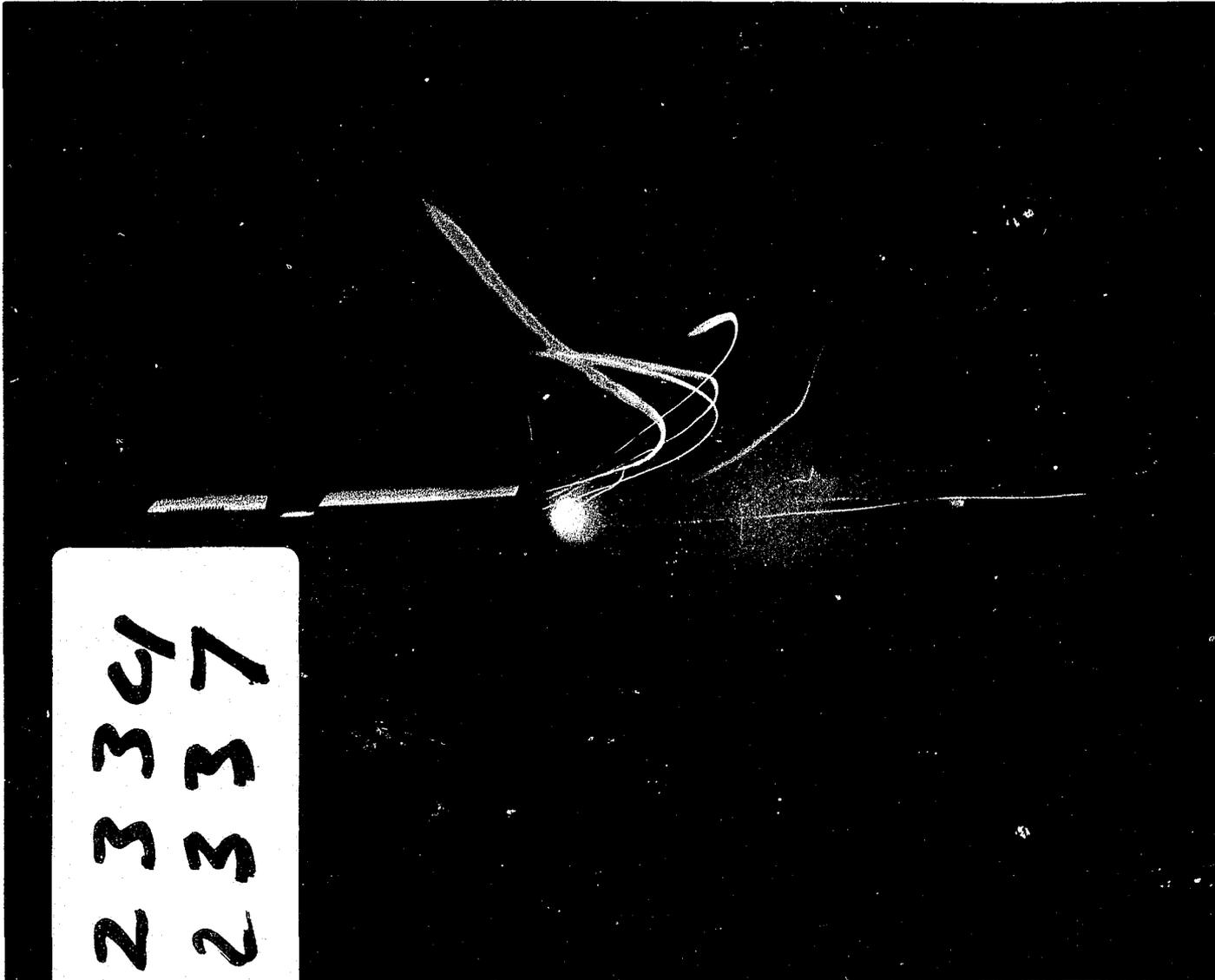




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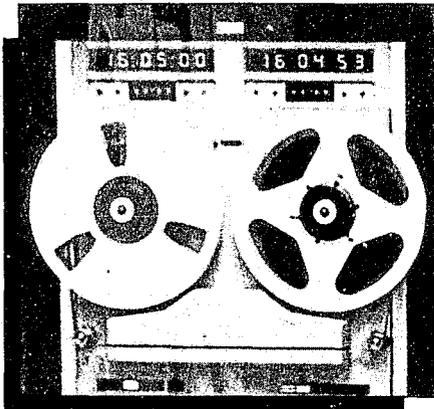
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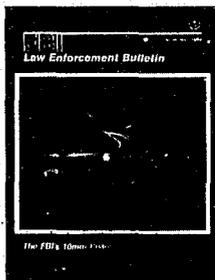
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The Cover: The 10mm semiautomatic pistol has been selected as the standard issue firearm for all FBI Agents. See article on page 2. All weapon photos in this issue are courtesy of Larry Wallery and Dennis Keener.

United States Department of Justice
Federal Bureau of Investigation
Washington, DC 20535

William S. Sessions, Director

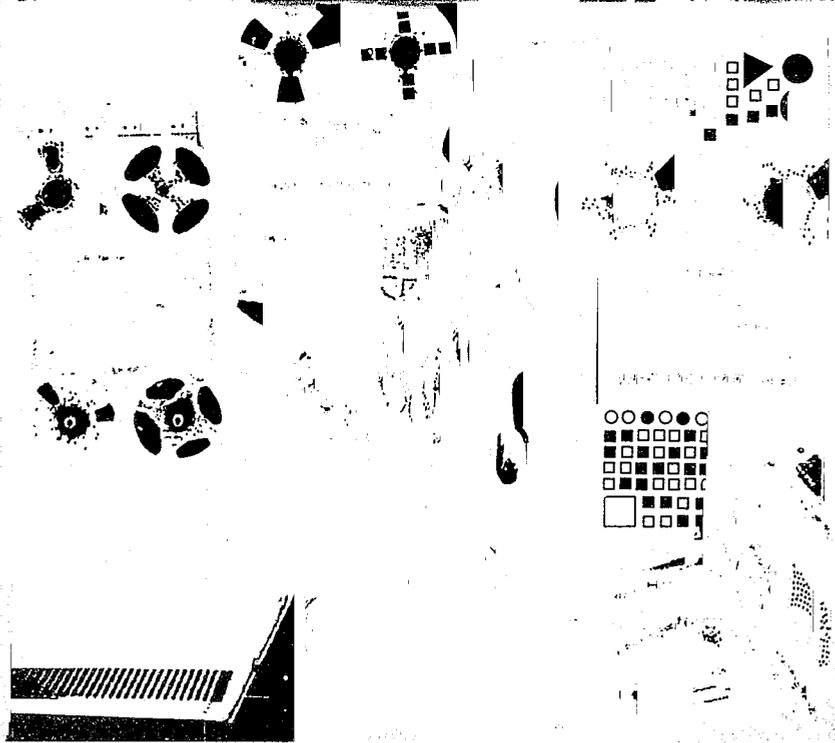
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The Judicial Sealing Requirement in Electronic Surveillance A Matter of Immediacy

BY

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Nonconsensual electronic surveillance involving the interception of telephone conversations, oral conversations, and electronic messages is a necessary and effective law enforcement technique for investigating certain types of serious criminal activity and conspiracies.¹ Legal requirements for nonconsensual electronic surveillance are set forth in Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (hereinafter title III),² as amended by the Electronic Com-

munications Privacy Act (ECPA) of 1986, and various State statutes which must be at least as restrictive as the Federal statutes.³ Compliance with the provisions of these statutes often requires the expenditure of considerable time, money, and manpower.

One such provision mandates the sealing of electronic surveillance evidence. It requires that "immediately upon the expiration of the period of the order [of electronic surveillance], or the extensions thereof, [the original

tape] recordings [of the interceptions] shall be made available to the judge issuing such order and sealed under his directions."⁴ Simply stated, the original tapes must be presented at the conclusion of the court-ordered period of nonconsensual interception to the issuing judge who will oversee their sealing and custody. Compliance with this judicial sealing requirement is sometimes delayed or overlooked because investigative personnel are preoccupied with seeking indictments, making

arrests, and conducting searches. Unfortunately, failure to comply with the sealing requirement can lead to the suppression of intercepted conversations and the loss of extremely valuable evidence.⁵

This article is written to assist law enforcement to understand and to successfully fulfill the sealing mandate. The article begins with a discussion of the purpose for this sealing requirement and its immediacy component. Next, it reviews the manner in which Federal and State courts have applied the sealing requirement. Finally, it suggests how law enforcement can prepare and ensure compliance.

THE JUDICIAL SEALING REQUIREMENT

The purpose of judicial sealing is to ensure the integrity of the electronic surveillance recordings, considering their potential for modification and the technical difficulty in detecting such changes.⁶ As one court recognized, judicial sealing accomplishes this task by "... prevent[ing] tampering, alterations or editing; ... aid[ing] in establishing the chain of custody; and ... protect[ing] the confidentiality of the tapes."⁷

To effectively preserve the integrity of the original tapes, Federal and State law requires officers to present them to a judicial official *immediately* at the conclusion of the original electronic surveillance order. However, officers may generally wait to fulfill this mandate until the expiration of any continuous noninterrupted extensions of that order if the extensions involve "... the same telephone, the same premises, the same crime, and substantially the same persons."⁸ For example, if

officers obtain an order authorizing the interception of telephone calls regarding drug transactions by certain individuals at a particular phone and obtain a judicial extension of that order, they may delay their formal sealing efforts until the conclusion of the continuous surveillance period.

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Some courts will not excuse a sealing delay ... unless the government is able to provide a satisfactory explanation for the failure to immediately seal....

”

However, if officers complete the objective of their investigation and cease their interceptions before the court-authorized time period has expired, they should fulfill the sealing requirement immediately at the time of cessation.⁹

IMMEDIACY DEFINED

When the judicial sealing requirement attaches, officers must comply with its demands immediately. The concept of immediacy usually connotes spontaneity or an absence of any delay. Law enforcement officers can normally satisfy this requirement by presenting the original tapes to the appropriate judicial official for sealing within 1 or at most 2 days of the final day of the continuous period of interceptions.¹⁰ This allows officers reasonable time to arrange the sealing appearance with the prosecuting attorney who has supervised the electronic surveillance and to schedule the sealing appointment with the appropriate judge. However, if the formal sealing process is delayed

beyond this limited period, courts must determine whether the delay is legally acceptable.

ACCEPTABLE DELAY IN SEALING

The standard for determining whether a particular delay in complying with the judicial sealing

requirement is acceptable varies from jurisdiction to jurisdiction. In the absence of a definitive Supreme Court decision, courts use one of the following three standards in making this determination:

- 1) Whether the government, despite the delay, has fulfilled the purpose of formal sealing by maintaining the integrity of the tapes;
- 2) Whether law enforcement has provided a satisfactory explanation for the delay; or
- 3) Whether officers have complied with a rigid, court-imposed sealing schedule.

Each of these three standards for determining whether sealing delay is acceptable is discussed below.

Integrity of Tapes Maintained Standard

Realizing that the goal of judicial sealing is to prevent alteration or modification of the original tapes, some courts have



Special Agent Fiatal

“**Courts do not ... excuse sealing delays merely because of the busy schedule of the supervising attorney or officer.**”

indicated that the “absence of any challenge to the integrity of the tapes, combined with the lack of any indication that tampering has occurred, goes a long way toward fulfilling [this] legislative objective.”¹¹ Therefore, even where there is a significant period of delay, courts using this standard, which include the U.S. Courts of Appeals for the Third, Fifth and Seventh Circuits, will not suppress the tapes if their integrity has not been violated and the defendant has not been prejudiced by the delay.¹²

Under this standard, officers can help insure the admissibility of the original tapes by maintaining them in a safe and secure manner. For example, in *United States v. Sklaroff*,¹³ the recordings were not judicially sealed until 14 days after the expiration of the nonconsensual electronic surveillance. During this delay, the original tapes were vigilantly kept in the FBI's evidence room with limited and controlled access. Under these circumstances, the U. S. Circuit Court of Appeals for the Fifth Circuit ruled the delay was excusable

because there was no indication that the tapes were altered or that the defendant was prejudiced. However, courts that apply this standard have put law enforcement on notice that it is not an open-ended invitation to ignore formal sealing requirements and that strict compliance will “avoid considerable uncertainty and delays”¹⁴ in the judicial process.

Satisfactory Explanation for Delay Standard

Some courts will not excuse a sealing delay, even if the original recordings have not been altered, unless the government is able to provide a satisfactory explanation for the failure to immediately seal the tapes at the conclusion of the period of continuous surveillance. These courts reason that title III requires a satisfactory explanation for the absence of the judicial seal¹⁵ and that a similar explanation is necessary when the tapes are not immediately sealed.¹⁶ Accordingly, the U.S. Court of Appeals for the First Circuit has recognized that “when sealing is other than ‘immediate’ ... result-

ant evidence can be utilized if—and only if—a ‘satisfactory explanation’ for the delay eventuates.”¹⁷

The circumstances that amount to a satisfactory explanation for a delay are determined on a case-by-case basis, but a “plain and simple failure to regard sealing the tapes as a priority”¹⁸ is never sufficient. Instead, the government must set forth a particularized explanation for the delay. First, the government must show that the tapes have not been compromised, that the delay provided no tactical advantage, and that proper security measures were employed in storing the original tapes.¹⁹

Second, the good faith of the officers involved must be established. Courts pay particular attention to the diligence of law enforcement personnel in attempting to satisfy the sealing prescription and whether the circumstances causing the delay were unforeseeable.²⁰ For example, in *United States v. Massino*,²¹ a 15-day delay in sealing was satisfactorily explained by the need to divert all available personnel to determine the cause of a leak in the investigation which was discovered the day before the electronic surveillance order expired. The court found there was an urgent need to investigate the leak which threatened to expose and endanger several informants and that the need for that investigation could not have been anticipated.

Similarly, in *United States v. Rodriguez*,²² a 14-day delay was found acceptable because the supervising prosecuting attorney was engaged in an unrelated multi-defendant trial at the end of the

surveillance period. Courts do not, however, excuse sealing delays merely because of the busy schedule of the supervising attorney or officer. For example, one State court rejected an explanation that a short delay was attributable to difficulty in retrieving the tapes from the supervising prosecutor and the unavailability of the judge who had issued the wiretap order. The court determined that other justices were available to accomplish sealing and that "inadequate police procedures . . . do not constitute a valid excuse."²³

A third factor considered by those jurisdictions that apply the satisfactory explanation is the time necessary to prepare the original tapes for sealing.²⁴ For example, one court sustained several sealing delays ranging from 3 to 8 days because there was no evidence of tampering or prejudice to the defendant, and the tapes had to be transported a long distance for duplication and judicial sealing.²⁵ However, courts recognize that law enforcement officers can make simultaneous duplicate recordings of their interceptions on a second recorder, or make copies of the original tapes on fast duplicators. In that regard, one Federal district court rejected an explanation for a 12-day delay in the absence of a proffer of why duplicate tapes used for transcription were not made promptly by the use of available sophisticated technical equipment.²⁶

Finally, the length of the delay is a crucial factor in determining the justification for any sealing tardiness. In *United States v. Ardito*,²⁷ the U.S. Court of Appeals for the Second Circuit found a 5-day delay acceptable because two of those days were

holidays, the issuing judge was unavailable for a third day, the officers responsible for delivering the recordings for sealing were busy seeking another wiretap order, and there was no prejudice to the accused.

Conversely, a lengthier delay is more difficult to satisfactorily explain. For example, in *United States v. Rios*,²⁸ FBI Special Agents conducted several court-ordered intercepts of wire and oral conversations. At trial, the government attempted to explain sealing delays of 82 and 118 days. Despite proof that the tapes were not modified and that the supervising attorney mistakenly and in good faith misunderstood when the sealing obligation attached, the court found the explanation inadequate for delays of such magnitude. The court held the government "... to a reasonably high standard of at least acquaintance with the [sealing] requirements of law"²⁹ and ruled inadmissible over 400 reel-to-reel tapes of intercepted conversations.

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... Federal and State law requires officers to present [original tapes] to a judicial official immediately at the conclusion of the original electronic surveillance order.

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Court-Mandated Procedures for Sealing

As the above discussion indicates, it is difficult to predict whether a particular explanation for a delay in judicial sealing is acceptable, and courts often hold extensive and costly pretrial hearings to resolve that issue. In an effort to overcome these problems

and provide timely judicial oversight of the sealing process, one court has crafted specific time limitations and procedures.

In *United States v. Mas-sino*,³⁰ the U.S. Court of Appeals for the Second Circuit held that if the original tapes are not presented for sealing within 2 days of the expiration of any continuous period of court-ordered electronic surveillance, the government must then comply with the following definitive guidelines:

- 1) If the delay is from 2 to 5 days, the government must at the time of judicial sealing submit affidavits documenting reasons for its tardiness;
- 2) If the delay is to be over 5 days, the government must seek an extension of time in which to submit the tapes for sealing from the judge who issued the surveillance order; and
- 3) If the issuing judicial officer is unavailable, the

extension order must still be obtained from another judge with appropriate jurisdiction.

The court concluded that these court-mandated procedures "... will create an incentive for the government to give priority to sealing, and judicial oversight at an early stage will limit justifiable

delays in the shortest time necessary. A failure of the government to follow this procedure will of course undermine any claim of satisfactory explanation."³¹ In the future, other courts may specifically delineate sealing standards in their orders authorizing nonconsensual electronic interceptions which law enforcement officers should carefully review and follow.

RECOMMENDED PROCEDURES

Concerted efforts to comply with judicial sealing requirements immediately at the conclusion of the continuous electronic surveillance period will avoid unnecessary litigation and assure the admissibility of valuable evidence. To avoid the devastating loss of incriminating evidence because of a sealing violation, law enforcement officers should adhere to the

pose of fulfilling the sealing function. Third, if a sealing delay is anticipated, officers should document the causes for the delay, immediately inform the supervising attorney, and consider seeking an extension of time from the appropriate judicial official.

The following additional suggestions are offered to assist officers in complying with the sealing requirement in a timely and orderly fashion:

- 1) While intercepting the communications, officers should make at least one duplicate recording simultaneous with the original tape by using multiple recording devices;³² the devices should be configured to avoid electronic erasure or physical alteration of the tapes. This procedure reduces the possibility of

information and to ensure reproduction quality. If the duplicates are unclear or garbled, the original recording should be copied before formal sealing. If a flawed duplicate tape is discovered after the original is sealed, officers should seek express judicial permission to reaccess the original for copying purposes.³³ Once copying is completed, the original tape should be resealed under judicial supervision.

- 3) Prior to formal sealing, officers should maintain the original tapes in a manner that assures their security and integrity and allows for their later identification. Persons monitoring the interceptions should contemporaneously mark the tape leader with the case number or name, the location and date of monitoring, and their initials. Once removed from the recorder, these marked tapes should immediately be placed in some type of enclosure, such as an over-sized envelope, which also reflects the case name, the location and date of the interceptions, and the monitoring officers' identities. A chain-of-custody log for these original tapes should be maintained and they should be stored in a secure area where access is monitored by logging all persons who enter and the reasons for their entry.

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... failure to comply with the sealing requirement can lead to the suppression of the intercepted conversations and the loss of extremely valuable evidence.

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following procedures. First, they should attempt to submit the original recordings of all nonconsensual interceptions to the issuing judicial authority for formal sealing within 1 or at the most 2 days of the expiration of the continuous surveillance period. Second, they should maintain close contact with the supervising prosecuting attorney and ensure the scheduling of an appointment with the appropriate judge for the express pur-

either accidentally erasing or recording over the original tapes, and provides duplicate tapes which are available for review, translation, and transcription.

- 2) Officers supervising the electronic surveillance should task sufficient personnel to immediately review the duplicate tapes in order to obtain lead

- 4) Officers should institute a tickler system to remind them of the specific date the sealing requirement attaches and their responsibility to arrange through the supervising prosecutor a sealing appointment with the appropriate judicial official.
- 5) If the sealing judge orders the sealed tapes maintained by law enforcement personnel rather than by the clerk of court, they should be stored in a locked cabinet which is clearly marked as containing judicially sealed material and located in a room with restricted and monitored access. Officers should obtain an inventory of the sealed tapes from the sealing judge³⁴ and access them only pursuant to explicit judicial permission.

CONCLUSION

Federal and State electronic surveillance statutes require that the original tapes of any court-ordered nonconsensual interception be immediately returned to the authorizing judicial official for sealing. Since violations of this sealing requirement can lead to the exclusion of the intercepted communications, it is imperative that law enforcement officers execute electronic surveillance orders in a manner that ensures compliance.

FBI

Footnotes

¹In 1988, Federal and State courts combined to authorize over 700 nonconsensual electronic surveillance orders. Over one-half of these listed drugs as the most serious offense

being investigated. A total of 2,486 individuals were arrested as a result of this surveillance activity. Report on Applications for Orders Authorizing or Approving the Interception of Wire, Oral or Electronic Communications (Wiretap Report) For the Period January 1, 1988, to December 31, 1988, Administrative Office of the U.S. Courts.

²18 U.S.C. 2510-20.
³47 U.S.C. 605; see *People v. Sher*, 345 N.E.2d 314 (N.Y. Ct. App. 1976).

⁴18 U.S.C. 2518(8)(a).
⁵*United States v. Mora*, 821 F.2d 860 (1st Cir. 1987); *United States v. Vasquez*, 605 F.2d 1269 (2d Cir. 1979); *United States v. Diana*, 605 F.2d 1307 (4th Cir. 1979); *United*

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The circumstances that amount to a satisfactory explanation for a delay are determined on a case-by-case basis....
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States v. Angelini, 565 F.2d 469 (7th Cir. 1975).

⁶See *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976); *United States v. Ricco*, 421 F.Supp. 401 (S.D.N.Y. 1976).

⁷*People v. Nicoletti*, 313 N.E.2d 336 at 338 (N.Y. Ct. App. 1974).

⁸*United States v. Vasquez*, supra note 5 at 1278 (2d Cir. 1979); see also *United States v. Scalfidi*, 564 F.2d 633 (2d Cir. 1977); *United States v. Fury*, 554 F.2d 522 (2d Cir. 1977); *United States v. Santoro*, 647 F. Supp. 153 (E.D.N.Y. 1986), contra *People v. Washington*, 385 N.E. 2d 593 (N.Y. Ct. App. 1978) (tapes must be presented for sealing upon the expiration of the specific order or extension, not at the end of any continuous period of interception).

⁹*United States v. Gerena*, 695 F.Supp. 649 (D. Conn. 1988); *United States v. Ricco*, supra note 6.

¹⁰*United States v. Massino*, 784 F.2d 153 (2d Cir. 1986); *United States v. Gerena*, supra note 9; *People v. Gallina*, 485 N.E.2d 189 (N.Y. Ct. App. 1985); *People v. Edelstein*, 429 N.E.2d 803 (N.Y. Ct. App. 1981).

¹¹*People v. Nieves*, 442 N.E.2d 228 at 233 (Ill. Sup. Ct. 1982).

¹²*United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974); *United States v. Caggiano*, 667 F.2d 1176 (5th Cir. 1982); *United States v. Diadone*, 558 F.2d 775 (5th Cir. 1977); *United States v. Sklaroff*, 506 F.2d 837 (5th

Cir. 1975); *United States v. Angelini*, supra note 5; *United States v. Lawson*, 545 F.2d 557 (7th Cir. 1975); *United States v. Vastola*, 670 F.Supp. 1244 (D.N.J. 1987); *United States v. Harvey*, 560 F.Supp. 1040 (S.D. Fla. 1982); *State v. Olea*, 678 P.2d 465 (Ariz. Ct. App. 1983); *Gilsirap v. State*, 292 S.E.2d 495 (Georgia Ct. App. 1982).

¹³*United States v. Sklaroff*, id.

¹⁴*United States v. Falcone*, supra note 12 at 484.

¹⁵18 U.S.C. 2518(8) (a).

¹⁶See *United States v. Gigante*, supra note 6.

¹⁷*United States v. Mora*, supra note 5 at 866.

¹⁸*United States v. Ramirez*, 602 F.Supp. 783 at 792 (S.D.N.Y. 1985).

¹⁹*United States v. Mora*, supra note 5.

²⁰Id.

²¹Supra note 10; see also *United States v. Squitieri*, 688 F.Supp. 163 (D.N.J. 1988).

²²786 F.2d 472 (2d Cir. 1986).

²³*People v. Gallina*, 485 N.E.2d 189 at 220 (N.Y. Ct. App. 1985); see also *State v. Cerbo*, 397 A.2d 671 (N.J. Sup. Ct. 1979).

²⁴*United States v. Rodriguez*, supra note 22.

²⁵*United States v. McGrath*, 622 F.2d 36 (2d Cir. 1980).

²⁶*United States v. Ricco*, supra note 6.

²⁷782 F.2d 358 (2d Cir. 1986).

²⁸875 F.2d 17 (2d Cir. 1989).

²⁹Id. at 23.

³⁰*United States v. Massino*, supra note 10.

³¹Id. at 159.

³²See *United States v. Scope*, 861 F.2d 339 (1st Cir. 1988); *United States v. Angiulo*, 847 F.2d 956 (1st Cir. 1988); *United States v. Gerena*, supra note 9; *United States v. Ricco*, supra note 6; *State v. Campbell*, 528 A.2d 321 (R.I. Sup. Ct. 1987); *People v. Washington*, supra note 8; *People v. Nicoletti*, supra note 7.

³³See *United States v. Diana*, supra note 5; *United States v. Long*, 697 F.Supp. 651 (S.D.N.Y. 1988); *People v. Washington*, supra note 8; *People v. Sher*, 345 N.E.2d 314 (N.Y. Ct. App. 1976).

³⁴See *United States v. Abraham*, 541 F.2d 624 (6th Cir. 1976).

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.