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AM. Sub. S.B. 222: Electronic Surveillance in Ohio

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LEGISLATION NOTE

AM. SUB. S.B. 222: ELECTRONIC SURVEILLANCE IN OHIO

I. INTRODUCTION

Adding a new tactical weapon to combat organized crime activities that "have become so sophisticated and well-organized that they are virtually immune from traditional investigative techniques,"[1] the 1986 Ohio General Assembly enacted Am. Sub. S.B. 222,[2] comprehensive legislation authorizing the official use of wiretaps. Substantively patterned after Title III of the federal Omnibus Crime Control and Safe Streets Act[3] (Title III), the Ohio statute allows "specified law enforcement officers to apply for and to execute interception warrants."[4]

However, in balancing the need for wiretaps with the fundamental privacy rights and expectations of Ohio citizens,[5] the General Assembly has enacted a statute that is more restrictive and has more safeguards against abuse than its federal counterpart. This note provides an explanation and analysis of the key provisions of Am. Sub. S.B. 222.

II. BACKGROUND

Construing the fourth amendment to the United States Constitution,[6] Chief Justice William Howard Taft wrote that wiretapping was

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1. *Wiretaps*, Gongwer News Serv., Inc., Ohio Report, Sept. 4, 1986, at 7 (quoting testimony of Ohio Attorney General Anthony J. Celebrezze, Jr.). Attorney General Celebrezze added, "Without wiretaps, we can disrupt these organizations, but we cannot penetrate them deeply enough to destroy them." *Id.*

2. Act of Nov. 21, 1986, 1986 Ohio Legis. Serv. 5-870 (Baldwin) (codified at OHIO REV. CODE ANN. § 2501.20 (Anderson Supp. 1986); *id.* §§ 2933.51, .53–.66 (Anderson 1987); *id.* § 2933.52 (Anderson Supp. 1987); amending *id.* § 4931.28 (Anderson Supp. 1986)).

3. 18 U.S.C. §§ 2510–2520 (1982 & Supp. IV 1987).

4. Act of Nov. 21, 1986, 1986 Ohio Legis. Serv. 5-870 (Baldwin) (preamble).

5. As one court has warned: "We are becoming a society that must exist in constant hazard from official snooping. Whatever incidental good flows from this invasion of privacy is submerged by the growing appearance of public surveillance so typical of totalitarian states." United States v. Kline, 366 F. Supp. 994, 996–97 (D.D.C. 1973).

6. U.S. CONST. amend. IV provides:

> 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 the persons or things to be seized.

not prohibited by the fourth amendment as contemplated by the framers because there was no physical intrusion upon the property of any defendant[7] and no material "thing" to be seized.[8] Evidence was adduced through the sense of hearing; there was no search and no seizure.[9]

Thirty-nine years later, in *Berger v. New York*,[10] the Supreme Court held facially void a New York statute allowing wiretaps to be authorized upon a reasonable belief that evidence would be obtained thereby.[11] The Court noted that "[t]he law, though jealous of individual privacy, has not kept pace with . . . advances in scientific knowledge,"[12] and concluded that "wiretapping and other electronic eavesdropping [are] within the purview of the Fourth Amendment."[13] The *Berger* decision set forth general guidelines that may be considered when determining whether a wiretapping statute can pass constitutional muster.[14]

The Court rejected the *Olmstead* physical-intrusion doctrine less than a year later in *Katz v. United States*,[15] noting that the "Fourth Amendment protects people, not places . . . [and, therefore,] what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[16] The Court held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment."[17]

Shortly thereafter, Congress enacted Title III,[18] incorporating many of the guidelines suggested by the *Berger* Court.[19] In addition to authorizing and regulating the use of electronic surveillance by federal officials, section 2516(2) of Title III authorizes individual states to en-

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7. Olmstead v. United States, 277 U.S. 438, 464–65 (1928), *overruled in* Katz v. United States, 389 U.S. 347 (1967).

8. *Olmstead*, 277 U.S. at 464.

9. *Id.*

10. 388 U.S. 41 (1967).

11. *Id.* at 45–64.

12. *Id.* at 49.

13. *Id.* at 64 (Douglas, J., concurring).

14. These guidelines include a showing of probable cause; detailed descriptions of the conversations to be intercepted; notice, unless exigent circumstances exist; specified and limited surveillance period; a termination date; a return of the warrant and seized materials to enable judicial supervision and control; and, for extensions, a continued showing of probable cause. *Id.* at 58–60.

15. 389 U.S. 347 (1967).

16. *Id.* at 351–52.

17. *Id.* at 357.

18. Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§ 2510–2520 (1982 & Supp. IV 1987).

19. *See supra* note 4.

act similar legislation.[20]

Prior to the passage of S.B. 222,[21] Ohio law generally prohibited wiretapping, with violators subject to both fines and imprisonment.[22] Notwithstanding this general prohibition, Ohio law did not require the suppression of evidence obtained from a warrantless recording. In *State v. Geraldo*,[23] a consenting police informant, while in police custody, telephoned the nonconsenting defendant. Although there was no warrant, the police recorded the call, and the defendant was subsequently indicted based upon evidence obtained from the warrantless recording.[24] The Ohio Supreme Court held that "[n]either the federal constitution nor state law requires the suppression of evidence obtained by the warrantless recording of a telephone conversation between a consenting police informant and a nonconsenting defendant."[25]

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20. 18 U.S.C. § 2516(2) (Supp. IV 1987). To date, 30 states and the District of Columbia have enacted legislation authorizing wiretaps. *See* ARIZ. REV. STAT. ANN. §§ 13-3001 to -3006, -3008 to -3009, -3012 to -3014 (1978); *id.* §§ 13-3007, -3010 to -3011 (Supp. 1987); COLO. REV. STAT. §§ 16-15-103 to -104, 18-9-301 to -310 (1986); *id.* §§ 16-15-101 to -102 (1986 & Supp. 1987); CONN. GEN. STAT. ANN. § 53a-187 (1985 & Supp. 1987); *id.* §§ 53a-188 to -189 (1985); DEL. CODE ANN. tit. 11, §§ 1335–1336 (1987); D.C. CODE ANN. §§ 23-541 to -545, -547 to -556 (1981); *id.* § 23-546 (1981 & Supp. 1987); FLA. STAT. ANN. §§ 934.01–.09, .10 (West 1985); *id.* § 934.091 (West 1985) (repealed 1985); GA. CODE. ANN. §§ 16-11-60, -63, -66 to -69 (1984); *id.* §§ 16-11-62, -64 to -65 (Supp. 1987); HAW. REV. STAT. §§ 803-41 to -50 (1985); IDAHO CODE §§ 18-6701 to -6710 (1987); ILL. ANN. STAT. ch. 38, ¶¶ 108A-1 to -10 (Smith-Hurd 1980); *id.* ¶ 108A-11 (Smith-Hurd Supp. 1987); KAN. STAT. ANN. §§ 22-2514 to -2519 (1981); LA. REV. STAT. ANN. §§ 15:1301–:1312 (Supp. 1987); MD. CTS & JUD. PROC. CODE ANN. §§ 10-401, -403 to -405, -407 (1984); *id.* §§ 10-402, -406 (Supp. 1987); *id.* § 10-408 (1984 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 1970 & Supp. 1987); MINN. STAT. ANN. §§ 626A.01, .04, .06–.17, .21–.23 (West 1983); *id.* §§ 626A.02–.03, .20 (Supp. 1988); *id.* § 626A.05 (West 1983 & Supp. 1988); NEB. REV. STAT. §§ 86-701 to -707 (1981); NEV. REV. STAT. ANN. §§ 179.410–.515, 200.610–.690 (Michie 1986); N.H. REV. STAT. ANN. § 570-A:1 (1986 & Supp. 1987); *id.* §§ 570-A:2 to :9, :10 to :11 (1986); *id.* § 570-A:9-a (Supp. 1987); N.J. STAT. ANN. §§ 2A:156A-1 to -26 (1985); N.M. STAT. ANN. §§ 30-12-1 to -11 (1978); N.Y. CRIM. PROC. LAW §§ 700.06–.40, .55, .70 (McKinney 1984); *id.* §§ 700.05, .50, .65 (McKinney 1984 & Supp. 1988); *id.* § 700.60 (Supp. 1988); OKLA. STAT. ANN. tit. 13, §§ 176.5–.14 (West 1983); *id.* § 176.4 (West Supp. 1988); OR. REV. STAT. §§ 133.723–.739 (1984); PA. CONS. STAT. ANN. §§ 18:5701–:5707, :5709–:5726 (Purdon 1983); *id.* § 18:5708 (Purdon 1983 & Supp. 1987); R.I. GEN. LAWS §§ 12-5.1-2 to .1-16 (1981); *id.* § 1205.1-1 (Supp. 1987); S.D. CODIFIED LAWS §§ 23-13A-1 to -13A-11 (1979 & Supp. 1987); TEX. STAT. ANN. arts. 18.20–.21 (Vernon Supp. 1988); UTAH CODE ANN. §§ 77-23a-1 to -11 (1982); VA. CODE ANN. §§ 19.2-61 to -70 (1983); WASH. REV. CODE. ANN. §§ 9.73.040–.050, .070–.080, .100 (1977); *id.* §§ 9.73.030, .060, .090, .110–.140 (Supp. 1987); WIS. STAT. ANN. §§ 968.27–.30, .32–.33 (1985); *id.* § 968.31 (1985 & Supp. 1987).

21. Act of Nov. 21, 1986, 1986 Ohio Legis. Serv. 5-870 (Baldwin).

22. OHIO REV. CODE ANN. §§ 2933.58 (Anderson Supp. 1985) (repealed 1987), 4931.28 (Anderson Supp. 1987).

23. 68 Ohio St. 2d 120, 429 N.E.2d 141 (1981), *cert. denied*, 456 U.S. 962 (1982).

24. 68 Ohio St. 2d at 120, 429 N.E.2d at 142–43.

25. *Id.* at 120, 429 N.E.2d at 142 (syllabus); *cf.* Beaber v. Beaber, 41 Ohio Misc. 95, 322 N.E.2d 910 (C.P. 1974) (taped telephone conversation admissible in evidence to impeach wife's testimony in a divorce action when husband tapped telephone line in his own home).

III. SUMMARY OF PROVISIONS

A. General Prohibition of Warrantless Interceptions

Section 2933.52 provides criminal penalties for the unauthorized interception,[26] use,[27] or disclosure[28] of wire or oral communications.[29] To come within this statute, the offender must act purposely,[30] and the act must constitute an interception.[31] The Ohio act expressly provides that pen registers[32] and traps[33] do not constitute interceptions.[34]

Criminal sanctions do not apply to interceptions made pursuant to state or federal statute.[35] The general prohibition also does not apply to employees of a communications common carrier[36] while engaged in routine quality control checks[37] or while providing assistance to persons effecting an interception pursuant to Ohio law.[38] Generally, anyone who is a party to the communication or who has obtained prior consent to intercept from one of the parties to the communication is not subject to criminal penalties.[39] Finally, police, fire, and emergency centers are not prohibited from effecting interceptions from a telephone, instrument, equipment, or facility used solely for administrative purposes,[40] so long as there is at least one form of communication "that is not subject to interception [and] is made available for public use."[41]

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26. OHIO REV. CODE ANN. § 2933.52(A)(1) (Anderson Supp. 1987).

27. *Id.* § 2933.52(A)(2).

28. *Id.* § 2933.52(A)(3).

29. *Id.* § 2933.52(C) (third degree felony); *cf.* 18 U.S.C. § 2511 (1982 & Supp. IV 1987).

30. OHIO REV. CODE ANN. § 2933.52(A) (Anderson Supp. 1987).

31. Interception refers to "the aural acquisition of the contents of any wire or oral communication through the use of any interception device." *Id.* § 2933.51(C) (Anderson 1987).

32. A pen register is a device that can identify the telephone number that is dialed by decoding or recording electronic impulses. *Id.* § 2933.52(B)(6) (Anderson Supp. 1987).

33. A trap is a device that "determines the origin of a wire communication to a telephone or telegraph instrument, equipment or facility, but does not intercept the contents of any wire communication." *Id.* § 2933.52(B)(7).

34. *Cf.* Armstrong v. Southern Bell Tel. & Tel. Co., 366 So. 2d 88, 90 (Fla. Dist. Ct. App. 1979) (device that records the numbers dialed from a particular telephone is not an interception device).

35. OHIO REV. CODE ANN. § 2933.52(B)(1) (Anderson Supp. 1987). Enumerated federal statutes include Title III, 18 U.S.C. §§ 2510–2520 (1982 & Supp. IV 1987), and the Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801.11 (1978).

36. " 'Communications common carrier' means any person who is engaged as a common carrier for hire in . . . communications by wire, radio, or radio transmission[s]." OHIO REV. CODE ANN. § 2933.51(H) (Anderson 1987).

37. *Id.* § 2933.52(B)(2) (Anderson Supp. 1987).

38. *Id.* § 2933.52(B)(5).

39. *See id.* § 2933.52(B)(3)–(4).

40. *Id.* § 2933.52 (B)(8)(a).

41. *Id.* § 2933.52(B)(8)(b).

B. *Application Procedures*

1. Interception Warrants

Section 2933.53 provides all applications for interception warrants[42] made to the designated judge[43] must be authorized by a county prosecuting attorney or his designee.[44] An application must be in writ-

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42. An "interception warrant" is defined as a court order authorizing the interception of wire or oral communications. *Id.* § 2933.51(F).

43. A "designated judge" and a substitute judge are appointed for each district by the presiding judge of the district court of appeals. *Id.* § 2501.20(A).

44. Section 2933.53(A) provides that "an assistant to the prosecuting attorney who is specifically designated by the prosecuting attorney to exercise authority under this section, may authorize an application for an interception warrant."

Such delegation of the authority to authorize an application for an interception warrant is in conflict with, and therefore should be preempted by, the relevant federal enabling provision, 18 U.S.C. § 2516(2) (Supp. IV 1987), which states that "[t]he principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision thereof, . . . may apply . . . for . . . an order authorizing, or approving the interception of wire, oral, or electronic communications." *Id.*

The analogous provision pertaining to *federal officials*, in its original language, states that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge . . . for . . . an order authorizing or approving the interception of wire or oral communications . . . ." 18 U.S.C. § 2516(1) (1982).

In United States v. Giordano, 416 U.S. 505, 508 (1974), the Supreme Court held that evidence obtained from wiretaps that were authorized by the Attorney General's executive assistant must be suppressed. The Court noted that the language of § 2516(1) clearly indicated that Congress intended "that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Id.* at 515. The Court found that legislative history indicating Congress wanted to centralize electronic surveillance policy formulation supported the Court's determination "that the authority to apply for court orders is to be narrowly confined . . . [and] limited to those responsive to the political process." *Id.* at 520 (citing S. REP. NO. 1097, 90th Cong., 2d Sess., 96–97 (1968)).

Section 2516(2) was intended to provide centralization and uniformity of *statewide* electronic surveillance policy by delegating authority to officials subject to the political process. *See Giordano*, 416 U.S. at 523 n.11. Since state law enforcement organizational differences, however, precluded express delegation in the federal enabling provision, *see id.* at 522–23, the issue of delegation was left to state law. *Id.*

Although courts have been unwilling to construe state wiretap statutes that contain ambiguous delegation language as empowering county prosecutors to delegate the authority to *authorize* an application for an interception order, *see* Annotation, *Who May Apply or Authorize Application for Order to Intercept Wire or Oral Communications Under Title III of Omnibus Crime Control and Safe Streets Act of 1968*, 64 A.L.R. FED. 115 (1983); State v. Cocuzza, 123 N.J. Super 14, 21, 301 A.2d 204, 208 (Essex County Ct. 1973); *cf.* State v. Daniels, 389 So. 2d 631, 636 (Fla. 1980) (state statute with no delegation language cannot be construed to grant assistant state attorneys power to authorize applications for interception warrants), the statutory delegation of authority to a specifically designated assistant state attorney empowering the assistant to *apply* for an order authorizing an interception warrant was ruled consistent with § 2516(2) in Commonwealth v. Vitello, 367 Mass. 224, 230–32, 327 N.E.2d 819, 825–26 (1975), with this judicial proviso: The "specially designated" assistant district attorney must bring the matter to the district attorney who must determine, after a full examination, whether the proposed interception is consistent with overall policy and give written authorization on a case by case basis. *Id.* at 254–56, 327 N.E.2d at 837–39. *Accord* United States v. Smith, 726 F.2d 852, 859 (1st Cir. 1984) (Massa-

ing upon oath or affirmation by the applicant;[45] it must contain the name and office of the applicant and the person authorizing the application[46] and the identity of the person who will carry out the interception.[47] In addition, the application must state the objective of the interception warrant[48] and provide a detailed statement justifying the applicant's belief that a warrant should be issued.[49] Specifically, this statement must include the nature of the "designated offense";[50] the identity, if known, of the suspect;[51] the target location of the interception;[52] the facilities or the site from which the interception will be made;[53] the particular type of communication that is to be the object of the interception; and, the basis for believing that the interception will result in evidence related to a designated offense.[54]

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chusetts statute "as glossed by *Vitello*, is entirely consistent with the intent of Congress"); *see also* Alexander v. Harris, 595 F.2d 87, 89 (2d Cir. 1979) (state statute allowing county prosecutor to "authorize in writing applications by investigative personnel" in conformity with § 2516(2)); State v. McManus, 404 So. 2d 757, 758 (Fla. Dist. Ct. App. 1981) (neither state statute or § 2516(2) proscribes state attorney authorization of application by police officer). *But see* State v. Farha, 218 Kan. 394, 403–04, 544 P.2d 341, 350 (1975) (statute authorizing assistant attorney general to make wiretap applications without approval of attorney general runs afoul of § 2516(2)), *cert. denied*, 426 U.S. 949 (1976); *see also* Poore v. State, 39 Md. App. 44, 57, 384 A.2d 103, 112 (Ct. Spec. App. 1978) (concluding that congressional intent in enacting § 2516(2) was "that the authority [to apply for an interception warrant] devolved upon the principal prosecutor of the State or of the political subdivision . . . and [could] not be delegated").

Each application must be reviewed by the Ohio Attorney General or a designated assistant attorney general and must contain a signed, written statement indicating agreement or disagreement with the submission of the application; however, disagreement does not preclude submission. OHIO REV. CODE ANN. § 2933.53(B)(9) (Anderson 1987).

45. OHIO REV. CODE ANN. § 2933.53(B) (Anderson 1987).

46. *Id.* § 2933.53(B)(1).

47. *Id.* § 2933.53(B)(2).

48. *Id.* § 2933.53(B)(3).

49. *Id.*

50. *Id.* § 2933.53(B)(3)(a). Designated offenses include any felony violation of §§ 2903.01 (aggravated murder), 2903.02 (murder), 2903.11 (felonious assault), 2905.01 (kidnapping), 2905.02 (abduction), 2905.11 (extortion), 2905.22 (extortionate credit and criminal usury), 2907.21 (compelling prostitution), 2907.22 (promoting prostitution), 2909.02 (aggravated arson), 2909.03 (arson), 2909.04 (disrupting public services), 2911.01 (aggravated robbery), 2911.02 (robbery), 2911.11 (aggravated burglary), 2911.12 (burglary), 2915.02 (gambling), 2915.03 (operating a gambling house), 2915.06 (corrupting sports), 2917.01 (inciting to violence), 2917.02 (aggravated riot), 2921.02 (bribery), 2921.03 (intimidation), 2921.04 (intimidation of crime victim or witness), 2921.32 (obstructing justice), 2921.34 (escape), 2923.20 (unlawful transaction in weapons), 2923.32 (engaging in a pattern of corrupt activity), 2925.03 (drug trafficking), and 2905.04 (child stealing). *Id.* § 2933.51(I)(1). Designated offenses also include complicity in the commission of any designated offense or any attempt or conspiracy violations of such offenses if the attempt or conspiracy is punishable by imprisonment of more than one year. *Id.* § 2933.51(I)(2)–(3).

51. *Id.* § 2933.53(B)(3)(b).

52. *Id.*

53. *Id.* § 2933.53(B)(3)(c).

54. *Id.* § 2933.53(B)(3)(d).

In addition, the application must contain a statement as to whether the applicant or authorizing official knows or has reason to know that the target communication is privileged, the basis for believing that any such privilege exists, and the nature of any existing privilege;[55] a statement as to the intended use of the intercepted communications;[56] a statement as to the interception time-span;[57] a detailed statement as to the investigative necessity for the interception;[58] a complete history of past applications involving the same persons or locations;[59] and, if applying for an extension, a detailed statement to justify that request.[60]

Any supporting affidavits submitted by the applicant must state the facts and the source of any information, including personal knowledge, forming the basis of any stated belief or conclusion.[61] Additional evidence or testimony in support of the application may be required by the designated appellate court judge.[62]

2. Issuance of an Interception Warrant

Upon receipt of an application for an interception warrant, an in-camera adversary hearing is held in order to provide an opportunity for the "designated attorney"[63] to oppose the application.[64] After the hearing, the judge may issue a warrant if he determines, based upon facts submitted, that specified statutory requirements have been met.[65] Specifically, the application and accompanying affidavits must comply with section 2933.53;[66] there must be "probable cause to believe that a particular person is committing, has committed, or is about to commit a designated offense"[67] and that the interception will be productive in obtaining "particular communications concerning the designated offense."[68] In addition, there must be a showing that "[n]ormal investigative procedures . . . have been tried and have failed[,] . . . reasona-

55. *Id.* § 2933.53(B)(4).
56. *Id.* § 2933.53(B)(5).
57. *Id.* § 2933.53(B)(6).
58. *Id.* § 2933.53(B)(7).
59. *Id.* § 2933.53(B)(8).
60. *Id.* § 2933.53(C).
61. *Id.* § 2933.53(D).
62. *Id.* § 2933.53(E).
63. *See id.* § 2933.51(O) ("designated attorney" is an attorney appointed for each district by the presiding judge of the district court of appeals for the purpose of opposing interception warrant applications).
64. *Id.*
65. *Id.* § 2933.54(A).
66. *Id.* § 2933.54(A)(1).
67. *Id.* § 2933.54(A)(2).
68. *Id.* § 2933.54(A)(3).

bly appear to be unlikely to succeed if tried[,] or [would be] too dangerous to employ"[69] and that the investigative officer has completed the statutory training requirements.[70]

Furthermore, a "special need"[71] must be shown if the "facilities from which a wire communication is to be intercepted are public facilities,"[72] or if

> the facilities for which, or the place at which, the wire or oral communications are to be intercepted are being used, are about to be used, or are leased to, listed in the name of, or commonly used by, a licensed physician, a licensed practicing psychologist, an attorney, a practicing clergyman, or a journalist,[73] or are used primarily for habitation by a husband and wife.[74]

If the judge is satisfied that sufficient grounds exist, he or she may

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69. *Id.* § 2933.54(A)(4). Analyzing the identical provision in the Hawaii wiretap statute, one commentator argued that mere "conclusory allegations that other investigative procedures have failed or are unlikely to succeed will not satisfy this requirement . . . ." Bowman, *Hawaii's New Wiretap Law*, 14 HAW. B.J. 83, 88 (1978). In United States v. Spagnulo, 549 F.2d 705 (9th Cir. 1977), the court held that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the *particular case at hand*." *Id.* at 710 (emphasis added).

70. OHIO REV. CODE ANN. § 2933.54(A)(6) (Anderson 1987); *see also infra* note 91.

71. A special need requires:

> [A] showing that a licensed physician, licensed practicing psychologist, attorney, practicing clergyman, journalist, or either spouse [or specified public facilities are being regularly used by someone who] is personally engaging in continuing criminal activity, was engaged in continuing criminal activity . . . or is committing, has committed, or is about to commit, a designated offense.

Id. § 2933.51(M).

Title III does not prohibit or limit the interception of privileged communications; however, it does provide that "[n]o 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." 18 U.S.C. § 2517(4) (Supp. IV 1987). The Ohio statute employs identical language but also requires a showing of special need. OHIO REV. CODE ANN. § 2933.54(C).

72. OHIO REV. CODE ANN. § 2933.54(B) (Anderson 1987).

73. "Journalist" is defined as any person employed by or connected with the news media in a news-related function. *Id.* § 2933.51(N).

74. *Id.* § 2933.54(C) (footnote added). Otherwise privileged communication does not, however, lose its privileged status even if the communication is intercepted in compliance with statutory requirements. *Id.* Several states with wiretapping statutes contain provisions regarding the interception of privileged communications that are more restrictive than the Ohio act. *See* J. CARR, THE LAW OF ELECTRONIC SURVEILLANCE § 5.5 (2d ed. 1987) (citing HAW. REV. STAT. § 803-46(e)(1)(B) (1985); WIS. STAT. ANN. § 968-30(10) (West 1985); KAN. STAT. ANN. § 22-2515(5) (1984)). For example, in Hawaii, "[p]rivileged conversations . . . shall not be intercepted unless both parties to the conversation are named or described in the wiretap . . . order." HAW. REV. STAT. § 803-46(e)(1)(B). Wisconsin law completely prohibits interception of attorney-client communication. WIS. STAT. ANN. § 968-30(10). In Kansas, on the other hand, probable cause showing criminal involvement of an attorney is required prior to an interception order. KAN. STAT. ANN. § 22-2515(5).

issue an interception warrant,[75] which must be accompanied by a finding as to the objective of the warrant.[76] The warrant terminates automatically when the objective has been achieved or after thirty days, whichever occurs first, unless an extension has been granted.[77] An application for an extension may be made prior to the expiration of the warrant and must comply with the warrant application provisions of the bill.[78]

3. Emergency Oral Interceptions

A judge may grant emergency oral approval for a warrantless interception based upon an informal application by a county prosecuting attorney or his designee if the judge conditions the grant upon the filing of an application for an interception warrant within forty-eight hours.[79] After an in-camera adversary hearing in which the "designated attorney" can oppose the informal application,[80] the judge may grant oral approval for the warrantless interception if he or she determines that there appear to be grounds upon which a warrant could have been issued,[81] there is probable cause that an emergency situation exists,[82] and there is "substantial danger to life or limb."[83]

Any subsequently-issued interception warrants would be dated retroactively to reflect the time of the oral approval.[84] If the warrant application is denied, the contents of the interception obtained under the grant of oral approval is suppressed except for use in a civil action brought by an aggrieved person.[85] In addition, the interception will be held to violate the Ohio wiretap law unless an application for an interception warrant is not made within forty-eight hours of the oral approval.[86] The Ohio act expressly grants immunity from criminal or civil action to any communication carrier who relies upon the oral approval

75. *See* OHIO REV. CODE ANN. § 2933.54(D) (Anderson 1987).
76. *Id.* § 2933.54(F).
77. *Id.* § 2933.54(E).
78. *Id.* § 2933.55(A).
79. *Id.* § 2933.57(A). The Title III counterpart to this provision permits eavesdropping without a warrant in an emergency when grounds exist upon which an interception could be authorized. Oral approval, however, is not required prior to the interception. 18 U.S.C. § 2518(7) (Supp. IV 1987).
80. OHIO REV. CODE ANN. § 2933.57(A) (Anderson 1987).
81. *Id.* § 2933.57(A)(1).
82. *Id.* § 2933.57(A)(2).
83. *Id.* § 2933.57(A)(3).
84. *Id.* § 2933.57(D)(1).
85. *Id.* § 2933.57(D)(4). The federal statute provides that if the application for an interception warrant subsequent to an emergency interception is *denied*, "the contents of any wire, oral, or electronic communication intercepted shall be treated as having been obtained in violation of this chapter." 18 U.S.C. § 2518(7) (Supp. IV 1987).
86. OHIO REV. CODE ANN. § 2933.57(D)(3) (Anderson 1987).

in good faith.[87]

C. *Instruction, Minimization, Execution, and Use*

The person authorizing the interception warrant must instruct the investigative officers as to the attorney-client, physician-patient, and priest-penitent privileges[88] prior to the execution of the warrant.[89] Furthermore, the investigative officers must be directed to minimize the interceptions of communications that are not subject to the warrant and must be instructed regarding the procedures to be followed if communications concerning an offense other than the one named in the interception warrant are intercepted.[90]

An authorized investigative officer who has received the statutorily-required training must execute the interception warrant according to its terms.[91] Contents of any intercepted communications must be tape recorded if possible; otherwise, a detailed resume of the intercepted communication must be transcribed immediately.[92] Safeguards must be taken during the recording or transcribing to "protect the recording or transcription from editing or any other alteration."[93] The

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87. *Id.*

88. *See id.* § 2317.02(A)–(C).

89. *Id.* § 2933.58(A).

90. *Id.* Clifford S. Fishman, a former New York County Assistant District Attorney, described the different methods to minimize interference of conversations not legally subject to interception:

> [Such methods] may be divided into four categories: extrinsic, intrinsic, dual recorder, and after-the-fact. . . .
>
> Extrinsic minimization involves limiting the time period during which monitoring is conducted. . . .
>
> Intrinsic minimization consists of attempting to screen out non-pertinent conversations as the conversations are taking place. . . .
>
> Dual recorder minimization utilizes two tape recorders. The monitors follow the intrinsic, good-faith procedure on one tape recorder, listening and recording only when they think a conversation is, or is about to become, pertinent. The second recorder, the speaker of which is disconnected, records every conversation in full. . . .
>
> After-the-fact minimization involves recording every conversation and then restricting disclosure of non-pertinent conversations by transcribing only pertinent conversations or by re-recording only pertinent conversations and then sealing the original tapes.

C. FISHMAN, WIRETAPPING AND EAVESDROPPING, § 151, at 204–06 (1978) (citations omitted). *See generally* Fishman, *The "Minimization" Requirement in Electronic Surveillance: Title III, The Fourth Amendment, and the Dread* Scott *Decision*, 28 AM. U.L. REV. 315 (1979).

91. OHIO REV. CODE ANN. § 2933.59(A) (Anderson 1987). Because the Ohio Peace Officers Training Council lacks the in-house expertise to train investigative personnel on how to properly execute an interception warrant, it will be soliciting bids from outside vendors to provide the training. Telephone interview with George Lewis, Director of Certification and Standards, Ohio Peace Officers Training Council (Feb. 8, 1988) (on file with University of Dayton Law Review). As of February 8, 1988, no bids had been solicited or received. *Id.*

92. OHIO REV CODE ANN. § 2933.59(A) (Anderson 1987).

93. *Id.*

Ohio act expressly provides that purposeful editing or altering of an interception recording or transcript intended for use in any judicial proceeding is a third degree felony.[94]

Any investigative officer is authorized under the Ohio act to disclose or to use, in the performance of his official duties, evidence lawfully obtained through an interception.[95] Similarly, any person receiving lawful wiretapping evidence may testify and disclose that evidence in any federal or state proceeding.[96]

D. Admissibility and Suppression of Evidence

The Ohio act contains express provisions pertaining to the admissibility and suppression of any evidence obtained pursuant to an interception warrant. Section 2933.55(C), for example, provides that intercepted communications of a criminal offense completely unrelated to the offense designated in the warrant may nevertheless be used as evidence if the interception is subsequently approved by the judge who issued the warrant.[97] If the judge finds that the interception was otherwise in compliance with the statute, he or she must issue an order approving the interception.[98] Evidence of an additional criminal offense not completely unrelated to the designated offense would be treated as if that particular offense was specified in the warrant, and would not require additional action.[99]

On the other hand, evidence will be suppressed if its disclosure is in violation of the Ohio act.[100] Evidence may also be suppressed unless each party is provided with a copy of the interception warrant and the application upon which the warrant was authorized at least ten days before trial;[101] however, if the judge determines that the ten-day period is impractical, it may be waived if the resulting delay in receiving the information is not prejudicial to the defendant.[102]

Section 2933.63 permits "any aggrieved person" to move to suppress the contents of an interception for any of the following reasons:

(1) The communication was unlawfully intercepted;

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94. *Id.* § 2933.59(C), (H).

95. *Id.* § 2933.59(F); *cf.* 18 U.S.C. § 2517(2) (Supp. IV 1987) (nearly identical language). The contents of a lawfully executed interception can therefore be used for such purposes as establishing probable cause to search. *See* Gordon v. Gordon, 534 F.2d 197, 199 (9th Cir. 1976); C. FISHMAN, *supra* note 90, § 148.

96. OHIO REV. CODE ANN. § 2933.59(G) (Anderson 1987).

97. *Id.* § 2933.55(C)(1).

98. *Id.*

99. *Id.* § 2933.55(C)(2).

100. *Id.* § 2933.62(A).

101. *Id.* § 2933.62(B).

102. *Id.*

(2) The interception warrant under which the communication was intercepted is insufficient on its face;

(3) The interception was not made in conformity with the interception warrant;

(4) The communications are of a privileged character and a special need for their interception is not shown or is inadequate as shown.[103]

Any motion to suppress must be made prior to the proceeding at which the evidence is to be used.[104] An exception is made if the aggrieved person was unaware of the grounds of the motion.[105]

IV. ANALYSIS

A. *Privacy Issues*

The Ohio act is a compromise, balancing the need for wiretapping[106] with the right of Ohio citizens to be free of unwarranted snooping by government officials.[107] Even though Ohio's wiretapping law is, for the most part, substantially patterned after Title III, the Ohio act provides greater protection of privacy rights in three specific areas: oral communications, adversary hearings, and privileged communications.

1. Oral Communications

Since oral communication is defined in Ohio Revised Code Section 2933.51(B) as "any human speech that is used to communicate,"[108] an interception warrant must be obtained before *any* communication can be lawfully intercepted. In contrast, under Title III, only "oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"[109] is protected from warrantless interception.[110] Thus, a warrant must be obtained under the Ohio statute, but not under Title III, to intercept conversations of prisoners and others who, because of their particular circumstances, have little expectation that

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103. *Id.* § 2933.63(A); *see also infra* notes 124–27 and accompanying text.

104. OHIO REV. CODE ANN. § 2933.63(B) (Anderson 1987).

105. *Id.*

106. *See supra* note 1 and accompanying text.

107. *See supra* note 5. According to State Senator Eugene Watts (R-Columbus), sponsor of S.B. 222, an effective compromise has been achieved by the Ohio legislation: "[The Ohio] bill is superior in the protection it affords to both citizens and law enforcement officers . . . . The bill tightly controls court-authorized electronic surveillance by law enforcement agencies in serious investigations involving organized crime. Also, S.B. 222 has more safeguards against improper use than any of the 29 states with wiretap statutes." Ohio State Senator Eugene Watts, Press Release, Wiretap Bill Approved by Legislature (Nov. 25, 1986) (on file with University of Dayton Law Review) [hereinafter PRESS RELEASE].

108. OHIO REV. CODE ANN. § 2933.51(B) (Anderson 1987).

109. 18 U.S.C. § 2510(2) (Supp. IV 1987).

110. *See id.* § 2511 (1982 & Supp. IV 1987).

their conversations are private.[111]

2. In-Camera Adversary Hearing

The Ohio statute requires the presiding judge of each court of appeals district to designate an attorney to appear in in-camera adversary hearings for the purpose of opposing applications for interception warrants.[112] This section has no Title III counterpart. Presumably, in-camera adversary hearings will function to prevent judges from "rubber-stamping" such applications,[113] because, as one commentator has noted, "[c]ontemplating even a limited adversary procedure, prosecutors can be expected to exercise care in the preparation of wiretap applications; judges, in turn, will be fully acquainted with arguable deficiencies in the prosecutorial assertions."[114]

Critics of the adversary hearing process have maintained that the process is costly and time-consuming, and "that the public privacy protection thus afforded is largely illusory" because the designated attorney is essentially limited to challenging the "facial sufficiency of the affidavits."[115]

A weakness of the Ohio act is that it does not provide sufficient detail concerning the scope of the designated attorney's role in opposing applications for wiretap warrants. For example, the act does not specifically state whether the opposing attorney may cross-examine witnesses (including the affiant) in preparing a case to oppose the warrant. Without the right to cross-examine the affiant supporting the application, it would appear that the designated attorney's role in opposing the warrant would be limited to challenging technical irregularities that appear on face of the application.

3. Privileged Communications

Title III does not prohibit the interception of privileged communications, although it does, in an indirect way, prohibit disclosure of such communications.[116] The new Ohio act, on the other hand, requires the establishment of a "special need"[117] before a warrant authorizing the interception of privileged communication can be issued.[118] Although the Ohio act specifies that a special need requires "a showing" that the

111. *See* C. FISHMAN, *supra* note 90, § 24, at 39.

112. OHIO REV. CODE ANN. § 2501.20(C) (Anderson Supp. 1987).

113. *See* Bowman, *supra* note 69, at 90.

114. *Id.*

115. *Id.* at 89–90.

116. *See* 18 U.S.C. § 2517(4) (Supp. IV 1987); *see also* C. FISHMAN, *supra* note 90, §§ 116, 159.

117. OHIO REV. CODE ANN. § 2933.51(M) (Anderson 1987); *see also supra* note 71.

118. OHIO REV. CODE ANN. § 2933.54(C) (Anderson 1987).

privileged person is somehow engaged in unlawful conduct,[119] it is unclear exactly what additional information, besides probable cause, must be shown. Accordingly, this type of provision has been criticized as a "mere verbal placebo" because it does not specifically require a showing of anything more than the probable cause required before the issuance of any interception warrant.[120]

B. *Judicial Interpretation*

No matter how carefully a wiretap statute might be crafted to balance the countervailing considerations of individual privacy and effective law enforcement, the courts must ultimately act as the fulcrum. In evaluating Title III jurisprudence, one commentator has observed that even though "[t]he authors of the federal wiretap statute pledged that the law, which replaced the absolute prohibition on the use of intercept[ed] evidence, would be strictly enforced[,] [i]t has not been."[121] For the most part, "the courts have come down on the side of 'reasonable' rather than 'strict' interpretation. Led by law-and-order advocates, such as Justice William Rehnquist, [courts have emasculated] the delicate balance and rigid controls in the federal wiretap jurisprudence . . . in favor of a reasonableness, police-oriented balancing test."[122]

In general, federal courts have developed a three-step test in determining whether evidence obtained in violation of a Title III provision should be suppressed.[123] First, the court must determine if the particular provision that has been violated "is a central or functional safeguard in Title III's scheme to prevent abuses. . . . If this test has been met, it must also be determined whether the purpose which the particular procedure was designed to accomplish has been satisfied in spite of the error."[124] If the first two tests do not dispose of the issue, the court may also consider "whether the statutory requirement was deliberately ignored; and, if so, whether there was any tactical advantage to be gained thereby."[125]

However, in construing state wiretap statutes, only a few state

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119. *Id.* § 2933.51(M).

120. *See* Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order"*, 67 MICH. L. REV. 455, 467–68 (1969) (suggesting as alternatives total exclusion or, at least, prohibition of post-indictment wiretapping).

121. Shugrue, *Wiretapping in Nebraska*, 19 CREIGHTON L. REV. 194, 234 (1985–1986).

122. *Id.* at 197.

123. *See, e.g.*, United States v. Caggiano, 667 F.2d 1176, 1179 (5th Cir. 1982); United States v. Diana, 605 F.2d 1307, 1312 (4th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); United States v. Chun, 503 F.2d 533, 542 (9th Cir. 1975).

124. *Chun*, 503 F.2d at 542.

125. *Id.*

courts have followed the federal approach.[126] A number of state courts have indicated that evidence obtained through wiretapping will be suppressed unless there has been strict compliance with the state statute[127] because, as one court has observed, "[t]he insidiousness of electronic surveillance threatens the right to be free from unjustifiable government intrusion into one's individual privacy to a far greater extent than . . . general warrants."[128] Since, according to the bill's sponsor, the Ohio statute was specifically drafted to include "safeguards" to protect against the unwarranted invasion of individual privacy rights,[129] Ohio courts should adopt the more restrictive state approach in order to effectuate legislative intent.

V. CONCLUSION

In opposing legislation to legalize wiretapping as "unnecessarily broad," President Franklin D. Roosevelt wrote that

> [While] [i]t is more than desirable, it is necessary that criminals be detected and prosecuted [as] vigilantly as possible[,] [i]t is more necessary that the citizens of a democracy be protected in their rights of privacy . . . . As an instrument for oppression of free citizens, I can think of none worse than indiscriminate wiretapping.[130]

The Ohio General Assembly, taking advantage of the flexibility in Title III,[131] has enacted legislation more restrictive than the federal law. Despite a few potential problems in the act, it provides a proven procedure for the detection of criminals as well as at least some

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126. *See* State v. Grant, 176 Conn. 17, 404 A.2d 873 (1979); State v. Whitmore, 215 Neb. 560, 340 N.W.2d 124 (1983).

127. *See, e.g.*, People v. Vinograd, 68 N.Y.2d 383, 502 N.E.2d 189, 509 N.Y.S.2d 512 (1986); State v. Siegal, 266 Md. 256, 292 A.2d 86 (1972); *see also* C. FISHMAN, *supra* note 91, § 253, at 272–73 (Supp. 1986) (collecting cases).

128. People v. Shultz, 67 N.Y.2d 144, 148–49, 492 N.E.2d 120, 122, 501 N.Y.S.2d 12, 14 (1986).

129. *See* PRESS RELEASE, *supra* note 107.

130. Letter from President Franklin D. Roosevelt to Rep. Thomas H. Elliot (Feb. 21, 1941) (opposing provisions of proposed legislation authorizing use of wiretaps to prevent "domestic crimes, but with possibly one exception—kidnapping and extortion in the Federal sense"), *reprinted in To Authorize Wiretapping: Hearings on H.R. 2266 and H.R. 3099 Before Subcomm. No. 1 of the House of Representatives Committee on the Judiciary*, 77th Cong., 1st Sess. 257 (1941), *quoted in* W. MURRAY, WIRETAPPING ON TRIAL 138 (1965). In the letter, President Roosevelt stated his willingness to support legislation that would only authorize wiretapping in cases of "espionage or sabotage against the United States."

131. 18 U.S.C. §§ 2510–2520 (1982 & Supp. IV 1987); *see* United States v. Mora, 821 F.2d 860, 863 n.3 (1st Cir. 1987) ("Generally speaking, insofar as wiretapping is concerned, states are free to superimpose more vigorous requirements upon those mandated by the Congress.").

additional safeguards to insure that Ohio citizens will not be subject to indiscriminate wiretapping.

L. Roger Bowling

Code Sections Affected: To amend section 4931.28, to enact sections 2501.20, 2933.51–.57, .59–.66, to repeal section 2933.58, and to enact new section 2933.58 of the Ohio Rev. Code.
Effective Date: March 25, 1987
Sponsor: Watts (S)
Committees: Judiciary (S & H)