted by attaching a bug to the outside of the public telephone booth from which Katz had placed his calls. The Government argued that the interception did not constitute a fourth amendment search and seizure because the agents had not physically penetrated the phone booth in making the interception. The Court held that a physical intrusion of the phone booth was not necessary to constitute a search and seizure under the fourth amendment: "[T]he Fourth Amendment protects people, not places. . . ." *Id.* at 351. "[T]he Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any 'technical trespass under . . . local property law.' " *Id.* at 353. Since investigators seized Katz's conversation without prior approval of a neutral and detached magistrate, the Court ruled that the District Court had erred in admitting the conversations in evidence and reversed Katz's conviction.

61 *Id.* at 361 (Harlan, J., concurring).

62 18 U.S.C. § 2510(12) (1988).

63 LAFAVE & ISRAEL, *supra* note 40, § 4, at 18 (Supp. 1987).

(A) the radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;
(B) any wire or oral communication;
(C) any communication made through a tone-only paging device; or
(D) any communication from a tracking device (as defined in section 3117 of this title).[64]

b. *Specific Statutory Provisions and Case Law Limiting the Scope of Title III*

Title III contains a number of provisions that directly or indirectly exempt certain uses of electronic surveillance from the statute. For example, provisions permitting telephone companies, and other providers of communications services, to conduct electronic surveillance narrow the scope of Title III. When conducted by such providers, activities involving maintenance of toll records, use of pen registers and other call tracing devices are not within the meaning of "intercept."[65]

The principal exception from the scope of Title III's regulatory framework is the authority to conduct consent surveillance. Sections 2511(2)(c) & (d),[66] grant this authority to law enforcement officers and to persons not acting under color of law. Title III's legislative history indicates that these exceptions are intended to reflect existing fourth amendment law upholding warrantless consent surveillance.[67] The legislative history also indicates that only a person participating in the conversation can give effective consent to surveillance.[68]

National security surveillance is also outside the scope of Title III. When Title III was enacted in 1968, it contained a provision that provided that nothing in Title III "shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or hostile acts of a foreign power . . . ."[69] This provision was repealed when Congress enacted the Foreign Intelligence Surveillance Act of 1978, which now governs the procedures for lawful national security surveillance.[70]

Intra-family interceptions are generally beyond the reach of electronic surveillance statutes. Cases involving interception of the communications of one family member by another typically arise in the context of spousal disputes and divorces. They sometimes occur when a parent seeks to monitor a child's communications and conversations. Since Ti-

64 18 U.S.C. § 2510(12) (1988).

65 *See supra* notes 42-54 and accompanying text; CARR, *supra* note 6, § 3.3, at 3-42 to 3-54.

66 Under Title III's consent exceptions law enforcement authorities are free to make consensual interceptions in a variety of ways: (1) by having the consenting party wear or carry a tape recorder with which he records his face-to-face conversations with another; (2) by having the consenting party wear a transmitter that broadcasts his conversations to agents equipped with a receiver; or (3) by having the consenting party to a telephone conversation record it or permit another to listen in on an extension. CARR, *supra* note 6, § 3.5, at 3-55 to 3-62; LAFAVE & ISRAEL, *supra* note 40, § 4.3(c), at 228.

67 *See* Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952); United States v. White, 401 U.S. 745 (1971).

68 S. REP. No. 1097, *supra* note 6, at 2182.

69 18 U.S.C. § 2511(3) (repealed 1978).

70 *See* LAFAVE & ISRAEL, *supra* note 40, § 4.3(d), at 228-30.

tle III is structured to absolutely prohibit third person surveillance,[71] subject only to the enumerated exceptions,[72] and intra-family surveillance is not among these exceptions, the use of electronic or other devices in these cases clearly qualifies as an interception under section 2510(4). Nonetheless, many courts will not apply the statute literally and hold such surveillance to be outside the scope of Title III. Courts reach this conclusion based on the doctrine of spousal immunity, the legislative history of Title III, and by classifying parental use of an extension telephone to listen secretly to conversations as normal use under section 2510(5)(a)(i).[73]

In certain circumstances, Title III exempts emergency surveillance from the requirement of prior judicial authorization. Under section 2518(7), electronic surveillance may be conducted without judicial approval when an emergency situation exists involving "(i) immediate danger of death or serious physical injury to any person, (ii) conspirital activities characteristic of organized crime that requires wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained."[74]

Title III also exempts certain activities by Federal Communication Commission (FCC) employees. Under section 2511(2)(b), an employee of the FCC may "in the normal course of his employment," intercept and disclose the contents of wire, electronic, and oral communications transmitted by radio.[75]

Title III does not cover use of video equipment when a video record is created, used, or disclosed. Nonetheless, if officers record both sounds and sights, the statute applies to the audio portion of the videotape.[76]

2. Authorization Provisions

a. *Crimes for Which Court-Ordered Electronic Surveillance May Be Employed as an Investigatory Tool*

Under Title III, a surveillance order authorizing the interception of wire and oral communications can issue to aid in investigations of only those offenses designated in section 2516(1). The federal offenses that can be investigated pursuant to this provision are roughly divided into three categories: (1) national security offenses; (2) intrinsically dangerous crimes; and (3) activities characteristic of organized crime.[77] Section

71 18 U.S.C. § 2511(1) (1988).

72 18 U.S.C. § 2511(2) (1988).

73 CARR, *supra* note 6, § 3.6, at 3-94 & 3-95.

74 18 U.S.C. § 2518(7) (1988). Before beginning surveillance under § 2518(7), the law enforcement officer must be satisfied that "there are grounds upon which an order could be entered" under Title III. Further, the officer must apply for a Title III court order within forty-eight hours after the interception begins. *Id.*

75 18 U.S.C. 2511(2)(b) (1988).

76 The conversations are oral communications pursuant to 18 U.S.C. § 2510(2) (1988). CARR, *supra* note 6, § 3.8, at 3-105.

77 *See* CARR, *supra* note 6, § 4.2(a), at 4-4 & 4-4.1.

Section 2516(1)(a) authorizes surveillance orders in the case of any offense punishable by death or imprisonment for more than one year relating to enforcement of the Atomic Energy Act of 1954, sabotage of nuclear facilities or fuel, espionage, sabotage, treason, riots, malicious mischief, destruction of vessels, or piracy. Section 2516(1)(b) authorizes orders for violation of restrictions on pay-

2516(1)(l) permits surveillance of conspiracies to commit any of the enumerated offenses.

b. *The Application*

Under section 2518(1), applications for a surveillance order must be made in writing, on oath or affirmation, and state the applicants' authority to make the application. Each application must also contain the identity of the investigative or law enforcement officers applying for the surveillance order and the officer authorizing the application,[78] and a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued and to establish probable cause.[79] The probable cause statement must include four elements: (1) the offense being investigated; (2) the facilities or place from which interception is to occur; (3) the type of communications to be intercepted; and (4) the identity of the person to be overheard.[80] Each of

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ments and loans to labor organizations, murder, kidnapping, robbery, or extortion. Section 2516(1)(c) authorizes orders for investigation of crimes involving bribery of public officials and witnesses, bribery in sporting contests, unlawful use of explosives, transmission of wagering information, escape under 18 U.S.C. § 751, influencing or injuring an officer, juror, or witness generally, obstruction of criminal investigations, obstruction of state or local law enforcement, Presidential assassinations, kidnapping, and assault, interference with commerce by threats or violence, interstate and foreign travel or transportation in aid or racketeering enterprises, use of interstate commerce facilities in the commission of murder for hire, violent crimes in the aid or racketeering activity, offer, acceptance, or solicitation to influence operations of employee benefit plans, prohibition of business enterprises of gambling, laundering of monetary instruments, engaging in monetary transactions in property derived from specified unlawful activity, theft from interstate shipment, embezzlement from pension and welfare funds, fraud by wire, radio, or television, sexual exploitation of children, interstate transportation of stolen property, trafficking in certain motor vehicles or parts, hostage taking, fraud and related activity in connection with access devices, failure to appear, witness relocation and assistance, destruction of aircraft or facilities, racketeer influenced and corrupt organizations, threatening or retaliating against a federal official, destruction of an energy facility, mail fraud, congressional, Cabinet, or Supreme Court assassinations, kidnapping and assault, transactions involving nuclear materials, destruction of motor vehicles or motor vehicle facilities, or wrecking trains. Section 2516(1)(d) authorizes orders in the case of counterfeiting offenses, while § 2516(1)(e) pertains to fraud in a Title 11 case or manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs, marihuana, or other dangerous drugs. Sections 2516(1)(f), (g), (h), (i), (j), and (k) address offenses involving extortionate credit transactions, reporting of currency transactions, interception devices and interception and disclosure of certain communications, destruction of natural gas pipelines or aircraft piracy, the Arms Export Control Act, and location of fugitives from justice, respectively.

Under § 2516(2) state law enforcement officers may obtain surveillance orders under state law to investigate and acquire:

> evidence of the commission of the offense of murder, kidnapping, gambling, robbery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb or property, and punishable by imprisonment for more than one year, designated in any applicable State statute authorizing interception, or any conspiracy to commit any of the foregoing offenses.

18 U.S.C. § 2516(2) (1988). State statutes, therefore, can authorize the use of electronic surveillance to investigate only those crimes that fall within the framework of § 2516.

78 18 U.S.C. § 2518(1)(a) (1988); United States v. Chavez, 416 U.S. 562, 579-80 (1974) (holding that failure to satisfy the identification requirement does not require suppression of the evidence if the application was in fact properly authorized).

79 18 U.S.C. § 2518(1)(b) (1988).

80 18 U.S.C. § 2518(1)(b)(i)-(iv) (1988). *See also* LAFAVE & ISRAEL, *supra* note 40, § 4.4, at 232-33. In regard to identity of the subject of the interception, in United States v. Kahn, 415 U.S. 143 (1974), the Court held admissible evidence obtained pursuant to a court order authorizing interception of conversations "of Irving Kahn and others as yet unknown." *Id.* at 147. The Court held "that Title III requires the naming of a person in the application or interception order only when the law en-

the four elements required by section 2518(1)(b) must be shown by proof sufficient to support a judicial finding of probable cause that those facts exist. If the applicant offers insufficient facts to establish probable cause concerning any of the four elements, the order cannot be issued. The judge determines probable cause to support issuance of a surveillance order using the same standards and procedures as those used in conventional search warrant cases.[81]

Under section 2518(1)(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 must be included in the application." The purpose of this provision is to ensure that electronic surveillance is not "routinely employed as the initial step in criminal investigation"[82] or "resorted to in situations where traditional investigative techniques would suffice to expose the crime."[83]

Under section 2518(1)(d), the application must also state the period of time surveillance will be necessary. If the investigators wish to continue surveillance beyond the first interception of the type of conversation sought, section 2518(1)(d) requires the application to establish probable cause to believe additional communications of the same type will occur.

Finally, surveillance order applications must contain a statement concerning previous related applications. Section 2518(1)(e) requires that the application contain:

> 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 interceptions of, wire, oral or electronic 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.[84]

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forcement authorities have probable cause to believe that the individual is 'committing the offense for which the wiretap is sought.' " *Id.* at 155. The Court also noted that nothing in Title III supports "an additional requirement that the Government investigate all persons who may be using the subject telephone in order to determine their possible complicity." *Id.* at 153 n.12. In United States v. Donovan, 429 U.S. 413, 435-37 (1977), the Court held that evidence obtained pursuant to a court order violating the particularity requirement of § 2518(1)(b)(iv) need not be suppressed because the "naming" requirement does not play a "substantial role" in the regulatory scheme, in that even with the omissions "the application provided sufficient information to enable the issuing judge to determine that the statutory preconditions were satisfied."

81 Under § 2518(1)(b), the judge must find probability, and not a mere prima facie showing. Appellate court review of such orders is not de novo, United States v. Smith, 726 F.2d 852, 864 (1st Cir. 1984) (en banc), but "the reviewing court determines simply whether the facts are minimally adequate to support the findings made by the issuing judge." CARR, *supra* note 6, § 4.4(c), at 4-28 to 4-30 (footnotes omitted).

82 United States v. Giordano, 416 U.S. 505, 515 (1974).

83 United States v. Kahn, 415 U.S. 143, 153 n.12 (1974). *See also* Dalia v. United States, 441 U.S. 238, 250 (1979) (The restrictions of § 2528(1)(c) are intended to guarantee that electronic surveillance is resorted to "only when there is a genuine need for it."). A reviewing court makes a de novo or independent review of whether the application contained a "full and complete statement" concerning the success or feasibility of alternative investigative procedures. United States v. Davis, 882 F.2d 1334, 1335 (8th Cir. 1989) ("de novo"); United States v. Carneiro, 861 F.2d 1171, 1176 (9th Cir. 1988) ("independent").

84 18 U.S.C. 2518(1)(e) (1988).

This provision prevents "judge shopping" and provides the judge with an additional factor upon which he may assess the statements of probable cause and investigative necessity.[85] Since it is central to the statutory scheme, deliberate omission of the previous application's information requires suppression of any evidence obtained under the order.[86]

Before the reviewing judge can issue a Title III surveillance order, he must find, based on the facts presented in the application, that:

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained by such interception;
> (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;
> (d) there is probable cause for belief that the facilities from which, or the place where the wire, oral or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.[87]

As long as the government's evidence shows that the issuing judge at least read the application, defense challenges to the adequacy of the review are generally rejected.[88]

c. *The Issued Order*

Section 2518(4) of Title III details the requirements for the contents of the issued surveillance order. It requires that each order authorizing

85 LAFAVE & ISRAEL, *supra* note 40, § 4.4(b), at 234.

86 *Id. See infra* notes 120-23 and accompanying text. *Cf.* United States v. Van Horn, 789 F.2d 1492, 1500 (11th Cir.), *cert. denied*, 479 U.S. 854 (1986). However, section 2518(1)(e) only requires disclosure of what is known by those authorizing and making the application. Furthermore, it does not apply to prior interceptions of the same person under an application in which that person was not named or required to be named. *Id.*

87 18 U.S.C. 2518(3) (1988). Title III's legislative history indicates that Congress intended the probable cause determination to be governed by then existing constitutional standards. S. REP. 1097, *supra* note 6, at 2189. At the time Title III was enacted the constitutional standards for determining probable cause were embodied in the "two-pronged" test of Aguilar v. Texas, 378 U.S. 108 (1964) (explained in Spinelli v. United States, 393 U.S. 410, 413, 416 (1969)). It is, therefore, arguable that Title III requires the judge to apply the two-pronged test of *Aguilar* and *Spinelli*, in determining probable cause for issuing a surveillance order. Nonetheless, a number of circuits have held that the Title III probable cause determination is governed by the now current constitutional standard, the "totality of the circumstances" test, under Illinois v. Gates, 462 U.S. 213 (1983). *See, e.g.*, United States v. Gonzales, 866 F.2d 781, 786 (5th Cir.), *cert. denied*, — U.S. —, 104 L. Ed.2d 994, 109 S. Ct. 2438 (1989); United States v. Gallo, 863 F.2d 185, 191 (2d Cir. 1988), *cert. denied*, — U.S. —, 103 L. Ed.2d 843, 109 S. Ct. 1439 (1989); United States v. Giacalone, 853 F.2d 470, 478 (6th Cir. 1988), *cert. denied*, — U.S. —, 109 S. Ct. 263 (1989); United States v. Townsley, 843 F.2d 1070, 1076 (8th Cir. 1988); United States v. Zambrana, 841 F.2d 1320, 1332 (7th Cir. 1988); United States v. Smith, 726 F.2d 852, 864 (1st Cir.), *cert. denied*, 469 U.S. 841 (1984); United States v. Camp, 723 F.2d 741, 745-46 (9th Cir. 1984); United States v. Tehfe, 722 F.2d 1114, 1119 (3d Cir. 1983), *cert. denied*, 466 U.S. 904 (1984).

88 CARR, *supra* note 6, § 4.6, at 4-88 (citing United States v. Feola, 651 F. Supp. 1068, 1108 (S.D.N.Y. 1987); United States v. Lucido, 373 F. Supp. 1142, 1146 (E.D. Mich. 1974); United States v. Cantor, 328 F. Supp. 561, 565 (E.D. Pa. 1971)).

or approving the interception of any wire, oral, or electronic communication must specify:

> (a) the identity of the person, if known, whose communications are to be intercepted;[89]
> (b) the nature and location of the communication facilities as to which, or the place where, authority to intercept is granted;[90]
> (c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;[91]
> (d) the order must also identify the agency authorized to intercept the conversations and the person authorizing the application.[92]

Besides these particularity requirements, Title III requires that surveillance orders contain certain directives designed to limit the scope of the order. Under section 2518(4)(e), for example, the order must specify "the period of time during which the interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained." Section 2518(5) requires that the order contain a directive that it be "executed as soon as practicable."[93] Section 2518(5) also provides that authorization may not last "for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days."[94] Section 2518(6) provides that it is within the court's discretion to "require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception."[95]

89 The Supreme Court has held that the Constitution does not require identification of persons subject to interception and that suppression is not required for failure to name known individuals. *See* United States v. Donovan, 429 U.S. 413, 427 (1977); United States v. Kahn, 415 U.S. 143, 152-53 (1974).

90 This exception does not apply when roving surveillance has been approved under § 2518(11). Suppression is not required when the order's description of the facilities or location of the surveillance is faulty, providing other information particularly describes the facilities or location and no danger exists that the misidentification will result in a misdirected electronic search. *See* United States v. Doolittle, 507 F.2d 1368, *aff'd en banc*, 518 F.2d 500 (5th Cir. 1975), *cert. denied*, 430 U.S. 905 (1977); United States v. Bynum, 386 F. Supp. 449 (S.D.N.Y. 1974), *aff'd*, 513 F.2d 533 (2d Cir.), *cert. denied*, 423 U.S. 952 (1975).

91 This provision attempts to satisfy the constitutional requirement that a search warrant describe with particularity the "things to be seized." U.S. CONST., amend. IV.

92 18 U.S.C. § 2518(4)(d) (1988). The requirement of identification of the person authorizing the application "looks backwards to the official who approved the application under § 2516(1) or § 2516(2), 'so that responsibility will be fixed.'" CARR, *supra* note 6, § 4.7(d) (citing S. REP. No. 1097, *supra* note 6, at 2192).

93 This provision prevents the probable cause information from becoming stale or inaccurate and was a mandate of Berger v. New York, 388 U.S. 41, 59-60 (1967).

94 One commentator remarks that despite the apparent thirty-day maximum, in reality surveillance orders may be extended indefinitely as a result of the opportunity to obtain an unlimited number of extension orders. He argues that the opportunity for unlimited extensions and the ambiguity of § 2518(5)'s phrase "objective of the authorization," delegate unlimited discretion to executing officers with respect to length of the search. CARR, *supra* note 6, § 4.7(3)(1)(C), at 4-106, 107. Courts have held, however, that the requirements of § 2518(5) adequately limit officer discretion. *See* United States v. Tortorello, 480 F.2d 764, 774 (2d Cir.), *cert. denied*, 414 U.S. 886 (1973); United States v. Cafero, 473 F.2d 489, 497 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1974). *See also* CARR, *supra* note 6, § 2.5(c)(3), at 2-29.

95 18 U.S.C. § 2518(6) (1988).

In addition to these temporal limitations, section 2518(5) also requires that the surveillance order mandate that surveillance "shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter."[96]

3. Execution Provisions

Title III's provisions pertaining to execution of the surveillance order impose even more significant privacy safeguards than those contained in its authorization provisions. Compliance with these provisions is essential to the admissibility of plain view evidence derived by electronic surveillance. As with the authorization provisions, Title III sets the minimum standards and serves as a model for state statutes. The recording requirement, the minimization requirement, the termination requirements and the requirements for amending a surveillance order are most relevant to the admissibility of plain view interceptions. The recording, minimization and termination requirements set standards limiting the scope of surveillance under the original surveillance order. The amendment provisions premise the admissibility of plain view interceptions upon compliance with these other execution provisions because, together, they define "a valid initial intrusion."[97]

a. *The Recording Requirement*

Title III's section 2518(8)(a) requires that any intercepted communication "shall, if possible, be recorded on tape or wire or other comparable device . . . in such a way as will protect the recording from editing or other alterations." The purpose of this requirement is to ensure that an accurate record of the conversation is made in the first instance and not altered in the interim before its use.[98] "This means that monitoring agents should record everything which is overheard by them, whether or not it is deemed pertinent."[99] Recording all monitored conversations pursuant to section 2518(8)(a) is necessary for an effective review of minimization efforts. However, the recording requirement should be distinguished from the minimization required by *Berger v. New York*[100] and section 2518(5).[101]

b. *The Minimization Requirement*

In *Berger*, the Supreme Court held that a New York eavesdropping statute was unconstitutional because it allowed the seizure of "the conversations of any and all persons coming into the area covered by the [eavesdropping] device . . . indiscriminately and without regard to their connection to the crime under investigation."[102] The Court held that the statute permitted what amounted to a general search prohibited by the

96 For further discussion of minimization, see *infra* notes 102-10 and accompanying text.
97 *See supra* note 28 and accompanying text.
98 S. REP. 1097, *supra* note 6, at 2193.
99 LAFAVE & ISRAEL, *supra* note 40, at 236.
100 388 U.S. 41 (1967)
101 *See infra* notes 102-10 and accompanying text.
102 Berger v. New York, 338 U.S. at 59.

fourth amendment and that evidence gathered pursuant to the unconstitutional statute must be excluded. In order to conform to the constitutional mandates of *Berger*, section 2518(5) requires that an electronic surveillance order be executed "in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter." Title III does not specify any particular procedures that must be employed to accomplish minimization, nor does the statute provide any criteria by which to measure the sufficiency of minimization efforts. Case law has filled these statutory gaps.

In *Scott v. United States*,[103] government agents, pursuant to a validly issued surveillance order, intercepted nearly every conversation over a particular telephone line. The government agents suspected that the subject of the surveillance was using the telephone line to further a conspiracy to import and distribute narcotics. The evidence showed that only forty percent of the conversations intercepted in the one-month period were related to the crime under investigation. The Supreme Court held that, in this case, the investigators did not violate section 2518(5)'s minimization requirements and that section 2518(5) does not prohibit the interception of all nonpertinent communications but rather requires that all agents conduct the surveillance so as to keep interception of such communications to a minimum. The Court held that sufficiency of minimization efforts depends upon "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time."[104] The Court considered several factors in deciding whether section 2518(5)'s minimization requirement was met. These factors included:

> (1) percentage of nonpertinent communications intercepted; (2) the nature of the offense under investigation and the purpose of the surveillance; (3) the normal use of the communications equipment subject to the interception; and (4) the stage of the authorized period of surveillance in which the interceptions in question took place.[105]

The more controversial holding of the *Scott* case is that courts should assess minimization efforts based on an *objective* standard. The Court held that the fact that the agents made no attempt to comply with section 2518(5)'s minimization requirements did not, by itself, require suppression.[106] The Court stated that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."[107] This aspect of the *Scott* decision received much criticism.[108] Under *Scott*'s objective standard, establishing sufficient minimization efforts is not difficult if the executing officers are well informed. For example, evidence of good

103 436 U.S. 128 (1978).

104 *Id.* at 135.

105 *Id.* at 140-41.

106 *Id.* at 137-39.

107 *Id.* at 136.

108 *See* Goldsmith, *supra* note 6, at 108-12; FISHMAN, *supra* note 6, at 226-32 (1978); CARR, *supra* note 6, § 5.7(d), at 5-39 & 5-40. While *Scott* does not require a good faith effort at minimization, good faith should be considered as a factor in evaluating minimization efforts. *See* Scott v. United States, 436 U.S. at 149.

faith spot-monitoring of nonpertinent conversations will usually meet *Scott*'s objective test.

Today, minimization is probably most crucial in the context of "plain view" interceptions.[109] Before the court can grant retroactive judicial approval for the interception of incriminating conversations unrelated to the crimes designated in the order, the judge must be convinced that such communications were "intercepted in accordance with the provisions of [Title III]."[110] Noncompliance with section 2518(5)'s minimization requirement is probably the best argument in support of a motion to suppress plain view evidence generated by electronic surveillance.

c. *Requirements for Terminating The Surveillance Order*

Specific provisions that regulate the duration of surveillance place further restrictions on electronic searches. Under section 2518(4)(e), the surveillance order must specify "the period of time during which . . . interception is authorized." The period is limited to the time "necessary to achieve the objective of the authorization," but cannot be longer than thirty days. Therefore, surveillance must terminate on the date specified in the order and may not extend any longer than necessary for the surveillance to accomplish its original purpose.[111]

d. *Requirements for Amending The Surveillance Order*

The controversy surrounding the admissibility of plain view interceptions stems from Title III's amendment provision. Section 2517(5) provides procedures for amending a surveillance order so as to retroactively authorize interception of communications concerning crimes not described in the original order. If officers are conducting surveillance pursuant to a Title III order and intercept communications relating to a crime other than the crimes specified in the order, the officers may, under section 2517(5), disclose the contents of the communications to other law enforcement or investigative officers to the extent "appropriate to the proper performance of the official duties of the officer making or receiving disclosure."[112] Section 2517(5) also permits the intercepting

109 *See infra* notes 112-16 and accompanying text.

110 18 U.S.C. § 2517(5) (1988).

111 In determining whether surveillance officers satisfied Title III's requirement to terminate upon attainment of the authorized objective, courts apply a reasonableness standard. *See generally* Cromwell, *Judicial Fine-tuning of Electronic Surveillance*, 6 SETON HALL 225, 249 (1975).

112 18 U.S.C. § 2517(1) (1988). Section 2517 reads as follows:

> § 2517. Authorization for disclosure and use of intercepted wire, oral, and electronic communications.
>
> (1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.
>
> (3) Any person who has received, by any means authorized by this chapter, any information concerning a wire, oral, or electronic communication, or evidence derived there-

officer to "use such contents to the extent such use is appropriate to the proper performance of his official duties."[113] Furthermore, the contents of communications concerning other crimes, and any evidence derived therefrom, are admissible in judicial proceedings, *but only if* "a judge of competent jurisdiction . . . finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable."[114]

An amendment under section 2517(5) constitutes retroactive judicial approval of the interception of communications relating to crimes not described in the original order. The application for such an amendment should "include a showing that the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order."[115] Section 2517(5) has been held constitutionally valid based on the plain view doctrine.[116]

4. Suppression Provisions

Like any other search, if an instance of electronic surveillance does not measure up to fourth amendment standards, a judicially created ex-

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from in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) *When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communication in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.*

18 U.S.C. § 2517 (1988) (emphasis added).

113 18 U.S.C. § 2517(2) (1988).

114 18 U.S.C. § 2517(5) (1988).

115 S. REP. No. 1097, *supra* note 6, at 2189. *See infra* notes 220-25 and accompanying text for a discussion of the requirement of "incidental" interception.

116 United States v. DePalma, 461 F. Supp. 800, 825 n.23 (S.D.N.Y. 1978); United States v. Sklaroff, 323 F. Supp. 296, 307 (S.D. Fla. 1971), *aff'd*, 506 F.2d 837 (5th Cir.), *cert. denied*, 423 U.S. 874 (1975); United States v. Escandar, 319 F. Supp. 295, 300-01 (S.D. Fla. 1970); People v. DiStefano, 38 N.Y.2d 640, 345 N.E.2d 548, 552, 382 N.Y.S.2d 5, 9 (1976).

There may also be occasions when *prospective* amendment of a surveillance order becomes necessary. For example, assume the surveillance order designates gambling as the subject offense but the officers begin to intercept conversations concerning narcotics. As soon as practicable the officers should apply for § 2517(5) retroactive judicial approval to intercept these narcotics conversations in plain view. Nonetheless, a point in time will come when the interception of narcotics conversations is occurring with such frequency that it is no longer "inadvertent" or "incidental," as (arguably) required for admissibility under § 2517(5) and the plain view doctrine. *See supra* notes 30, 115 and accompanying text. *Cf. supra* note 31 and *infra* notes 140, 220-25 and accompanying text. By this point, the investigators must have prospectively amended the surveillance order so that they would be authorized to intercept further conversations relating to narcotics offenses. To obtain a prospective amendment, the applicants must satisfy the probable cause requirements of § 2518. *See supra* text accompanying notes 79-81, 87.

clusionary rule[117] will exclude any evidence obtained during the surveillance. Additionally, two provisions in Title III establish statutory bases for exclusion. Section 2515 provides that

> [w]henever 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 before any court grand jury, department, . . . if the disclosure of that information would be in violation of this chapter.[118]

Section 2518(10)(a) provides the procedural bases for implementing section 2515. Under section 2518(10)(a), a suppression motion can rest on any of three grounds: "(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."[119]

In *United States v. Giordano*,[120] the Supreme Court interpreted the provisions of section 2518(10)(a). The Court held that "[t]he words 'unlawfully intercepted' are themselves not limited to constitutional violations."[121] Rather, section 2518(10)(a)(i) was "intended to require suppression where there is failure to satisfy any of those statutory requirements that . . . was intended to play a central role in the statutory scheme."[122] The Court interpreted the second and third subsections of section 2518(10)(a) as supplemental to the broad meaning of section 2518(10)(a)(i). Subsections (ii) and (iii) provide "suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)."[123] In *United States v. Chavez*,[124] the Supreme Court addressed the "insufficient on its face" test of subparagraph (ii). The Court concluded that the test requires suppression only when the order is determined to be insufficient without resort to any other facts.

Title III grants standing for a motion to suppress under section 2518(10)(a) to any "aggrieved person." Section 2510(11) defines an aggrieved person as one "who was a party to any intercepted wire, oral or electronic communication or a person against whom the interception was directed." Title III's legislative history indicates that the drafters intended section 2510(11) to reflect existing law with respect to standing to exclude evidence obtained through eavesdropping.[125] Therefore, Title III incorporates the Supreme Court's decision in *Alderman v. United*

117 Berger v. New York, 388 U.S. 41 (1967). *See supra* text accompanying note 102.

118 Commentators suggest that the language of section 2515, properly read, requires exclusion of evidence when the *seizure* of such evidence violated Title III. LAFAVE & ISRAEL, *supra* note 40, § 4.6(a), at 240.

119 18 U.S.C. § 2518(10)(a) (1988).

120 416 U.S. 505 (1974).

121 *Id.* at 527.

122 *Id.* at 527-28. Provisions that "play a central role in the statutory scheme," are those provisions "that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." *Id.* at 527.

123 *Id.*

124 416 U.S. 562 (1977).

125 S. REP. No. 1097, *supra* note 6, at 2180.

States[126] which expands standing under section 2510(11) to include persons with a possessory interest in the location subject to the surveillance.[127]

B. *Title III and the Plain View Doctrine*

Section 2517(5) provides that when officers are executing a surveillance order and they intercept a conversation relating to a crime not described in their order, the conversation is inadmissible as evidence in a judicial proceeding unless the officers obtain a retroactive amendment to the original order.[128] According to the plain view doctrine, however, officers need not amend a conventional search warrant to ensure the admissibility of plain view evidence seized during a conventional search. Thus, section 2517(5)'s retroactive amendment provision exceeds fourth amendment requirements. This condition exists not as a result of legislative design but because fourth amendment standards for the admissibility of plain view evidence evolved after Title III was enacted.

1. Legislative History

When Title III was drafted in 1968, *Marron v. United States*[129] still restricted seizures to items described with particularity in the warrant. The Supreme Court had recognized the legality of plain view seizures made pursuant to lawful warrantless searches.[130] But the Court had not yet issued its opinions in *Coolidge v. New Hampshire*[131] and *Texas v. Brown*,[132] which permitted plain view seizures made while executing a warrant. To ensure compliance with then current fourth amendment jurisprudence, Title III's drafters included section 2517(5)'s retroactive amendment requirement.[133]

126 394 U.S. 165 (1965).

127 In addition to the suppression sanction, 18 U.S.C. § 2520 (1988) allows for civil remedies for violations of Title III and 18 U.S.C. § 2511 (1988) allows for criminal penalties for violations of the statute. *See* CARR, *supra* note 6, § 8.2, at 8-6 and § 8.3, at 8-16.1.

128 *See supra* notes 112-16 and accompanying text.

129 Marron v. United States, 275 U.S. 192 (1927); *see supra* notes 20-23 and accompanying text.

130 *See supra* notes 24, 25 and accompanying text.

131 Coolidge v. New Hampshire, 403 U.S. 443 (1971); *see supra* notes 26-32 and accompanying text.

132 Texas v. Brown, 460 U.S. 730 (1982); *see supra* notes 33-35 and accompanying text.

133 *See* Blakey & Hancock, *A Proposed Electronic Surveillance Control Act*, 43 NOTRE DAME LAWYER 657, 670-71 (1968). Professor Blakey was the principal drafter of Title III. While Congress was debating over the bills that would later become Title III, the NOTRE DAME LAWYER published Professors Blakey and Hancock's proposed electronic surveillance statute. To deal with plain view interceptions, the proposed statute included section 7(b)(1) which read as follows:

> (b) The [insert appropriate prosecuting officer] may authorize, in writing, any investigative or law enforcement officer to make application to a court of competent jurisdiction for an order of approval of the previous interception of any wire or oral communication when the contents:
>
> (1) relate to an offense other than that specified in an order of authorization . . . .

Id. at 670. In the footnote that followed this section, the authors explained that: "[p]aragraph (1) sets up a procedure modeled on the present search warrant procedure under which use and disclosure might be based upon a subsequent court order. . . . Such a procedure represents the 'safe way' to handle [the problem posed by *Marron*'s interpretation of the fourth amendment's particularity requirement]." *Id.* at 670-71 n.27.

Congress intended the amendment process under section 2517(5) to be analogous to what was, in 1968, accepted practice by officers who discovered evidence in plain view while executing a search warrant which did not particularly describe the item viewed. The officers could lawfully seize the evidence if they posted a guard for the item while another officer obtained a second search warrant authorizing seizure of the plain view evidence. Title III's drafters reasoned that conversations concerning crimes not described in the electronic surveillance order could be intercepted and admitted in evidence if authorized by subsequent amendment to the original surveillance order.[134] This analogy was open to criticism because conversations in plain view are necessarily "seized" before the subsequent authorization can be obtained, while conventional plain view evidence is not "seized" until after a second warrant is issued (even though the guarding officer ensured the plain view evidence remained undisturbed). The drafters considered this distinction inconsequential. They reasoned that admissibility under section 2517(5) is conditional upon a prompt judicial determination that the plain view interception conforms with the provisions of Title III.[135]

Today, "the establishment of the plain view doctrine and the apparent rejection of *Marron* have made the theory behind section 2517(5) obsolete."[136] Consequently, legislators have attempted to eliminate or relax Title III's amendment requirement.[137] These attempts have been unsuccessful. Thus, section 2517(5) remains as originally enacted, and plain view evidence derived by electronic surveillance is admissible in court only if the following requirements are met. First, an application to amend the surveillance order must be made "as soon as practicable"[138] to a judge of competent jurisdiction (as defined in section 2510(9)). Second, the judge must approve or authorize the disclosure of the contents

134 *See* Goldsmith, *supra* note 6, at 141-42.

135 *Id.* at 142.

136 G. Robert Blakey, Lecture on the Execution of Electronic Surveillance, Federal Criminal Law Class, University of Notre Dame Law School (April 19, 1989). *See also* Goldsmith, *supra* note 6, at 143. Professor Goldsmith states: "[W]hen the Supreme Court later gave plain view seizures broad fourth amendment approval in *Coolidge v. New Hampshire*, it became apparent that a formal retroactive amendment, as required by section 2517(5), was not constitutionally necessary." *Id.* (footnotes omitted).

137 *See* Goldsmith, *supra* note 6, at 145, 155-56 (citing *A Bill to Amend Title III of the Omnibus Crime Control Act of 1968: Hearings on S. 1717 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 26 (1988) (statement of Clifford Fishman, Associate Professor of Law, Catholic University of America) and S. 1630, 97th Cong., 2d Sess. § 3105(a) (1982) (proposing to eliminate the amendment requirement or to postpone the amendment requirement until the plain view communication is offered into evidence)).

138 With respect to the prompt application requirement, commentators have noted that "delays of several months have often been tolerated" and that "present practice [in applying for retroactive amendments] is so loose that the statutory language is actually being disregarded." Goldsmith, *supra* note 6, at 144 (footnotes omitted). *See, e.g.*, United States v. De Palma, 461 F. Supp. 800 (S.D.N.Y. 1978), where the court ruled that the plain view interceptions were admissible even though the investigators did not apply for § 2517(5) amendment until six months after terminating surveillance under the original order. The court stated:

> [Section 2517(5)] does not contemplate immediate amendment of orders of authorization as soon as information relating to other offenses is intercepted. To maintain so is to ignore the existence of Section 2517(1) and (2) which explicitly allow the use of such information without an amendment to the order of authorization.

Id. at 825.

of the intercepted communication, or evidence derived from it, upon a finding that the contents were intercepted in accordance with the provisions of Title III.[139]

Title III's legislative history explains that the second requirement mandates a showing that "the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order."[140] The legislative history also states that the plain view communication need not relate to an offense designated by section 2516(1) as a proper subject of a Title III surveillance order.[141]

2. Judicial Construction

An increasing number of courts liberally construe section 2517(5)'s requirements which more freely admits plain view interceptions as evidence in a grand jury or judicial proceeding. But a minority of courts continue to strictly apply the requirements of section 2517(5). For example, in *United States v. Brodson*,[142] the United States District Court for the Eastern District of Wisconsin denied the government's motion to reconsider the court's previous dismissal of an indictment. The indictment charged a violation of a federal statute prohibiting transmission of wagering information.[143] The government intercepted evidence of that offense while executing a surveillance order that authorized interception of communications relating to the operation of illegal gambling businesses, which was a violation of a different federal statute.[144] The government applied for a section 2517(5) amendment one week before the date of trial but well after it had presented the evidence to the grand jury and secured an indictment. The court denied the government's application for retroactive amendment and dismissed the indictment issued against the defendant because the government failed to comply with section 2517(5). The court interpreted the provision to mandate the application for an amendment *before* the plain view interceptions could be disclosed to a grand jury. The court reasoned:

> The language of [section] 2517 is straightforward. It is designed to avoid electronic fishing expeditions and other abuses by requiring the prosecution to come forward with evidence of offenses other than

139 18 U.S.C. § 2517(5) (1988).

140 S. REP. No. 1097, *supra* note 6, at 2189. Some commentators suggest that § 2517(5) may be unconstitutional because "incidental interception" is a less stringent standard than *Coolidge*'s "inadvertent discovery" requirement. *See, e.g.*, CARR, *supra* note 6, § 5.9(b), at 5-59 & 5-60. Since the Court itself has questioned the necessity of "inadvertent discovery" (*see supra* note 31), § 2517(5) will likely withstand constitutional challenge. Moreover, courts that have interpreted the "incidentally intercepted" language of § 2517(5)'s legislative history hold that the language does not embody *Coolidge*'s inadvertent discovery requirement. *See infra* notes 200-25 and accompanying text.

141 S. REP. No. 1097, *supra* note 6, at 2189. *See also*, In Re Grand Jury Subpoena served on Doe, 889 F.2d 384, 387 (2d Cir. 1989) (holding that § 2517(5) amendments may retroactively approve interception and disclosure of communications relating to both federal and state offenses not listed in § 2516, absent indication of bad faith or subterfuge by investigators applying for the § 2517(5) amendment).

142 393 F. Supp. 621 (E.D. Wis.), *aff'd*, 528 F.2d 214 (7th Cir. 1975).

143 18 U.S.C. § 1084 (1988).

144 18 U.S.C. § 1955 (1988).

> those specified by the court in the original electronic surveillance authorization—but obtained pursuant thereto—as soon as practicable . . . *prior* to its use in *any* [proceeding held under the authority of the United States]. . . . Only through strict adherence to the requirements of [section] 2517(5) can the court's supervisory role in this sensitive area remain effective.[145]

On appeal to the Seventh Circuit sitting *en banc*, the government argued that a 2517(5) amendment was unnecessary because the intercepted conversations "related to" the federal gambling offense specified in the original order as well as the gambling offense for which the defendant was indicted.[146] Writing for a unanimous panel, retired Supreme Court Justice Tom C. Clark upheld the district court's ruling. Justice Clark opined that without the strict adherence to section 2517(5) insisted upon by the district court, Title III surveillance orders were in danger of degenerating into "the electronic equivalent . . . of a 'general search warrant.' "[147] The court, therefore, rejected the government's argument and held that while there may be some overlap of evidence required to prove the two gambling offenses, the offenses involve dissimilar elements and are "wholly separate and distinct."[148] However, Justice Clark stressed that the court's holding was based not on the dissimilarity of the offenses but on "the fact that the Government itself has violated the key provision of the legislative scheme of 2515 [protecting individual privacy], in that it did not comply with the mandate of Section 2517(5)."[149]

In *United States v. Marion,*[150] the Second Circuit cited *Brodson* to support its decision to reverse the defendant's convictions for perjury and obstruction of justice. In his first appearance before a federal grand jury, the defendant, Marion testified under grant of immunity. The government questioned him based on two conversations intercepted while executing two surveillance orders issued by a justice of the New York State Supreme Court. One of the orders, the "Delmonico Order," authorized interception of conversations relating to the state offense of possession of dangerous weapons. While executing the Delmonico Order, investigators intercepted a conversation relating to possible violations of a federal law prohibiting the transportation and transfer of an unregistered weapon in interstate commerce,[151] a crime not specified in the state surveillance order. On the basis of inconsistencies between these conversations and Marion's testimony before the first grand jury, a second grand jury indicted Marion for perjury and obstruction of justice. In the second grand jury proceeding, the government disclosed the conversation about the federal offense intercepted pursuant to the Delmonico Order, but without first applying for and receiving retroactive amendment to the

145 United States v. Brodson, 393 F. Supp. at 624 (emphasis in original).
146 United States v. Brodson, 528 F.2d at 215.
147 *Id.*
148 *Id.* at 216.
149 *Id.*
150 535 F.2d 697 (2d Cir. 1976).
151 18 U.S.C. §§ 371, 922 (1988).

original order.[152] Marion made a pretrial motion to dismiss the indictment on the ground that, by disclosing evidence of the federal offense to the grand jury, the government violated section 2517(5). The trial judge denied the motion and Marion was eventually convicted. The Second Circuit reversed. The court refused to accept the dissent's conclusion that the state and federal offenses at issue were "closely enough related to consider them as the same for the purpose of [section] 2517(5)."[153] Rather, the court held:

> It is clear beyond all doubt that this federal offense was separate and distinct from the alleged state crime which formed the predicate for the original Delmonico wiretap authorization, and thus falls within the ambit of [section] 2517(5) . . . . Because the conversations here in question clearly *did* relate to offenses "other than those specified" in the state court's . . . order of authorization, and since the Government failed to obtain subsequent judicial approval required by [section] 2517(5) . . . Marion's conviction . . . must be reversed."[154]

More recently, Judge Getzendanner, in *United States v. Mancari*,[155] followed the literal approach of *Brodson* and *Marion* despite "aspersions cast on these case[s] by other circuits" purporting to establish more preferable, "flexible" interpretations of section 2517(5)'s requirements.[156] In *Mancari*, the Federal Bureau of Investigation (FBI) installed a wiretap on the defendant's telephone. The surveillance order authorized the FBI to intercept the defendant's phone conversations relating to offenses of interstate transportation and receipt of stolen property, participation in an "enterprise involving a pattern of racketeering activity" (a RICO violation)[157] and conspiracy to commit those offenses. The investigation into these offenses stemmed from the defendant's alleged involvement in a widespread scheme to sell automobiles rebuilt from stolen auto bodies and other parts. After thirty days of surveillance under the original order the FBI applied for an extension. The application mentioned, in addition to the original offenses, the suspicion that the defendant was involved in distribution of controlled substances. The judge approved the extension. More than three years later, a special grand jury indicted the defendant, charging various acts of mail and wire fraud stemming from auto theft, insurance-fraud-related-activities and distribution of cocaine.

The defendant filed a motion to dismiss the indictment or alternatively to suppress the wiretap evidence of mail and wire fraud on the ground that the government failed to obtain a section 2517(5) amend-

152 Despite the fact that investigators intercepted the evidence pursuant to state authorization, the court held that in the federal proceeding § 2517(5) governed admissibility rather than a similar New York provision because the New York provision was potentially less exacting than § 2517(5): "whether the proceeding be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III." United States v. Marion, 535 F.2d at 702 (footnotes omitted). *See also infra* note 234.

153 *Id.* at 709 (Anderson, J., dissenting in pertinent part).

154 *Id.* at 704 (footnotes omitted) (emphasis in original).

155 663 F. Supp. 1343 (N.D. Ill. 1987).

156 *Id.* at 1353.

157 Racketeering Influenced and Corrupt Organization Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified at 18 U.S.C. §§ 1961-68 (1988)).

ment. In its brief, the government claimed that a proper application and order was filed and signed. Nevertheless, the documents submitted along with the government's brief indicated that application and approval of retroactive amendment of the original order did not occur until the day that the grand jury handed down the indictments. Predictably, the defendant argued that any prior use of the intercepted communications pertaining to mail and wire fraud and before the grand jury tainted the indictments and mandated their dismissal. Judge Getsendanner wrote:

> Given [the chronology of events in this case] and the rule articulated in *Brodson*, I conclude that any disclosure of intercepted conversations pertaining to mail or wire fraud (or any information derived from such interceptions) to the grand jury prior to the date of the [retroactive amendment to the original order] violates Title III.
>
> In light of the foregoing, the government is ordered to immediately advise the court whether it did, in fact, make such disclosures before the grand jury. Should this be the case, the parties will be ordered to brief the question of appropriate relief.[158]

In reaching this decision, Judge Getzendanner adopted "*Brodson*'s clear cut approach"[159] to section 2517(5). She characterized section 2517(5) as imposing a "post-intercept/pre-disclosure requirement [that] is not a mere technicality whose violation is easily cured; it is a 'key provision of the legislative scheme . . . .' "[160] Her opinion expressly rejected more flexible interpretations of the section 2517(5)'s requirements which she recognized as being accepted by a growing number of United States Courts of Appeals:

> In recent years, courts have attempted to evade the harsh results compelled by *Brodson* through more "flexible" interpretations of the statute's requirement. . . . [T]hese "flexible rules seem far less preferable than *Brodson*'s clear-cut approach. Accordingly, I believe that *Brodson* remains both rationally compelling and legally in force, despite aspersions cast on the case by other circuits.[161]

Judge Getzendanner's rationale for rejecting more flexible interpretations of section 2517(5) rested, in part, on the premise that the statute's drafters intended the retroactive amendment requirement to function primarily as an extra safeguard furthering Title III's underlying policy that statutory authority to conduct electronic surveillance be used with restraint. She noted "the evident care with which Title III was drafted to balance Congress's competing concerns,"[162] and that " '[o]ften, legislators, to make doubly sure, draft a statute that goes further than the goal they wanted to achieve; they overshoot the mark to make sure they won't undershoot it.' "[163]

158 United States v. Mancari, 663 F. Supp. at 1354.

159 *Id.* at 1353.

160 *Id.* at 1351 (quoting United States v. Brodson, 528 F.2d 214, 216 (7th Cir. 1975)).

161 United States v. Mancari, 663 F. Supp. at 1351-53.

162 *Id.* at 1352.

163 *Id.* (quoting Federal Deposit Insurance Corp. v. O'Neil, 809 F.2d 351, 353 (7th Cir. 1987)).

As previously discussed,[164] however, the primary motivation for section 2517(5)'s retroactive amendment requirement was ensuring compliance with then current fourth amendment law governing plain view seizures and not to add to Title III's privacy safeguards. In 1968, fourth amendment law governing plain view seizures was embodied in the Supreme Court's decision in *Marron v. United States*.[165] The drafters of section 2517(5) interpreted *Marron* as requiring a procedure analogous to, what was then, the prevailing practice of posting a guard over plain view evidence discovered in a search pursuant to a warrant until another officer could obtain a second warrant authorizing seizure of the item.[166] Nonetheless, since the Court's decisions in *Coolidge v. New Hampshire*[167] and *Texas v. Brown*,[168] effectively overruled *Marron*, the rationale behind section 2517(5) is outdated. It is not surprising that an increasing number of courts have reacted by liberally interpreting section 2517(5).

Courts have fashioned three exceptions or rules relaxing or obviating the requirements of section 2517(5) under certain circumstances.[169] These exceptions or rules are: (1) "the similar offense exception;" (2) "the integral part exception;" and (3) "the implicit authorization rule." The first two exceptions are based on liberal interpretations of what constitutes communications "relating to offenses other than those specified in the order of authorization," the interception of which triggers section 2517(5)'s retroactive amendment requirement. The implicit authorization rule is a liberal interpretation of what constitutes "subsequent application" for a retroactive amendment and what constitutes sufficient judicial authorization or approval to disclose the contents of plain view interceptions.

The similar offense exception to section 2517(5)'s retroactive amendment requirement was conceived by the Fifth Circuit in *United States v. Campagnuolo*[170] and explained by the Eleventh Circuit in *United States v. Watchmaker.*[171] The exception is founded on section 2517(5)'s stated purpose,[172] of preventing subterfuge searches.[173] By focusing on the statute's purpose, the exception permits a more "flexible" interpretation of the statute. It allows courts to relax the authorization requirement, in cases where the offense specified in the original order and the

164 *See supra* notes 129-35 and accompanying text.
165 275 U.S. 192 (1927). *See supra* notes 20-23 and accompanying text.
166 *See supra* notes 26-32 and accompanying text.
167 403 U.S. 443 (1971). *See supra* notes 33-35 and accompanying text.
168 460 U.S. 730 (1983).
169 United States v. Mancari, 663 F. Supp. 1343, 1351-52 (N.D. Ill. 1987). *See also* United States v. Orozco, 630 F. Supp. 1418, 1529 n.13 (S.D. Cal. 1986).
170 556 F.2d 1209, 1214-15 (5th Cir. 1977).
171 761 F.2d 1459, 1470 (11th Cir. 1985), *cert. denied sub nom.*, Harrell v. United States, 474 U.S. 1100, (1986); *see also* United States v. Smith, 726 F.2d 852, 865-66 (1st Cir. 1984); United States v. Arnold, 576 F. Supp. 304, 309 (N.D. Ill. 1983); United States v. Young, 822 F.2d 1234 (2d Cir. 1987).
172 *See supra* note 115 and accompanying text.
173 The Fifth Circuit elaborated on § 2517(5)'s legislative history stating that the purpose of § 2517(5) is to "assure that the Government does not secure a wiretap authorization order to investigate one offense as a subterfuge to acquire evidence of a different offense for which the prerequisites to an authorization order [e.g. probable cause] are lacking." United States v. Campagnuolo, 556 F.2d at 1214.

offense for which information was disclosed were so similar in nature that it would be unreasonable to believe the original application was a subterfuge.[174]

The second exception, the integral part exception, is closely related to the similar offense exception, but was developed specifically for RICO[175] cases. Like the similar offense exception, the integral part exception relaxes the requirements of section 2517(5) by liberally interpreting the provision in light of its purpose to prevent subterfuge searches. Under this doctrine, interceptions made pursuant to a surveillance order specifying a RICO predicate offense may be disclosed as evidence of a RICO violation without obtaining a section 2517(5) amendment even though the surveillance order did not mention RICO itself.[176] For example, in *United States v. Watchmaker*,[177] despite the government's failure to obtain a 2517(5) amendment, the court held that interceptions made pursuant to an order specifying state narcotics offenses were lawfully disclosed to a federal grand jury investigating RICO violations.[178] The court reasoned that:

> [T]he prosecution under the RICO statute bears a unique kind of similarity to the prosecution under the drug law. It is not merely a question of crimes which have "some common elements" or "some overlapping proof": where, as here, a drug offense is one of the predicate acts for the RICO violation, every element of that offense must be proven before the RICO violation can be established. Although the object of the RICO statute might be different, the extent of similarity in what must be proven makes "subterfuge" virtually impossible; the government might seek, in the long run, to offer additional proof against the "enterprise," but in the context of the intercepted conversation, it is most likely that the government is interested in offering evidence of the predicate offense.[179]

Other cases suggest the possibility of an "inverse integral part" exception.[180] This exception would permit the disclosure of interceptions relating to predicate offenses made pursuant to an order authorizing interceptions pertaining only to RICO violations without requiring a section 2517(5) amendment as a prerequisite to such disclosure.

The third way courts have relaxed the requirements of section 2517(5) is by applying the "implied authorization rule." The Second Circuit developed this rule in *United States v. Tortorello*,[181] and it has since

174 United States v. Watchmaker, 761 F.2d at 1470. *See also* United States v. Mancari, 663 F. Supp. 1343, 1352 (N.D. Ill. 1987); United States v. Orozco, 630 F. Supp. 1418, 1529 n.13 (S.D. Cal. 1986). Both cases discuss the similar offense exception but refuse to adopt it.

175 Racketeer Influenced and Corrupt Organizations Act of 1970, Pub. L. No. 91-452, 84 Stat. 941-44 (1970) (codified at 18 U.S.C. §§ 1961-68 (1988)).

176 *Id.* at 1470-71 (discussed United States v. Mancari, 663 F. Supp. at 1342 and United States v. Orozco, 630 F. Supp. at 1529 n.13).

177 761 F.2d 1459 (11th Cir. 1985).

178 *Id.* at 1470-71. *See also* United States v. Mancari, 663 F. Supp. at 1352.

179 United States v. Watchmaker, 761 F.2d at 1470-71.

180 United States v. Mancari, 663 F. Supp. at 1352 & n.18 (citing United States v. Sedovic, 679 F.2d 1233, 1235 & n.n.3, 4 (8th Cir. 1982) and United States v. Daly, 535 F.2d 434 (8th Cir. 1976)).

181 480 F.2d 764, 781-83 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973) (discussed in United States v. Mancari, 663 F. Supp. at 1351).

been applied in other circuits.[182] The rule excuses a formal section 2517(5) application and amendment when plain view interceptions are mentioned in an application for extension of the original order[183] or in a judicial progress report[184] and the judge allows surveillance to continue. The rationale behind the rule is that, by allowing surveillance to continue, the judge implicitly authorizes interception and disclosure of evidence relating to the offenses mentioned in the extension application or progress report. In other words:

> "[Nothing in section 2517(5)] requires the issuing judge to announce formally in open court that he had noticed the interception of evidence not covered by the original order and has determined that it was properly obtained. *It is enough if notification of the interception of evidence not authorized by the original order be clearly provided in the renewal and amendment application papers . . . .*" Thus, although a subsequent court authorization or approval issued after express delineation of offenses "other than those specified in the order" unquestionably satisfies [section] 2517(5), it does not represent the only method of compliance.[185]

The implied authorization rule is subject to criticism because it is based on the assumption that the judge will scrutinize the progress reports and extension applications in the same manner he or she would review a section 2517(5) application. One court has written that "it is not reasonable to assume that a judge reviewing a request for an extension of a wiretap order will search for evidence of crimes not specifically cited therein and determine whether they meet the requirements of [Title III], without a prosecution request to do so."[186]

In addition to these liberal constructions courts loosely interpret section 2517(5)'s "as soon as practicable" language by tolerating delays of several months.[187] Some courts even suggest that suppression is not an available remedy for violations of section 2517(5).[188] Thus, recognizing that section 2517(5)'s requirements unnecessarily exceed the current

182 *See* United States v. Masciarelli, 558 F.2d 1064, 1067-68 (2d Cir.), *cert. denied*, 429 U.S. 1061 (1977); United States v. Van Horn, 789 F.2d 1492, 1503-04 (11th Cir.), *cert. denied*, 479 U.S. 854 (1986); United States v. Johnson, 539 F.2d 181, 187 (D.C. Cir. 1976); United States v. Ardito, 782 F.2d 358 (2d Cir.), *cert. denied*, 476 U.S. 1160 (1986); United States v. Gambale, 610 F. Supp. 1515 (D.C. Mass. 1985).

183 Submitted pursuant to 18 U.S.C. § 2518(5) (1988).

184 Submitted pursuant to 18 U.S.C. § 2518(6) (1988).

185 United States v. Mascairelli, 558 F.2d at 1068 (quoting United States v. Tortorello, 480 F.2d at 783) (emphasis in original)).

186 United States v. Orozco, 630 F. Supp. 1418, 1529 (S.D. Cal. 1986). *See also* Goldsmith, *supra* note 6, at 144-45 ("Judges reviewing progress reports and applications—documents which are often both lengthy and complex—will not necessarily perceive new crimes that have been intercepted. Furthermore, a passing reference in a progress report or extension application does not provide an appropriate context for formal determination of whether the interception complied with all plain view requirements."); CARR, *supra* note 6, § 5.9(d)(1), at 5-68.1.

187 *See* Goldsmith, *supra* note 6, at 144 & n.857 and cases cited therein.

188 *See id.* at 145 (citing United States v. Vento, 533 F.2d 838, 855 (3d Cir. 1976)).

Decisions such as *Vento* argue that § 2517(10)(a) (*see supra* notes 117-27 and accompanying text) limits suppression to interception (or execution) violations. Therefore, suppression is an inappropriate remedy for a violation of § 2517(5)'s amendment requirements because late filing or failing to file is a post-interception violation. United States v. Vento, 533 F.2d at 855. Professor Goldsmith points out that:

> This reading, however, ignores language in section 2518(5) which directly establishes an evidentiary prerequisite to admissibility which is independent of Title III's exclusionary

constitutional standards of the plain view doctrine, a majority of federal courts liberally construe the statute's language to the point of ignoring it.

III. State Law Governing the Admissibility of Plain View Evidence Derived Through Electronic Surveillance

A. *State Electronic Surveillance Law Generally*

Title III provides that states must enact specific legislation in order to implement the authority granted by section 2516(2) to conduct electronic surveillance.[189] At present, thirty-two states and the District of Columbia have enacted statutes that legalize the use of electronic surveillance.[190] Title III's legislative history indicates that it was not intended

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rule; no evidence of other crimes [plain view interceptions] may be disclosed in judicial proceedings unless timely retroactive amendment has been filed and approved.

Goldsmith, *supra* note 6, at 145.

Courts have taken three positions concerning the appropriate remedy when plain view interceptions are disclosed to the grand jury in violation of § 2517(5)'s amendment requirements. *See* United States v. Orozco, 630 F. Supp. 1418, 1529-30 (S.D. Cal. 1986). The first and most drastic position holds that such a violation warrants dismissal of the entire indictment. *Id.* (citing United States v. Brodson, 528 F.2d 214 (7th Cir. 1975)). *See also* CARR, *supra* note 6, § 5.9(d)(1), at 5-70. The second, less drastic position advocates examining the government's behavior to determine whether the government acted in bad faith and then imposing sanctions flexibly with the statutory purpose of preventing subterfuge searches in mind. United States v. Orozco, 630 F. Supp. at 1530 (citing United States v. Southard, 700 F.2d 1, 31 (1st Cir. 1983); United States v. Watchmaker, 761 F.2d 1459, 1471 (11th Cir. 1985); United States v. Vento, 533 F.2d 838, 856 (3d Cir. 1976); and United States v. Aloi, 449 F. Supp. 698, 721 (E.D.N.Y. 1977)). The third approach provides that disclosure to the grand jury in violation of § 2517(5) is a technical violation that does not merit the severe sanctions of dismissal or suppression. United States v. Orozco, 630 F. Supp. at 1530 (citing United States v. Cardell, 773 F.2d 1128 (10th Cir. 1985) and United States v. Southard, 700 F.2d at 29)). Professor Goldsmith argues that "[t]he only appropriate remedy is exclusion of the evidence." Goldsmith, *supra* note 6, at 143. However, since United States v. Calandra, 414 U.S. 338, 348 (1974), held that the exclusionary rule does not apply in grand jury proceedings, "improper" disclosure of plain view interceptions to the grand jury should not result in exclusion of such evidence in a subsequent trial as long as all prerequisites for admissibility are satisfied before the evidence is offered at trial.

189 18 U.S.C. § 2516(2) (1988); S. REP. No. 1097, *supra* note 6, at 2187.

190 ARIZ. REV. STAT. ANN. §§ 13-3004 to -3017 (1978 & Supp. 1988); CAL. PENAL CODE §§ 629-631 (West Supp. 1989); COLO. REV. STAT. §§ 16-15-101 to -104 (1986 & Supp. 1988); CONN. GEN. STAT. ANN. §§ 54-41a to -41t (West 1985 & Supp. 1988); DEL. CODE ANN. tit. 11, § 1336 (1987); D.C. CODE ANN. §§ 23-541 to -556 (1981 & Supp. 1988); FLA. STAT. ANN. §§ 934.01-.15 (West 1985 & Supp. 1988); GA. CODE ANN. §§ 26-3001 to -3010 (1988 & Supp. 1988); HAW. REV. STAT. §§ 803-41 to -50 (1985 & Supp. 1987); IDAHO CODE §§ 18-6701 to -6719 (1987 & Supp. 1988); KAN. STAT. ANN. §§ 22-2514 to -2519 (1981 & Supp. 1987); LA. REV. STAT. ANN. §§ 15:1301 to 1312 (West 1981 & Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. §§ 10-401 to -4B-05 (1984 & Supp. 1988); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1980 & Supp. 1988); MINN. STAT. ANN. §§ 626 A.01-.40 (West 1983 & Supp. 1989); NEB. REV. STAT. §§ 86-701 to -712 (1987 & Supp. 1988); NEV. REV. STAT. §§ 179.410-.515 (1986 & Supp. 1987); N.H. REV. STAT. ANN. §§ 570-A to B (1986 & Supp. 1988); N.J. STAT. ANN. §§ 2A:156 A-1 to -26 (West 1987 & Supp. 1988); N.M. STAT. ANN. §§ 30-12-1 to -11 (1978 & Supp. 1988); N.Y. CRIM. PROC. LAW §§ 700.05-.70 (McKinney 1984 & Supp. 1989); OHIO REV. CODE ANN. §§ 2933.51-.66 (Baldwin 1987); OKLA. STAT. ANN. tit. 13, §§ 176-177 (West 1983 & Supp. 1989); OR. REV. STAT. §§ 133.721-.739 (1984 & Supp. 1988); PA. STAT. ANN., tit. 18, §§ 5701-5726 (Purdon 1983 & Supp. 1988); R.I. GEN. LAWS §§ 12-5.1-1 to -16 (1981 & Supp. 1988); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1 to -34 (1988); TEX. CRIM. PROC. CODE ANN., art. 18.20-21 (Vernon Supp. 1989); UTAH CODE ANN. §§ 77-23a-1 to -16 (1982 & Supp. 1988); VA. CODE ANN. §§ 19.2-61 to -70 (1983 & Supp. 1988); WASH. REV. CODE ANN. §§ 9.73.010 to .140 (1988 & Supp. 1989); WIS. STAT. ANN. §§ 968.27 to .37 (West 1985 & Supp. 1988); WYO. STAT. §§ 7-3-601 to -611 (1987).

to preempt state regulatory authority.[191] Rather, the drafters intended Title III to establish minimum standards for state surveillance statutes. Thus, while state law may be more restrictive than the provisions of Title III, and therefore more protective of individual privacy, state law may not be less restrictive than the federal statute.[192] For example, in *United States v. Marion*,[193] the government argued that state law rather than Title III governs the issue of whether evidence derived from the execution of state wiretap orders may be used in federal proceedings.[194] Fearing that the applicable state law could be construed in a manner less restrictive than section 2517(5), the court rejected the government's argument:

> [W]e believe it clear beyond peradventure that [the government's argument] runs counter to both the overall scheme and provisions of Title III. The Act provides the minimum standard against which the interceptions in question must be judged. . . . *[D]espite the fact the interceptions were made pursuant to a state court authorization, at the very least the other requirements of the Title III—including [section] 2517(5)—must be satisfied. But whether the proceedings be federal or state, interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III*. If a state should set forth procedures *more* exacting than those of the federal statute, however, the validity of the interceptions and the orders of authorization by which they were made would have to comply with that test as well.[195]

B. *State Electronic Surveillance Law and the Plain View Doctrine*

Most state provisions governing the admissibility of plain view evidence generated by electronic surveillance are essentially identical to Title III's.[196] Nonetheless, other state statutes are more restrictive on the admissibility of plain view interceptions. In four states, intercepted communications relating to crimes other than those specified in the order are admissible only when the evidence concerns a felony.[197] Statutes in four

191 S. REP. No. 1097, *supra* note 6, at 2187. "The state statute must meet the minimum standards reflected as a whole in the proposed chapter. The proposed provision [§ 2516(2)] envisions that states would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation." *Id.*

192 *Id.*; 144 CONG. REC. 11206, 11470 (1968) (statement of Sen. McClellan).

193 535 F.2d 697 (2d Cir. 1976); see *supra* notes 150-54 and accompanying text.

194 *Id.* at 701.

195 *Id.* at 701-02 (emphasis added).

196 *See, e.g.*, D.C. CODE ANN. § 23-548(b) (1981); DEL. CODE ANN. tit. 11, § 1336(q) (1987); KAN. STAT. ANN. § 22-2515(6) (1981); M.D. CTS. & JUD. PROC. CODE ANN. § 10-407(e) (1984 & Supp. 1988); MINN. STAT. § 626A.09 (West 1987 & Supp. 1989); NEB. REV. STAT. § 86-704(5) (1987); N.H. REV. STAT. ANN. § 570-A:8V (1986); N.Y. CRIM. PROC. LAW ANN. § 700.65(4) (Mckinney 1984); OR. REV. STAT. § 133.738(5) (1984); 18 PA. CONS. STAT. ANN. § 5718 (Purdon 1983); S.D. CODIFIED LAWS ANN. § 23A-35A-18 (Supp. 1988); TEXAS CRIM. PROC. ANN., art. 18.20 sec. 7(e) (Vernon Supp. 1989); UTAH CODE ANN. § 77-23a-9(5) (1982 & Supp. 1988); WIS. STAT. ANN. § 968.29(5) (West 1985).

197 *See* COLO. REV. STAT. ANN. §§ 16-15-102(16) (1986); HAW. REV. STAT. § 803-45(e) & (f) (Supp. 1987); VA. CODE § 19.2-67(E) (Supp. 1988); WYO. STAT. § 7-3-600(r) (1987). For example, the Virginia Statute provides:

> E. When an investigative or law enforcement officer, or police officer of a county or city, while engaged in intercepting wire, electronic, or oral communications in the manner authorized herein, or observing or monitoring such interception intercepts, observes or monitors wire, electronic or oral communications relating to offenses other than those specified in the order of authorization, the contents thereof, and evidence derived there-

other states provide that plain view interceptions are inadmissible unless they relate to a designated offense.[198] The Nevada statute provides that communications relating to crimes not particularized in the order are inadmissible but evidence derived therefrom is admissible.[199] In Pennsylvania, plain view interceptions are admissible evidence if noted in a final report filed with the court at the completion of surveillance.[200] Pennsylvania courts interpret the statute to require suppression of evidence not mentioned in the final report only upon the defendant's showing of prejudice due to the omission.[201] The Connecticut statute does not permit intercepted communications relating to crimes not described in the surveillance order to be used in criminal proceedings; such evidence can be used and disclosed only for investigatory purposes.[202] The

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from, shall not be disclosed or used . . . *unless such communications or derivative evidence relates to a felony*, in which case use of disclosure may be made as provided in subsections A, B [for investigatory purposes] and C [as evidence in a judicial proceeding] of this section. Such use and disclosure pursuant to subsection C of this section shall be permitted only when approved by a judge of competent jurisdiction where such judge finds, on subsequent application, that such communications were otherwise intercepted in accordance with the provisions of this chapter. . . .

VA. CODE § 19.2-67(E) (Supp. 1988) (emphasis added).

198 FLA. STAT. ANN. § 934.08(5) (1985); GA. CODE ANN. § 16-11-64(c) (1988); OKLA. STAT. ANN. tit. 13, § 176.8(E) (West 1983); VA. CODE § 19.2-67(3) (1983). For example, the Florida Statute provides:

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications *relating to offenses for which an order or [sic] authorization or approval could have been secured* pursuant to s. 934.07, other than those specified in the order of authorization or approval, the contents thereof and evidence derived therefrom may be disclosed or used [for investigatory purposes]. Such contents and any evidence derived therefrom may be used [as evidence in a judicial proceeding] when authorized or approved by a judge of competent jurisdiction when such judge finds or subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

FLA. STAT. ANN. § 934.08(5) (1985) (emphasis added).

199 NEV. REV. STAT. ANN. § 179.465(4) (1986).

4. When an investigative or law enforcement officer engaged in intercepting wire or oral communications as authorized by [this statute], intercepts wire or oral communications relating to offenses other than those specified in the order . . ., the contents of the communications and the evidence derived therefrom may be disclosed or used [for investigatory purposes]. The direct evidence derived from such communications is inadmissible in a criminal proceeding, but any other evidence obtained as a result of knowledge obtained from such communications may be disclosed or used [in judicial proceedings] when authorized or approved by a justice of the Supreme Court or district judge who finds upon application made as soon as practicable that the contents of such communications were intercepted in accordance with the provisions of [this statute].

Id.

200 18 PA. CONS. STAT. ANN. § 5712(e) (Purdon 1983).

(e) Final report.—Whenever a surveillance is authorized pursuant to this section, a complete written list of names of participants and evidence of offenses discovered, including those not stated in the application for order, shall be filed with the court at the time authorized surveillance is terminated.

Id.

201 *See, e.g.*, Commonwealth v. Hashem, 525 A.2d 744, 754 (Pa. Super. 1987).

202 CONN. GEN. STAT. ANN. § 54-41p(c) & (d) (West 1985).

(c) If an investigative officer, while engaged in interception of wire communications in accordance with the provisions of this chapter, intercepts wire communications relating to any crime not specified in the order authorizing such interception, the contents of such intercepted communications and evidence derived therefrom may be disclosed [for investigatory purposes].

California statute[203] is the most extreme in its restrictions on the use of plain view interceptions. It provides that intercepted communications concerning crimes not specified in the original order and evidence derived from them may not be used by officers, except "to prevent the commission of a public offense," and they may not be used in court unless the evidence "was obtained through an independent source or inevitably would have been discovered."[204]

IV. Extending the Plain View Doctrine to Electronic Searches

The different interpretations of section 2517(5) and the varying requirements among state provisions illustrate that opinions differ as to whether, and to what extent, courts should apply the plain view doctrine to electronic surveillance. Apparently, three general approaches exist: (1) the Most Restrictive Approach which holds that it is inappropriate, or even unconstitutional, to extend the plain view doctrine to electronic searches; (2) the Less Restrictive Majority Approach which holds that the plain view doctrine should be given only limited applicability to electronic searches; and (3) the Constitutional Approach which holds that the plain view doctrine should apply without restrictions to lawful electronic searches in the same manner it applies to lawful conventional searches. This Part argues that state and federal legislatures should adopt the Constitutional Approach and admit plain view interceptions into evidence without requiring retroactive amendment of the original order or imposing other superfluous restrictions.[205]

A. *The Most Restrictive Approach*

Proponents of the most extreme anti-plain view position argue that, in order to avoid "constitutional problems," courts should apply a *per se* exclusionary rule to plain view evidence discovered during electronic surveillance.[206] They reason that electronic searches are inherently more intrusive of individual privacy than conventional searches, and that the likelihood of discovering evidence of unparticularized crimes is much greater with electronic surveillance than with conventional searches. Therefore, they argue, plain view interceptions cannot meet *Coolidge*'s (debated) inadvertent discovery requirement,[207] and thus, cannot be squared with the fourth amendment. Their suggested solution is to al-

(d) Any investigative officer who discloses the contents of any intercepted wire communication or evidence derived therefrom (1) to any person not authorized to receive such information (2) in a manner otherwise than authorized by the provisions of this chapter shall be guilty of a class D felony.

Id.

203 CAL. PENAL CODE § 629.32(b) (West Supp. 1989). *See infra* text accompanying notes 229-34 for the language of the California provision and the absurd results of its application.

204 *Id.*

205 *See infra* notes 235-53 and accompanying text.

206 *See, e.g.*, CARR, *supra* note 6, § 5.9(b), at 5-57 to 5-61 and materials cited therein; Note, *Subsequent Use of Electronic Surveillance Interceptions and The Plain View Doctrine: Fourth Amendment Limitations on The Omnibus Crime Control Act*, 9 U. MICH. J.L. REF. 529, 553 (1976); FISHMAN, *supra* note 6, at 551.

207 *Id. See supra* note 31 debating the constitutional necessity of *Coolidge*'s inadvertent discovery requirement.

low police to use plain view interceptions only for investigatory purposes while excluding the particular communications and any derivative evidence from the courtroom. This approach purports to avoid perceived fourth amendment difficulties and to reduce the incentive for investigators to exceed minimization limitations.[208] Both California[209] and Connecticut[210] reflect this reasoning in their electronic surveillance statutes.

The Most Restrictive approach is poorly reasoned because: (1) it ignores the substantial safeguards in Title III that all surveillance statutes must include to minimize the intrusiveness of electronic surveillance; (2) it overemphasizes the importance of inadvertent discovery as an element of the plain view doctrine;[211] and (3) it furthers no significant individual privacy interest while substantially hindering effective law enforcement in a manner that produces absurd results.

First, the Most Restrictive Approach ignores the substantial privacy safeguards that Title III requires of all surveillance statutes.[212] For example, Title III requires that an application for a surveillance order must establish the inadequacy of alternative investigative procedures.[213] Courts characterize this requirement as an "extra protection of privacy, above and beyond that required by the Fourth Amendment, [which] manifests the intention of the framers of the statute to ensure that each wiretap would be not only reasonable, but also necessary."[214] Additionally, under Title III and all state surveillance statutes, law enforcement officers can utilize electronic surveillance to investigate only certain crimes.[215] Other Title III requirements imposing substantial privacy safeguards include: the recording requirement;[216] the minimization requirement;[217] the termination requirement;[218] and the judicial progress report provision.[219] These provisions sufficiently compensate for any greater degree of intrusiveness electronic searches may possess.

Second, the Most Restrictive Approach argues that because of the greater likelihood of intercepting evidence of crimes not specified in the order, plain view interceptions can never be truly inadvertent. Under the

208 *Id.* at 5-60 & 5-61. Professor Carr argues that "[a]n automatic exclusionary rule would keep the particular conversation from evidence, but the officers could still act to prevent future criminal activity. . . ." *Id.* Unlike the California statute discussed *infra* notes 229-34, Professor Carr would admit evidence derived from the inadmissible plain view interceptions which, as he notes, is the approach taken by Nevada. *Id.* (citing NEV. REV. STAT. § 179.465(4) (1986)).

209 CAL. PENAL CODE § 529.32(b) (West Supp. 1989) is discussed *infra* at notes 229-34 and accompanying text.

210 *See* CONN. GEN. STAT. ANN § 54-41p (West 1985).

211 *See supra* note 31 debating the necessity of the inadvertent discovery requirement.

212 *See supra* notes 36-127, 189-95 and accompanying text.

213 *See supra* notes 82-83 and accompanying text discussing 18 U.S.C. § 2518(1)(c) (1988).

214 United States v. Perillo, 333 F. Supp. 914 (D. Del. 1971).

215 *See supra* note 77, 189-92 and accompanying text. Admittedly, in any search investigators hope, or even expect to discover as much criminal evidence as they can, to include evidence of crimes not described in the warrant. Goldsmith, *supra* note 6, at 147 n.877 and accompanying text. This may be especially true with regard to electronic searches. *Id.* at 147 n.878 and accompanying text.

216 *See supra* notes 98-101 and accompanying text.

217 *See supra* notes 102-10 and accompanying text.

218 *See supra* note 111 and accompanying text.

219 *See supra* note 95 and accompanying text.

modern formulation of the plain view doctrine,[220] however, inadvertent discovery may not be an essential element of a constitutionally valid plain view seizure.[221] Moreover, while section 2517(5)'s legislative history indicates that plain view interceptions must be made "incidentally" in order to meet the provision's requirements, the courts hold that this language does not impose an inadvertency requirement.[222]

In *United States v. McKinnon*,[223] for example, the First Circuit held that:

> Evidence of crimes other than those authorized in a wiretap warrant are intercepted "incidentally" when they are the by-product of a bona fide investigation of crimes specified in a valid warrant. Congress did not intend that a suspect be insulated from evidence of one of his illegal activities gathered during the course of a bona fide investigation of another of his illegal activities merely because law enforcement agents are aware of his diversified criminal portfolio.[224]

Professor Clifford Fishman asserts that "[t]he First Circuit's reasoning in *McKinnon* is consistent with contemporary interpretation of the plain view doctrine . . .; it is persuasive and ought to be adopted."[225] Further support for the argument that *Coolidge*'s inadvertency requirement is not lurking in section 2517(5)'s legislative history is the fact that the Supreme Court did not decide *Coolidge* until 1971, three years after Congress enacted Title III. It is highly unlikely that Title III's drafters anticipated *Coolidge*'s inadvertent discovery requirement.

Finally, California and Connecticut's automatic exclusion approach furthers no significant individual privacy interest that is not protected by other electronic surveillance limitations. As noted in the commentary to the ABA Standards Relating to Electronic Surveillance:

> [T]he privacy of the individual has already been invaded lawfully by the original search during the course of an investigation for a designated offense. Formulating a rule which would prevent the use of [plain view] evidence would not change police conduct in the future or protect as such citizen privacy.[226]

As a means to reduce investigator incentive to violate minimization requirements, an automatic exclusion rule would, again, be superfluous. If investigators fail to "minimize,"[227] any plain view evidence they intercept becomes excludable because officers have exceeded the scope of the authorized search. Under all surveillance statutes, failing to meet minimization standards is grounds for exclusion of intercepted evidence,

220 *see supra* notes 33-35 and accompanying text.

221 *See supra* note 31 and accompanying text.

222 *See, e.g.*, United States v. McKinnon, 721 F.2d 19 (1st Cir. 1983) (evidence relating to crimes not specified in the surveillance order need not be discovered inadvertently or take investigators by surprise in order for a court to properly authorize disclosure of such evidence pursuant to § 2517(5)); United States v. Levine, 690 F. Supp. 1165, 1175 (E.D.N.Y. 1988) (same).

223 United States v. McKinnon, 721 F.2d at 22-23.

224 *Id.*

225 FISHMAN, *supra* note 6, at 339-40 (Supp. 1989).

226 1968 ABA STANDARDS, *supra* note 6, at 145.

227 *See supra* notes 102-10 and accompanying text.

including plain view evidence.[228] Minimization and suppression provisions, therefore, provide ample incentive for officers to minimize.

Applying California's electronic surveillance law to a hypothetical situation illustrates the unfortunate results engendered by a *per se* exclusionary approach. The California statute provides that:

> § 629.32 INTERCEPTIONS RELATING TO CRIMES NOT SPECIFIED IN ORDER OF AUTHORIZATION; USE
>
> If a peace officer, while engaged in intercepting wire communications in the manner authorized by this chapter, intercepts wire communications relating to crimes other than those specified in the order of authorization . . ., the contents thereof, and any evidence derived therefrom may not be disclosed or used [by peace officers for investigatory purposes], *except* to prevent the commission of a public offense. The contents and any evidence derived therefrom may not be used [in any criminal court or grand jury proceeding], *except* where the evidence was obtained through an independent source or inevitably would have been discovered, and the use is authorized by a judge who finds that the contents were intercepted in accordance with this chapter.[229]

Assume that California peace officers are lawfully executing a properly issued order authorizing a residential wiretap. The subject is suspected only of importation, possession for sale and sale of cocaine. The order authorizes interception of the subject's phone conversations relating only to those offenses.[230] One Saturday at about noon, the officers intercept a conversation between the subject and a caller who identifies himself as "the hitman." The hitman says that he is calling from the phone booth outside the Safeway supermarket on Main Street. Their conversation reveals that the hitman just watched the subject's wife enter the grocery store and that as previously arranged, the hitman is going to use the pistol and silencer that the subject gave him to shoot the subject's wife as she leaves the grocery store. The hitman is then going to put the body in the trunk of the wife's car, drive it to Steep Cliff just across the state line in Nevada, and push the car over the edge. The subject says that he will meet the hitman at Steep Cliff at one o'clock when, as promised, the subject will give the hitman $100,000 in a brown briefcase and they will go their separate ways. Before he hangs up, the subject tells the hitman that he will be glad to finally be rid of "that unfaithful wench."

After inadvertently intercepting this incriminating conversation, the investigating officers realize they have no time to secure an arrest warrant and that they must move quickly. The hitman, carrying his pistol and silencer, is arrested for conspiracy to commit murder as he leaves the phone booth just ten steps behind the subject's wife. The subject, carrying his brown briefcase filled with $100,000 in twenty-dollar-bills, is arrested after the police follow him to the state line near Steep Cliff.

Since the conversation between the subject and the hitman related to conspiracy to commit murder and is completely unrelated to the nar-

228 *See supra* notes 117-27 and accompanying text.

229 CAL. PENAL CODE § 629.32(b) (West Supp. 1989).

230 Under the California statute electronic surveillance can be authorized only to investigate narcotics offenses. CAL. PENAL CODE § 629.02 (West Supp. 1989).

cotics offenses specified in the order of authorization, CAL. PENAL CODE § 629.32(b) is the provision governing the use and admissibility of the contents of the conversation and evidence derived therefrom. Under this provision it was lawful for the investigators to disclose the contents of the subject's conversation with the hitman but only in order to prevent the murder, a "public offense."[231] Nonetheless, the contents of the conversation and all the derivative evidence—the hitman's pistol and the subject's briefcase and the circumstances under which they were seized—are inadmissible in any criminal court or grand jury proceeding.

The statute provides that, with respect to plain view interceptions, "[t]he contents and any evidence derived therefrom may not be used [in any criminal court or grand jury proceeding] except where the evidence was obtained through an independent source or inevitably would have been discovered . . . ."[232] The evidence of the murder conspiracy consists of the contents of the plain view interception and evidence derived solely from that conversation, none of which inevitably would have been discovered. Furthermore, the California statute does not contain any provision that would provide a separate basis for admissibility.[233] Thus, the absurd result of applying the Most Restrictive Approach is that none of the evidence of the conspiracy between the subject and the hitman is admissible in court.[234]

B. *The Less Restrictive Majority Approach*

Title III and the majority of state electronic surveillance statutes extend the plain view doctrine to electronic searches but constrain the doctrine's applicability. As discussed, the Less Restrictive Majority

231 CAL. PENAL CODE § 629.32(b) (West Supp. 1989).

232 *Id.*

233 Unlike Title III's emergency surveillance provision, the California statute authorizes a judge to retroactively approve emergency surveillance only when there are grounds upon which an order could be issued. CAL. PENAL CODE § 629.06(a)(1) (West Supp. 1989). Conspiracy to commit murder is not an offense for which a surveillance order can issue under the California statute. *See* CAL. PENAL CODE 629.02(a) (West Supp. 1989).

234 If the California provision was applied to the facts in United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972) and United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918 (1974) the results would be the same as the results of the provision's application to this hypothetical. *See infra* note 262. When state officers gather evidence using electronic surveillance that is inadmissible under the state statute but would be admissible under Title III, there is some authority for gaining admissibility of the evidence in federal court by passing the evidence to federal law enforcement officers. *See* CARR, *supra* note 6, § 7.4(c)(2)(B); Note, *United States v. McNulty: Title III and the Admissibility in Federal Court of Illegally Gathered Evidence*, 80 NW. U.L. REV. 1714 (1986). One court described the rationale behind this modern revival of the "silver platter doctrine": "Congress was agreeable to allowing the states to enact measures that were more strict than the federal law, but was not agreeable to allowing more restrictive state laws to govern federal prosecutions." CARR, *supra* note 6, § 7.4(c)(2)(B) (quoting *United States v. McNulty*, 729 F.2d 1243, 1253 (10th Cir. 1984) (*en banc*)).

A split among the United States Courts of Appeals exists over the propriety of admitting in federal court evidence that could not be lawfully gathered or lawfully disclosed in state court. Eight circuits (the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth) will not apply state standards in federal court. *See* Note, *supra*, at 1717 n.14, 1724 n.80. Since the Ninth Circuit would not apply state standards in federal court, the California police officers in the above hypothetical could turn over all evidence to federal authorities and it would be admissible in federal court provided federal jurisdiction could be established. Three circuits (the Second, Tenth, and Eleventh) will apply the state law and require suppression of silver platter evidence. *Id.* at 1717-18 n.16, 1733 nn.142-51.

Approach admits plain view interceptions as evidence in judicial proceedings. However, it imposes procedural prerequisites to admissibility[235] or limits admissibility to only those plain view interceptions relating to a certain list or class of crimes.[236]

The Majority Approach to the admissibility of plain view interceptions is defective in three ways: (1) the rationale behind the retroactive amendment procedure has become obsolete under current fourth amendment plain view jurisprudence so that enforcement of such procedures unnecessarily hampers law enforcement efforts; (2) the amendment process does not afford any privacy protections not protected by other provisions of surveillance statutes; and (3) little policy basis exists for limiting admissibility of plain view interceptions to certain crimes as many Majority Approach states do.

First, these procedural and particular crime limitations on the admissibility of plain view interceptions are no longer constitutionally required. Therefore they unnecessarily restrict the effectiveness of an "indispensable aid to law enforcement."[237] Considering the modern formulation of the plain view doctrine under *Coolidge* and *Brown*,[238] Title III's *Marron*-based retroactive amendment process in section 2517(5) and state provisions modeled after it is obsolete[239] because such a procedure is no longer necessary to meet fourth amendment standards.

Under *Coolidge* and *Brown*, the plain view doctrine requires only a valid initial intrusion, that the incriminating nature of the item (or communication) seized be immediately apparent, and (arguably) that the discovery be inadvertent. The Constitution imposes these requirements to ensure that plain view evidence is not admitted unless: (1) the initial intrusion is authorized and not just a pretext for gaining access to the item in plain view; and (2) the investigators were acting within the scope of their initial authority at the time they made the seizure. Title III's legislative history indicates that these objectives are the same objectives that section 2517(5) sought to achieve.[240] As applied in the context of conventional searches, the modern plain view doctrine achieves these objectives without requiring "retroactive amendment" of the warrant authorizing the initial intrusion. Once these objectives are satisfied, as one court recognized, "the public interest militates against ignoring what is in plain view."[241]

A strict "as soon as practicable" retroactive amendment requirement merely hinders law enforcement. One court examined the burden of such a strict requirement:

> Such a burden would unduly hamper the government's investigation of organized crime or otherwise burden busy government staffs with recording and documenting everything done during every lengthy in-

235 *See supra* notes 112-16 and accompanying text.
236 *See supra* notes 197, 198 and accompanying text.
237 *See supra* text accompanying note 40.
238 *See supra* notes 26-35 and accompanying text.
239 *See supra* note 129-41 and accompanying text.
240 *See supra* note 115 and accompanying text.
241 United States v. Masciarelli, 558 F.2d 1064, 1066 (2d Cir. 1977).

> vestigation for possible use in future court hearings. In view of [section 2517(5)'s] stated legislative purpose, Congress could not have intended to impose such burdens upon law enforcement officers. If the legislative purpose is fulfilled the government has done what it is required to do.[242]

Recognizing the foregoing, many federal courts have liberally construed section 2517(5)'s requirements almost to the point of ignoring them.[243] A logical legislative response is to remove such unnecessary restrictions.

Second, the requirement of prompt retroactive judicial amendment to the initial order does not provide any extra protection against unreasonable searches and seizures.[244] Like the former practice of posting a guard on the plain view evidence while another officer obtained a second warrant particularizing the plain view item, the retroactive amendment requirement is a *pro forma* procedure that does nothing to narrow the scope of the search or deter future unconstitutional police conduct.[245] Instead, the amendment process merely provides an early judicial review to determine whether investigators were complying with the applicable surveillance statute at the time they made the plain view interception.[246] In other words, the judge must decide whether investigators discovered the plain view evidence during a lawful search, a task which can be handled equally well at a suppression hearing, once it becomes clear that the government intends to offer the plain view interceptions as evidence. Some commentators argue that the amendment procedure was intended primarily as a means of ensuring judicial supervision of the execution of surveillance orders.[247] On the contrary, judicial supervision was not the policy underlying section 2517(5); Title III's drafters included the amendment procedure to comply with the prohibition of plain view seizures made during a search pursuant to a warrant, a prohibition once imposed by *Marron*[248] but now obsolete. Moreover, Title III's drafters provided for judicial supervision by giving the judge the option of requiring judicial progress reports,[249] which serve the supervisory function more efficiently than the retroactive amendment process.

Finally, in addition to the retroactive amendment requirement, several states limit the admissibility of plain view interceptions to only those communications relating to a felony or an offense that the surveillance

242 United States v. Arnold, 576 F.Supp. 304, 308-09 (N.D. Ill. 1988).

243 *See supra* notes 167-88 and accompanying text.

244 Persons not named in the original surveillance order but later included as a result of a § 2517(5) amendment would, however, presumably be entitled to post surveillance notice under § 2518(8)(d).

245 *See infra* text accompanying notes 255-56 (explaining the absence of deterrent value in excluding constitutionally seized plain view evidence as a penalty for failure to comply with the retroactive amendment requirement or other restrictions on the admissibility of such evidence).

246 More intensive judicial review can be required through judicial insistence on periodic reports as provided for in provisions such as § 2518(6) which provides "[w]henever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made towards achievement of the authorized objective and the need for continued interception. Such reports shall be made a such intervals as the judge may require." 18 U.S.C. § 2518(6) (1988).

247 *See* CARR, *supra* note 6, § 5.9(d)(1) at 5-70.

248 *See supra* notes 23-24 and accompanying text.

249 *See supra* note 95.

statute designates as a proper subject of a surveillance order.[250] In these jurisdictions, plain view evidence acquired by electronic surveillance can not be used to prosecute any crime that is not enumerated in the electronic surveillance statute. States that have interpreted or drafted their statutes to impose such restrictions have done so without any sound policy justifications. There is no policy reason for restricting otherwise properly acquired plain view interceptions to those crimes designated by statute.[251] Title III's legislative history[252] and the 1980 American Bar Association's Standards Relating to Electronic Surveillance[253] agree that, if lawfully obtained, plain view interceptions should be admissible as evidence of any crime.

C. *The Constitutional Approach*

In contrast to the foregoing approaches which preclude or limit the admissibility of plain view interceptions, the approach that admits such evidence without procedural prerequisites or other restrictions emerges as most logical. Given the present formulation of the plain view doctrine[254] and the privacy safeguards already imposed by electronic surveillance statutes,[255] excluding or limiting the admissibility of plain view interceptions does not further any significant fourth amendment or privacy interest. Courts impose the sanction of exclusion when evidence is unconstitutionally acquired in order to deter future unconstitutional police conduct and protect the people from further unreasonable searches and seizures. As long as officers obtain and execute a surveillance order in compliance with the privacy protections embodied in the authorization and execution provisions of Title III, *any* incriminating communications that they intercept should be admissible evidence. Excluding such interceptions will not deter future unconstitutional police conduct because the investigators never conducted themselves outside the fourth amendment in the first instance.

When the intercepting officers do fail to comply with the surveillance statute, the search is unlawful and plain view evidence derived from the surveillance should be excluded. Courts can determine the lawfulness of the electronic search, and the admissibility of plain view interceptions, in the same manner courts determine the admissibility of the fruits of a conventional search: by holding a suppression hearing after it becomes clear the plain view interceptions will be offered as evidence. After the Supreme Court's decisions in *Coolidge* and *Brown*, premature admissibility determinations, such as those required by section 2517(5)'s retroactive amendment requirement, are merely burdensome red tape and are no longer necessary.

250 *See supra* notes 197, 198 and accompanying text.

251 *See* Goldsmith, *supra* note 6, at 142 n.847.

252 *See* S. REP. No. 1097 *supra* note 6, at 2189.

253 *See* AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 2.42 (1980).

254 *See supra* notes 33-35 and accompanying text.

255 *See supra* notes 36-127, 189-95 and accompanying text.

Electronic surveillance statutes, therefore, should be drafted or amended to include language that permits the disclosure of the contents of lawfully intercepted plain view evidence in judicial proceedings, regardless of the type of offense the evidence relates to and without imposing unnecessary procedural prerequisites. Two states have incorporated such language in their statutes. The plain view provisions of the Idaho[256] and Louisiana[257] statutes authorize the use and disclosure of the contents of plain view interceptions, and evidence derived from them, while giving testimony under oath in any state or federal criminal proceeding. The Idaho and Louisiana statutes require only that officers obtain the plain view interception while conducting surveillance in accordance with the other provisions of the statutes; they are, therefore, consistent with current constitutional standards under *Coolidge* and *Brown*. The plain view provisions of the Idaho and Louisiana statutes should serve as a model for all electronic surveillance statutes.

V. Conclusion

When properly employed, electronic surveillance is an "indispensable aid to law enforcement,"[258] especially in combatting organized crime which relies heavily on the extensive use of wire and oral communications for its success.[259] The "real punch" of electronic surveillance statutes is their authorization for the disclosure and use of evidence "captured by the intercept as though in plain view."[260] In recent years, the activities of criminals engaged in drug trafficking have become "more widespread, organized, and violent."[261] Electronic surveillance statutes can provide an effective means of evidence gathering and at the same time protect against unreasonable searches. However, the challenge of organized narcotics-related crime requires that electronic surveillance

256 IDAHO CODE ANN. § 18-6707(5) (1987) reads as follows:

> (5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization, the contents therefor, and evidence derived therefrom, may be disclosed or used as provided in subsections (1), (2) and (3) of this section.

Subsection (3) authorizes the disclosure or use of information concerning properly intercepted wire and oral communications "while giving testimony under oath or affirmation in any criminal proceeding in any court of this state, of the United States or of any state or in any political subdivision thereof." IDAHO CODE ANN. § 18-6707(3) (1987).

257 LA. REV. STAT. ANN. § 1309E (Supp. 1989) reads as follows:

> E. When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications obtains knowledge of communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in Subsections A, B and C of this Section.

Subsection C authorizes the disclosure or use of information concerning properly intercepted wire or oral communications "while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States or of the state or in any federal or state grand jury proceeding." LA. REV. STAT. ANN. § 1309C (Supp. 1989).

258 *See supra* note 40.

259 *See* S. REP. No. 1097, *supra* note 6, at 2177.

260 N.Y. CRIM. PROC. LAW ANN. § 700.65(4) (McKinney 1984) (Practice Commentary, written by Joseph W. Bellacosa).

261 Note, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant is an Idea Whose Time Has Come*, 64 NOTRE DAME L. REV. 552, 558, 559-60 (1989).

statutes allow law enforcement officers to utilize this investigatory tool to the fullest extent authorized under the Constitution.[262] It is unnecessary to hinder the effectiveness of electronic surveillance by imposing procedural prerequisites or other restrictions on the admissibility of plain view interceptions beyond those imposed by the fourth amendment, and it is even more absurd to adopt provisions that automatically exclude such evidence. Therefore, legislatures should draft new statutes or amend un-

262 In 1972, only four years after Title III was enacted, Senator McCellan addressed the Senate concerning the effectiveness of electronic surveillance as a law enforcment weapon for combatting organized narcotics-related crime. The following is an excerpt from the Congressional Record reporting that address.

FAR-REACHING RESULTS OF COURT-AUTHORIZED WIRETAPPING

Mr. McCellan. Mr. President, in 1988, the Senate by a vote of 68 to 12 defeated a motion to strike title III of the Omnibus Crime Control and Safe Streets Act of 1968, a title of the 1968 act that I sponsored. By this vote, the Senate indicated its approval of the use of court-authorized and supervised wiretaps and electronic surveillance in the investigation of certain Federal offenses. Because of the claims and fears of some that title III would be ineffective or would not stand up to challenges in court, I have attempted to keep this body informed of significant developments in the use of wiretaps and electronic surveillance, so that we all might be able to judge the results of our work.

On December 1 of last year, I was pleased to inform the Senate that in its first major Federal appellate review, title III was sustained as constitutional. On October 13, 1971, the U.S. Court of Appeals for the Tenth Circuit, in Cox v. United States, No. 71-1043, specifically upheld the legal reasoning behind and justification for Title III.

The issue before the court in the Cox case was the right of the Government to use information concerning a robbery, which had been incidentally obtained during the course of a lawfully authorized and executed narcotics wiretap. The court upheld the statutory scheme, which provides for retroactive judicial approval for such incidentally intercepted communications. In so doing, Judge Doyle stated:

In electronic surveillance of organized criminals involved in gambling, information might be intercepted disclosing a conspiracy to commit murder. Surely the officials must be empowered to use this information notwithstanding the lack of specific prior authorization.

Mr. President, to show the far-reaching and successful results of this one wiretap, I should like to bring to the Senate's attention additional facts in the Cox case as revealed by a July 30, 1971, full-page article in the Kansas City Star, an article which has only just been drawn to my attention.

According to this article, from January 1969, through May 1970, an organized group called by law enforcement officials a "Black Mafia" conducted "virtually 100 percent of the narcotics traffic and controlled much of the loan-sharking, gambling, prostitution, and burglary on Kansas City's East Side," carried out several bank robberies, had an estimated gross income of upwards of $100,000 a day, in the course of its diabolical operations killed at least 20 women and men, and were planning further killings when the leaders were finally incarcerated. Further, the article states:

The Kansas City Black Mafia had ties with many other cities around the country. Asked if the gang could have operated for the length of time and with the efficiency it did without the assistance to some persons in law enforcement, a highly placed federal sourced said it definitely could not.

The organization's murder victims were people who refused to join the organization, who owed money or were suspected of being police informants. At least two of these victims were tortured before they were killed. Youths were recruited from the street to carry out robberies. These young men were often heavy narcotics users, who were supplied with weapons, given instructions, and forced to turn over some or all of the loot to the organization. Sometimes they were beaten out of what was to have been their share of the robbery proceeds. We can thus see how such an organization can ensnare susceptible youths into the most despicable and inhuman sort of life. But not only were young hoodlums reached by this gang: one of the regular targets for the organization's narcotics trade were the soldiers at Fort Riley.

By the beginning of 1970, Government agents knew a great deal about the nature and extent of the organization's operations, but "hard evidence was needed before they could secure indictments." After a series of incidents involving informants, infiltration, and plans

necessarily restrictive provisions so that courts can begin to hear more criminal conversations in plain view.

John D. LaDue

for more killing, on April 30, 1970, agents received authorization to place a wire tap on the phone of one of the gang's three leaders. This is what the paper says about that wire tap:

The wire tap proved to be the key that broke the case, for in addition to recording enough information on narcotics activity to warrant indictments, agents also overhead plans to rob the Southgate State Bank and a scheme to murder one of the pushers.

The repercussions of this one wire tap were far-reaching. Four men, bank robbers, were arrested and subsequently convicted. Fourteen narcotic convictions and one for assault of a Federal officer were obtained.

The wire tap also revealed plans to murder a pusher for shooting large quantities of the narcotics he was meant to sell. The intended victim was taken into private custody and agreed to testify for the Government. It was learned that a price of $10,000 was put on this man's head.

With the wire tap evidence and testimony of the pusher, the leaders of the gang were arrested. The tenacity of these men is shown by one fact that this was not the end of their evil-doing, for there were plottings from within jail and further killings of potential informants. But now 19 convictions have been obtained, including the convictions of the three leaders on various charges. This indescribably evil organization, Mr. President, has been thwarted by one wire tap.

Surely the case is a vivid demonstration of the worth of title III and the good it can do to end crime that nothing else can achieve. This one case alone vindicates the Senate's 1988 judgment that the motion to strike title II should have been defeated.

118 Cong. Rev. S. 4903-06 (daily ed. March 28, 1972). *See also* United States v. Cox, 449 F.2d 679 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); United States v. Cox, 462 F.2d 1293 (8th Cir. 1972), *cert. denied*, 417 U.S. 918, *reh'd denied*, 419 U.S. 885 (1974). The plain view interceptions in the *Cox* cases made a significant contribution to the convictions that destroyed the Cox organization. If the wiretap in *Cox* were installed under a California surveillance order, the plain view interceptions relating to robbery and conspiracy to commit murder would be inadmissible under current California surveillance law.