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Bruce T. Flynn

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Electronic Surveillance: A New Weapon for California Law Enforcement in the War on Drugs

In 1872, the California Legislature enacted Penal Code Section 640, which made nonconsensual eavesdropping and wiretapping a felony.¹ Notwithstanding the prohibition in section 640 against non-consensual eavesdropping and wiretapping, section 640 failed to address whether evidence gained by police through these illegal means was admissible.² Then, in 1955, the California Supreme Court in *People v. Cahan*³ held that evidence gained by police through illegal wiretapping is inadmissible in any judicial proceeding.⁴ Recently, however, the California Legislature enacted Senate Bill (S.B. 1499)⁵ and Senate Bill 83 (S.B. 83),⁶ both of which permit state law enforcement officers to obtain judicially authorized warrants⁷ to conduct surreptitious electronic surveillance in the investigation of certain drug related offenses.⁸ Additionally, S.B. 1499 and S.B. 83

1. 1872 CAL. PENAL CODE § 640.

2. *Id.*

3. 44 Cal. 2d 434, 282 P.2d 905 (1955).

4. *Cahan*, 44 Cal. 2d at 445, 282 P.2d at 911. *Cahan*'s conviction for violating the bookmaking laws was based on evidence gained by a listening device that the government covertly planted in his home. *Id.* at 435, 436, 282 P.2d at 905, 906.

5. 1988 Cal. Stat. ch. 111, sec 2, at ____ (enacting CAL. PENAL CODE §§ 629-631).

6. 1988 Cal. Stat. ch. 1374, sec 1, at ____ (amending Penal Code §§ 629.32, 631).

7. See 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629) (information required to be included in application for authorization to conduct a wiretap search); *Id.* (enacting CAL. PENAL CODE § 629.02) (requirements that must be satisfied before a judicial order to intercept wire communications may be issued).

8. *Id.* (enacting CAL. PENAL CODE § 629.02(a)(1)). The drug offenses include the importing, selling, transporting, manufacturing, possessing for sale, or the selling of a controlled substance containing PCP, methamphetamine, heroin, cocaine or their analogs where the substance exceeds 10 gallons by liquid volume or 3 pounds of solid substance. *Id.*

make evidence gained through a judicially authorized wiretap admissible in any judicial proceeding.⁹ Because the statutes permit non-consensual wiretapping they may be subject to challenges based on the fourth amendment protection against unreasonable searches and seizures under the United States Constitution and the right to privacy guaranteed by the California Constitution.¹⁰

Part I of this note discusses the legal background of electronic surveillance in California by focusing on applicable state and federal statutes and judicial decisions.¹¹ Part I also briefly discusses the twenty year political struggle to pass a wiretap statute in California.¹² Part II discusses the procedure and constitutionality of newly enacted S.B. 1499 and S.B. 83.¹³ Finally, Part III discusses the legal ramifications of these newly enacted Senate bills.¹⁴

I. LEGAL BACKGROUND

A. *State Law Regarding Electronic Surveillance and the Admissibility of Wiretap Evidence*

In 1872, the California Legislature enacted Penal Code Section 640, the first statute to prohibit any person from surreptitiously intercepting telegraphic communications.¹⁵ In 1905, the legislature amended California Penal Code section 640 to include prohibiting any person from surreptitiously intercepting telephone communications.¹⁶ In an attempt to keep up with modern advances in technology and law, the legislature later enacted other statutes prohibiting the

9. *See id.* (enacting CAL. PENAL CODE § 629.22) (a defendant may only move to suppress evidence gained through judicially authorized wiretapping as a violation of the defendant's right against illegal search and seizure under the fourth amendment); 1988 Cal. Stat. ch. 1374, sec. 1 at ____ (amending CAL. PENAL CODE § 629.32(b)) (evidence of crimes, other than the enumerated drug offenses, that are intercepted may not be used to prevent a crime unless: (1) The evidence came from an independent source; or (2) the evidence would have inevitably been discovered).

10. *See*, U.S. CONST. amend IV.; CAL. CONST. art. 1, § 1.

11. *See infra* notes 15-79 and accompanying text.

12. *See infra* notes 80-100 and accompanying text.

13. *See infra* notes 101-238 and accompanying text.

14. *See infra* notes 238-264 and accompanying text.

15. 1872 CAL. PENAL CODE § 640, (the penalty for violating section 640 could have been a sentence of no more than five years imprisonment in the state prison, up to one year imprisonment in the county jail, a fine of up to five thousand dollars, or both a jail sentence and a fine).

16. 1905 Cal. Stat. ch. 78, sec 1, at 689-691 (amending CAL. PENAL CODE § 640).

unauthorized installation of dictograph¹⁷ machines and the recording of confidential conversations of people in governmental custody.¹⁸ But California wiretap statutes did not provide criminal defendants with an exclusionary remedy at criminal trials.¹⁹

Until 1955, the California courts were silent about the admissibility of evidence the government seized through illegal wiretapping. Then, in 1955, the California Supreme Court in *People v. Cahan*²⁰ held that evidence the government seizes through illegal wiretapping in violation of the fourth amendment to the United States Constitution is inadmissible in any judicial proceeding.²¹ In *Cahan*, police officers entered the defendant's home without a search warrant and placed a microphone under a chest of drawers located in the defendant's bedroom.²² The microphone was attached to a recording device in a nearby garage.²³ For one month the police recorded all conversations picked up by the hidden microphone.²⁴ The police then repeated the same procedure at the home of the defendant's co-conspirator.²⁵ The government used the recorded conversations as evidence to convict the defendant of conspiracy to engage in horse-race bookmaking.²⁶

The California Supreme Court recognized that almost all the evidence introduced at trial was gained by police in violation of the federal and state Constitutions as well as state and federal statutes.²⁷ The court believed that California courts in the past had essentially participated in lawless activity by admitting illegally obtained evidence.²⁸ In so holding, the *Cahan* court adopted the federal exclusionary rule introduced in *Weeks v. Colorado*,²⁹ which prevents the government from securing convictions supported by evidence the

17. A dictograph is a telephonic instrument with a small, sensitive, easily concealed transmitter used for listening to or recording conversations in another room. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986).

18. See 1941 Cal. Stat. ch. 525, sec. 1, at 1833 (adding CAL. PENAL CODE § 653h) (prohibiting the installation of dictographs) and 1957 Cal. Stat. ch. 1879, sec. 1 at 3285 (adding Cal. Penal Code § 653i) (prohibiting the recording of any conversation between a person in custody and that person's attorney, religious advisor, or licensed physician).

19. See *supra* notes 11-14.

20. 44 Cal. 2d 434, 282 P.2d 905 (1955).

21. *Id.* at 445, 282 P.2d at 911.

22. *Id.* at 436, 282 P.2d at 906.

23. *Id.*

24. *Id.*

25. *Id.* at 437, 282 P.2d at 906.

26. *Id.* at 436, 282 P.2d at 905-906.

27. *Id.*

28. *Id.* at 445, 282 P.2d at 911.

29. 232 U.S. 383 (1914).

police gained through illegal means.³⁰ Later, in 1963, the legislature codified the exclusionary rule adopted in *Cahan* by enacting California Penal Code section 653j.³¹ Section 653j prohibited the government from introducing evidence gained through nonconsensual wiretapping in any legislative, administrative, or judicial proceeding.³²

Apparently responding to rapid improvements in the equipment and techniques used to intercept wire communications,³³ the California Legislature enacted the California Invasion of Privacy Act of 1967 (Privacy Act).³⁴ The Privacy Act revised California wiretapping law by adding criminal and civil penalties for wiretapping violations.³⁵ Section 631 as enacted by the Privacy Act prohibited any form of nonconsensual wiretapping or the use of evidence obtained by non-consensual wiretapping.³⁶

B. Federal Law Regarding Electronic Surveillance and the Admissibility of Wiretap Evidence

The United States Supreme Court first ruled on the constitutionality of wiretapping in 1928. In *Olmstead v. United States*,³⁷ the Court held that the government's electronic surveillance was not a search and seizure under the fourth amendment.³⁸ In *Olmstead*, federal prohibition officers placed wiretaps on telephone lines in the basement of the building where the defendant's business was located.³⁹ They

30. See *Cahan* at 44 Cal. 2d 445, 282 P.2d at 911, *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (the exclusion of illegally obtained evidence under the fourth amendment is enforceable against the states under the due process clause of the 14th Amendment for federal crimes; however, states are not required to adopt the exclusionary rule).

31. 1963 Cal. Stat. ch. 1886, sec 1, at 3871 (enacting CAL. PENAL CODE § 653j). But see 1967 Cal. Stat. ch. 1509, sec. 9, at 3589 (repealing Cal. Penal Code § 653j).

32. *Id.*

33. See CAL. PENAL CODE § 630 (West Supp. 1988) (legislative findings and intent). The legislature did not intend to further restrict the use of electronic surveillance equipment by law enforcement officers. *Id.*

34. 1967 Cal. Stat. ch. 1059, sec 1, at 3584 (repealing CAL. PENAL CODE §§ 640, 653i, 653j and enacting CAL. PENAL CODE §§ 630-637.5).

35. See *id.*

36. See 1967 Cal. Stat. ch. 1509, sec. 1, at 3584 (enacting CAL. PENAL CODE § 631). See also *People v. Conklin*, 12 Cal. 3d 259, 270, 522 P.2d 1049, 1056, 114 Cal. Rptr. 241, 248 (1974) (the purpose of the Privacy Act is to protect the privacy of California citizens from non-consensual wiretapping); *Tavernetti v. Superior Court*, 22 Cal. 3d 187, 194, 583 P.2d 737, 742, 148 Cal. Rptr. 883, 888 (1978) (in enacting the privacy provisions of the Penal Code the legislature clearly chose to protect the citizens of California from surreptitious interception of wire communications).

37. 277 U.S. 438 (1928).

38. *Olmstead*, 277 U.S. at 466.

39. *Id.* at 457.

also placed wiretaps on telephone lines outside the defendant's home.⁴⁰ While placing the wiretaps, the government officials never trespassed on any property owned by the defendant.⁴¹ Through the use of these wiretaps the government gained information that uncovered a major international criminal conspiracy.⁴² The government also used the information to convict the defendant in federal district court of conspiracy to import, transport, and possess for sale intoxicating liquors.⁴³

The *Olmstead* opinion focused on the traditional common law rule of trespass⁴⁴ in holding that the fourth amendment was not violated unless there was a search and seizure of a person, a person's material effects, or a physical invasion of a person's home or curtilage with the intent to make a seizure.⁴⁵ Consequently, the *Olmstead* Court held that the actions of the federal prohibition officers were not a search and seizure within the meaning of the fourth amendment.⁴⁶ In addition, the Court allowed the federal government to use the evidence obtained through wiretapping to prosecute the defendant despite a state statute prohibiting wiretapping.⁴⁷

In the wake of *Olmstead*, Congress passed the Federal Communications Act of 1934 (FCA),⁴⁸ which prohibited any form of non-consensual wiretapping by any person without government

40. *Id.*

41. *Id.*

42. *Id.* at 456-457.

43. *Id.* at 455.

44. See *Hester v. United States*, 265 U.S. 57, 57-59 (holding that even if the police had trespassed onto defendant's property there was no illegal search and seizure of the defendant's property when the defendant fled and abandoned the whiskey jugs in an open field).

45. *Olmstead*, 277 U.S. at 466. Justice Taft, writing for the majority, reasoned that the literal language of the fourth amendment could not be expanded to include telephone wires that could extend around the world as part of a person's house or curtilage. *Id.* at 465.

46. See *id.* at 466. *Cf. id.* at 478-479 (Brandeis, J., dissenting) (The framers of the Constitution sought to protect Americans in their thoughts, beliefs, and emotions from government invasion. The tapping of a telephone is an evil far greater than a general warrant as a tool for espionage.); *id.* at 475-476 (quoting *Entick v. Carrington*, 19 Howell's State Trials, 1030, 1066) ("It is not the breaking of his doors, and the rummaging of his drawers that constitutes the essence of this offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has not been forfeited by his conviction for some public offense"); *id.* at 469 (Holmes, J., dissenting) (although the detection of criminals, and all available evidence to convict criminals is desirable, it is a lesser evil to allow some criminals to go free than to permit the government to benefit from illegal acts).

47. See *id.* at 466. The common-law rule of evidence does not exclude evidence that is illegally obtained. *Id.* at 467; See also *Weeks v. United States*, 232 U.S. 383, 398 (the application of the exclusionary rule applies only to the federal government).

48. 47 U.S.C. § 605 (1934) amended by 18 U.S.C. §§ 2510-2520 (1968).

authorization.⁴⁹ However, the Supreme Court interpreted the FCA to apply only in instances of physical trespass.⁵⁰ For example, in *Goldman v. United States*,⁵¹ the Supreme Court held that the placement of a detectaphone⁵² on the wall of an adjoining room for the purpose of recording conversations was not a search because there was no physical trespass.⁵³ And in *Silverman v. United States*,⁵⁴ the Court held that a spike mike⁵⁵ driven through a wall and touching the heating duct of the defendant's house was a physical trespass;⁵⁶ therefore, any conversations the government recorded through the use of the spike mike were obtained in violation of the FCA.⁵⁷

In 1966, the Supreme Court in *Berger v. New York*⁵⁸ and *Katz v. United States*⁵⁹ took a more active role in defining constitutional standards for wiretap statutes.⁶⁰ In *Berger*, New York police obtained a judicially authorized wiretap order to record conversations taking place in the office of a New York State Liquor Authority agent.⁶¹ On the basis of the evidence gained through this wiretap, police were able to obtain a second judicially authorized wiretap order to record conversations in the office of another Liquor Authority agent.⁶² Based solely on the evidence gained by the police through these wiretaps,

49. See *id.* See also *Nordone v. United States*, 302 U.S. 379, 384 (1937) (under the FCA, the word "person" includes federal law enforcement officers). In the absence of clear congressional intent to include federal law enforcement officers within the FCA, the Court must exclude the evidence the government agents obtained in violation of the statute. *Id.*

50. See *supra* notes 51-57 and accompanying text.

51. 316 U.S. 129 (1942).

52. A detectaphone is a telephone apparatus used for secretly listening to phone conversations. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 616 (1986).

53. *Goldman*, 316 U.S. at 135. The Court held that the conversations recorded by federal agents were neither "communications," nor were the conversations "intercepted" under the FCA. *Id.* at 133.

54. 365 U.S. 505 (1961).

55. A spike mike is a microphone with a foot long spike attached to it that must be hammered into a wall and touching the area from which conversations are to be intercepted. *Silverman*, 365 U.S. at 506.

56. *Id.* at 512.

57. *Id.* at 510-11. *Goldman* and *Olmstead* are not overruled since those decisions were premised on the lack of a physical intrusion into a constitutionally protected area. The sole concern of the Court should not be local property rules or distinctions about the types of electronic equipment used, but on whether an individual's privacy has been invaded. *Id.* at 513 (Douglas, J., concurring).

58. 388 U.S. 41 (1966).

59. 389 U.S. 347 (1966).

60. See *Berger*, 388 U.S. at 59-63 (discussing criteria required for a statute to pass constitutional scrutiny while striking down a New York wiretap statute); *Katz*, 389 U.S. at 353 (overruling the trespass doctrine of *Olmstead* and *Goldman*).

61. *Berger*, 388 U.S. at 45.

62. *Id.*

the New York District Attorney secured a conviction against the defendant as a “go between” in a bribery conspiracy.⁶³

The *Berger* Court examined whether New York’s permissive wiretap statute violated the defendant’s fourth amendment right against unreasonable searches and seizures.⁶⁴ In striking down the New York State wiretap statute, the Court concluded that the language was too broad because it allowed trespassory intrusions into constitutionally protected areas.⁶⁵ In addition, the Court set forth nine criteria that a nonconsensual wiretap statute must meet in order to be constitutional under the fourth amendment.⁶⁶

In 1967, the Supreme Court decided *Katz*, which further defined constitutional standards for wiretap statutes.⁶⁷ The *Katz* Court rejected the trespass doctrine of *Olmstead* and its progeny, and held that the invasion of any place where a person has a legitimate and justifiable expectation of privacy constitutes a search under the fourth amendment.⁶⁸ In *Katz*, FBI agents placed a microphone on top of a telephone booth from which the defendant made personal telephone calls.⁶⁹ The FBI agents listened to and recorded only the defendant’s end of each conversation.⁷⁰ Based on the FBI’s wiretap evidence, the defendant was convicted in a federal district court for illegally transmitting wagering information.⁷¹ The Court of Appeals held that since there was no physical invasion into the area occupied by the defendant, there was no search within the meaning of the fourth

63. *Id.*

64. *Id.* at 43-44.

65. *Id.* at 44.

66. *Id.* at 58-63. Justice Clark writing for the majority established the following constitutional standards: (1) An affiant must have probable cause to believe a crime is being or has been committed; (2) an order must specifically describe the particular communications to be intercepted and the scope of the executing officer’s conduct; (3) the court order can only authorize limited intrusions for each showing of probable cause; (4) the court order must be executed promptly; (5) conversations seized must have some connection to the crime under investigation; (6) after the conversation sought after is obtained, a court order must terminate; (7) a different showing of probable cause is needed to extend the wiretap; (8) exigent circumstances must be shown to justify the wiretap; and (9) conversations seized must be returned to the judge issuing the order before being used. *Id.*

67. *Katz v. United States*, 389 U.S. 347 (1967).

68. *Id.* at 353. The fact that a listening device placed on top of a phone booth from which the defendant was placing a call did not physically penetrate the wall cannot have any Constitutional significance. *Id.* The fourth amendment requires (1) that a person exhibit a subjective expectation of privacy, and (2) that the expectation is one that society is prepared to accept as reasonable. *Id.* at 361 (Harlan, J., concurring).

69. *Id.* at 348.

70. *Id.*

71. *Id.*

amendment.⁷² The United States Supreme Court, in overruling *Olmstead* and the Court of Appeals, held that the government had conducted a "search" without first obtaining a valid search warrant within the meaning of the fourth amendment by invading an area where the defendant had a legitimate and reasonable expectation of privacy.⁷³ Additionally, the Court held that government agents need to obtain a warrant approved by a neutral and detached magistrate before commencing any type of electronic surveillance.⁷⁴

Following *Berger* and *Katz*, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III)⁷⁵ in an attempt to aid federal law enforcement officers in the battle against organized crime. Title III enables federal law enforcement officials to obtain judicially authorized wiretap orders to conduct electronic surveillance in accordance with the *Berger* and *Katz* standards.⁷⁶ Because Congress based Title III on the criteria set out in *Berger* and *Katz*, the Act as a whole has not been challenged successfully in the federal courts.⁷⁷ Today, twenty-nine states and the District of Columbia have statutes authorizing the interception of wire communications modeled after Title III.⁷⁸

72. *Id.* at 348-49.

73. *Id.* at 358-59.

74. *Id.* at 356-59. Even though the FBI agents acted with restraint in only recording defendant's half of the conversation, the predetermination of the scope of the search was made by the agents and not a neutral magistrate. *Id.* at 356.

75. Omnibus Crime Control and Safe Streets Act; Pub. L. No. 90-351, 82 Stat. 218 (1968) (codified as amended at 18 U.S.C. §§ 2510-2520 (1982)) (federal statutes authorizing wiretapping by federal law enforcement officers). See generally, U. S. CODE CONG. & ADMIN. NEWS 2112, 2157 (the purpose of Title III is to fight organized crime in the United States).

76. See 1968 U. S. CODE CONG. & ADMIN. NEWS 2112, 2157.

77. See, e.g., *United States v. Sklaroff*, 506 F.2d 837, 840 (5th Cir. 1975) (holding that Title III meets the *Berger* and *Katz* standards), *cert. denied*, 423 U.S. 874 (1975); *United States v. Ramsey*, 503 F.2d 524, 526-531 (7th Cir. 1974) (holding Title III not facially unconstitutional), *cert. denied*, 420 U.S. 932 (1975); *United States v. Martinez*, 498 F.2d 464, 467-468 (6th Cir. 1974) (holding that provisions of Title III which permit limited electronic surveillance must be under strict judicial supervision to satisfy the Constitution), *cert. denied*, 419 U.S. 1056 (1974).

78. See ARIZ. REV. STAT. ANN. §§ 13-30001-13-3011 (Supp. 1988); COLO. REV. STAT. §§ 16-15-101 through 15-150104 (West Supp. 1988); CONN. GEN. STAT. ANN. §§ 54-41a-54-41t; DEL. CODE ANN. tit. 11, § 1336 (1988); D.C. CODE ANN. §§ 23:541-23:556 (1981); FLA. STAT. ANN. §§ 934.01-934.10 (West Supp. 1988); GA. CODE ANN. § 16-11-64 (1988); HAW. REV. STAT. §§ 803-41-803-50 (1988); IDAHO CODE §§ 18-6701-18-6716 (1987); KAN. CRIM. PROC. CODE ANN. §§ 22-2514-22-2516 (Vernon 1980); LA. CODE CRIM. PROC. ANN. art. 15:1301-15:1312 (West 1981); MD. CRIM. CODE ANN. §§ 10-401-10-401(2) (1988); MASS. GEN. LAWS ANN. ch. 272 99 (West Supp. 1988); MINN. STAT. ANN. §§ 626A.01-626A-23 (West Supp. 1988); NEB. REV. STAT. §§ 86-701-86-707 (1987); NEV. REV. STAT. §§ 179.410-179.515 (1988); N.H. REV. STAT. ANN. §§ 570-A:1-570-A:11 (Supp 1988); N.J. REV. STAT. ANN. §§ 2A:156A-1-156A-26 (West Supp. 1988); N.M. STAT. ANN. §§ 830-12-2-830-12-11; N.Y. CRIM. PROC. CODE §§ 700.05-700.70 (McKinney's 1984); OKLA. STAT. ANN. tit. 13 176.7 (West 1983); OR.

C. *The Politics of S.B. 1499 and S.B. 83: The End of a Twenty-Year Struggle*

In 1970, two years after Congress passed Title III, California State Senator Nejedly introduced the first wiretap bill in the California Senate.⁷⁹ In the eighteen years that followed, ten other wiretap bills were introduced, but all failed passage.⁸⁰ In 1986, Senator Presley introduced S.B. 83.⁸¹ This first version of S.B. 83 allowed a judge to issue a wiretap order based upon probable cause that a person was committing, had committed, or would commit murder,⁸² kidnapping,⁸³ robbery,⁸⁴ certain drug offenses,⁸⁵ or any crime endangering life.⁸⁶ Having passed the Senate, however, S.B. 83 died in the Assembly Committee on Public Safety and was placed on the inactive file in 1987.⁸⁷

In 1988, the Senate reconsidered S.B. 83, but it was referred back to the Assembly Committee on Public Safety where it seemed likely to die again.⁸⁸ However, Senator Presley, the author of S.B. 83, deleted the contents of a prison construction bill (S.B. 1499) and added the contents of S.B. 83 as amended on March 28, 1988 in order to bypass the Assembly Committee on Public Safety.⁸⁹ The Assembly then passed a motion to allow the amended version of

REV. STAT. §§ 133.721-133.739 (1985); 18 PA. CONS. STAT. ANN. §§ 5701-5726 (Purdon 1983); R.I. GEN. LAWS §§ 12-5.1-1-12-5.1-16 (Supp. 1988); S.D. CODIFIED LAWS ANN. §§ 23A-35A-1-25A-35A-34 (1988); TEX. CRIM. PROC. CODE ANN. § 18.20 (Vernon Supp. 1988); UTAH CODE ANN. §§ 77-54(A)-1-77-54(A)-11 (1988); VA. CODE ANN. § 19.2-61-19.2-70.3 (Supp. 1988); WASH. REV. CODE. § 9.73.040 (1988); WIS. STAT. §§ 968.27-968.33 (Supp. 1988).

79. S.B. 185, 1969-70 Cal. Leg., Reg. Sess.

80. See S.B. 159, 1984-85 Cal. Leg., Reg. Sess.; S.B. 1020, 1980-81 Cal. Leg., Reg. Sess.; A.B. 931, 1978-79 Cal. Leg., Reg. Sess.; S.B. 684, 1976-77 Cal. Leg., Reg. Sess.; S.B. 64, 1976-77 Cal. Leg., Reg. Sess.; S.B. 1976, 1976-77 Cal. Leg., Reg. Sess.; S.B. 2089, 1975-76 Cal. Leg., Reg. Sess.; S.B. 1081, 1971-72 Cal. Leg., Reg. Sess.; S.B. 228, 1970-71 Cal. Leg., Reg. Sess.

81. S.B. 83, 1986-87 Cal. Leg., Reg. Sess. (as introduced Dec. 11, 1986).

82. CAL. PENAL CODE § 187 (West 1988) (definition of murder).

83. *Id.* § 207 (definition of kidnapping).

84. *Id.* § 211 (definition of robbery).

85. See note 7 and accompanying text.

86. S.B. 83, 1986-87 Cal. Leg., Reg. Sess., § 629.02 (as introduced Dec. 11, 1986).

87. SENATE RECESS HISTORY, 1987-88 Cal. Leg., Reg. Sess., Oct. 5, 1988, at 44.

88. *Id.*

89. Compare S.B. 1499, 1986-87 Cal. Leg., Reg. Sess. (as amended Sept. 3, 1987) (amended Sept. 3, 1987) (permitting the state to obtain a wiretap warrant to investigate murder, robbery, kidnapping, certain drug offenses, and crimes endangering life); with S.B. 1499, 1987-88 Cal. Leg., Reg. Sess. (as amended Apr. 7, 1988) (permitting the state to obtain a wiretap warrant only for serious drug offenses).

S.B. 1499 to be set for special order⁹⁰ on April 14, 1988.⁹¹ Before consideration of S.B. 1499, the Assembly granted Assemblymember Hannigan's motion for unanimous consent to recess in order to allow the Democratic Caucus to meet in the Assembly lounge.⁹² This recess allowed the proponents of S.B. 1499 to muster support for the bill before voting. After the recess, Assemblymember Hannigan, along with the coalition of the "Gang of Five" conservative democrats⁹³ and two republican assemblymembers, made a demand for previous question of the passage of S.B. 1499.⁹⁴ This procedure effectively terminated all debate and required the Assembly to vote on the pending question—S.B. 1499. The Assembly then passed S.B. 1499 by a vote of 49 to 19.⁹⁵ After the Governor signed the bill, the Secretary of State chaptered S.B. 1499 which is codified in California Penal Code sections 629 through 631.⁹⁶ After passing S.B. 1499, the legislature recalled S.B. 83 from the inactive file to correct drafting errors in S.B. 1499, then passed S.B. 83 as amended.⁹⁷

II. THE PROCEDURE AND CONSTITUTIONALITY OF S.B. 1499 AND S.B. 83

A. *The Procedure For Obtaining a Wiretap Order Under S.B. 1499*

The explosion of illegal drug trading is the main reason the legislature passed S.B. 1499 and S.B. 83. Today, sophisticated and highly organized cartels dominate large scale sales of illegal drugs in

90. CAL. STATE ASSEMBLY, STANDING RULES OF THE ASSEMBLY § 88 (1987) (a matter set before the assembly as a special order may only be debated as to the propriety of setting the main question as a special order of business). *Id.*

91. 1987-88 CAL. ASSEMBLY, ASSEMBLY JOURNAL, at 6818 (April 14, 1988).

92. *Id.*

93. CAL. J., Apr., 1988, at 152. The Gang of Five is a group of California Democrat assemblymembers who openly opposed Speaker of the Assembly Willie Brown's leadership at the beginning of the 1987-88 Assembly regular session. The five assemblymembers are Areias, Calderon, Condit, Eaves, and Peace. *Id.*

94. 1987-88 CAL. ASSEMBLY, ASSEMBLY JOURNAL, at 6819 (April 14, 1988) (Assembly members Elder, Hannigan, Nolan, N. Waters, and Statham make a demand for previous question). See CAL. ASSEMBLY, STANDING RULES OF THE ASSEMBLY 87 (1987) (if five members make a demand for previous question, and a majority consents, then a bill will be voted on without further debate of the question pending).

95. See 1987-88 CAL. ASSEMBLY, ASSEMBLY JOURNAL, at 6819.

96. SENATE RECESS HISTORY, 1987-88 Cal. Leg., Reg. Sess., Oct. 5, 1988, at 44.

97. 1988 Cal. Stat. ch. 1374, sec 1, at _____ (amending CAL. PENAL CODE §§ 629.32, 631).

the United States.⁹⁸ Drug organizations reap gigantic profits and use unscrupulous means to protect their interests.⁹⁹ Not surprisingly, California has become a major hub of illegal drug activity.¹⁰⁰ A recent federal government report has identified Los Angeles as a major national drug importation and distribution center.¹⁰¹ In addition, San Francisco police worry that rock cocaine (crack) dealers are taking over entire neighborhoods.¹⁰²

Federal government officials, in their attempt to curtail illegal drug trading, have found that investigating and prosecuting the leaders of organized criminal entities is difficult and frustrating.¹⁰³ As a result of this problem, Congress enacted Title III of the Omnibus Crime Control and Safe Streets Act of 1968.¹⁰⁴ Title III enables federal law enforcement officers to obtain judicial warrants for conducting electronic surveillance.¹⁰⁵ In enacting Title III, Congress was aware that leaders of organized crime syndicates shield their criminal activities by purposefully failing to keep formal business records and by intimidating potential witnesses against them.¹⁰⁶ These tactics prevent law enforcement officials from obtaining admissible trial evidence to support convictions against organized crime leaders.¹⁰⁷ In addition, Congress understood that large criminal organizations depend on the telephone to organize and conduct illegal activities, and that wiretapping is an effective way to obtain admissible trial evidence.¹⁰⁸

Because of increased drug trading and increased difficulties in convicting drug kingpins, the California Legislature enacted S.B. 1499 to aid California law enforcement officers.¹⁰⁹ S.B. 1499 allows judicially supervised wiretapping for use in investigating serious drug

98. COMPTROLLER GENERAL OF THE UNITED STATES, CONTROLLING DRUG ABUSE: A STATUS REPORT (March 1988).

99. *Id.*

100. In the 1980's federal law enforcement officials in Los Angeles have been seizing greater amounts of illegal drugs due to the flight of major drug dealers from law enforcement crackdowns in Florida and New York. Sacramento Bee, Dec. 19, 1988, at A1, col. 1.

101. COMPTROLLER GENERAL OF THE UNITED STATES, CONTROLLING DRUG ABUSE *supra* note 101 at 25.

102. *Id.* at 26.

103. 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2157-2161.

104. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 218 (1968) (codified as amended at 18 U.S.C. §§ 2510-2520 (1988)).

105. *Id.*

106. *Id.*

107. 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2157-2161.

108. *Id.*

109. California State Assembly, Senate Third Reading Report on S.B. 1499 at 6 reprinted in CAL. DIST. ATTY'S ASSOC., INTERCEPTION OF WIRE COMMUNICATIONS: CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION (1988).

offenses.¹¹⁰ The only offenses that state law enforcement officers may obtain a judicially authorized wiretap order are for the manufacture, sale, possession for sale, transportation, and importation of cocaine, heroin, PCP, methamphetamines or their analogs, when the amount of the substance exceeds three pounds by weight or ten gallons by liquid volume.¹¹¹

To obtain a judicially authorized wiretap order, a law enforcement officer must file a written application requesting judicial authorization to intercept wire communications with the presiding superior court judge or a judge designated¹¹² by the presiding superior court judge.¹¹³ Each application must contain the following information: (1) The identity of the applicant and the supervisor who authorizes the application;¹¹⁴ (2) the identity of the law enforcement agency executing the order;¹¹⁵ (3) the facts that the applicant believes justify wiretapping;¹¹⁶ (4) the time authorized for the interception of wire communications;¹¹⁷ and (5) the facts relating to any known previous wiretap applications to a state or federal judge.¹¹⁸

A judge can only approve an application and issue an order¹¹⁹ authorizing wiretapping if exigent circumstances exist¹²⁰ and there is probable cause to believe the following: (1) A person is committing, has committed, or is about to commit certain drug offenses;¹²¹ (2) a conspiracy to commit certain drug offenses exists;¹²² (3) conversations relating to the named illegal activities will be intercepted;¹²³ and (4) the person named on the affidavit uses or is about to use the place or facility to be wiretapped to commit the named drug offenses.¹²⁴

110. 1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE 629.02)

111. *Id.* (enacting CAL. PENAL CODE § 629.02(a)(1)).

112. *Id.* (enacting CAL. PENAL CODE § 629.02 (the presiding superior court judge names the other judge)).

113. *Id.*

114. *Id.* (enacting CAL. PENAL CODE § 629(a),(b)).

115. *Id.* (enacting CAL. PENAL CODE § 629(c)).

116. The facts must include; (1) The particular offense under investigation; (2) the existence of exigent circumstances requiring wiretapping; (3) the type of communications to be intercepted; (4) the nature and place of the interception; and (5) any known information about the identity of the person whose conversations will be intercepted. *Id.* (enacting CAL. PENAL CODE § 629(d)).

117. *Id.* (enacting CAL. PENAL CODE § 629(e)).

118. *Id.* (enacting CAL. PENAL CODE 629(f)).

119. *Id.*

120. An applicant must state that normal investigative techniques have been or will be useless or dangerous. *Id.* (enacting CAL. PENAL CODE §§ 629(d), 629.02(d)).

121. *Id.* (enacting CAL. PENAL CODE § 629.02(a)). *See also supra* note 7 and accompanying text.

122. *Id.* (enacting CAL. PENAL CODE § 629.02(a)(2)).

123. *Id.* (enacting CAL. PENAL CODE § 629.02(c)).

124. *Id.*

A judge may approve an oral application for a wiretap order only if grounds exist upon which the judge would normally grant a written petition for a wiretap order.¹²⁵ In addition, a judge must find probable cause to believe that an investigation requires emergency action¹²⁶ and that substantial danger to life or limb¹²⁷ justifies the immediate interception of wire communications.¹²⁸

Once approved, an order must be executed promptly in the least intrusive manner possible.¹²⁹ The method of recording conversations must allow for a system of immediate verification of the originality and authenticity of the audiotape.¹³⁰ Upon termination of the order, all evidence gained through wiretapping must be brought to the issuing judge to be sealed.¹³¹ Within ninety days of the termination of the order or extension order, the issuing judge must cause the persons named on the application and any other known persons whose conversations were intercepted, to be served notice of the entry of the order, the beginning and ending dates of the order, and the recording of conversations.¹³² The issuing judge has the discretion to grant a motion to inspect the contents of the evidence under seal.¹³³ Moreover, evidence may not be used in any trial, hearing, or proceeding¹³⁴ unless each party has been given a transcript of the recorded conversations and a copy of the application and court order authorizing the wiretap.¹³⁵

B. The Constitutionality of the Wiretapping Statutes

Both *Berger* and *Katz* clearly control the extent to which the government may violate a reasonable expectation of privacy in the

125. *Id.* (enacting CAL. PENAL CODE § 629.06(a)(1)).

126. *See id.* (enacting CAL. PENAL CODE § 629.06(a)(2)). *See also* Nabozny v. Marshall, 781 F.2d 83, 83-85 (6th Cir. 1986) (an emergency existed allowing the police to use electronic surveillance when suspects kidnapped a bank manager and attempted to extort money from the bank).

127. *See* (1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE § 629.06(a)(2)).

128. *Id.* (enacting CAL. PENAL CODE § 629.06).

129. *Id.* (enacting CAL. PENAL CODE § 629.08).

130. *Id.* (enacting CAL. PENAL CODE § 629.14). The recording equipment must be able to pick up and measure the length of interceptions. *Id.*

131. *Id.*

132. *Id.* (enacting CAL. PENAL CODE § 629.18). A judge must also cause to be served notice of an application to intercept wire communications that has been refused. *Id.*

133. *Id.* The government may make an ex-parte showing of good cause to postpone the serving of the inventory. *Id.* The judge may postpone the serving of notice only for the time needed to achieve the purposes of the delay. *Id.*

134. *Id.* (enacting CAL. PENAL CODE § 629.20). Wiretap evidence may always be used in a grand jury hearing. *Id.*

135. *Id.*

context of electronic surveillance.¹³⁶ Consequently, Congress relied on *Berger* and *Katz* for guidance to create legislation¹³⁷ that would not violate the fourth amendment.¹³⁸ Since the California Legislature relied on Title III for guidance when it enacted S.B. 1499 and S.B. 83, these bills should survive future fourth amendment challenges to the extent that they are like those parts of Title III that have already survived challenge.¹³⁹ To the extent that S.B. 1499 and S.B. 83 have no Title III counterparts, S.B. 1499 and S.B. 83 must still pass constitutional scrutiny. Any constitutional weighing of S.B. 1499 and S.B. 83 must be by the nine minimum constitutional standards set out in *Berger* and the warrant requirement under *Katz*.¹⁴⁰

1. Probable Cause Requirements

Under *Berger*, an affiant must show that probable cause exists to believe that a crime "has been or is being committed."¹⁴¹ Senate bill 1499 requires that an affiant provide a complete factual basis justifying a belief that a crime has been, is being, or will be committed before a judge may approve a wiretap order.¹⁴² In addition, S.B. 1499 prohibits the authorization of a wiretap order unless a magistrate determines that probable cause exists to believe the following: (1) A person has committed, is committing, or will commit a specified drug offense; (2) a conspiracy exists to commit any of the named drug offenses; (3) communications concerning the above illegal activities will be obtained through electronic surveillance; and (4) the person named on the affidavit uses or will use the place to be tapped.¹⁴³

The provisions of S.B. 1499 are identical to the language in Title III.¹⁴⁴ Although an affiant must show that probable cause exists to

136. See *Berger v. New York*, 388 U.S. 41 (1966); *Katz v. United States*, 389 U.S. 347 (1967).

137. 1968 U.S. CODE CONG. & ADMIN. NEWS 2112, 2156-2157.

138. "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." U. S. CONST. amend IV.

139. See *infra* note 78 and accompanying text.

140. See *supra* notes 60-66 and accompanying text.

141. *Berger v. New York*, 388 U.S. 41, 55 (1966).

142. 1988 Cal. Stat. ch. 111, sec. 2, at _____ enacting CAL. PENAL CODE § 629) (outlining procedures for application for wiretap warrant).

143. *Id.* (enacting CAL. PENAL CODE § 629.02) (entering an order authorizing electronic surveillance).

144. Compare *id.* with 18 U.S.C. § 2518(1)(b) (1988).

believe that a crime, "has been or is being committed,"¹⁴⁵ at least one federal court has held that the phrase "is about to be committed,"¹⁴⁶ in Title III is constitutional.¹⁴⁷ Further, since Title III has survived all facial probable cause constitutional challenges, S.B. 1499 is almost certainly constitutional.¹⁴⁸

2. *Particularity of the Order and the Scope of the Executing Officer's Authority in Executing the Wiretapping Order*

Under *Berger* a judge must specify on each order the particular communications to be intercepted and the scope of the executing officer's authority in executing the wiretap order.¹⁴⁹ The *Berger* Court stated that requiring the government to specifically describe the conversations to be intercepted limits the authority of the executing officer and prevents the government from conducting general searches.¹⁵⁰ Subsequent to *Berger*, the courts, aware that describing a future conversation with complete accuracy is impossible,¹⁵¹ have held that a full and complete description of the offense to be investigated sufficiently defines the type of conversations the government may seize.¹⁵²

S.B. 1499 adopts the language of Title III and requires that a law enforcement officer describe in the affidavit the particular conversations to be intercepted.¹⁵³ Additionally, S.B. 1499 requires the judge to describe the particular conversations to be intercepted in the

145. *Berger*, 388 U.S. at 55.

146. 18 U.S.C. § 2518(1)(b)(i) (1968).

147. The purpose of Title III is to gain evidence of crimes committed and to prevent the commission of future crimes. *United States v. Southard*, 700 F.2d 1, 27 (1st Cir. 1983). The determination of probable cause is what is important, not when the criminal conduct occurred. Common sense and reasoning would lead a reasonable judge to authorize a search warrant based on a reliable informant's statement that the plans, tools, and weapons to be used in a future crime are located at a certain place. *Id.*

148. See *Dalia v. United States*, 441 U.S. 238, 254-259 (1978); *United States v. Bailey*, 607 F.2d 237, 240-241 (9th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); *United States v. Martin*, 599 F.2d 880, 883-884 (9th Cir. 1979); *United States v. Frederickson*, 581 F.2d 711, 713 (8th Cir. 1978) (per curiam); *United States v. Ford*, 553 F.2d 146, 152-170 (D.C. Cir. 1977); *United States v. Argresa*, 541 F.2d 690, 696-698 (8th Cir. 1976); *United States v. Feldman*, 535 F.2d 1175, 1181 (9th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976); *United States v. Kirk*, 534 F.2d 1262, 1273 (8th Cir. 1976), *cert. denied*, 430 U.S. 906 (1977).

149. *Berger v. New York*, 388 U.S. at 57 (1966).

150. *Id.* at 59.

151. J. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* § 2-25 (1986).

152. *Id.*

153. See 1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE §§ 629(d), 629.04(c)).

order.¹⁵⁴ Also like Title III, S.B. 1499 requires that each order authorizing wiretapping particularly describe (1) any known information relating to the identity of the persons whose conversations are to be intercepted, (2) where the authorized interception will take place, (3) the illegal activities under investigation, and (4) the length of time for which the order is authorized.¹⁵⁵ Moreover, S.B. 1499 requires the executing officer to submit a written progress report to the issuing judge every seventy-two hours.¹⁵⁶

Federal courts have held that Title III satisfies the *Berger* requirement that the affidavit and order specifically describe the conversations to be intercepted.¹⁵⁷ Since the Title III requirements limiting the discretion of the officer executing the warrant are identical to S.B.1499, these sections almost certainly satisfy the particularity standards described in *Berger*.¹⁵⁸

3. Probable Cause Requirement for Additional Searches

Under *Berger*, the government may continue wiretapping after seizing a conversation of the type it seeks only if it establishes probable cause to believe additional conversations will occur.¹⁵⁹ In striking down New York's permissive wiretap statute, the *Berger* Court criticized the statute for allowing a judge to authorize a wiretap order that allowed the government to sustain a series of intrusions for up to sixty days based on a single determination of probable cause.¹⁶⁰ Despite the Court's concern that a prolonged government wiretap might create a series of searches based upon a single determination of probable cause, Congress specifically enacted a thirty

154. See *id.* (enacting CAL. PENAL CODE § 629(d)) (listing information required on an affidavit); *id.* (enacting CAL. PENAL CODE § 629.04(c)) (requiring that communications to be intercepted are specified on the order).

155. *Id.* (enacting CAL. PENAL CODE § 629.04(a)-(c),(e)).

156. *Id.* (enacting CAL. PENAL CODE § 629.10).

157. See *United States v. Martinez*, 498 F.2d 464, 468 (6th Cir. 1974), *cert. denied* 419 U.S. 1056 (1974); *United States v. Pacheco*, 489 F.2d 554, 565 (5th Cir. 1974), *cert. denied*, 419 U.S. 909 (1975); *United States v. Bobo*, 477 F.2d 974, 983 (4th Cir. 1973).

158. See J. CARR, *supra* note 154, §§ 2-24, 2-27. See also *Berger v. New York*, 388 U.S. 41, 57 (1966). The objective of the particularity requirements is to define the government's justification for invading a constitutionally protected area and to protect unauthorized areas from intrusion. *Id.*

159. *Berger*, 388 U.S. at 59-60.

160. *Id.* at 57, 59. The majority was concerned that a statute may permit an invasion of a constitutionally protected area by general warrant which is in contravention to the protections provided by the Fourth Amendment. *Id.* at 64.

day restriction on electronic surveillance in Title III.¹⁶¹ This restriction allows the judge to authorize a wiretap order for up to thirty days based upon a single showing of probable cause.¹⁶² One federal court has held that this thirty day time limit does not constitute a general warrant search in violation of the fourth amendment.¹⁶³

S.B. 1499 is similar to Title III in that it limits electronic surveillance to the time necessary to achieve the government's purpose and places a thirty day time limit on electronic surveillance.¹⁶⁴ Under S.B. 1499, however, once the government intercepts a conversation of the type it seeks, the government may not continue electronic surveillance unless the affiant establishes that there is probable cause to believe that additional illegal conversations will occur.¹⁶⁵ Since this requirement under S.B. 1499 is more restrictive than the similar provision under Title III, it should pass constitutional muster.

4. *The Government Must Execute the Wiretap Order Promptly and in the Least Intrusive Manner*

Berger requires every wiretap order to contain a provision that the government execute the wiretap order promptly and in the least intrusive manner.¹⁶⁶ In enacting Title III, Congress specifically included a provision that all wiretap orders must contain a requirement that the government execute the order promptly and in the least intrusive manner.¹⁶⁷ Like Title III, S.B. 1499 specifically requires that every order and extension order contain a provision that each authorized wiretap will be executed "as soon as practicable" and in the least intrusive manner with respect to unrelated conversations.¹⁶⁸ On its face, these requirements satisfy the "least intrusive manner" requirement under *Berger* because they require each order to contain the least intrusive manner provision.

161. See 18 U.S.C. 2518(5) (1968). An order may only authorize electronic surveillance for the time necessary to obtain the objective of the search but no longer than 30 days. *Id.*

162. *Id.*

163. See *United States v. Ramsey*, 503 F.2d. 524, 531 (7th Cir. 1974), *cert. denied* 420 U.S. 932 (1974) (the time period does not make Title III facially unconstitutional as a general warrant).

164. See 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629.08). See also 18 U.S.C. § 2518(5) (1966).

165. 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629).

166. *Berger v. New York*, 388 U.S. 41, 59 (1966).

167. 18 U.S.C. § 2518(5) (1968).

168. 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629.08).

However, whether the government's conduct actually constituted "the least intrusive manner" requires the courts to employ the analysis set forth in *Scott v. United States*.¹⁶⁹ In *Scott*, federal agents obtained a judicially authorized wiretapping order under Title III to investigate a drug selling conspiracy involving several suspects.¹⁷⁰ The wiretap order contained Title III's language requiring that the executing officers conduct the electronic surveillance promptly in the least intrusive manner to the persons named in the order.¹⁷¹ At the end of the surveillance period, the government arrested twenty-two persons and indicted fourteen, including defendant Scott.¹⁷² Before Scott's trial, the district court suppressed all the government's wiretap evidence because the federal officers intercepted all conversations even though only forty percent of the calls were shown to be narcotics related.¹⁷³

The Court of Appeals reversed and remanded the case to the trial court to consider not only the percentage of narcotics related calls, but also the reasonableness of the officers' actions with respect to the purpose of the wiretap order and the officers' knowledge of the information available at the time of the interception.¹⁷⁴ On remand, the district court ruled that the government's wiretap evidence should be suppressed because the federal agents knew of the least intrusive manner requirement, but never attempted to comply with it.¹⁷⁵ Once again the Court of Appeals reversed and remanded the case to the district court¹⁷⁶ holding that the suppression motion must be based on an objective assessment of the actual interceptions and not on the subjective intent of the officers executing the wiretap order.¹⁷⁷ The government's wiretap evidence was eventually admitted and Scott was convicted of conspiracy to sell and purchase narcotics.¹⁷⁸

In his petition for certiorari to the Supreme Court, Scott argued that Title III required federal officers to make a good faith effort to meet the least intrusive manner requirements when executing a

169. 436 U.S. 128, 139 (1978).

170. *Scott*, 436 U.S. at 131. The affidavit alleged that probable cause existed to believe that nine named people were involved in the conspiracy. *Id.*

171. *Id.* at 131-32.

172. *Id.* at 132.

173. *Id.*

174. *Id.* at 132-33.

175. *Id.* at 133.

176. *Id.* at 134.

177. *Id.*

178. *Id.* at 134-35.

wiretap order.¹⁷⁹ Scott further argued that the government's failure to make a good faith effort required the court to suppress any wiretap evidence.¹⁸⁰ The Supreme Court held that whether an officer has executed a wiretap order in the least intrusive manner depends on the circumstances of each case.¹⁸¹ Under *Scott*, a trial court must determine whether an officer used the least intrusive manner by focusing on whether the officer's conduct was reasonable in executing a wiretapping order under Title III, rather than focusing on the officer's subjective motives.¹⁸² The Court explained that the reasonableness of an officer's conduct in executing a wiretap order depends on the circumstances of the investigation.¹⁸³ In finding the actions of the officers in *Scott* reasonable, the Court relied on the following factors: (1) The percentage of nonpertinent to pertinent calls intercepted; (2) the circumstances of the wiretap; (3) the stage in the investigation in which the calls were intercepted; and (4) the type of use to which the telephone was put.¹⁸⁴

The least intrusive manner requirements of S.B. 1499 are identical to the Title III least intrusive manner requirements that the Court examined in *Scott*.¹⁸⁵ Therefore, the California courts should apply the *Scott* reasonableness test when examining the reasonableness of a California law enforcement officer's conduct in executing a wiretapping order under S.B. 1499.¹⁸⁶

5. *The Government May Seize Only Criminal Conversations*

Berger allows the government to seize only conversations having a connection with the crime or crimes under investigation.¹⁸⁷ S.B. 1499 expressly prohibits the government from intercepting privileged¹⁸⁸

179. *Id.* at 135.

180. *Id.*

181. *Id.* at 140.

182. *Id.* at 139.

183. *Id.* at 140.

184. *Id.* at 140-41.

185. Compare 1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE § 629.08) with 18 U.S.C. 2518(5) (1968).

186. See *infra* note 185 and accompanying text (to determine reasonableness the Court looked at the following factors: (1) the percentage on nonpertinent to pertinent calls intercepted; (2) the circumstances of the wiretap; (3) when the calls were intercepted; and (4) the type of use to which the telephone was put).

187. *Berger v. New York*, 388 U.S. 41, 57 (1966).

188. CAL. EVID. CODE § 917 (West 1966) The opponent of the claim of privilege has the burden of proof to show that any communication between a lawyer-client, physician-patient, psychotherapist-patient, clergyman-penitent, or husband-wife was not privileged. *Id.*

communications.¹⁸⁹ Under S.B. 1499 if a law enforcement officer acting in accordance with a judicially approved order, intercepts a privileged communication, the officer must terminate the interception for at least two minutes.¹⁹⁰ After the two minute period, an officer may resume the interception up to thirty seconds to determine whether the nature of the conversation is no longer privileged.¹⁹¹ This monitoring process may continue until the conversation ends or is no longer privileged.¹⁹²

These safeguards attempt to satisfy the requirements set out in *Berger* that the government may seize only criminal conversations.¹⁹³ Because these safeguards are subject to the least intrusive manner test in *Scott*, which requires an officer's conduct to be reasonable under the circumstances, the government may be able to seize non-criminal communications.¹⁹⁴ For example, despite *Berger*, the Court in *Scott* allowed the government to seize all telephone calls at the beginning of the surveillance in order to identify and categorize unrelated and privileged conversations.¹⁹⁵ Since almost all the calls were ambiguous and difficult to characterize until the end of the conversation, the Court held that the monitoring was not unreasonable.¹⁹⁶

6. When a Wiretap Order Must Terminate

Under *Berger* electronic surveillance must cease once the government seizes a conversation of the type specified in the wiretap order.¹⁹⁷ The Court was concerned that allowing an order to extend after the government seized the communications of the type it sought would give the government too much discretion in monitoring its own activities.¹⁹⁸ Title III requires federal law enforcement officers to cease electronic surveillance either after the government seizes a

189. 1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE § 629.30).

190. *Id.*

191. *Id.*

192. *Id.* Conversations must be recorded in a way so that a reviewing court could find that the interruptions were also recorded. *Id.*

193. *Berger v. New York*, 388 U.S. 41, 59 (1966).

194. See *Scott v. United States*, 436 U.S. 128, 137 (1978) (emphasizing the objective aspect of "reasonable").

195. *Id.* at 140.

196. *Id.* at 140-43.

197. *Berger*, 388 U.S. at 59-60.

198. *Id.* at 59-60.

conversation of the type it seeks or at the time the order expires.¹⁹⁹ Additionally, Title III requires federal law enforcement officers to establish probable cause to believe additional criminal conversations will occur before a judge can approve a wiretapping order that will not cease after the government seizes a conversation of the type it seeks.²⁰⁰ At least one federal court has held that the termination requirements of Title III are constitutional.²⁰¹

S.B. 1499 adopts the same language as Title III,²⁰² which requires electronic surveillance to cease either at the time the government seizes a conversation of the type it seeks or on the date the order is supposed to expire.²⁰³ In addition, S.B. 1499 uses the same language as Title III,²⁰⁴ which allows a judge to approve a wiretap order that extends after the state seizes a conversation of the type it seeks as long as the state establishes probable cause to believe that additional criminal conversations will occur.²⁰⁵ Consequently, S.B. 1499 should not face any serious facial challenges under the United States Constitution.

Like Title III, S.B. 1499 provides for extensive judicial oversight to prevent potential police abuses.²⁰⁶ S.B. 1499 requires the government to furnish a report to the issuing judge every seventy-two hours stating the progress the government has made or an explanation why no progress has been made to accomplish the goal of the order.²⁰⁷ A judge must terminate the order if the government has made no progress in the investigation, the government's explanation for lack of progress is unsatisfactory, or the electronic surveillance is no longer necessary.²⁰⁸ Since these statutory protections are modeled after Title III and effectively limit the discretion of the executing officer, they are almost certainly constitutional.

199. 18 U.S.C. § 2518(5) (1968).

200. *Id.* § 2518(1)(d).

201. *United States v. Cafero*, 473 F.2d 489, 501 (3d Cir. 1973), *cert. denied*, 417 U.S. 918 (1973).

202. *Compare* 1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE 929(e)) with 18 U.S.C. §§ 2518(1)(d), 2518(5) (1968).

203. 1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE § 629.08).

204. *Compare id.* (enacting CAL. PENAL CODE 629(e)) with 18 U.S.C. § 2518(1)(d) (1968).

205. *See* 1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE § 629) (application for authorization of electronic surveillance); *id.* (enacting CAL. PENAL CODE § 629.02) (order authorizing electronic surveillance); *id.* (enacting CAL. PENAL CODE § 629.08) (limitations on obtaining an extension order).

206. 1988 Cal. Stat. ch. 111, sec. 2, at _____ (enacting CAL. PENAL CODE § 629.10).

207. *Id.*

208. *Id.*

7. *The Government Must Show Probable Cause to Extend a Wiretap Order*

Under *Berger* a judge may extend a wiretapping order if the government establishes that there are independent grounds for probable cause to believe that additional criminal conversations will occur.²⁰⁹ This means that the government cannot obtain an extension order if it bases probable cause solely on the information contained in the original application for a wiretap order. The textual language of Title III does not specifically require the government to show an independent basis for probable cause to believe future criminal conversations will occur before a judge can extend a wiretap order.²¹⁰ Instead, before a judge can extend a wiretap order under Title III, the government must provide the judge with the current results of the investigation or a reasonable explanation for not obtaining any results.²¹¹ At least one federal court has held that before a judge can extend a wiretap order, the government must provide more than just the original facts supporting the initial determination of probable cause.²¹²

Like Title III, S.B. 1499 and S.B. 83 do not require an independent determination of probable cause to extend a wiretap order.²¹³ S.B. 1499 requires each application to include the number of conversations intercepted, the results of the investigation, or a reasonable explanation of a failure to intercept pertinent conversations.²¹⁴ The information required in S.B. 1499 should satisfy the *Berger* probable cause requirements since S.B. 1499 provides the judge with the necessary information to make a neutral and detached determination of probable cause based on the progress of the investigation.²¹⁵ In light of the *Katz* standard requiring a predetermination of probable cause before conducting electronic surveillance,²¹⁶ California law enforce-

209. *Berger v. New York*, 388 U.S. 41, 57, 59 (1966).

210. 18 U.S.C. § 2518 (1982).

211. *Id.* § 2518(1)(f).

212. *United States v. Williams*, 737 F.2d 594, 601 (7th Cir. 1984) (a magistrate must have the necessary information in order to make an informed predetermination of probable cause), *cert. denied*, 470 U.S. 1003 (1974).

213. See 1988 Stat. ch. 111, secs. 2-4 at ____ (enacting CAL. PENAL CODE §§ 629-631); 1988 Stat. ch. 1374, secs. 1-3 at ____ (amending Cal. Penal Code §§ 629.32, 631). See also *supra* note 214 and accompanying text.

214. 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629(g)).

215. *Id.*

216. See *Katz v. United States*, 389 U.S. 347, 358-359 (1967).

ment officers will have to support an application for an extension order with additional information before a judge will extend a wiretap order.²¹⁷

8. *Exigent Circumstances Required*

Berger requires the government to show that exigent circumstances exist before a judge may approve or extend a wiretap order.²¹⁸ The Court felt that a wiretap order may be approved only if exigent circumstances exist, since a wiretap order is highly intrusive and permits the government to search without notifying the suspect.²¹⁹ Under Title III, a judge may not approve a wiretap order unless the government shows that conventional investigative techniques most likely will fail or are too dangerous.²²⁰ In addition, Title III requires the government to show an emergency situation exists before a judge may approve an oral application for a wiretap order.²²¹

The exigent circumstance language in S.B. 1499 is identical to the exigent circumstance language in Title III.²²² S.B. 1499 requires an affiant to state, and a judge to find, that conventional investigative techniques are, or most likely will be, ineffective or dangerous.²²³ In addition, a judge may approve an oral application only if the judge finds probable cause to believe that an investigation requires emergency action,²²⁴ or that there is a substantial risk of death or serious bodily injury²²⁵ if the judge does not authorize electronic surveillance.²²⁶ Since the federal courts have held that the exigent circumstance provision of Title III satisfies the exigent circumstance

217. *United States v. Williams*, 737 F.2d 594, 601 (7th Cir. 1984) (a magistrate must have the necessary information in order to make an informed predetermination of probable cause), *cert. denied* 470 U.S. 1003 (1984).

218. *Berger v. New York*, 388 U.S. 41, 60 (1966).

219. *Id.*

220. 18 U.S.C. § 2518(1)(c) (1982).

221. *Id.* § 2518(7)(a).

222. Compare 1988 Cal. Stat. ch. 111, sec. 2 at ____ (enacting CAL. PENAL CODE § 629.02(d)) with 18 U.S.C. § 2518(1)(c) (1982).

223. See 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE §§ 629, 629.02).

224. See *supra* note 129 and accompanying text.

225. See *supra* note 130 and accompanying text.

226. An oral order may not be authorized unless there are grounds for issuance. 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629.06(a)(1)). An order may be issued on the condition that a written application be filed with the judge within 48 hours of the issuance of the order. *Id.* 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629.06(b)).

requirement in *Berger*, the analogous provisions in S.B. 1499 are almost certainly constitutional.²²⁷

9. Judge Must Review Evidence

Berger requires the government to turn over evidence obtained through electronic surveillance to the issuing judge before the government uses the evidence.²²⁸ The *Berger* Court feared that the New York statute gave the government too much discretion as to the use of evidence without judicial supervision or adequate protections.²²⁹

In addressing these concerns, the California Legislature adopted language from Title III.²³⁰ Senate bill 1499 and S.B. 83 which require the government, before using wiretap evidence, to turn over all evidence obtained through wiretapping to the issuing judge for the judge to inspect and seal.²³¹ The issuing judge must also cause all those named on the application to be served notice of the entry of the order, the period of authorized surveillance, and whether conversations were intercepted.²³² Moreover, evidence may not be used in a criminal prosecution unless each party receives a transcript of the conversations intercepted at least ten days before trial.²³³ Since the provisions of Title III requiring judicial inspection of evidence have survived constitutional challenge, S.B. 1499 and S.B. 83 should also pass constitutional challenge.²³⁴

PART III: LEGAL RAMIFICATIONS

A. Remedies Under S.B. 1499 and S.B. 83

S.B. 1499 and S.B. 83 require any wiretap evidence that the state seizes in violation of a defendant's fourth amendment right against

227. See *United States v. Tortorello*, 480 F.2d 764, 773 (2nd Cir. 1973), cert. denied, 414 U.S. 866 (1973); *United States v. Bobo*, 477 F.2d 974, 981 (4th Cir. 1973).

228. *Berger v. New York*, 388 U.S. 41, 60 (1966).

229. *Id.*

230. Compare 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE 629.14, 629.16, 629.18) with 18 U.S.C § 2518(8)(a), (b), (d) (1982).

231. 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629.14).

232. *Id.* (enacting CAL. PENAL CODE § 629.18).

233. *Id.* (enacting CAL. PENAL CODE § 629.20).

234. See *United States v. Cohen*, 530 F.2d 43 (5th Cir. 1976) (judicial inspection requirement under Title III was not violated when judge did not receive the evidence until five months after the surveillance ended and the government was able to establish an uninterrupted chain of custody), cert. denied, 429 U.S. 855 (1976).

unreasonable searches and seizures to be inadmissible under the federal exclusionary rule.²³⁵ In addition, S.B. 1499 provides a wiretap victim with civil and criminal remedies for a violation of the wiretap statute.²³⁶ A person violating S.B. 1499 and S.B. 83 may be imprisoned for up to one year, fined up to \$2,500, or both fined and imprisoned.²³⁷ Finally, a wiretap victim whose rights are abrogated in violation of S.B. 1499 may also have a civil cause of action against any person who intercepts, uses, or discloses private communications, and may recover actual and punitive damages along with reasonable attorney and litigation costs.²³⁸ Any wiretapper in a criminal or civil action, however, may assert a good faith reliance on a judicially authorized court order as a complete defense.²³⁹

B. Remedies Under the California Constitution

1. Exclusion Under Article I, Section 1.

Article I, section 1 of the California Constitution grants California residents a substantive right to be free of unreasonable government intrusion.²⁴⁰ S.B. 1499 may violate this right to privacy by enabling state law enforcement officials to listen secretly to private telephone conversations without the consent of either party to the conversation.²⁴¹ Nevertheless, even if the state violates a wiretap victim's right to privacy, any relevant evidence the state obtains through wiretapping may be admissible under article I, section 28(d).²⁴² Article I,

235. See 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629.22). See also *Mapp v. Ohio*, 367 U.S. 643 (1961) (all evidence that the state obtains in violation of the fourth amendment to the United States Constitution is inadmissible in a state court as well as a federal court).

236. See 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629.34) (criminal penalties); *id.* (enacting CAL. PENAL CODE § 629.36) (civil penalties).

237. *Id.* (enacting CAL. PENAL CODE § 629.34).

238. See *id.* (enacting CAL. PENAL CODE § 629.36). See also *Malley v. Briggs* 475 U.S. 335, 341 (1985) (a police officer will not be immune from civil liability if an objectively reasonable and competent officer could conclude that probable cause to obtain a search warrant was not present).

239. See 1988 Cal. Stat. ch. 111, sec. 2 at ____ (enacting CAL. PENAL CODE §§ 629.36, 629.41). See also *United States v. Leon*, 468 U.S. 897, 899 (1984) (exceptions to the "good faith" rule).

240. CAL. CONST. art. I, § 1 (providing the right to privacy as an inalienable right).

241. 1988 Cal. Stat. ch. 111, sec. 2, at ____ (enacting CAL. PENAL CODE § 629.02).

242. CAL. CONST. art I, § 28(d) (right to truth-in-evidence provision (Proposition 8) requiring that all relevant evidence be admitted in a criminal trial unless gained in violation of the United States Constitution).

section 28(d) requires California criminal courts to admit all relevant evidence in criminal trials unless the federal exclusionary rule applies.²⁴³

In *In re Lance W.*,²⁴⁴ the California Supreme Court held that under article I, section 28(d) a trial judge may suppress evidence in a criminal trial only if the fourth amendment to the United States Constitution requires suppression.²⁴⁵ In *In re Lance W.*, the defendant was detained after police officers observed him dropping a plastic baggie into a truck belonging to a stranger.²⁴⁶ The police officers searched the vehicle without consent and without a search warrant, and found the plastic baggie, which contained marijuana.²⁴⁷ The police arrested Lance, searched him, and found more marijuana.²⁴⁸ At a later suppression hearing, he contended that the judicially created California "vicarious exclusionary rule"²⁴⁹ gave him standing to suppress the illegally seized evidence.²⁵⁰ The juvenile court held that Lance had standing to object to the illegal search of the truck because article I, section 28(d) abrogated the judicially created vicarious exclusionary rule.²⁵¹

The California Supreme Court held that article I, section 28(d) eliminated judicially created exclusionary remedies but did not effect the scope of substantive rights protected by the state and federal constitutions.²⁵² Furthermore, the court held that state created exclusionary rules are not a proper remedy for enforcing state substantive rights under the state constitution.²⁵³

Since the California Supreme Court has held that state created exclusionary rules are not an acceptable means of enforcing substantive state rights, article I, section 1 probably will not prevent the

243. *Id.*

244. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985).

245. *In re Lance W.*, 37 Cal. 3d at 886-87, 694 P.2d at 752, 210 Cal. Rptr. at 639 (1985).

246. *Id.* at 880, 694 P.2d at 747, 210 Cal. Rptr. at 635.

247. *Id.* at 880, 694 P.2d at 748, 210 Cal. Rptr. at 635.

248. *Id.*

249. The vicarious exclusionary rule gives a criminal defendant standing to object to the state's use of evidence obtained by the police through an illegal search and seizure of a third party. *Id.* at 880-81, 694 P.2d at 748, 210 Cal. Rptr. at 635.

250. *Id.*

251. *Id.* at 880, 694 P.2d at 748, 210 Cal. Rptr. at 635.

252. *See id.* at 886-887, 694 P.2d at 752, 210 Cal. Rptr. at 639 (defendant's right must be determined under the federal constitution and federal case law interpreting those rights). *See also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, § 23jj (Supp. 1985) (the sole basis of exclusion under Proposition 8 is the fourth amendment).

253. *In re Lance W.*, 37 Cal. 3d at 887, 694 P.2d at 752, 210 Cal. Rptr. at 639.

government from using wiretap evidence obtained under S.B. 1499 in criminal trials.

2. *Constitutionality of S.B. 1499 and S.B. 83 Under Article I, Section 1*

Since a wiretap victim may not exclude relevant criminal evidence based on independent state grounds, a wiretap victim must look for another remedy if the state violates the wiretap victim's right to privacy under the California Constitution. One way persons affected by electronic surveillance under S.B. 1499 and S.B. 83 may protect their right to privacy under the California Constitution is by seeking an injunction. Therefore, it is important to discuss whether S.B. 1499 and S.B. 83 are constitutional on their face under article I, section 1 of the California Constitution.

In *White v. Davis*²⁵⁴ the California Supreme Court examined whether governmental surveillance and data gathering activities were subject to scrutiny under the privacy protections of article I, section 1 of the California Constitution.²⁵⁵ In *Davis*, police officers acted as undercover agents by registering as students, attending classes, and reporting their observations of faculty and student activities to the police department.²⁵⁶ White, a taxpayer, sought to enjoin the police department from expending public funds to conduct covert surveillance activities at the state university.²⁵⁷ The court, in overruling a demurrer, held that covert police action surveillance was the type of activity that the privacy provision of the California Constitution is designed to prohibit.²⁵⁸ The court stated that the actions of the police officers epitomized the type of government conduct that article I, section 1 bans.²⁵⁹ Additionally, the court held that the privacy provision of article 1, section 1 created an enforceable right of privacy for all people in California,²⁶⁰ but that the state may justify an

254. 13 Cal. 3d 757, 533 P. 2d 222, 120 Cal. Rptr. 94 (1975).

255. *Davis*, 13 Cal. 3d at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105.

256. *Id.* at 762, 533 P.2d at 225, 120 Cal. Rptr. at 97.

257. *Id.*

258. *Id.* at 773-777, 533 P.2d. at 234-35, 120 Cal. Rptr. at 104-05.

259. If the information gathered by the police has no connection to any illegal activity, the government has the burden of proving that a compelling state interest in eavesdropping exists. *Id.* at 776, 533 P.2d at 234, 120 Cal. Rptr. at 106.

260. *See id.* at 774, 533 P.2d at 233, 120 Cal. Rptr. at 105 (the ability to control the circulation of personal information is fundamental to personal freedom). *See also* *Katz v. United States*, 389 U.S. 344, 350-351 (1967) (the fourth amendment does not provide a general

invasion of a person's privacy by showing a legitimate and compelling government interest.²⁶¹ In *Davis* the legitimate state interest in gathering information to prevent future crimes did not give the state the power to conduct surveillance by any means.²⁶² Moreover, the court determined that the federal Bill of Rights and the protections of the California Constitution must determine the limits of permissible law enforcement action.²⁶³

In the context of police surveillance, however, California courts have interpreted *Davis* to mean that a person's right to privacy under article I, section 1 has been violated if the state unreasonably intrudes into a person's subjective and objective reasonable expectation of privacy.²⁶⁴

Private telephone conversations clearly fall within the types of activity where a person may have a subjective expectation of privacy that society is prepared to accept as reasonable. What is not so clear is whether the state's use of electronic surveillance to investigate large scale drug rings will be reasonable. Because of the increasing problems generated by growing drug sales in California, the state should be able to establish that the investigation of high volume drug trading constitutes a legitimate and compelling state interest. Furthermore, considering the limited purpose and scope of S.B. 1499 and S.B. 83 in investigating serious drug offenses, the strict probable cause requirements under S.B. 1499, and the extensive judicial oversight of police conduct in executing a wiretapping order, the state should be able to establish that the government's invasion of a person's privacy in obtaining drug information within the scope of S.B. 1499 and

constitutional right to privacy, but protects citizens from certain forms of government intrusion). The protection of a person's general right to privacy is left to the law of each state. *Id.* at 351.

261. *Davis*, 13 Cal. 3d at 775-76, 533 P.2d at 234, 120 Cal. Rptr. at 106. See also *Alarcon v. Murphy*, 201 Cal. App. 3d 1, 248 Cal. Rptr. 26 (1988) (a person's right to privacy has been violated if a person's objectively reasonable expectation of privacy has been infringed upon by an unreasonable government intrusion); *Armenta v. Superior Court*, 61 Cal. App. 3d 584, 132 Cal. Rptr. 586 (1976) (use of an informant to gain information of specific criminal activities does not violate the right to privacy).

262. *Davis*, 13 Cal. 3d at 766, 533 P.2d at 228, 120 Cal. Rptr at 99 (1975).

263. *Id.*

264. See *People v. Crowson*, 33 Cal. 3d, 623, 629, 660 P.2d 389, 392, 190 Cal. Rptr. 165, 168 (1983) (article I, section 1 has never been held to provide a broader privacy protection than the fourth amendment of the United States Constitution); *People v. Owens*, 112 Cal. App. 3d 441, 449, 169 Cal. Rptr. 359, 362 (1980) (search and seizure and privacy protections of the California Constitution are to be considered coextensive in the context of police surveillance); *People v. Ayers*, 51 Cal. App. 3d 370, 377, 124 Cal. Rptr. 283, 287 (1975) (*White v. Davis* does not affect the application of the United States Constitutional standard prohibiting unreasonable searches and seizures).

S.B. 83 is reasonable. However, a court may grant injunctive relief if the state's application of S.B. 1499 and S.B. 83 violates article I, section 1 of the California Constitution.

CONCLUSION

The enactment of S.B. 1499 and S.B. 83 marks a significant change of policy in California regarding the detection and apprehension of criminals. The magnitude of this change is reflected in the collision course between the "truth in evidence" provision of article I, section 28(d) and the fundamental right to privacy guaranteed by article I, section 1. This conflict pits people's legitimate expectation that their phone conversations will be kept private against the state's need to protect the public from the inherent dangers in the illegal drug trade. Since S.B. 1499 and S.B. 83 are based on Title III and contain even more restrictive provisions than the federal wiretap statute, the statutes will probably withstand any facial federal constitutional challenges. And considering the extent of the drug problem in California's cities and the limited types of crimes that fall under S.B. 1499, the state will probably be able to overcome the state constitutional burden of showing a compelling state interest to invade the privacy rights of a limited class of individuals.

Bruce T. Flynn

APPENDIX

Code Sections Affected

SB 1499 (Presley); 1988 STAT. Ch. 111
Penal Code §§ 629, 629.02, 629.04, 629.06, 629.08, 629.10, 629.12,
629.14, 629.16, 629.18, 629.20, 629.22, 629.24, 629.26, 629.28,
629.30, 629.32, 629.34, 629.36, 629.38, 629.39, 629.40, 629.41,
629.42, 629.44, 629.46, 629.48, 631 (new).
SB 83 (Presley); 1988 STAT. Ch. 1374
Penal Code § 631 (amended).