Reach Out and Bug Someone: California's New Wiretap Law

Philip H. Pennypacker
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Those who would sacrifice liberty for a small amount of security, deserve neither.

-Benjamin Franklin

Approximately twenty years after Title III of the federal Omnibus Crime Control and Safe Streets Act¹ was enacted, California adopted the Presley-Felando-Eaves Wiretap Act.² Against a backdrop of increasing crime control and the need for broader intelligence gathering, both Acts permit law enforcement personnel to delve into what are believed to be the inner workings of criminal operations.

The independent development of the Acts was strikingly similar. For many years prior to their enactment, the United States Supreme Court, Congress, the California Supreme Court and the California Legislature each adopted strict bans on wiretapping and on the invasion of privacy that results from a wiretapping.³ Because of

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the general feeling that conversations should be candid and confidential, national and state proposals to relax these bans experienced tough sledding.

In the congressional arena, unsuccessful attempts were made in the early 1950s to relax the ban. In California, bills introduced as early as 1970 met with similar failure.

But in 1968, when the country was confronted with "crime in the streets," a "nation gone haywire" and "gangsters on the loose," Congress successfully enacted Title III. Twenty years later, when California faced the proliferation of crime involving modern drug distribution and a "state addicted to drugs," the California Legislature followed suit and adopted the Presley-Felando-Eaves Wiretap Act. The primary focus of the California Act is the interception of wire communications relative to drug transactions.

This article is an overview of the statutory requirements of the California Act. It will discuss the requirements judicially derived under Title III that will likely be applied in California and will explore new issues likely to be litigated in California.

While a majority of persons view electronic surveillance as repugnant, the sad truth is that when confronted with an option to suppress crime or to ensure liberty, most persons would prefer the former. Thus, even though these acts violate every fundamental concept of liberty, the experience of Title III suggests that the California Act will survive most legislative and judicial attacks and specific smaller provisions of the California Act will be tested on a case-by-case basis.

I. THE CALIFORNIA LEGISLATION

The California statute, Penal Code Section 629, establishes a procedure whereby the state's top law enforcement officials may apply to the presiding judge of the superior court, or another designated judge, for an interception of a wire communication. Essentially, the application process parallels the procedures mandated under the federal Act. The application must disclose:

a. The law enforcement agency seeking the wiretap.

\[\text{a wiretap act stemmed from 1970.}\]
5. REPORT OF THE CALIFORNIA SENATE COMMITTEE ON JUDICIARY (April 20, 1988).
7. Id. § 629(a).
b. The agency empowered to execute the order.  

c. A certification that the facts have been reviewed by a chief executive officer making the application.  

d. A “full and complete” review of the “facts and circumstances” leading to the application, including:

1. Details regarding the offense(s) committed or about to be committed.  

2. Why conventional investigative techniques have failed or why they would be unsuccessful or too dangerous.  

3. A description of the nature and location of the “facilities” from which or place where communication is to be intercepted.  

4. The type of communication to be intercepted.  

5. The identity, if known, of person(s) committing the offense and whose communications are to be intercepted.

The applicant also must certify three other factors. First, the applicant must set forth the time period within which the interception will occur. Second, the applicant must give a complete statement of previous applications made to either state or federal courts involving the same parties, facilities and places, and any actions taken by a judge pursuant to such applications. Finally, if the application is a request to extend a prior wiretap, there must be a progress report on the original interception and an explanation as to why results were not achieved during the original period.

The court may enter an ex parte order granting the interception if it is satisfied that one or more controlled substance crimes is, has or will occur. The court must certify probable cause and necessity for the wiretap. The order must also delineate the following factors:

(a) The identity, if known, of the person whose communications are to be intercepted, or if the identity is not known, then that information relating to the person’s identity known to the
applicant.

(b) The nature and location of the communication facilities as to which, or the place where, authority to intercept is granted.

(c) A particular description of the type of communication sought to be intercepted, and a statement of the illegal activities to which it relates.

(d) The identity of the agency authorized to intercept the communications and of the person making the application.

(e) 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.\(^8\)

The Act also provides for an emergency oral approval of an order allowing interception when emergency factors are apparent.\(^9\)

The maximum duration permitted for a wiretap is thirty days or as soon as the goal of the interception is achieved.\(^20\) Law enforcement officials, upon signing the order, may immediately commence the interception process and must minimize irrelevant or privileged conversations.

The law enforcement agency executing the order must periodically report to the court at a minimum of every seventy-two hours.\(^21\) In addition, an annual report of statewide wiretap activity must be filed with the Legislature, the Judicial Council and the Administrative Office of the United States Courts.\(^22\)

Within at least ninety days after the cessation of the intercepting activity, the enforcement agency must file an inventory of the interception and serve it on each of the intercepted parties.\(^23\) If the information obtained through the wiretap is to be used in court proceedings, the agency must also furnish a transcript of the wire conversations to the parties.\(^24\) Revelation of the contents of the interception is forbidden, except under the most strictly delineated circumstances.\(^25\) The defendant's remedy for an illegally conducted wiretap is a motion to suppress pursuant to Penal Code section

\(^8\) Id. § 629.04(a)-(e).
\(^9\) Id. § 629.06.
\(^20\) Id. § 629.08.
\(^21\) Id. § 629.10.
\(^22\) Id. § 629.12.
\(^23\) Id. § 629.18.
\(^24\) Id. § 629.20.
\(^25\) Id. §§ 629.24, 629.26, 629.28.
There are three significant differences in the California Act. The California legislation, unlike its federal counterpart, has an added feature regarding "privileged communications." This unique provision requires law enforcement to go "off line" and "on line" when privileged conversations are taking place.

The California Act, also unlike the federal counterpart, forbids the use of derivative evidence of non-specified crimes, unless there is an independent source or the evidence inevitably would have been discovered. Basically, this provision precludes the use of evidence gathered by the interception as it relates to criminal activity not delineated as the targeted drug offenses, unless law enforcement officials reasonably could have gathered this evidence in another manner.

Finally, the California Act forbids covert entry to affect the purposes of the wiretap.

II. OVERVIEW OF SIGNIFICANT ISSUES RAISED BY THE CALIFORNIA LEGISLATION

A. Overall Constitutionality of the Act

The wording of the California Act closely parallels Title III. Title III encourages states to adopt parallel statutes and the California Legislature was mindful of this when enacting its statute. While no federal case has mounted a broad, facial attack of Title III in the United States Supreme Court, the California Act will probably not escape such challenge before the California Supreme Court.

Title III came under immediate constitutional scrutiny at the district court and court of appeal levels. The ensuing legal attacks were based on prior United States Supreme Court holdings relative to privacy expectations and focused on particular sections of the legislation. A frontal attack, questioning the social benefit of electronic invasions, never materialized.

In questioning Title III's constitutionality, defense practitioners looked to two United States Supreme Court decisions to buttress

26. Id. § 629.22.
27. Id. § 629.30.
28. Id.
29. Id. § 629.32(b).
30. Id. § 629.39.
31. Senate Committee on Judiciary, supra note 5.
their attacks. In the decision of *Berger v. New York*, the Court struck down the New York Wiretap statute on the basis of numerous deficiencies. Such deficiencies included the failure to require specification of the crime targeted, the sixty-day length of the tap, automatic review of the intrusion and the failure of the statute to require an inventory upon completion.

A second decision announced that same year, *Katz v. United States*, provided the Court with an opportunity to develop its landmark test for the privacy expectations of citizens. In that case, an electronic listening device was attached to the top of a phone booth and conversations were intercepted without the benefit of a search warrant. The Court emphasized that the protections available under the fourth amendment are personal, and that what an individual seeks to keep private, regardless of the location, should remain so. The Court did note, however, that such intercepted evidence might have been admissible in court if obtained pursuant to a duly authorized warrant. Legislation leading to the approval of Title III immediately followed these decisions.

Thus, in the early decision of *United States v. Whittaker*, a district court in Pennsylvania found Title III unconstitutionally broad. The ruling was based on *Berger* and *Katz*. Specifically, the court in *Whittaker* found three defects in Title III that ran afoul of the rules enunciated in those cases. First, the court found the thirty-day period of interception to be unduly extensive. Next, it found that the failure to provide standards provided unguided discretion for law enforcement. Finally, Title III failed to provide prompt notice of interference. This decision was quickly overruled. In *United States v. Cafero*, the Third Circuit overruled *Whittaker* and the stage was set for further constitutional attacks.

The court in *Cafero* found that the Constitution did not foreclose the use of electronic surveillance so long as proper procedures were implemented. The court explained that Title III required a careful and complete delineation of facts and circumstances underlying probable cause. Moreover, the court found that the time limitation of thirty days or less was reasonable. The court explained:

> Carte blanche is given no one. Executing officers are not free to intercept beyond attainment of their objective for an hour, a

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35. 473 F.2d 489 (3d Cir. 1973).
day, seven days, or twenty-nine days. They are allotted time to achieve an objective, period. Should they intercept beyond this time, they have violated the Act.38

The defendant in Cafero had also challenged Title III on the ground that termination of the interception was illusory in light of the extension provisions. The court concluded that Title III did satisfactorily require new showings of probable cause to obtain an extension, but acknowledged that "'[b]ootstrapping', the phenomenon of one interception begetting another in the guise of probable cause, may occur."39

Traditionally, Title III has been interpreted as striking a delicate balance between the legitimate interests of law enforcement and the privacy rights of individuals.38 Unfortunately, the courts have paid little more than lip service to the privacy interests. For example, in United States v. Kalustian,39 the Court noted:

The restraint with which such authority was created reflects the legitimate fears with which a free society entertains the use of electronic surveillance. As stated in Berger, . . . "Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."40

The California Constitution, article I, section 1, provides specifically for a right of privacy.41 The protection has afforded California citizens with extensive privacy rights not enjoyed in any other state. While the California Supreme Court has always enforced the standard enunciated in Katz, the court has developed its own body of rules on privacy matters that exceed the protections provided in Katz.42 With this, California has given succor to those persons who desire to keep their matters within their residence.43

Prior to the addition of Proposition 8, the Victim's Bill of Rights, to the California Constitution, the question of wiretapping

36. Id. at 496.
37. Id. at 497.
39. 529 F.2d 585 (9th Cir. 1976).
40. Id. at 588.
41. CAL. CONST. art. I, § 1 (1974). "All people . . . have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy." Id.
might have been clear cut. The California Supreme Court might have simply voided the wiretap legislation on grounds that it was violative of the privacy guarantees contained in the California Constitution. The court also may have looked at the long established tradition of upholding the state Constitution on "separate and independent grounds" and voided the California Act. This powerful judicial vehicle for the expansion of liberty interests in California was first advanced by the state Supreme Court in California v. Krivda and People v. Brisendine. Under this constitutional doctrine, the California Supreme Court developed its own body of privacy rights that were more expansive than those promulgated by the United States Supreme Court pursuant to the federal Constitution.

However, in 1982, California voters enacted Proposition 8, which added the following language to the state Constitution:

Except as provided by statute hereafter enacted by two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding . . . .

In essence, this provision abolished the tradition of a separate and independent California Constitution as it relates to California's search and seizure matters. Specifically, in the case of In re Lance W., the California Supreme Court declared that the California standard for the exclusion of illegally seized evidence was to be congruent with the federal standard. The court explained:

What Proposition 8 does is to eliminate a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled.

Thus, Lance W. severely restricts potential challenges to the Wiretap Act under the California Constitution. The Act must be evaluated according to federal law and evidentiary exclusions must be limited to violations of the fourth amendment. However, Lance W. does leave open the prospect of civil actions for violations of Cali-

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48. Id. at 886-87, 210 Cal. Rptr. at 639.
49. CAL. PENAL CODE § 629.22 (West 1988).
Accordingly, the only potential challenges to this Act might be a taxpayer suit to declare the entire Act in violation of article I, section I of the California Constitution and a detailed, case-by-case challenge to key portions of the Act.

B. The Sweep of the Two Statutes

The California and federal statutes pursue different objectives. Title III focuses primarily on crimes of international consequence, interstate racketeering, extortion and drug offenses. In contrast, the California Act targets crime involving four controlled substances: heroin, cocaine, PCP and methamphetamine.

Title III is aimed at major interstate offenses. However, the enumerated offenses are so broad in their focus that renewal of the wiretap or a derivative evidentiary question rarely arises. For example, a case could commence under the auspices of gathering evidence on a cocaine distribution network. During the course of the interception process, conversations might disclose an extortion scheme. As a result of the broad coverage of the Title III enumerated offenses, federal courts would have little or no difficulty permitting the admission of such derivative evidence at trial.

The California Act, on the other hand, has a specific and narrow sweep. Specifically, the Act is limited to several enumerated controlled substance offenses. The California Act also specifically forbids the use of intercepted evidence of crimes other than the crime or crimes described in the wiretap application, "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."52

The process established by the California Legislature is illusory in light of the trend toward upholding validly issued orders for electronic interception. The procedure for determining whether derivative evidence was lawfully obtained requires the courts to evaluate an interception that has already run its course. A brief review of national statistics illustrates the tendency of courts to admit wiretap evidence. In 1987, 673 orders were sought from judges within the

52. Id. § 629.32(b).
of thirty-three jurisdictions permitting wiretap surveillance. Of those, no orders were denied. Of the 673 orders, fifty-six percent of the wiretaps were geared toward narcotics offenses; twenty percent were geared toward gambling offenses and nine percent were geared toward racketeering offenses. During the calendar year 1986, no motions to suppress electronically intercepted conversations were granted in federal court.

The message to lawyers seeking to suppress wiretap evidence is predictable: the motion may be well written, but will probably receive short shrift in the courts. The trend in California, under the dual exceptions for "independent source" and "inevitable discovery," casts a long shadow on the hopes of anyone seeking suppression of derivative evidence.

Constitutionally, both the independent source and inevitable discovery exceptions carry tremendous significance. In the federal case of Nardone v. United States, the government utilized evidence from an illegal wiretap. The question was whether the case against the defendant could have been proven independent of the inadmissible evidence. In this case, the government utilized evidence from an illegal wiretap. The court stated:

Here, as in the Silverthorne case, the facts improperly obtained do not "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it" simply because it is used derivatively. 251 U.S. 385, 392.

In practice this generalized statement may conceal concrete complexities. Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. A sensible way of dealing with such a situation—fair to the intendment of § 605, but fair also to the purposes of the criminal law—ought to be within the reach of experienced trial judges. The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that

54. Id.
55. Id.
56. Id. at 22.
57. 308 U.S. 338 (1939).
wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.\textsuperscript{58}

The California wiretap statute requires that the trial court make a finding that there was an independent source for the evidence or that the evidence would have inevitably been discovered. \textit{Nardone} provides a fair indication of the attenuation needed to remove the taint of illegality.

Another example of the taint issue was seen in the federal case of \textit{Gelbard v. United States}.\textsuperscript{59} In that case, the United States Supreme Court foreclosed the testimony of a grand jury witness and, therefore, sanctioned a refusal to testify where the evidence was obtained from an illegal electronic surveillance.

The concept of inevitable discovery was discussed in the federal case of \textit{Nix v. Williams}.\textsuperscript{60} In that case, the United States Supreme Court defined the concept as follows:

\begin{quote}
[If the government can prove that the evidence would have been obtained inevitably and, therefore, would have been admitted regardless of any over-reaching by the police, there is no rational basis to keep that evidence from the jury in order to ensure the fairness of the trial proceedings.\textsuperscript{61}
\end{quote}

More recently, the Court in the case of \textit{Murray v. United States},\textsuperscript{62} refined the two concepts of independant source and inevitable discovery. The Court noted:

\begin{quote}
The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independant source doctrine. \textit{Since} the tainted evidence would be admissible if in fact discovered through an independant source, it should be admissible if it inevitably would have been discovered.\textsuperscript{63}
\end{quote}

California courts have adopted this line of reasoning and have implemented the federal standards for independent source and inevi-

\begin{flushleft}
\textsuperscript{58} \textit{Id. at 341.} \\
\textsuperscript{59} 408 U.S. 41 (1972). \\
\textsuperscript{60} 467 U.S. 431 (1984). \\
\textsuperscript{61} \textit{Id. at 447.} \\
\textsuperscript{62} 108 S. Ct. 2529 (1988). \\
\textsuperscript{63} \textit{Id. at 2534.}
\end{flushleft}
C. Standing to Make the Motion to Suppress

Title III contains its own suppression procedure.64 The rule permits an “aggrieved person” to move for suppression. An “aggrieved person” is defined as “a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.”65

Traditional federal standards of “standing” apply in motions to suppress contested wiretaps. This means that pursuant to Alderman v. United States66 and Rakas v. Illinois,67 the person requesting suppression must demonstrate either that he or she is an interceptee or the person is closely associated with the targeted facility.68

The California Act was framed in less precise terms. Penal Code Section 629.22 provides, in part, as follows:

> Any person . . . may move to suppress some or all of the contents of any intercepted wire communications, or evidence derived therefrom, only on the basis that the contents or evidence were obtained in violation of the Fourth Amendment of the United States Constitution or of this chapter.69

The words “any person” are susceptible to more than one interpretation. Since the primary conclusion of In re Lance W. was that California’s constitutional rule was congruent with the federal rule forbidding vicarious standing, an argument might be made that “any person” must be someone with direct standing. This argument would deny standing to non-intercepted co-defendants or co-conspirators who were derivatively implicated.

On the other hand, an argument could be made that the language employed in the Act provides for expanded standing. The argument would be that by referring to “any person,” rather than an “aggrieved person” as in the federal Act, the California Legislature indicated its intention to expand standing beyond the narrow con-

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64. 18 U.S.C. § 2518(10)(a), (b), (c) (1970).
65. Id. § 2510(11) (Supp. IV 1986).
68. While prosecutors have traditionally adhered to this view, some doubt was cast on this view by the United States Supreme Court decision of United States v. Donovan, 429 U.S. 413, 432-33 (1977). In footnote 22, the majority indicates that because 18 U.S.C. § 2518 (10)(a) (1982) provides for suppression of illegally seized oral or wire communication, or “evidence derived therefrom,” other interceptees have standing.
fines of Lance W. Moreover, it may further be argued that since the Act passed by more than a two-thirds majority in the California Legislature, it accordingly altered the standing requirement of Lance W. This argument is premised on the fact that Proposition 8 may be amended by a two-thirds vote of the California Legislature.

D. Technical Requirements

The California courts will be confronted with challenges in three specific technical areas. The courts are likely to rely heavily on federal interpretations of Title III to resolve these challenges. These areas of potential contest include the naming of persons affected when determining probable cause, the filing of the post-interception inventory, and the problem of covert entry to affect the interception.

Title III and the California Act are virtually identical in their language concerning the identification of persons perceived to be potential interceptees. Often, during the course of an interception, persons who are not named as targets become involved in the criminal conduct. While the California courts have not had an opportunity to determine the legality of this process, the federal courts have spoken clearly.

This problem was addressed in the case of United States v. Donovan. In that case, both the district court and court of appeals sustained a motion to suppress because the investigators failed to name the defendants as potential interceptees in the application for the intercept order.

The United States Supreme Court considered the legislative history of Title III and determined that this failure to identify did not constitute an adequate ground to suppress. Defense counsel attempted to analogize the violation with that forbidden in United States v. Giordano. In that case, the Department of Justice failed to designate a wiretap applicant and this failure led to suppression of the intercepted evidence. In Donovan, the Court reasoned that unlike Giordano, the failure to identify persons to be intercepted was not a violation of precondition requirements and, further, it failed to play a "central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance."

The California courts would likely view a non-targeted person's
motion to suppress in the same fashion. This is because the courts would also view the activity as an unimportant part of the process.

A second technical requirement the government must follow under both Title III and the California Act is the post-interception inventory process. This process requires law enforcement officials to file notice with the court that conversations were intercepted. Unless good cause is shown, the court requires persons affected to be served with notice that their conversations were intercepted. This requirement was established to comply with the notion that potential grand jury targets should be treated adequately and informed that certain covert investigation techniques were used against them. The Congressional Record is replete with discussions of situations in which inventories should not have been served. For example, publication of the inventory may be adverse to the business reputation of the callers. On the other hand, legitimate fears regarding the failure to file the inventory are frequently raised. Also discussed is the view that if the government has willfully breached the very stringent technical requirements of Title III, suppression of the conversations would be the only remedy.

But in United States v. Donovan, the Court specifically held that the inventory requirement was one of the requirements that did not necessitate suppression if unfulfilled since it neither violates a precondition of an interception order nor goes to a central role in the surveillance process.

However, Donovan left the issues of identification and inventory unresolved in one critical area. That is, if the government intentionally and in bad faith omitted certain names, or conspired to deprive the district court judge of those names, or conspired to deprive an interceptee of notice, would suppression be appropriate? The Court suggests that if actual prejudice can be articulated, then suppression may be in order.

Given the fact, however, that the California Act provides for complete discovery of the intercepted conversation, then prejudice, if any, would be slight. Accordingly, it would be difficult under the California Act to provide defense counsel a basis on which to suppress the entire interception.

Finally, issues involving the covert entry to execute surveillance orders is one of major importance. The United States Supreme Court, in Dalia v. United States, held that covert entry was per-

73. 114 Cong. Rec. 14,476 (1968); Donovan, 429 U.S. at 430 n.20.
74. Donovan, 429 U.S. at 439 n.29.
75. 441 U.S. 238 (1979).
missible under Title III. The California Legislature strictly forbade this approach in Penal Code Section 629.39. This means that since this activity is proscribed, any evidence suggesting covert entry would give rise to suppression of the conversations. This conclusion is also supported by California's high regard for privacy interests.

E. Probable Cause Problems

Probable cause is statutorily required by Title III and the California Wiretap Act before an intercept order will be issued. The probable cause requirement has two separate analyses. The first is the overall evaluation of the underlying facts, including the suspected crimes, the persons to be targeted, the location and layout of the facility, and the type of conversations to be seized. The second prong of the inquiry is the so-called "necessity" prong, which requires law enforcement officials to detail reasons that conventional investigative techniques will not work or are too dangerous to attempt.

"Probable cause" hinges upon the definition coined by the United States Supreme Court. When Title III was adopted in 1968, the definition for probable cause was the *Aguilar-Spinelli* standard that required a search warrant applicant to disclose the factual reliability of his or her information and to disclose the credibility of the informant. By adhering to the precise wording of Title III and by utilizing the *Aguilar-Spinelli* template, the federal courts were required to screen applications carefully. In 1983, the United States Supreme Court modified its test for probable cause in the case of *Gates v. Illinois*. In that case, the standard was relaxed to provide that probable cause need not be mechanically weighed, and instead the courts need only look to the "totality of the circumstances" in determining whether probable cause exists.

Curiously, the decision in *Gates* had little impact on the rate of rejection of warrants for electronic interception. A review of the ten-year statistics from the United States Administrative Office of Courts notes the following rate of rejection:  

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76. The district court must enter an order that "probable cause" exists. This requirement necessarily hinges on the current definition of that term by the United States Supreme Court.
Year | Applications | Granted | Denied | %Denied
--- | --- | --- | --- | ---
1977-1983 | 4,132 | 4,128 | 4 | .09%
1984-1987 | 3,017 | 3,012 | 5 | .16%

As specifically articulated by the Court in *United States v. Camp*, the determination by a judge in issuing an intercept order is a fluid process in which great deference is paid to the expertise of the officials seeking the intercept order. The Court noted:

> The task of the issuing [judge] is simply to make a practical, commonsense decision whether, given all of the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the [judge] had a "substantial basis for . . . concluding" that probable cause existed.  

This evaluation process encompasses the statutory mandate of Title III and the holding of *Gates*.

There are strong policy reasons for seeking a departure from the *Gates* standard in the electronic interception context. California courts may be presented with some of these arguments to override *Gates* in a challenge to the California Act. The policy reasons include the following four considerations.

First, as pointed out in *Gates*, the applicant seeking the search warrant might not be the highest trained investigator. Common sense dictates that police department training standards vary according to jurisdiction. In the electronic monitoring arena, Title III and the California Act require a lawyer within the highest echelons of prosecutorial service to seek the application. The statutes also require advanced training of such persons responsible for the actual wiretapping.

Second, *Gates* also suggests that in some jurisdictions the magistrate signing the warrants might not be a lawyer. This leads to a departure from a rigorous formulation of probable cause. In the electronic interception area, the order may only be signed by a "judge" or, in California, a superior court judge.

Third, of major concern in *Gates* was the preference for war-

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80. 723 F.2d 741, 745 (9th Cir. 1984).
82. 462 U.S. at 235.
83. E.g., CAL. PENAL CODE § 629.44(a)(b) (West 1988).
84. 462 U.S. at 235.
85. U.S. CONST. art. III.
rants. The fear was that by rejecting warrants, law enforcement officials would rely on less neutrally detached methods of gathering the evidence. In the electronic surveillance arena, the only way to garner evidence is to do so through the use of the order of interception.

Finally, a physical search is a one-time intrusion. While it may have the consequence of upsetting the target's life, it ceases within a short number of hours. But an electronic surveillance can continue for weeks. A ten-year survey disclosed that wiretaps average twenty-five days per order. In one New Jersey district court authorization, the tap remained on the line for 258 days. This is hardly the one-time intrusion contemplated by the authors of the Gates opinion.

Still, it is unlikely that the United States Supreme Court or the California Supreme Court will require a higher standard for applications and will distinguish the holding of Gates in the electronic interception area. Alternatively, in lieu of a broad based challenge to the Gates standard, the California courts, like the federal courts, will insist on strict compliance with the probable cause formulation within their respective acts. Both Title III and the California Act require law enforcement officials to give a full and complete statement of the facts and circumstances surrounding the situation prompting the need for electronic intrusion. In evaluating the application, the California courts will probably look to federal decisions for guidance.

Issues surrounding three probable cause factors have frequently arisen in the federal context. These factors include the conclusory statement in the application, the staleness of the information, and the location of the tap. First, the federal courts have not favored the use of conclusory language in applications. When Title III and the California Act insist on “facts and circumstances,” bald assertions will not suffice. For example, under the necessity prong, the court in United States v. Kalustian stated:

In effect the Government's position is that all gambling conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view.

86. 462 U.S. at 236.
87. By definition, as in Gates, the intrusion was a one-time intrusion.
88. REPORT ON APPLICATIONS, supra note 53, at 38.
89. 529 F.2d 585 (9th Cir. 1975).
90. Id. at 589.
A second factor arising in federal court is that of the staleness of the received information. The court in *United States v. Martino*91 pointed out that “[i]t is elementary that the probable cause needed to validate the issuance of an authorization for a wiretap must exist at the time of issuance.”92 In this connection, the court must review the age of the facts, the potential transitory nature of the alleged conduct and the recency of the confidential informant’s observations.

A final factor is the issuance of the order for “facilities as to which, or the place,” where the communication is to be intercepted.93 “Facilities,” as used in this context, refers to the electronic device for carrying the communication. The critical point is that either the facility or the location must be clearly identified. Whether this means that there has to be prior contact on a particular facility (telephone number) is a question yet to be resolved. What is clear, however, is that most courts look to the address of the target to provide guidance. For example, in *United States v. Adams*,94 the court was provided with ample evidence that the location was one that was being utilized regularly for drug purchases. This intercept accordingly passed muster.

The concept of “necessity” for the authorization is one with which the courts have constantly grappled. Under both Title III and the California Act, the applicant must allege and the court must certify that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.”95 In cases in which “necessity” has been challenged, courts have been quick to point out several issues.

First, courts have held in numerous cases that while electronic surveillance should not be the first investigative tool of choice, law enforcement officials need not wait for every aspect to fail before utilizing it.96 For example, in *United States v. Bailey*,97 the court stated that “the necessity requirement is also to be interpreted in a practical, common sense fashion, and need not therefore be used only as a last resort.”98 In *Bailey*, a lengthy one-and-one-half year investigation yielded little evidence. A decoder was placed on the touch-

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91. 664 F.2d 860 (2d Cir. 1981).
92. Id. at 866 (citations omitted).
94. 759 F.2d 1099 (3d Cir. 1985).
96. See United States v. Martin, 599 F.2d 880 (9th Cir. 1979); United States v. Smith, 519 F.2d 516 (9th Cir. 1975); United States v. Santora, 600 F.2d 1317 (9th Cir. 1979).
97. 607 F.2d 237 (9th Cir. 1979).
98. Id. at 241-42.
tone phone. The decoder was promptly discovered. Informants could not permeate the veil of the activities. The court found that the actions, documented by a thirty-two page affidavit, constituted sufficient necessity for the wiretap, which was finally installed.

Second, the affidavit must set forth facts that clearly establish that there is compliance with the necessity requirement. Often, applicants seeking a wiretap rely on the fact that certain classes of cases must, by their very nature, require electronic intrusion. The courts have rejected this notion in many cases and require specific facts to bolster a showing of necessity. For example, in the case of United States v. Ippolito, the court explained the reasons for the requirement:

The reason for the requiring specificity is to prevent the government from making general allegations about classes of cases and thereby sidestepping the requirement that there be necessity in the particular investigation in which a wiretap is sought.

Conclusory language within the application is the most common failure. In the case of United States v. Spagnuolo, the court was met with an application that failed to factually describe why normal investigative procedures would not work. Moreover, the application was boilerplate and conclusory in its assertions. The Court held:

We start by indicating that the common thread running through the Kerrigan line of decisions is 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. This may be accomplished in various ways, including, but not limited to, descriptions of the particular illicit operation's peculiarities which necessitate a wiretap and of the heretofore unsuccessful investigatory efforts of the police. . . . An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with Section 2518(1)(c).

Third, the same showing of necessity is required as to each co-conspirator to be included and as to each extension order. The court found that in United States v. Abascal, a mere desire to tap all co-conspirators was not enough of the required necessity to allow a tap

99. 774 F.2d 1482 (9th Cir. 1985).
100. Id. at 1486.
101. 549 F.2d 705 (9th Cir. 1977).
102. Id. at 710.
103. 564 F.2d 821, 826 (9th Cir. 1977).
to go forth.

Finally, it appears that if the application factually discloses information relative to a particular target, and there has been a failure of less intrusive means of infiltration, a showing of necessity will be complete. The courts do not accord much weight to defense counsel's second guessing of professional investigators such as the F.B.I. and D.E.A. In more than one case, the courts have focused on proving the necessity requirement at the time of the application, rather than on what may have developed or what other techniques defense counsel now suggests could or should have been utilized at the time the warrant was requested.104

If, however, information presented to the judge is materially false and misleading, the defendant still maintains the right to challenge the factual veracity of the application pursuant to Franks v. Delaware.105 An attack on an application on the basis that it rests on false and material statements can apply to overall probable cause or to the necessity prong of the requirement.

In the case of United States v. Perdomo,106 the court set forth five essential requirements for a Franks hearing:

(1) the defendant must allege specifically what portions of the warrant affidavit are claimed to be false; (2) the defendant must contend that the false statements or omissions were deliberately or recklessly made; (3) a detailed offer of proof, including affidavits, must accompany the allegations; (4) the veracity of only the affiant must be challenged; (5) the challenged statements must be necessary to find probable cause.107

In the case of United States v. Ippolito, the defense proved that the government used materially false statements regarding an informer. This severely crippled the necessity prong of the government's case, and the wiretap was suppressed.

The most common failure in a Franks motion is simply failing to make a clear offer of proof to upset the balance in finding probable cause. There are always numerous errors in the affidavits, which often run 80-100 pages in length. The critical feature is finding a pivotal issue that can sway the balance toward requiring an evidentiary hearing.

The probable cause and necessity elements of a wiretap case

104. E.g., United States v. Orozco, 630 F. Supp. 1418, 1509 (S.D. Cal. 1986); United States v. Martinez, 588 F.2d 1227, 1232 (9th Cir. 1978).
106. 800 F.2d 916 (9th Cir. 1986).
107. Id. at 920.
will be the most fruitful portion for litigation concerning the California Act. With California's liberal criminal defense discovery law, most attention will probably be focused on the application of the Franks hearing.

F. The Minimization Requirement

Both Title III and the California Act require that the intercepting agents "minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days." There is by statute, therefore, a quantitative measure for minimizing the interference and by case law, a qualitative measure.

The quantitative measurement of minimization is thirty days or whenever the objective is attained. This assumes several features requiring closer examination. First, the thirty-day period is subject to a new application for extension. Second, the "attainment of the goal" is sometimes meaningless since the goals may have been set forth in very broad strokes. For example, under federal law, if the applicant identified the targeted crime as a "continuing criminal enterprise" and wished the court to authorize a tap to "learn of the web of the cocaine dealings of X," the goal could never completely be obtained but the basis for numerous extensions has been established. Rather than approaching the problem in terms of a minimization problem, a judge might instead scrutinize the law as a probable cause or "general warrant" problem devoid of any specificity relative to known facts.

Appellate courts reviewing Title III have not adopted a per se rule regarding the length of legal interception. In the case of United States v. Tortorello, the court rejected a contention that a five month, twenty day tap was unreasonable. A similar challenge to a fifty-nine day tap was rejected in United States v. Manfredi.

The qualitative measure of minimization is more troublesome and will be a major issue in the interpretation of the California Act. In the landmark case of Scott v. United States, the United States
Supreme Court refused to paint a bright line to evaluate the minimization efforts mandated by Title III since a "strict percentage" rule would be counterproductive. Rather, the Court identified four critical areas.

First, according to Scott, the hearing court must look at the objective facts and circumstances rather than the subjective intent manifested by the officer.\textsuperscript{114} By examining the facts known to the officer, a clearer picture of what was reasonable emerges.

Second, there should be a flexible approach in determining whether reasonableness was proper in a given case.\textsuperscript{115} In Scott, the agents "seized" every conversation during the course of a one month wiretap. Percentages of calls intercepted are not the sole determining factor for the court.

Third, the type of facility is important.\textsuperscript{116} The Court pointed out that if the phone was a public telephone suspected of being commonly used by illegal gamblers, minimization would be greater than if the phone was located at the alleged residence of a perceived kingpin in a drug conspiracy.

Finally, the court looks to events during the early stage of the interception to see whether the calls can be categorized as either nonpertinent, and therefore minimized, or calls of great relevance. During the life of the tap, the court should examine the degree of minimization utilized on non-pertinent calls.

The Scott decision was not greeted with high praise from two members of the Court. Justice Brennan, who was joined by Justice Marshall, dissented as follows:

The Court today eviscerates this congressionally mandated protection of individual privacy, marking the third decision in which the Court has disregarded or diluted congressionally established safeguards designed to prevent Government electronic surveillance from becoming the abhorred general warrant which historically had destroyed the cherished expectation of privacy in the home.\textsuperscript{117}

Both the dissenters and the petitioners in Scott advanced the notion that the subjective intent of the agents was critical. In other words, if the agents attempted in good faith to minimize, then mental state is relevant to a determination by the court on the issue of sup-

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 136.
\item \textit{Id.} at 139-140.
\item \textit{Id.} at 140-141.
\item \textit{Id.} at 143-144.
\end{enumerate}
\end{footnotesize}
pression. The majority deferred this reasoning by holding that after a violation had been proven, the question of good faith was then to be considered in determining whether suppression was appropriate.

This means, of course, that the government could still have committed a violation of the minimization mandate. If it was committed in good faith, however, the suppression of the intercepted calls may not be required.

The good faith standard did have a life prior to Scott. In the case of United States v. Turner,\(^{118}\) the court explored a tap lasting some forty days. The agents intercepted 1,788 conversations of which 539 were busy signals, wrong numbers or misdials. Of the remaining conversations, 670 lasted one minute and 185, or one-third of the other 589 were minimized. The court held:

In a case where it is clear that the minimization provision of the order was disregarded by the Government throughout the period covered by the order, a total suppression might well be appropriate. We assume, arguendo, that such should be the rule. Here, however, the district court found reasonable and good-faith effort on the part of the Government to comply with the orders authorizing the interceptions.\(^{119}\)

A more particular problem of minimization arises when agents intercept privileged calls. Originally, the American Bar Association’s Section on Criminal Justice drafted a major portion of what was to become Title III.\(^{120}\) Part of the ABA Standard Relating to Electronic Surveillance specified the prohibition against tapping otherwise privileged conversations. Currently, Standard 2-5.10 provides:

(a) No order should be permitted authorizing or approving the overhearing or recording of communications over a facility or in a place primarily used by licensed physicians, licensed lawyers, practicing clergymen, or other professionals whose communications are deemed to be privileged under applicable state law, in a place used primarily for habitation by a husband and wife, unless, in addition to the showings required under standards 2-5.3 and 2-5.4, the applicant establishes probable cause to believe that there is a special need to conduct such surveillance.

(b) No otherwise privileged wire or oral communication overheard in accordance with or in violation of these standards

\(^{118}\) 528 F.2d 143 (9th Cir. 1975).

\(^{119}\) Id. at 156.

\(^{120}\) For a general history of formulation of Title III, see Schwartz, supra note 4.
should lose its privileged character.\textsuperscript{121}

Indeed, in the early phases of implementation of Title III, the government was very reluctant to pursue privileged conversations. For example, the agents in \textit{United States v. Chavez}\textsuperscript{122} were cautioned by the instructing agent to terminate any lawyer-client calls or priest-penitent calls. No such instructions are in operation presently. The courts have accepted the government's premise that attorneys may well be part of a conspiracy and, therefore, their calls are not worthy of termination.\textsuperscript{123}

The California Act parts company with Title III on this point. The California law specifically describes how minimization of privileged communications shall occur. The Legislature has described an "off-line" and "on-line" process that is a compromise to many, but should provide some needed protections.

Under federal law, the trial court does not have to hold a minimization hearing simply because the defendant has so requested. Instead, the defendant must make an extensive showing of potential violations of the minimization requirement. The procedural steps in such a hearing were outlined in the case of \textit{United States v. Orozco}.\textsuperscript{124}

The government has the burden of proof in the first instance to show that the minimization requirement was met. . . . Compliance with the minimization requirement is demonstrated by a showing that agents' minimization efforts were reasonable under the circumstances. . . . There is no single formula that can be applied to determine whether agents made reasonable efforts to minimize the seizure of unauthorized conversations while conducting the wiretaps. The reasonableness of their efforts will depend upon the facts and circumstances of each case. . . .

The question of whether an evidentiary hearing on a motion to suppress is appropriate rests on the reasoned discretion of the district court. . . . The extent of inquiry to be permitted during a minimization hearing is also within the court's discretion. . . . A survey of the case law provides no absolute rule as to when and to what extent an evidentiary hearing should be

\textsuperscript{121} I ABA \textsc{Standards for Criminal Justice} 2-5.10 (2d ed. 1980). \textit{See supra} notes 2-56 and accompanying text.
\textsuperscript{122} 533 F.2d 491, 494 (9th Cir. 1976).
conducted in order to assist the court in its determination of the reasonableness of minimization efforts.\textsuperscript{125}

While this procedure might be a potential model for California, there is no certainty that it will be pursued. Unlike federal law, the decision to grant an evidentiary hearing is not controlled by the court. Rather, Penal Code section 1538.5 permits defense counsel to request a special hearing and the court has no power to deny an evidentiary presentation regarding any aspect of the wiretap process, including minimization. What is normally a tight process under Title III may be a wide ranging exploration under California law.

III. CONCLUSION

The California Wiretap Act was modeled after Title III of the federal law. However, unlike the broad sweep of Title III, the California Act only targets certain drug offenses. Nevertheless, in interpreting the California Act, the courts of this state are likely to give great weight to the decisions of the federal courts.

It is unlikely that the California Act will be declared unconstitutional as against the California Constitution, even though the state Constitution has a specific provision protecting the privacy of its citizens. Rather, lawyers who litigate in this area will have to be content with piecemeal, case-by-case attacks on the overall implementation of the Act. The areas of challenge will probably be limited to the technical requirements of the Act, the derivative evidence adduced, the formulation of probable cause and minimization.

While the Act has specifically rejected covert entry and across-the-board interception of privileged conversations, these two concessions to civil liberties are small in comparison to the intrusions likely to occur. Further, potential amendments aimed at lessening the intrusiveness of the Act will probably fail.

Finally, though the California Act is due to sunset on January 1, 1994, not many expect it to fade into the west on that date.

\textsuperscript{125} Id. at 1537 (citations omitted).