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Warrants for Videotape Surveillance Issuable Despite Lack of Statutory Authority

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Cona, however, held that a motion to dismiss for insufficient evidence did not preserve for the Court the issue of whether the conviction was based upon uncorroborated accomplice testimony.

Also noteworthy is *Salla v. County of Monroe,* wherein the Court found that the privileges and immunities clause of the United States Constitution prohibits New York State from statutorily mandating contract terms requiring the employment of its residents on public works projects. In the area of criminal procedure, the Court's decision in *People v. Conyers* held that the credibility of a defendant's exculpatory trial testimony may not be impeached by proof of his silence at the time of his arrest, despite the absence of *Miranda* warnings.

People v. Teicher, an important lower court decision commented upon in *The Survey,* concerns the admissibility of evidence gathered by means of videotape surveillance. In *Teicher,* the Appellate Division, First Department, held that despite the absence of express statutory authority, a court is empowered to issue a warrant for visual electronic surveillance. Through *The Survey's* discussion of these and other refinements in New York law, it is our intention to be of continuing assistance to the practicing attorney.

CRIMINAL PROCEDURE LAW

Warrants for videotape surveillance issuable despite lack of statutory authority

The New York State Constitution[1] and article 700 of the CPL[2]

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[1] N.Y. CONST. art. 1, § 12. The state constitutional prohibition against warrantless telegraphic and telephonic interceptions provides:

> The right of the people to be secure against unreasonable interception of telephone and telegraph communications shall not be violated, and ex parte orders or warrants shall issue only upon oath or affirmation that there is reasonable ground to believe that evidence of crime may be thus obtained . . . .

N.Y. CONST. art. 1, § 12; *see* Comment, *Electronic Eavesdropping Under the Fourth Amendment — After Berger and Katz,* 17 BUFFALO L. REV. 455, 466 (1968).

[2] CPL § 700.15 provides:

> An eavesdropping warrant may issue only:
> 1. Upon an appropriate application made in conformity with this article; and
> 2. Upon probable cause to believe that a particularly described person is committing, has committed, or is about to commit a particular designated offense; and
> 3. Upon probable cause to believe that particular communications concerning such offense will be obtained through eavesdropping; and
> 4. Upon a showing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or to be too

permit electronic eavesdropping by wiretaps or mechanical listening devices[3] pursuant to a special search warrant. No constitutional or statutory authority exists, however, for the issuance of warrants permitting videotape surveillance.[4] Recently, in *People v. Teicher*,[5] the Appellate Division, First Department, held that despite the absence of express statutory authority, videotape surveillance pursuant to a warrant issued upon a showing of probable cause was permissible under the fourth amendment.[6]

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dangerous to employ; and

5. Upon probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

CPL § 700.15 (1971).

[3] For purposes of CPL § 700.15, eavesdropping is defined as " 'wiretapping' or 'mechanical overhearing of conversation,' as those terms are defined in section 250.00 of the penal law." CPL § 700.05 (1971). The penal law defines these terms respectively as the "intentional overhearing or recording of a telephonic or telegraphic communication," and "the intentional overhearing or recording of a conversation," N.Y. PENAL LAW § 250.00 (1), (2) (McKinney 1980).

[4] Videotape is a device that records pictures and sounds on magnetic tape. Once recorded, the tape can be played back instantaneously. Comment, *Videotape: A New Horizon in Evidence*, 4 J. MAR. J. PRAC. & PROC. 339, 339 (1971). Because eavesdropping and wiretapping are limited to the aural gathering of evidence, *see* note 2 *supra*, the videotape's visual aspect excludes it from the coverage of CPL article 700.

[5] 73 App. Div. 2d 136, 425 N.Y.S.2d 315 (1st Dep't 1980), *aff'g*, 90 Misc. 2d 638, 395 N.Y.S.2d 587 (Sup. Ct. N.Y. County 1977).

[6] 73 App. Div. 2d at 139, 425 N.Y.S.2d at 318.

The fourth amendment to the Federal Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

The existence of a search warrant is generally considered to be the key factor in establishing the constitutionality of a search and seizure. *See* Katz v. United States, 389 U.S. 347, 357 (1967). Warrantless searches, even based on probable cause, are unlawful. *Id.; see* Dalia v. United States, 441 U.S. 238, 255-58 (1979); Mancusi v. DeForte, 392 U.S. 364, 370 (1968); People v. Terrell, 53 Misc. 2d 32, 43, 277 N.Y.S.2d 926, 938 (Sup. Ct. Bronx County 1967), *aff'd*, 30 App. Div. 2d 644, 291 N.Y.S.2d 1002 (1st Dep't 1968); Comment, *Judicial Administration — Technological Advances — Use of Videotape in the Courtroom and the Stationhouse*, 20 DE PAUL L. REV. 924, 953 (1971). The Supreme Court has held that a search warrant must meet three requirements to satisfy fourth amendment standards: first, the warrant must be issued by a "neutral and detached" magistrate who is competent to determine whether there is probable cause for the search, Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972); second, the police must show probable cause that "the evidence sought will aid in a particular apprehension or conviction," Warden v. Hayden, 387 U.S. 294, 307 (1967); and finally, the warrant must describe with particularity the area of the search and the property to be seized, Stanford v. Texas, 379 U.S. 476, 485 (1965). *See* Dalia v. United

In *Teicher*, the defendant, a dentist, was accused of sexually abusing several female patients while they were under anesthesia during the course of treatment.[7] In conjunction with their investigation of these complaints, the police installed videotape equipment in the defendant's office pursuant to a court-ordered warrant.[8] A policewoman, posing as a patient, voluntarily submitted to anesthesia while undergoing dental treatment.[9] During the resuscitation procedure, the policewoman was allegedly subjected to nonconsensual sexual contact.[10] Prompted by the video transmission, a policeman entered the office, witnessed the conduct, and arrested the defendant.[11] At his subsequent trial on charges of sexual abuse in the first degree,[12] the Supreme Court, New York County, denied the defendant's motion to suppress the videotape evidence, holding that the lack of express statutory authority for videotape warrants did not preclude their issuance since a court has the inherent power to issue such warrants provided the search complies with the fourth amendment.[13]

On appeal, the Appellate Division, First Department, affirmed, finding that the videotape was admissible into evidence.[14] Justice Kupferman, writing for the majority,[15] initially noted that a state

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States, 441 U.S. 238 (1979).

[7] 90 Misc. 2d at 638-39, 395 N.Y.S.2d at 589. The videotape device consisted of two separate components: a camera placed in a ceiling ventilator and a recording device hidden on the undercover policewoman. 73 App. Div. 2d at 138, 425 N.Y.S.2d at 317.

[8] 73 App. Div. 2d at 138, 425 N.Y.S.2d at 317.

[9] *Id.*

[10] *Id.* at 137, 425 N.Y.S.2d at 316.

[11] *Id.* at 138, 425 N.Y.S.2d at 317. The criminal conduct occurred largely out of the camera's view.

[12] N.Y. PENAL LAW § 130.65(2) (McKinney 1975). Teicher was convicted by the trial court of two counts of sexual abuse.

[13] 90 Misc. 2d at 643-44, 395 N.Y.S.2d at 592-93. The trial court recognized that CPL article 700 alone could not serve as the predicate for the issuance of the warrant since it deals exclusively with aural communication. The court determined, however, that visual observation fell within the definition of "property" subject to seizure in CPL article 690. *Id.* at 643, 395 N.Y.S.2d at 592. Thus, the court concluded that by reading CPL articles 690 and 700 together, the issuance of a videotape warrant was authorized. *Id.* at 644, 395 N.Y.S.2d at 593. In addition, the court found that, "in any event," courts have an inherent power to issue videotape search warrants under the fourth amendment. *Id.*

[14] 73 App. Div. 2d at 139, 425 N.Y.S.2d at 318. The defendant appealed his conviction of counts I and III. As to count I, the majority rejected the defendant's contention that his actions did not meet the "sexual contact" requirement of N.Y. PENAL LAW § 130.65 (McKinney 1975). Count III involved the legality of the videotape surveillance.

[15] Presiding Justice Murphy concurred in a separate opinion. Justice Fein concurred in the opinion of Justice Murphy as to count I and the opinions of Justice Murphy and Justice Kupferman on count III. Justice Markewich concurred in a separate opinion with respect to

may afford a criminal defendant greater rights than those guaranteed by the Federal Constitution.[16] The majority asserted, however, that those rights must be balanced against the need for effective law enforcement.[17] Under this balancing test, Justice Kupferman concluded that no justification existed for suppressing the videotape evidence.[18] Finally, the majority reasoned that the use of electronic devices has been sustained by the Supreme Court,[19] and other jurisdictions have admitted videotape evidence in criminal trials[20] even in the absence of a specific legislative sanction.[21]

In a dissenting opinion, Justice Birns argued that the issuance of a videotape warrant without express constitutional or statutory authority[22] was a judicial usurpation of legislative power.[23] More-

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count III and dissented as to Count I. Justice Birns dissented on both counts.

[16] 73 App. Div. 2d at 138, 425 N.Y.S.2d at 317.

[17] *Id.; see* Oregon v. Hass, 420 U.S. 714, 719 (1975); Cooper v. Morin, 49 N.Y.2d 69, 79, 399 N.E.2d 1188, 1193-94, 424 N.Y.S.2d 168, 174 (1979).

[18] 73 App. Div. 2d at 138, 425 N.Y.S.2d at 317. The *Teicher* court did not specifically assess the reasonableness of videotape intrusions. Rather, it merely stated that the Federal Constitution allowed the gathering of evidence by videotape. *Id.* The court noted, however, that the warrant authorizing the videotape had been narrowly drawn and the videotape alone was insufficient to establish criminal conduct on the part of the defendant. *Id.*

[19] *Id.* at 138, 425 N.Y.S.2d at 317; *see* Dalia v. United States, 441 U.S. 238 (1979); United States v. New York Tel. Co., 434 U.S. 159 (1977); Katz v. United States, 389 U.S. 347 (1967). Although the Supreme Court has upheld the use of electronic devices, it has never ruled on the propriety of videotapes.

[20] 73 App. Div. 2d at 138, 425 N.Y.S.2d at 317; *e.g.,* Hendricks v. Swenson, 456 F.2d 503, 506 (8th Cir. 1972) (videotape of confession); Mikus v. United States, 433 F.2d 719, 725 (2d Cir. 1970) (videotape of bank robbery); Paramore v. State, 229 So. 2d 855, 859 (Fla. 1969), *vacated on other grounds,* 408 U.S. 935 (1972) (videotape of confession); State v. Lusk, 452 S.W.2d 219, 224 (Mo. 1970) (videotape of confession); *see* Stewart, *Videotape: Use in Demonstrative Evidence,* 21 DEF. L.J. 253, 256 (1972).

While other jurisdictions have held videotapes admissible, no court prior to *Teicher* had addressed the question whether warrants are issuable for videotape searches. In Avery v. State, 15 Md. App. 520, 292 A.2d 728 (1972), *appeal dismissed,* 410 U.S. 977 (1973), a Maryland court found that videotape surveillance of a doctor suspected of sexually abusing a patient in her home was not an unreasonable search and seizure. *Id.* at 542, 292 A.2d at 743. In *Avery,* however, there was no warrant issued and the camera was planted with the consent of the homeowner. *Id.; see* note 27 *infra.*

[21] 73 App. Div. 2d at 139, 425 N.Y.S.2d at 318.

In a concurring opinion, Justice Markewich noted that before any federal or state statutes regulated the use of sound recording devices for investigative purposes, courts had decided the legality of these searches on fourth amendment grounds. *Id.* at 140, 425 N.Y.S.2d at 318 (Markewich, J., concurring); *see* note 27 *infra.* Thus, Justice Markewich concluded that in the absence of a restrictive statute, videotape surveillance should be allowed if constitutional. 73 App. Div. 2d at 140, 425 N.Y.S.2d at 318 (Markewich, J., concurring).

[22] 73 App. Div. 2d at 140, 425 N.Y.S.2d at 319 (Birns, J., dissenting). Justice Birns relied on the dissenting opinion of Justice Stevens in Dalia v. United States, 441 U.S. 238

over, the dissent contended that videotape surveillance violated an individual's reasonable expectation of privacy, since the eavesdropping statute defines the permissible limits of intrusion into the area of personal privacy.[24] Justice Birns concluded, therefore, that only through the imposition of statutory guidelines can the necessary balance between privacy and investigative interests be achieved.[25]

It is submitted that the *Teicher* court's affirmance of a court's inherent power to issue warrants for videotape surveillance is supported by legal precedent. State courts have historically enjoyed broad power to assist in criminal investigations by issuing search warrants.[26] Furthermore, prior to the enactment of eavesdropping statutes, the legality of electronic eavesdropping warrants was determined solely on fourth amendment grounds.[27] It appears sound, therefore, to apply the standards of the fourth amendment to warrants for videotape surveillance in the absence of legislation expressly addressing their legality. It seems, moreover, that a videotape search warrant complying with the guidelines of CPL article 700 would survive fourth amendment scrutiny.[28] Consequently,

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(1979), as support for the proposition that a court is not empowered to authorize videotape surveillance without specific statutory authorization. 73 App. Div. 2d at 140-44, 425 N.Y.S.2d at 319-21 (Birns, J., dissenting). It is interesting to note, however, that Justice Stevens specifically restricted his analysis in *Dalia* to a federal context and excluded state courts from his discussion. 441 U.S. at 264-65 n.6 (Stevens, J., dissenting).

[23] 73 App. Div. 2d at 142-44, 425 N.Y.S.2d at 320-21 (Birns, J., dissenting).

[24] *Id.* at 144, 425 N.Y.S.2d at 321 (Birns, J., dissenting).

[25] *Id.* (Birns, J., dissenting).

[26] Dalia v. United States, 441 U.S. 238, 264-65 n.6 (Stevens, J., dissenting). *See In re* Steinway, 159 N.Y. 250, 258, 53 N.E.2d 1103, 1105 (1899); People v. Teicher, 90 Misc. 2d 638, 644, 395 N.Y.S.2d 587, 592-93 (Sup. Ct. N.Y. County 1977), *aff'd*, 73 App. Div. 2d 136, 425 N.Y.S.2d 315 (1st Dep't 1980); 1 M. HALE, HISTORY OF THE PLEAS OF THE CROWN 577-78 (1st Amer. ed. 1897).

[27] The federal courts decided several cases dealing with the investigative use of electronic devices prior to the adoption of any regulating statute. The Supreme Court reflected in Berger v. New York, 388 U.S. 41 (1967), that "the Constitution [does] not forbid the obtaining of evidence by wiretapping . . . ." *Id.* at 51. Prior to *Berger*, the admissibility of evidence obtained through the use of electronic devices was determined, in the absence of statutory authorization, on fourth amendment grounds, *see* Silverman v. United States, 365 U.S. 505, 509-10 (1961) (eavesdropping); On Lee v. United States, 343 U.S. 747, 753-54 (1952) (electronic recording of phone conversation); Goldman v. United States, 316 U.S. 129, 133-34 (1942) (detectaphone), and by examining the circumstances of the case, *see* United States v. New York Tel. Co., 434 U.S. 159, 170 (1977) (pen registers permitted without specific statute); Osborn v. United States, 385 U.S. 323, 330-31 (1966) (tape recorded conversation).

[28] CPL § 700.15 (1971) enumerates the requirements for acquiring eavesdropping search warrants. There must be a showing of probable cause to a neutral magistrate that: (1)

there should be no constitutional objection to the issuance of videotape warrants under the *Teicher* test, even without explicit statutory authorization.[29]

It is suggested, however, that because of the intrusive nature of videotape surveillance, the legislature should adopt strict guidelines governing videotape warrants.[30] Where conventional means of obtaining evidence have proved ineffective, as in *Teicher,* the individual's expectation of privacy should yield.[31] If less intrusive means of evidence-gathering exist, however, a balancing of the individual's rights and the need for effective law enforcement should result in a denial of a videotape warrant.[32] These limitations would

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a particular person has, is, or is about to commit an offense; (2) a particular communication relating to the crime will be intercepted; and (3) the place where the eavesdropping will take place is commonly used or associated with the suspect. *Id.* In addition, the police must show that normal investigative techniques would not succeed or are too dangerous. *Id.* The particularity required by this statute and the fact that warrants will be issued only as a "last resort," would seemingly serve to make videotape surveillance under CPL article 700 guidelines constitutional. *See* United States v. Cirillo, 499 F.2d 872, 878 (2d Cir.), *cert. denied,* 419 U.S. 1056 (1974); note 6 *supra.* In addition, the propriety of the decision to issue a warrant is always appealable. *See* Dalia v. United States, 441 U.S. 238, 258 (1979).

[29] *But see* Note, *Electronic Visual Surveillance and the Fourth Amendment: The Arrival of Big Brother?,* 3 HASTINGS CONST. L.Q. 261, 294-99 (1976) [hereinafter cited as *Electronic Visual Surveillance*], in which the author suggests that a videotape intrusion constitutes an unreasonable search and seizure, since conventional methods of investigation and authorized eavesdropping procedures were sufficient to aid effective law enforcement. *Id.* at 294-99.

[30] *See generally Electronic Visual Surveillance, supra* note 29, at 264-66. A shortening of the effective period of a videotape warrant, for example, may be the most logical way to minimize the privacy invasion. Article 700 states that the warrant is valid only for the lesser of 30 days or the time needed to produce the desired evidence. CPL § 700.10(2) (1971). It is suggested, however, that a 10-day time limit would discourage investigators from seeking videotape warrants except where there is the greatest likelihood of success and would ensure a new probable cause showing at more frequent junctures. *Cf.* CPL §§ 700.15, 700.40 (1971) (new showing of probable cause necessary to renew the eavesdropping warrant after expiration of 30-day period). It is also suggested that the police be required to show that normal investigative techniques, including eavesdropping, have in fact failed, rather than showing that they would not have succeeded, *see* CPL § 700.15 (1971). This would guarantee that videotape warrants were issued only as a last resort.

[31] In *Teicher,* the police had unsuccessfully attempted to gather evidence by normal investigative techniques and by eavesdropping. 90 Misc. 2d at 649, 395 N.Y.S.2d at 596. Moreover, the patients were unable to satisfactorily relate the extent of the sexual contact because they were sedated at the time of its occurrence. *Id.* Additionally, there was a reasonable basis for believing that the dentist would commit the same offense in the presence of the undercover policewoman, *id.* at 648, 395 N.Y.S.2d at 596, and that the alleged criminal activity would be intercepted by focusing the camera on the dental chair, the scene of the three reported sexual incidents. *Id.* at 647, 395 N.Y.S.2d at 595.

[32] *Cf.* United States v. Tortorello, 480 F.2d 764, 784 (2d Cir.), *cert. denied,* 414 U.S. 866 (1973) (unnecessary intrusion upon privacy must be avoided); CPL § 700.15 (1971) (normal

serve the dual purpose of decreasing the probability of unreasonable intrusions while maintaining the effectiveness of investigative procedures.

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EDUCATION LAW

Voluntary preemployment waiver of tenure rights held not to violate public policy

In order to insure the employment of quality personnel in the public education system, the Education Law provides teachers with certain tenure rights guaranteeing job security.[33] Historically,

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investigative techniques would fail).

[33] *See* N.Y. EDUC. LAW §§ 3012, 3014, 3020-a (McKinney Supp. 1971-1979). Prior to the enactment of tenure statutes, teacher employment contracts were subject to annual renewal. Moritz v. Board of Educ., 60 App. Div. 2d 161, 166, 400 N.Y.S.2d 247, 251 (4th Dep't 1977). The change wrought by the legislature was intended to give permanence to teaching positions, *id.;* Walcott v. Fisher, 274 App. Div. 339, 341, 83 N.Y.S.2d 536, 538 (3rd Dep't 1948), *aff'd,* 299 N.Y. 688, 87 N.E.2d 71 (1949), and to recognize the strong public policy to reward competent teachers with security in the positions to which they were appointed, Boyd v. Collins, 11 N.Y.2d 228, 233, 182 N.E.2d 610, 613, 228 N.Y.S.2d 228, 232-33 (1962), *overruled on other grounds sub nom.* Abramovich v. Board of Educ., 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109, *cert. denied,* 444 U.S. 845 (1979); Monan v. Board of Educ., 280 App. Div. 14, 18, 111 N.Y.S.2d 797, 800 (4th Dep't 1952).

As a precondition to eligibility for receiving tenure, appointment to a probationary period not exceeding three years is required. N.Y. EDUC. LAW §§ 3012(1), 3014(1) (McKinney Supp. 1971-1979). Probationary appointment is made by majority vote of the BOCES or school board upon the recommendation of the district superintendent. *Id.* To attain the position of a tenured teacher, the district superintendent must, on or before the expiration of the probationary period, recommend that the board grant tenure to those probationary teachers who have been found to be "competent, efficient and satisfactory." *Id.* (2), 3014(2). It is then within the board's discretion to grant or deny tenure. Bergstein v. Board of Educ., 34 N.Y.2d 318, 322, 313 N.E.2d 767, 769, 357 N.Y.S.2d 465, 468 (1974). Probationary teachers who are not recommended for tenure must be notified in writing by the district superintendent no later than sixty days prior to the expiration of the probationary period. Pavilion Cent. School Dist. v. Pavilion Faculty Ass'n, 51 App. Div. 2d 119, 380 N.Y.S.2d 387 (4th Dep't 1976); N.Y. EDUC. LAW §§ 3012(2), 3014(2) (McKinney Supp. 1971-1979). Failure to give notice to the teacher as required may result in tenure by estoppel and acquiescence. *See* Ricca v. Board of Educ., 47 N.Y.2d 385, 392, 391 N.E.2d 1322, 1326, 418 N.Y.S.2d 345, 349 (1979); Baer v. Nyquist, 34 N.Y.2d 291, 313 N.E.2d 751, 357 N.Y.S.2d 442 (1974); Matthews v. Nyquist, 67 App. Div. 2d 790, 412 N.Y.S.2d 501 (3rd Dep't 1979).

Once granted tenure, a teacher can only be removed by a school board acting in strict compliance with the Education Law. *See* N.Y. EDUC. LAW §§ 3012, 3014, 3020-a (McKinney Supp. 1971-1979). Indeed, a tenured teacher has been held to enjoy a constitutionally protected property interest in his compensation and employment which cannot be deprived without due process. Abramovich v. Board of Educ., 91 Misc. 2d 481, 485, 398 N.Y.S.2d 311, 315 (Sup. Ct. Suffolk County 1977), *rev'd on other grounds,* 62 App. Div. 2d 252, 403 N.Y.S.2d 919 (2d Dep't 1978), *aff'd,* 46 N.Y.2d 450, 386 N.E.2d 1077, 414 N.Y.S.2d 109, *cert.*