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BEYOND THE WIRE: AN ANALYSIS OF NON-TELEPHONIC CONVERSATIONS UNDER TITLE III

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INTRODUCTION

Electronic surveillance has become, arguably, the greatest weapon on the war against organized crime. Though organized crime is not limited only to the traditional conception of "the mob,"

the use of wiretaps and electronic bugs against the Mafia in New York is a terrific example of how such electronic surveillance can be used to increase both the safety and efficiency of law enforcement. Such tactics were at the heart of the Mafia Commission Trial of the mid-1980s that sent most of the Mafia leadership to prison. Evidence was gathered from bugs planted in the homes, cars, and meeting places of Paul Castellano, Anthony "Fat Tony" Salerno, Gennaro "Jerry Lang" Langella, and Anthony "Tony Ducks" Corallo (so named for his habit of ducking prosecutions). These electronic surveillance techniques made their capture quicker and easier, and less risky, than if traditional methods had been used. The non-technological strategy of infiltration can supply a wealth of information but is difficult and dangerous. Even Joe Pistone, the famed Donnie Brasco, had his investigation supplemented by wiretaps. Mob informants can be tremendously helpful, but first they must be flipped. Electronic surveillance can aid in this area as well. For example, Henry Hill cooperated with the government after hearing a recording where he was marked for execution. Wiretaps have also provided key evidence against drug rings and motorcycle gangs such as the Bandidos.

Such powerful tools cannot be used without some protection for public rights, however, as well as and measures to ensure responsibility and accountability in their application. The wiretaps and bugs in these federal cases required authorization pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"),[1] which lays out the requirements for obtaining such approval. One of Title III's key provisions requires that the type of communication sought be described with particularity.[2] Before wiretapping proceeds, an order authorizing the interception of wire communication must be obtained.

As with any statute, situations arise which were not considered prior to the enactment of the law. For example, suppose an order was issued that authorized the interception of wire communication. Acting pursuant to the warrant, any statements made between the two people talking on the phone are clearly admissible. It is less clear how to treat other statements that are captured outside

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[1] 18 U.S.C. §§ 2510-20.
[2] *See* 18 U.S.C. § 2518(4)(c).

the scope of that conversation. These non-telephonic statements (as opposed to telephonic statements, which are statements made in the course of conversation between two people talking on the phone) pose a difficult question: can non-telephonic statements be utilized in a criminal proceeding or should such statements be suppressed?

Section I will outline the four categories of statements I use to better understand and analyze the wide variety of circumstances that fit into the category of non-telephonic statements. Section II will discuss the categorization of these statements under Title III. Section III will discuss the applicability of the plain view doctrine to non-telephonic statements. Section IV will ask whether a motion to suppress the recordings of non-telephonic statements should be granted even if the statute was violated and whether there are any exceptions which would allow the admission of such recordings as evidence.

I. STATEMENTS TO BE USED FOR ANALYSIS

Non-telephonic statements come in a variety of different forms. Treating all such statements as equal would make it impossible to discuss the topic in a meaningful way. In order to conduct a proper analysis, I have defined four categories of non-telephonic statements.

The first two types of statements are "non-use statements," statements made when no active telephone call is occurring. Such statements may be recorded when the phone is taken off the hook to avoid disruption or when the phone is not properly replaced in its cradle. Under such circumstances, the wiretap will essentially act as an electronic bug, capturing all conversation in the area of the telephone. These statements will be referred to as "telephone bug statements."

Non-use statements may also be recorded when the telephone is deliberately picked up in order to make an outgoing call, and the statements are made before a call is placed. Such statements will be referred to as "upcoming call statements."

The other two types of statements are both "in-use statements." In-use statements are statements made while a telephone call is in progress, but not in the course of conversation between the people engaged in telephonic discussion. The first type of in-use statement is one made by a person not involved in the telephone

conversation. Background conversations are a perfect example. Such statements will be referred to as "passerby statements."

The final category is the "aside statement." This category includes statements made by, or addressed to, a person involved in a telephonic discussion, but not directed to the person on the other end of the telephone and not meant to be overheard by such a person.

Use of these categories will allow for a more complete discussion of the various issues that arise under Title III.

II. STATUTORY CATEGORIZATION

Title III applies to wire, oral, and electronic communication. However, authorization orders may apply only to the interception of wire communication. It is therefore necessary to determine whether non-telephonic statements are wire communication as defined by Title III. Non-telephonic statements, if not considered wire communication, are oral communication. However, oral communication under Title III is only protected if it is subject to a reasonable expectation of privacy; if no such expectation is present, no authorization order is necessary for the interception.[3]

A. DEFINITIONS

Title III protects wire, oral, and electronic communication against electronic interception. Electronic communication includes email and transmission of other files but explicitly excludes wire and oral communication from its purview.[4] Non-telephonic statements are therefore protected by Title III only if they are wire communication or oral communication. "Wire communication" is defined by Title III as

> any aural transfer made in whole or part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception . . . furnished or operated by any person engaged in providing or operating such facilities for

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[3] *See* 18 U.S.C. § 2510(2).
[4] *See* 18 U.S.C. § 2510(12).

> the transmission of interstate or foreign communications or communications affecting interstate or foreign commerce.[5]

An "aural transfer" is "a transfer containing the human voice at any point between and including the point of origin and the point of reception,"[6] which covers all of the situations at issue here.

Oral communication is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[7] Title III thus does not protect all oral communications, only those made under circumstances justifying an expectation of privacy.

B. WIRE COMMUNICATION

The first step in the statutory analysis is to determine whether non-telephonic statements are wire communication as defined by Title III.

Non-use statements fall fairly obviously outside the definition of wire communication. Citing a variety of different reasons, courts which have faced the issue have never found non-use statements to be wire communication.[8] The early cases are thin on analysis. In *United States v. Feola*, a case in which the DEA and NYPD used a wiretap in the prosecution of a narcotics conspiracy, the trial court admitted statements recorded while the phone was off the hook to make an uncompleted outgoing call (upcoming call statements).[9] The court did not even address the possibility that the statement could qualify as wire communication, instead discussing privacy concerns which arise when the statement is determined to be an oral communication.[10]

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[5] 18 U.S.C. § 2510(1).
[6] 18 U.S.C. § 2510(18).
[7] 18 U.S.C. § 2510(2).
[8] *See, e.g.*, United States v. Willoughby, 860 F.2d 15, 22 (2d Cir. 1988); United States v. Borch, 695 F. Supp. 898, 900-02 (E.D. Mich. 1988), *remanded on other grounds*, 903 F.2d 1068 (6th Cir. 1990); United States v. Feola, 651 F. Supp. 1068, 1107 (S.D.N.Y. 1987); People v. Basilicato, 474 N.E.2d 215, 219-20 (N.Y. 1984).
[9] *See Feola*, 651 F. Supp. at 1107.
[10] *See id*.

In *People v. Basilicato*, a gambling case, the recording device was activated when a phone was taken off the hook so as not to disrupt the conversation occurring at the defendant's home.[11] The court found that "the seizure of non-telephonic conversations pursuant to a warrant that authorizes only wiretapping clearly goes beyond the scope of the warrant."[12] While the court did discuss the statutory language, the discussion was based on state law that differentiated between "telephonic communication" and "[mechanical] overhearing of a conversation."[13] While the *Basilicato* court noted that "[a] similar distinction is drawn in the applicable Federal statutes,"[14] the differences in the language are significant enough that the analysis in *Basilicato* is of limited usefulness to the Title III analysis.

In *United States v. Willoughby*, a case in which the FBI used a wiretap to prevent witness tampering, the statement in question was recorded by a wiretap after the conclusion of one call but before making another call.[15] The court found that the conversation was "not 'made in whole or part through the use of' telephone wires. Rather, it was a face-to-face conversation adventitiously picked up by the recording system."[16] The court found that the statement was an oral communication rather than a wire communication.[17] This analysis would seem to require that a wire communication must be a conversation between one person at the point of origin and one person at the point of reception. Under this interpretation, the statements can only be characterized as wire communication when the wires are necessary for the conversation to occur.

In *United States v. Borch*, where the FBI used a wiretap to bust a narcotics conspiracy, the incriminating statements were intercepted when the defendant, after finishing a phone call, failed to properly replace the phone in the cradle.[18] Statements made by the defendant and others were subsequently recorded as they talked in

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[11] *See Basilicato*, 474 N.E.2d at 218.
[12] *Id.* at 220.
[13] *Id.* at 219-20.
[14] *Id.* at 219 n.1.
[15] *See* 860 F.2d at 22.
[16] *Id.* (quoting 18 U.S.C. § 2510(1)).
[17] *See id*.
[18] *See* 695 F. Supp. 898, 899 (E.D. Mich. 1988).

her home (telephone bug statements).[19] The court focused on the requirement that there be a transmission between the point of origin and the point of reception.[20] The court rejected the government's argument that "non-telephonic discourse transmitted only as far as the FBI monitoring equipment is of the same nature from a statutory perspective,"[21] holding that wire transmissions reaching only to the FBI monitoring equipment did not involve a point of reception as required by the statute.[22] The court held that "[a] contrary ruling would unjustifiably blur Congress' clear differentiation between 'wire communications' and 'oral communications.'"[23]

For a number of reasons, non-use statements are not, and have not been, considered wire communications under Title III. In-use statements, on the other hand, are a much closer decision, although only one court has squarely confronted the issue. In *United States v. King*, a marijuana conspiracy case, the defendant moved to suppress background conversations recorded by the wiretap while a phone call was occurring (passerby statements).[24] The court found that "[s]ince only wire communications were described in Judge Schwartz's order, the Government's interception of any other type of communication constituted an unreasonable search and seizure."[25] The *King* court did not consider background conversations intercepted while recording an otherwise properly intercepted call to be wire communications.

Two other courts have considered the issue but ruled on other grounds. In *United States v. Couser*, a case in which the DEA and Baltimore Police used a wiretap to record evidence of narcotics offenses, the government recorded parts of a conversation between the defendant, participating in an otherwise properly recorded call, and a third party standing near the phone.[26] The Fourth Circuit indicated that, under the circumstances, the conversation could be

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[19] *Id*.
[20] *See id*. at 900.
[21] *Id*. at 900-01.
[22] *See id*. at 901.
[23] *Id*. at 902.
[24] *See* 335 F. Supp. 523, 548 (S.D. Cal. 1971), *rev'd on other grounds*, 478 F.2d 494 (9th Cir. 1973).
[25] *Id*.
[26] *See* 732 F.2d 1207, 1208 (4th Cir. 1984).

used. The court listed a number of factors that suggested this to be the appropriate result: all of the statements recorded in this manner were made by the defendant while using the telephone; statements of those in the vicinity (including the person to whom the defendant was talking) were not recorded; and the government could not minimize the background conversations without losing the entire call which was, as previously noted, otherwise properly intercepted.[27] The court did not rule on the issue, however, instead deciding to affirm the denial of suppression on different grounds.[28]

In *Borch*, the court was confronted with a non-use statement. In its analysis, the court found that "there is a fundamental distinction between background discussions during a point-to-point phone call and face-to-face discourse while no point-to-point call is in progress. Only the former category of conversation can be classified as 'wire communication' within the meaning of the operative statutory language."[29] Since those in the background are "well aware that their statements may be transmitted to the receiving end of the telephone line" and the statute "contemplates surreptitious monitoring activity within the channel of transmission," background conversations are wire communication as long as a phone call is in progress.[30] The court also relied on precedent from both *Basilicato* and *Feola*.[31]

Thus three main theories emerge from the cases interpreting the definition of wire communications under Title III for non-telephonic communications. The first is the *Borch* theory, under which non-telephonic communications are wire communications as long as they are transmitted within the channel of transmission during a phone call. The second is the *Couser* theory, under which statements to third parties made by those using the phone constitute wire communications as long as efforts are made to minimize the likelihood of this occurrence. The final theory is the *Willoughby* theory, under which wire communications are conversations that require a wire or similar connection

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[27] *See id*. at 1208-09.
[28] *See id*. at 1209.
[29] United States v. Borch, 695 F. Supp. 898, 901 (E.D. Mich. 1988).
[30] *Id*. at 900 (emphasis omitted).
[31] *See id*. at 901.

to be completed; any conversations directed outside the channel of transmission are not wire communication.

The *Borch* theory suffers from several holes in its reasoning. First, in forming the theory, the *Borch* court relies on *Basilicato* and *Feola*. As previously noted, *Basilicato* discusses a New York statute[32] which has the advantage of clarity and uses far different language than that of Title III.[33] The court uses *Feola* to conclude that there is "a fundamental distinction between background discussions during a point-to-point phone call and face-to-face discourse while no point-to-point call is in progress."[34] The *Feola* court notes that "in *Basilicato* the telephone was taken off the hook not to make an uncompleted outgoing call, as here, but to prevent incoming calls: there is thus arguably a legitimate privacy interest implicated in *Basilicato* that is absent here."[35] The *Feola* court is discussing the statements as oral communications and using a privacy analysis to determine whether they are protected by Title III. Oral communications made without a reasonable expectation of privacy are not protected by Title III and hence may be admitted without a warrant.[36] Such reliance on the differences between *Feola* and *Basilicato* is inapplicable to the "wire communication" analysis.

The *Borch* court, apart from its reliance on precedent, defines background statements as wire communication because they go through the channel of communication and those making the statements are "well aware that their statements may be transmitted to the receiving end of the telephone line."[37] The court is apparently using a diminished expectation of privacy (by conditioning protection on the awareness of the speaker) to conclude that all statements made when a phone call is in progress are potentially wire communications if they are of sufficient volume. This concern does not strike at the definition of wire communication. The proper role of the privacy analysis is in determining whether an oral communication is protected under Title III.

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[32] *See* People v. Basilicato, 474 N.E.2d 215, 219-20 (N.Y. 1984).
[33] *Compare* N.Y. CRIM. PROC. § 700, *with* 18 U.S.C. §§ 2510-20.
[34] *Borch*, 695 F. Supp. at 901.
[35] United States v. Feola, 651 F. Supp. 1068, 1107 (S.D.N.Y. 1987).
[36] *See* 18 U.S.C. § 2510(2).
[37] *Borch*, 695 F. Supp. at 900.

The decision in *Borch* fails to differentiate between wire communications, where privacy analysis is inapplicable, and oral communications, where such analysis is proper. Nonetheless, a modified *Borch* theory may be applicable. Under the modified *Borch* theory, non-use statements do not qualify as wire communication only because there is no point of reception aside from the governmental interception station. Since there is a point of reception for in-use statements (and therefore the statements reach the far end of the phone line), such statements are wire communications; they are communications that literally travel along the wire.

Of the three theories, the *Couser* theory seems to have the least basis in the statutory language. The *Couser* theory has not been fully considered by a court, as the Fourth Circuit in *Couser* ruled on different grounds and merely listed reasons why the statements *may* qualify as wire communication.[38] While it may be appealing to limit wire communication to in-use statements which are made by one of the participants in the phone conversation (that is, consider aside statements wire communication but not passerby statements), there is no good reason for doing so. Such a theory would have to be based on an awareness of the risk theory, which uses knowledge of an active telephone to find a diminished expectation of privacy. As noted previously, privacy concerns play no role in defining wire communication.

While both of the remaining theories have a basis in the statutory language, the *Willoughby* theory is more appropriate. First, it should be noted that most courts have found that non-telephonic statements do not constitute wire communications. Thus, the precedential evidence is mostly on the side of the *Willoughby* theory. While some courts have considered the question in detail, others have simply dismissed the idea that such statements could be considered wire communication. While not dispositive, the lack of any discussion gives weight to the theory that non-telephonic statements are not wire communication.

The *Willoughby* theory also gives meaning to the language that requires an aural transfer to be "made in whole or part through the use of facilities for the transmission of communications by aid of

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[38] *See* United States v. Couser, 732 F.2d 1207, 1209 (4th Cir. 1984).

wire, cable, or other like connection."[39] The *Willoughby* court found that non-telephonic statements are not made in whole or part through telephone wires.[40] An alternative reading is that the use of the word "aid" indicates that the wire should be an integral part of the communication; otherwise the language could have simply read "for the transmission of communications by wire, cable, or other like connection."[41] Either way, the language requires not only that the statement travel through the wires, but that the statement be intended to travel through the wires.

The *Willoughby* theory better fulfills the purposes of the legislation. The legislation was designed to protect the privacy of wire and oral communications against electronic interception and clarify the circumstances under which such communications may be intercepted.[42] One of the ways the drafters chose to protect privacy was by requiring that probable cause be shown as to the particular type of communication sought to be intercepted.[43] Defining non-telephonic statements as wire communication would remove some of the privacy protections created by Congress under Title III.

Such a definition would also blur the line between wire communication and oral communication. That is not to say that all statements must be one or the other; there are statements that qualify as both. For example, in a conference call on speakerphone, a person is addressing both those in the room and those on the other end of the phone line. However, there is necessarily a difference between wire and oral communication; otherwise Congress would not have defined them separately. The *Willoughby* theory more clearly differentiates between the two. Under the modified *Borch* theory, a conversation between two people walking near a pay phone could be classified as wire communication, at which point it would become very difficult to differentiate between oral and wire communication—an absurd result.

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[39] 18 U.S.C. § 2510(1).
[40] *See* United States v. Willoughby, 860 F.2d 15, 22 (2d Cir. 1988) (specifically contrasting a conversation made "in whole or in part through the use" of telephone wires and a "face-to-face conversation adventitiously picked up by the recording system").
[41] *See id.*
[42] S. REP. NO. 90-1097 (1968), *reprinted in* 1868 U.S.C.C.A.N. 2112, 2153 [hereinafter LEGISLATIVE HISTORY].
[43] *See* 18 U.S.C. § 2518(3)(b).

Under the *Willoughby* theory, neither passerby statements nor aside statements depend on the wire. Therefore, in-use statements are, like non-use statements, Oral communication under Title III.

C. ORAL COMMUNICATION AND THE EXPECTATION OF PRIVACY

In contrast to wire communication, oral communication is only protected by Title III when there is a legitimate privacy interest involved.[44] Congress recognized that

> [t]he tremendous scientific and technological developments that have taken place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques. As a result of these developments, privacy of communication is seriously jeopardized by these techniques of surveillance . . . . No longer is it possible, in short, for each man to retreat into his home and be left alone.[45]

One of the purposes of enacting Title III was "protecting the privacy of wire and oral communications."[46]

The legislative history makes it clear that the privacy analysis is "intended to reflect existing law."[47] Performing such an analysis, Justice Harlan tells us in his concurrence in *Katz v. United States* that there is a twofold requirement, "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one society is prepared to recognize as 'reasonable.'"[48] Although the language appeared in a concurring—rather than majority—opinion, it is the test that has been adopted by courts.[49] In order to meet this first requirement,

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[44] *See* United States v. Paul, 614 F.2d 115, 118-19 (6th Cir. 1980) (Phillips, J., concurring).
[45] LEGISLATIVE HISTORY, *supra* note 42, at 2154.
[46] *Id.* at 2153.
[47] *Id.* at 2178 (citing Katz v. United States, 389 U.S. 347 (1967)).
[48] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).
[49] *See, e.g.*, United States v. Titemore, 437 F.3d 251, 256 (2d Cir. 2006) (discussing the import of Harlan's concurrence in *Katz* in Fourth Amendment analysis generally and

the defendant must show that he believed that the communications were not subject to interception.[50] The latter requirement demands a policy judgment.

Whether there exists a reasonable expectation of privacy, either subjective or objective, is necessarily a fact-intensive inquiry.[51] The legislative history explains, "The person's expectation that his communication is or is not subject to 'interception' . . . is . . . to be gathered and evaluated from and in terms of all the facts and circumstances."[52] Therefore, such analysis is ill-suited to the general purpose of the present inquiry. There may, however, be fundamental differences between the different categories of non-telephonic statements which make one less likely to be protected under the Fourth Amendment than another.

The legislative history provides some clues as to whether a statement is protected by the statute.

> The person's subjective intent or the place where the communication was uttered is not necessarily the controlling factor . . . . Nevertheless, such an expectation would clearly be unjustified in certain areas; for example, a jail cell or an open field. Ordinarily, however, a person would be justified in relying on such an expectation when he was in his home or his office but even there, his expectation under certain circumstances could be unwarranted, for example, when he speaks too loudly.[53]

In determining whether there is an expectation of privacy, courts have looked to considerations such as:

> the volume of the communication or conversation, the proximity or potential of other individuals to overhear the conversation, the potential for communications to be reported, the affirmative actions taken by the speakers to shield their privacy, the need for technological enhancements to hear the

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applying Harlan's test); United States v. McIntyre, 582 F.2d 1221, 1223 (9th Cir. 1978) (as applied to Title III).

[50] *See* United States v. Longoria, 177 F.3d 1179, 1182 (11th Cir. 1999).

[51] *See* O'Connor v. Ortega, 480 U.S. 709, 718 (1987); United States v. Smith, 978 F.2d 171, 180 (5th Cir. 1992).

[52] LEGISLATIVE HISTORY, *supra* note 42, at 2178.

[53] *Id.* (citations omitted).

> communication, and the place or location of oral communications as it relates to the subjective expectations of the individuals who are communicating.[54]

Using these factors, then, the question becomes whether there are fundamental differences in the character of each non-telephonic statement so as to make one less deserving of a reasonable expectation of privacy than another.

In *Feola*, the court noted that there was "arguably a legitimate privacy interest implicated in *Basilicato* that is absent here."[55] The difference indicated by the court is that in *Basilicato* the phone was taken off the hook to avoid interruption, rather than to make an uncompleted outgoing call.[56] There is arguably a stronger case for privacy in *Basilicato* than in *Feola* because taking the phone of the hook is an affirmative action representing a desire for privacy. In both cases, however, the phone is off the hook but no call has been made. It seems perfectly reasonable that a person could pick up the phone without dialing, then respond to a remark made by another and expect that conversation to remain private.

Further, this rationale would seem to differentiate between taking the phone off the hook and not replacing the phone correctly in its cradle. A person who refuses to answer a phone or mutes the volume instead of taking it off the hook, however, is exhibiting the same expectation of privacy as is a person who refuses to answer the phone when it rings. It is difficult to differentiate between the latter scenario and a phone that is accidentally off the hook. While refusing to answer may represent a stronger affirmation of privacy, certainly no lack of privacy may be inferred when someone does not have the chance to ignore the phone due to accident. At least one court has indicated that conversations occurring when a phone was accidentally off the hook are subject to a reasonable expectation of privacy.[57] While telephone bug statements may be subject to a slightly greater expectation of privacy than upcoming call statements, both are entitled to protection under Title III.

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[54] Kee v. City of Rowlett, 247 F.3d 206, 213-15 (5th Cir. 2001).
[55] United States v. Feola, 651 F. Supp. 1068, 1107 (S.D.N.Y. 1987).
[56] *See id*.
[57] *See* United States v. Baranek, 903 F.2d 1068, 1070-71 (6th Cir. 1990).

It is also difficult to see why an aside statement is not made under a reasonable expectation of privacy. Assuming that all other circumstances indicate a reasonable expectation of privacy, the only difference between an aside statement and a regular conversation is the presence of an active phone. Wire communications, however, are presumed to be subject to a reasonable expectation of privacy.[58] It is true that you are taking the risk that the person on the other end of the line will report you, but in the absence of that occurrence (which would be especially unlikely if that person was involved in whatever illegal activity is being discussed), it would be a preposterous result to suggest that the presence of an active phone means any expectation of privacy is unreasonable.[59]

Passerby statements, however, seem to be the least likely category of non-telephonic statements to be subject to an expectation of privacy. That is not to say that such statements are never protected by the statute, or even that they usually are not. If the conversation takes place in a home, with two conspirators on the phone and two more in the background, the analysis seems little different than for an aside statement.

However, several factors weigh against a reasonable expectation of privacy in the context of passerby statements. In order for background conversations to reach the phone they must necessarily be of a certain volume (in the absence of technological enhancement, which is a different case altogether). In the situation where the passers-by are not known to the caller, there is no expectation of privacy because they are talking at a sufficient volume in front of people unknown to them. No affirmative action is taken to protect the privacy interest in such communication. Once again, though, the resolution of this question depends on the unique factual circumstances of the individual occurrence.

It is impossible to make a categorical statement about the reasonable expectation of privacy for non-telephonic statements. The determination is necessarily dependent upon the facts and

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[58] *See* Williamette Subscription Television v. Cawood, 580 F. Supp. 1164, 1168 (D. Or. 1984).

[59] There would probably not be a reasonable expectation of privacy if the person on the other end of the line was a police officer; however, almost invariably, the person on the other end of the line is a co-conspirator.

should be decided on a case-by-case basis. Only those statements which are made in a situation justifying both a subjective and objective expectation of privacy will be protected by Title III.

III. PLAIN VIEW

Title III allows the use of communications "[w]hen an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized [by Title III] intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval" under certain circumstances.[60] This section is not directly on point for the plain view theory at issue. Nontelephonic communications will not necessarily relate to offenses not named in the authorization order. Rather they will relate to types of communication not named in the authorization order.

The plain view doctrine allows for the seizure of other evidence related to a crime when the evidence, rather than the underlying crime, is not in the authorization order. The Supreme Court applied the plain view doctrine when a police officer, pursuant to a warrant for the proceeds of a robbery, searched the defendant's house and discovered weapons and clothing that had been identified by the victim in plain view.[61] Under the plain view doctrine, in theory, law enforcement could use oral communication gathered pursuant to an order authorizing the seizure of wire communication.

The acceptance by the Supreme Court of the plain view doctrine is generally traced to *Coolidge v. New Hampshire*.[62] In a plurality opinion, Justice Stewart wrote that the evidence was seized without a valid warrant and the plain view exception did not justify the seizure of the defendant's car.[63] Justice Stewart identified as a common strand in all plain view cases that "the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused."[64] In another plurality opinion, Justice

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[60] 18 U.S.C. § 2517(5).
[61] *See* Horton v. California, 496 U.S. 128, 136 (1990).
[62] 403 U.S. 443 (1971).
[63] *See id*. at 474.
[64] *Id*. at 467.

Rehnquist wrote that "'[p]lain view' is perhaps better understood . . . not as an independent 'exception' to the Warrant Clause, but simply as an extension of whatever the prior justification for an officer's 'access to an object' might be."[65] These cases provide the basis for the requirement that an "officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed."[66]

The plain view doctrine has now been recognized by a Supreme Court majority a number of times.[67] The exact requirements, however, have been subject to debate and change.[68] The *Horton v. California* Court explained the current requirements for the application of the plain view doctrine: in addition to the requirement that the officer must be lawfully in position to view item, there are

> two additional conditions . . . . First, not only must the item be in plain view, its incriminating character must also be immediately apparent. . . . Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.[69]

The final requirement bars an officer from trespassing in order to seize evidence.[70]

There is some question as to whether the plain view doctrine is applicable to Title III. No court has addressed the question directly because it is unusual for the problem to arise. Section 2517(5) of Title III provides the answer regarding evidence of other crimes, by far the most common application under Title III. It does not, however, speak to evidence from a different type of communication. The *Couser* court came the closest to tackling the issue, ultimately deciding the case on other issues and refusing to speculate as to "whether the 'plain view' doctrine is itself an excep-

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[65] State v. Brown, 460 U.S. 730, 738-39 (1983).
[66] *Horton*, 496 U.S. at 136.
[67] *See, e.g.*, State v. Dickerson, 508 U.S. 366, 374-75 (1993); *Horton*, 496 U.S. at 133-34.
[68] *See, e.g.*, *Horton*, 496 U.S. at 139-40 (rejecting the "inadvertence" requirement).
[69] *Id.* at 136-37 (citations omitted).
[70] *See id.* at 137.

tion to the federal *statutory* requirements and, if so, to what extent."[71] The other courts that have considered the plain view doctrine applied it without considering its interplay with section 2517(5).[72]

There are two possible ways the plain view doctrine can apply to non-telephonic statements. Section 2517(5), under a narrow reading, may be understood as addressing only offenses not listed in the authorization order. Under this interpretation, types of communication not listed in the authorization order would be subject to federal common law. However, this construction is implausible. By creating the statute and carving out an exception for offenses not listed in the authorization order, Congress created a very stringent framework. If the communication is protected under Title III, it may only escape the increased protection under circumstances specifically listed in the statute.

A more plausible theory is that section 2517(5) should be read in light of subsequent plain view jurisprudence. More specifically, it is a "placeholder for the evolving Plain View exception."[73] Section 2517(5) was written in 1968. At the time, plain view seizures were unconstitutional because *Marron v. United States*[74] was still valid. Congress drafted section 2517(5) to conform to accepted practice at the time. Officers could not seize evidence in plain view without a warrant. Instead, a guard was posted while another police officer obtained a warrant for the evidence in plain view.[75] Section 2517(5) allows seizure without a warrant, but the authorization order must be amended to cover the seized conversation. Section 2517(5) is not a heightened requirement; it was written as an attempt to ensure the constitutionality of the seizure of evidence in plain view, as it is impossible to guard a conversation.

The use of the plain view doctrine in Title III cases seems in some respects troublesome and contrary to the purposes of the stat-

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[71] United States v. Couser, 732 F.2d 1207, 1210 (4th Cir. 1984) (emphasis in original).
[72] *See* United States v. Baranek, 903 F.2d 1068, 1070 (6th Cir. 1990); United States v. Borch, 695 F. Supp. 898, 902 n.5 (E.D. Mich. 1988).
[73] Larry Downes, *Electronic Communications and the Plain View Exception: More "Bad Physics,"* 7 HARV. J.L. & TECH. 239, 263 (1994).
[74] 275 U.S. 192 (1927).
[75] *See* John D. LaDue, *Electronic Surveillance and Conversations in Plain View: Admitting Intercepted Communications Relating to Crimes Not Specified in the Surveillance Order*, 65 NOTRE DAME L. REV. 490, 514 (1990).

ute. Congress could have chosen to allow for the interception of communications on the same offense by a different medium, but such interception is contrary to the legislative scheme in the absence of express authorization. The legislation, on its face, denies the interception of certain types of electronic interception unless probable cause is given as to that particular type of communication.[76] Although there may be some truth to these contentions, Congress could not have anticipated the problems arising from non-telephonic statements. Almost forty years after Title III was enacted, there are still only a handful of cases where the plain view doctrine could be applied to communications of a type not listed in the authorization order. Simply put, Congress did not envision circumstances under which oral communications could properly be in plain view pursuant to an order authorizing electronic surveillance of wire communication.

The Tenth Circuit additionally recognized that the comparison between property and communication is "imperfect because the search for property is a different and less traumatic invasion than is the quest for private conversation."[77] The defendant in *United States v. Cox* used this principle to argue that not only should the plain view doctrine not apply to electronic interceptions, but that section 2517(5) was unconstitutional.[78] In some cases, the invasion of privacy inherent in the interception of conversation is deeply humiliating. There is the chance that those whose words are recorded will feel violated. But the same privacy interests are present in personal property. The level of invasion is mostly based on what is seized. A conversation about the weather does not lead to humiliation, whereas the seizure of a diary or similar personal items would leave a person feeling violated. The comparison may be imperfect, but it works well enough that the application of the plain view doctrine to Title III is valid.

In enacting section 2517(5), Congress decided that when a law enforcement officer who is lawfully engaged in a search for evidence happens upon other evidence, "the public interest mili-

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[76] United States v. Cox, 449 F.2d 679, 686 (10th Cir. 1971).
[77] *Id.*
[78] *See id.* at 684-85.

tates against his being required to ignore what is in plain view."[79] Officers

> have no obligation to close their ears to unexpected incriminating information . . . . They have a legal right to their position within electronic earshot of conversations over certain telephones within certain time limitations. Like an officer who sees contraband in plain view from a vantage point where he has a right to be, one properly overhearing unexpected villainy need not ignore such evidence.[80]

The practical approach is very appealing in these circumstances. In *Cox*, the Tenth Circuit concluded that "[i]t would be the height of unreasonableness to distinguish between information specifically authorized and that which is unanticipated and which develops in the course of an authorized search."[81] The *Cox* court would no doubt agree that it would be irrational to hold that officers authorized to listen to a wiretap must, upon learning from a non-telephonic statement that a bank robbery is about to occur, shut down the wiretap and not use the information to prevent the robbery.[82] It is easy to imagine more complex problems. What if, instead of a bank robbery, the non-telephonic statements revealed a murder plot? Surely officers would be able to use the statements in order to prevent the murder.

Precedent also supports the application of the plain view doctrine to Title III. The Fourth Circuit held the evidence in *United States v. Baranek* (on appeal from *Borch*) admissible under the plain view doctrine.[83] *Borch* and *Basilicato* both found that the plain view doctrine is inapplicable under the circumstances, but not that it is inapplicable under any circumstances.[84] *Couser* questions its applicability, but establishes that there is some reason to believe

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[79] United States v. Masciarelli, 558 F.2d 1064, 1067 (2d Cir. 1977).
[80] United States v. Johnson, 539 F.2d 181, 188 (D.C. Cir. 1976).
[81] *Cox*, 449 F.2d at 687.
[82] *See id.*
[83] *See* United States v. Baranek, 903 F.2d 1068, 1070 (6th Cir. 1990).
[84] *See* United States v. Borch, 695 F. Supp. 898, 901 n.5 (E.D. Mich. 1988); People v. Basilicato, 474 N.E.2d 215, 220 (N.Y. 1984).

that the plain view doctrine is an exception to the federal statutory requirements.[85]

One case does not seem to support either theory. The *Feola* court denied a motion to suppress communication recorded in a case where the authorization order was amended to allow the "interception of a communication occurring within the premises of [defendant's] apartment, which was overheard and intercepted while the telephone had been taken off the hook to make an outgoing call."[86] Such an interception does not seem to be authorized under either theory. Under the narrow reading theory, such interception would not be permitted because it changes the method of interception rather than the crimes of which communication can be intercepted. Under the evolving plain view theory, the officers were not lawfully in a position to overhear the conversation (which is a requirement of the plain view doctrine) because the original order did not authorize them to listen to any conversations when a phone call was not in progress. An alternative explanation may be that the officers had probable cause for the use of a bug, but there is no such indication in the case. This notion, however, does not invalidate the applicability of the evolving plain view theory; instead, it indicates that the motion to suppress in *Feola* was wrongly decided.

In order to fall under the protection of the plain view doctrine, the interception in question must meet the requirements set down by the Supreme Court. The officer must be lawfully in a position to overhear the conversation, the evidentiary value of the communication must be immediately apparent, and the officer must be lawfully in a position to "seize" the conversation.[87]

The latter two requirements are fact intensive questions and cannot be answered without knowing the circumstances of the seizure. The third requirement may not even extend to plain hearing cases, because in electronic surveillance search and seizure are closely aligned. There is no danger of trespassing, as there is when dealing with property. As the Supreme Court has observed, "once police are lawfully in a position to observe an item first hand, its

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[85] *See* United States v. Couser, 732 F.2d 1207, 1210 (4th Cir. 1984).
[86] United States v. Feola, 651 F. Supp. 1068, 1107 (S.D.N.Y. 1987).
[87] *See* Horton v. California, 496 U.S. 128, 136-37 (1990).

owner's privacy interest in that item is lost."[88] "It has long been clear that 'protecting the risk of misdescription hardly enhances any legitimate privacy interest'; thus a government agent may constitutionally record conversation lawfully overheard."[89] This indicates that there is no trespassing component for purposes of electronic surveillance. Nevertheless, assuming that the latter two requirements are valid and met for the purposes of this discussion, the first requirement—that the officer be lawfully in a position to overhear the conversation—will be analyzed.

For in-use situations, the first requirement is met. There is no question that the officer has the right to listen to relevant telephone conversations under the authorization order. In *Couser*, passerby statements were intercepted during the course of a telephonic conversation otherwise intercepted under the terms of the authorization order.[90] Although the case was ultimately decided on other grounds, the court did address the plain view argument and found that all of the conditions for the application of the doctrine were present.[91] One of the factors considered by the court was the inadvertence requirement, "little different from 'good faith,'"[92] which has since been removed from plain view jurisprudence. This difference is unimportant in the context of the current analysis, as the requirement in question, "a prior independent valid reason for being present at the . . . point of listening," was considered and approved.[93]

Non-use situations, however, pose a much tougher challenge to this requirement, although one court has approved the use of the plain view doctrine in such a situation.[94] The contention against the application of the plain view doctrine for non-use statements is that the warrant does not provide for the interception of conversations when the telephone is not is use. There is no prior justification for the officer's access to the conversation. The

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[88] Illinois v. Andreas, 463 U.S. 765, 771 (1993).
[89] United States v. Williams, 737 F.2d 594, 606 (7th Cir. 1984) (quoting United States v. Jacobson, 466 U.S. 109, 119 (1984)).
[90] *See Couser*, 732 F.2d at 1208.
[91] *See id.* at 1210.
[92] *Id*.
[93] *Id*.
[94] *See* United States v. Baranek, 903 F.2d 1068, 1070 (6th Cir. 1990).

interception of such statements would essentially constitute a bug, separate authorization for which could have been sought by the government if probable cause existed.

In *Borch*, the court addresses the plain view argument raised by the government after a telephone bug statement was intercepted.[95] The court recognized the difference between in-use statements and non-use statements: "While such a theory may have some application in the context of background conversation, the plain hearing concept is of no significance when non-call discourse is intercepted in the absence of contemporaneous telephonic discussion."[96]

In *Basilicato*, the court found the plain view doctrine to be inapplicable to telephone bug statements.[97] Non-use statements do not qualify for the plain view doctrine because "[t]here is no 'prior justification for [the] intrusion,' no 'legitimate reason for being present', when an unauthorized means of eavesdropping is employed."[98] The court argues that the officers should have terminated the interception when they realized the phone was not in use but rather off the hook.[99]

Baranek, on the other hand, based the admission of a telephone bug statement on the plain view doctrine.[100] The court held that "there was a properly issued authorization order which clearly makes the 'initial intrusion' lawful."[101] However, the court did not address the argument present in *Borch* and *Basilicato*. Judge Jones, in dissent, voiced this concern, noting that he does "not believe the initial intrusion was lawful under the authorization order as the majority states because the agents immediately knew they were not listening to a 'wire communication' and thus were aware they were operating outside the scope of the authorization."[102]

The approach taken by the majority in *Baranek* can only be justified by saying that since the officers only knew that the phone

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[95] *See* United States v. Borch, 695 F. Supp. 898, 902 n.5 (E.D. Mich. 1988).
[96] *Id.* (citations omitted).
[97] *See* People v. Basilicato, 474 N.E.2d 215, 220 (N.Y. 1984).
[98] *Id.* (quoting Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)) (alteration in original).
[99] *See id.*
[100] *See* United States v. Baranek, 903 F.2d 1068, 1070 (6th Cir. 1990).
[101] *Id*. at 1071.
[102] *Id.* at 1073 (Jones, J., dissenting).

was off the hook, they had the right to monitor whether there was a phone call occurring and then immediately heard information that was related to criminal activity. Even if this argument was true, it is unlikely to be an issue in the modern context due to the advancement of technology. Law enforcement likely has more advanced equipment that is able to detect when a phone call is in progress.

Moreover, even if this is the only way to monitor such conversations, the officers still are not authorized to intercept non-telephonic conversations and cannot maintain the spoils on the basis of plain view if they do so. To allow such a thing would not be in keeping with the spirit of the plain view doctrine. The comparable case is not one where, while serving a warrant, the officers stumble upon evidence in the house they are searching. Instead, it is as if they accidentally entered the wrong house and found evidence in plain view. Such evidence would not, and should not, be allowed under the plain view doctrine. Allowing evidence gathered in such a manner to be used in criminal trials would encourage "mistakes." It would also erode the protections of the Fourth Amendment, allowing a plain view seizure when the officers were not lawfully in a position to observe the evidence left in plain view. *Baranek* presents the same situation. Non-use statements cannot be admitted under the plain view doctrine because there is no prior justification for being in the position to intercept such statements.

IV. SUPPRESSION

Finding that evidence was subject to a search and seizure in violation of the statute is not enough to exclude that evidence from further use by law enforcement. The aggrieved party must move to suppress the evidence. The motion to suppress is decided according to the statutory exclusionary rule. However, even if technically within the statutory exclusionary rule, there still may be an exception to the rule which prevents suppression.

A. STATUTORY EXCLUSIONARY RULE

Section 2515 of Title III provides that "no part of the contents of [wire or oral] communication and no evidence derived therefrom may be received in evidence . . . if the disclosure of that

information would be in violation of [Title III]."[103] This section is not self-executing; section 2518 provides the remedy for the right created by section 2515.[104]

Section 2518 mandates the suppression of evidence on the grounds that "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval."[105]

Courts have recognized an exception from the statutory exclusionary rule when the violations are of a technical nature.[106] This rule was established by two Supreme Court decisions. In *United States v. Giordano*, the court found that suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device."[107] After examining the legislative history, the court concluded that Congress intended to "condition the use of intercept procedures upon the judgment of a senior official in the Department of Justice."[108] The authorization order in question had not been approved by a justice official in conformity with the statute; therefore, suppression was appropriate.[109]

In *United States v. Chavez*, a companion case to *Giordano*, the authorization order had been approved by the appropriate federal official, but he was misidentified in the affidavits provided to the judge.[110] The court ruled this was a technical violation, as opposed to one that required suppression under *Giordano*; the important matter was that it was approved by an authorized official.[111]

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[103] 18 U.S.C. § 2515.
[104] *See* United States v. Philips, 540 F.2d 319, 325 (8th Cir. 1976).
[105] 18 U.S.C. § 2518(10)(a).
[106] *See* United States v. Couser, 732 F.2d 1207, 1209 (4th Cir. 1984).
[107] 416 U.S. 505, 527 (1974).
[108] *Id*.
[109] *See id*. at 528.
[110] *See* United States v. Chavez, 416 U.S. 562, 565-66 (1974).
[111] *See id*. at 572.

There is some doubt about the scope of the technical violation exception.[112] *Borch* refused to consider the technical violation exception to a motion for suppression under subsection (iii) because the Supreme Court had carved out this exception only in the context of subsection (i).[113] The reasoning of the court in *Giordano* in creating the exception gives heft to this interpretation.

The Supreme Court created the technical violation exception because "if unlawful interceptions under paragraph (i) include purely statutory issues, paragraphs (ii) and (iii) are drained of all meaning and are surplusage."[114] "[T]he inference is that since paragraphs (ii) and (iii) were retained, they must have been considered . . . not covered by paragraph (i)."[115] The analysis in *Chavez* bears out this interpretation. The court found that misidentification of the justice official "did not affect the fulfillment of any of the reviewing or approval functions required by Congress *and* is not within the reach of paragraphs (ii) and (iii)."[116] Thus, after deciding the technical violation issue, the court still had to consider (ii) and (iii) because those subsections are not subject to the requirement.

Other courts, however, do not make this distinction. In *Couser*, the court applied the technical violation rule to find that no suppression was necessary without differentiating between the different subsections of the statute.[117] The *Couser* court additionally points to *Donovan* which, in its recitation of the applicable law, does not limit the exception to violations of subsection (i).[118] *Donovan*, however, dealt with a situation in which "only § 2518(10)(a)(i) [was] relevant."[119] It was therefore irrelevant that the exception did not apply to subsections (ii) and (iii).

Non-use statements again are the easiest case. In non-use non-telephonic statements, the motion to suppress would be made under Section 2518(10)(a)(iii) because the interception was not made in conformity with the authorization order. The order allows for the

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[112] *See* United States v. Borch, 695 F. Supp. 898, 902-03 (E.D. Mich. 1988).
[113] *See id.*
[114] *Giordano*, 416 U.S. at 526.
[115] *Id.* at 526-27.
[116] *Chavez*, 416 U.S. at 575 (emphasis added).
[117] *See* United States v. Couser, 732 F.2d 1207, 1209 (4th Cir. 1984).
[118] *See id.* (citing United States v. Donovan, 429 U.S. 413, 433-34 (1977)).
[119] *Donovan*, 429 U.S. at 432.

interception of wire communications, but oral statements were intercepted. Therefore the statements should be suppressed under Title III. This is true even in the case that the technical violation exception applies. The analysis "focuses on activity that falls squarely within the ambit of subsection (iii)."[120] This is not a technical violation. Congress meant to require a warrant to intercept all wire, oral, and electronic communications by electronic means. Allowing the admission of non-use statements in this context would permit law enforcement to use bugs when authorized to tap a phone.

In-use statements prove to be a tougher case. Subsection (iii) is not at issue because the interception was made in conformity with the order of authorization. The fact that extra information was captured does not change the fact that the proper procedures were followed. Since the interception was in accordance with an order of authorization that was not insufficient on its face (eliminating the possibility of suppression under subsection (ii)), the motion to suppress must be made under subsection (i), which means the technical violation exception is applicable.

The communication was unlawfully intercepted because Title III specifically prohibits the interception of wire, oral, or electronic communication unless probable cause is shown as to the interception of that type of communication.[121] The legislative history shows that these requirements are central to the congressional scheme. One of the purposes of Title III is to protect the privacy of oral and wire communications. "[T]itle III prohibits all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officers . . . and only after authorization of a court order obtained after a showing and finding of probable cause."[122]

Moreover, the particularity requirement is at the very heart of a decision that Congress used as a "guide" in drafting Title III, *Berger v. New York*.[123] In *Berger*, the Supreme Court found a New York eavesdropping statute unconstitutional for, among other things, the lack of provisions specifying the place to be searched or

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[120] United States v. Borch, 695 F. Supp. 898, 903 (E.D. Mich. 1988).
[121] *See* 18 U.S.C. § 2518(3)(b).
[122] LEGISLATIVE HISTORY, *supra* note 42, at 2153.
[123] *See id.* at 2161-63.

the persons or things to be seized.[124] The court noted that "[t]he need for particularity . . . is especially great in the case of eavesdropping" because of the privacy interests implicated in such a search.[125] In the context of Title III, the place to be searched is the specific type of communication (wire, oral, or electronic). Therefore the technical violation exception is not applicable to in-use statements and the evidence should be suppressed.

B. EXCEPTIONS

1. Good faith

In *Baranek*, the government put forward an additional argument: suppression was not mandated because the surveillance agents acted in good faith.[126] The only good faith contention against the suppression of evidence is the good faith exception of *United States v. Leon*,[127] although it is unclear whether the exception applies to Title III cases.

Current law is divided into two camps. The Eighth and Eleventh Circuits have concluded that a good faith exception is applicable to Title III.[128] The Sixth Circuit, on the other hand, has refused to apply the good faith exception to Title III cases.[129]

In *United States v. Malekzadeh*, the Eleventh Circuit did not consider the interplay between *Leon* and Title III.[130] However, the Eighth Circuit, in *United States v. Moore* recognized that *Leon* dealt with the judicially created exclusionary rule instead of the statutory exclusionary rule under Title III.[131] Two reasons were put forward in support of the extension to Title III. First, the exclusionary rule is worded in such a way as to make suppression discretionary.[132]

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[124] Berger v. New York, 388 U.S. 41, 56 (1967).
[125] *Id*.
[126] *See* United States v. Baranek, 903 F.2d 1068, 1068 (6th Cir. 1990).
[127] *See* 468 U.S. 897 (1984).
[128] *See* United States v. Moore, 41 F.3d 370 (8th Cir. 1994); United States v. Malekzadeh, 855 F.2d 1492 (11th Cir. 1988).
[129] *See* United States v. Rice, 478 F.3d 704 (6th Cir. 2007).
[130] *See Malekzadeh*, 855 F.2d at 1497.
[131] *See Moore*, 41 F.3d at 376 ("*Leon* of course dealt with the judicially developed exclusionary rule for Fourth Amendment violations, whereas we deal here with a statutory exclusionary rule imposed for a 'violation of this chapter.'").
[132] *See id.* (noting that the statute reads "[i]f the motion is granted").

Second, the legislative history shows a "clear intent to adopt suppression principles developed in Fourth Amendment cases."[133]

The Sixth Circuit, on the other hand, found that both the language of the statute and the legislative history counseled against the adoption of the good faith exception under Title III.[134] The court found the statute was clear on its face and did not provide for any exceptions.[135] The legislative history shows a desire to incorporate search and seizure law, but only the portion thereof which was in place in 1968.[136] Additionally, the court noted that *Leon* involved a balancing process which in this case has already been done by Congress.[137] "The rationale behind judicial modification of the exclusionary rule is . . . absent with respect to warrants obtained under Title III's statutory scheme."[138]

On the whole, the Sixth Circuit interpretation is more reasonable. "If the motion is granted" only recognizes that not every motion will be granted. The legislative history states that Title III is not meant to "press the scope of the suppression role beyond present search and seizure law."[139] This language indicates the legislation was meant to include search and seizure law as it existed in 1968. *Leon* was not decided until 1984. Congress could have added a good faith exception when it amended Title III in 1986, but it did not.[140] Nonetheless, the circuit split seems likely to remain until the Supreme Court confronts the issue, and therefore the good faith exception must be considered.

Even if the good faith exception is applicable to Title III, it is not applicable under these facts. In *Leon*, the court held that evidence seized by law enforcement officials operating in good faith and in reliance on a warrant later found defective does not require suppression.[141] The court concluded that "the marginal

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[133] *Id.*
[134] *See Rice*, 478 F.3d at 712-13.
[135] *See id*. at 712.
[136] *See id*. at 713.
[137] *See id*.
[138] *Id.*
[139] *See* LEGISLATIVE HISTORY, *supra* note 42, at 2185.
[140] *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, § 101, 100 Stat. 1848, 1848-53 (1986).
[141] *See* United States v. Leon, 468 U.S. 897, 922 (1984).

or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[142] Thus the good faith in question concerns not a communication intercepted in violation of the order but without misconduct by the surveillance officers, but a reasonable reliance on a warrant that is later found defective.[143]

2. Federal Common Law Exclusionary Rule

Another potential argument from *Baranek* is that suppression is unnecessary because the decision would have "something less than global impact" and "since the circumstances are wholly fortuitous . . . [it] will not impact or shape future conduct."[144] This analysis is based upon the federal common law exclusionary rule. Under the rule, "evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure."[145] The purpose of the rule is not to redress the injury (privacy cannot be restored, just as Pandora's Box cannot be closed) but to redress "future unlawful police conduct."[146] Of critical importance is that the exclusion of evidence obtained in an illegal search and seizure is not automatic. In deciding whether to exclude the evidence, a court must weigh the benefits of suppressing the evidence in terms of specific deterrence against the evidentiary costs.[147]

The argument is that because there was an absence of bad faith, there would be no benefit in terms of specific deterrence from suppression of the evidence. In *Baranek*, the court noted that suppression of the evidence, due to the "highly unusual fact situation," would not "impact or shape future conduct because the government was a wholly passive beneficiary of what happened."[148] Due

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[142] *Id*.
[143] *See, e.g.*, United States v. Moore, 41 F.3d 370, 376 (8th Cir. 1994) (noting that a warrant may be so facially deficient as to prevent a finding that the officers acted reasonably); *Rice*, 478 F.3d at 707 (warrant issued on the basis of a misleading affidavit).
[144] United States v. Baranek, 903 F.2d 1068, 1070 (6th Cir. 1990).
[145] United States v. Calandra, 414 U.S. 338, 347 (1974).
[146] *Id*.
[147] *See id*. at 349.
[148] *Baranek*, 903 F.2d at 1070.

to the minimal benefit of suppression, in terms of both the likelihood of occurrence and the specific deterrence as to future conduct, as compared to the immense benefit of allowing such evidence, the exclusionary rule does not require suppression.

The Supreme Court has spoken on the difference between the statutory rule at issue here and the exclusionary rule. "The availability of the suppression remedy for . . . statutory, as opposed to constitutional, violations . . . turns on the provisions of Title III rather than the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights."[149] The questions at issue here are of purely statutory violations. The statute provides Fourth Amendment protections at least at the level of *Katz* and *Berger*.[150] Indeed, Title III has been found constitutional on a number of occasions.[151]

Another possible spin is that the statutory suppression rule should include a weighing of the benefits of suppression versus the evidentiary value. However, courts have found that the statutory and federal common law exclusionary rules have divergent purposes.[152] Congress has already weighed the competing interests and decided that electronically intercepted evidence is admissible only if it meets certain criteria as mandated by Title III.

V. CONCLUSION

As noted previously, the question whether the non-telephonic statement in question should be admitted or suppressed will depend on the circumstances of the individual case. There are too many variables to make a definitive statement. Consider, for example, an incriminating aside statement uttered by defendant X. The statement, as a general matter, would be admissible under the plain view doctrine. If the officers conducting the surveillance failed to follow the proper minimization procedures, the statement would likely be suppressed. However, if X made the

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[149] United States v. Donovan, 429 U.S. 413, 432 n.22 (1977).
[150] *See* LEGISLATIVE HISTORY, *supra* note 42, at 2153, 2163.
[151] *See, e.g.*, United States v. Ianelli, 477 F.2d 999, 1001 (3d Cir. 1973); United States v. Kalustian, 529 F.2d 585, 588 (9th Cir. 1979) (noting that Title III was "designed to conform to prevailing constitutional standards").
[152] *See* United States v. Vest, 813 F.2d 477, 481 (1st Cir. 1987).

statement in question during a loud conversation in a crowded public place, the statement would not be suppressed because it is not subject to a reasonable expectation of privacy and therefore not protected by Title III.

The foregoing analysis avoided these specific questions, choosing instead to concentrate on characteristics that are inherent in each type of non-telephonic statement. Although the general conclusions drawn herein will not be dispositive in every case, they do provide a reasonable starting point. As a general matter, in-use statements should be admitted under the plain view doctrine. Non-use statements, on the other hand, should be suppressed as a matter of course.