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Wisconsin v. Rewolinski: Do Members of the Deaf Community Have a Right to be Free from Search and Seizure of Their TDD Calls?

Stephanie Hoit Lee*

Introduction

On the night of June 9, 1987, Robert Rewolinski killed his girlfriend, Catherine Teeters.¹ During Rewolinski's trial, the judge admitted into evidence two printed transcripts of Telecommunications Device for the Deaf (TDD) phone calls made between Rewolinski and Teeters.² Under United States Supreme Court precedent, the admission of this evidence violated the Fourth Amendment.

Because Rewolinski and Teeters were both deaf³ and non-verbal, they needed to use TDD machines⁴ to communicate by tel-

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1. See *Wisconsin v. Rewolinski*, 464 N.W.2d 401, 403 (1990).

2. *Id.* at 404.

3. The author of this Comment has chosen to use the term "deaf" rather than "hearing impaired" because it is her understanding that many people who do not hear do not like to think of themselves as "disabled," "handicapped" or "impaired." See CAROL PADDEEN & TOM HUMPHRIES, *DEAF IN AMERICA: VOICES FROM A CULTURE* 43-44 (1988). Deaf people tend to refer to themselves by terms such as "disabled," only when it is necessary to ally themselves with other groups in order to fight for legislation or other benefits. *Id.* There is, among deaf people, a distinction between the word "deaf," which means an individual who cannot hear and the word "Deaf," which refers to a culture having unique characteristics and a unique language—American Sign Language. *Id.* at 2-4.

4. A TDD (Telecommunications Device for the Deaf) is a machine which allows typed messages to be transmitted to another TDD machine through ordinary telephone lines. The messages show up on a small screen on the TDD machine. Some models also transmit a printed transcript of the call. People who use the TDD machines often also require "sound-sensitive visual alarms," which flash lights to let the person know that the telephone or the doorbell is ringing. SUSAN REZEN, PH.D. & CARL HAUSMEN, *COPING WITH HEARING LOSS: A GUIDE FOR ADULTS AND THEIR FAMILIES* 119-20 (1985). Some people refer to TDD machines as TTYs (Teletypewriters). This term was used for older models which were bigger

ephone. Although prior precedent had established hearing persons' rights to privacy in their telephone calls, the *Rewolinski* decision indicates that deaf persons may not be afforded the equivalent privacy protection.

On the day of Teeters' death, Rewolinski was stopped by Pierce County (Wisconsin) sheriff's deputies as he was driving. The deputies arrested Rewolinski for driving on a suspended license and took him to the sheriff's department. Upon his release, Rewolinski requested to use the department's TDD machine⁵ to call Teeters to drive him home. He was permitted to use the TDD which was located in a limited access area.⁶ Two separate phone conversations took place between Teeters and Rewolinski on the sheriff department's TDD. During the course of the first call, Rewolinski called Teeters for a ride home from the station and Teeters initially refused to pick him up. Later, Teeters called Rewolinski back on the department's TDD. During this second call, Teeters consented to drive Rewolinski home on the condition that he would not harm her or their children. When Rewolinski attempted to leave the limited access area with these printouts, the dispatcher, Deputy Sheriff Sandra Roed, forcibly took them from his hand.⁷ These printouts indicated Teeters' fear of Rewolinski and referred to his previous assault on her.⁸ At his trial and on

and heavier and did not have a visual display screen. TDDs are newer, lighter machines which have a visual display screen. People now use the terms "TDD" and "TTY" interchangeably. BERYL LIEFF BENDERLY, *DANCING WITHOUT MUSIC: DEAFNESS IN AMERICA* 237-38 (1980). The author of this Comment will use the term TDD throughout.

5. The machine at the sheriff's department had a visual display which displayed one-half inch characters. The machine also had a feature which printed a transcript of the call. This feature could be turned off by pushing a privacy button. Not all machines have such a feature. The court record does not say whether Rewolinski's home machine had such a feature. *Rewolinski*, 464 N.W.2d at 404. Federal law requires federally assisted programs to have a TDD available. 28 C.F.R. §§ 42.501-42.540 (1991).

6. The TDD was located in the dispatch area. In order to get into this area, a dispatcher had to unlock the door and let Rewolinski enter. The dispatcher was in this room at all times during Rewolinski's calls. *Rewolinski*, 464 N.W.2d at 404.

7. The dispatcher, Deputy Sheriff Sandra Roed admitted that she had to force open Rewolinski's hand when he refused to give her the printouts. *Id.* at 404.

8. The printouts recorded Teeters statement, "I am scared to death that you will make us die in car accident." Also appearing on the printouts is the fact that Teeters had made Rewolinski promise that he would not hurt her or the children. *Id.* at 404. On the printouts there was also reference to a previous assault. Rewolinski said to Teeters, "if the kids want daddy or not, okay. He said smiling, I love you any more since I learned myself on May 4 that I hit your ear and shoulder and understand about how you are feeling." Transcript at 364, *Wisconsin v. Rewolinski* (No. 87 CR 155) (1987). It does not appear in the record whether Rewolinski was ever arrested or tried for this assault. As will be discussed later, the reason for the lack of clarity in some the language of Teeter's and Rewolinski's calls is that both Rewolinski and Teeters spoke American Sign Language (ASL)

appeal, Rewolinski claimed that the forcible removal of these printouts and the sheriff's subsequent reading of them was an illegal search and seizure in violation of his Fourth Amendment rights. He argued that the judge should not have admitted them into evidence at his trial because of this violation.⁹ Rewolinski claims that the judge's decision to admit the printouts was harmful error because it effectively negated his heat of passion defense, prompting the jury to convict him of first degree murder instead of manslaughter.¹⁰

This Comment contends that the Wisconsin Supreme Court used a flawed analysis which represents a dangerous trend away from a previously broad accommodation to Fourth Amendment protection. The doubt that this case brings to the rights of the deaf in the privacy of their TDD calls underscores the tragedy of this holding. Part I of this Comment provides a brief history of Fourth Amendment analysis. Part II details the holdings and rationale of the lower courts and the Wisconsin Supreme Court. Part III criticizes both the supreme court's treatment of the burden of proof issue and its mode of analysis which overemphasizes the significance of property interests. This section will explain how these aspects of the court's decision represent a departure from precedent. Part IV examines public policy considerations, recent legislation in the area of the rights of the deaf, and the problems inherent with the admission of TDD printouts into evidence. This Comment con-

rather than English. See *infra* notes 199-201 and accompanying text. It is interesting to note that both the court of appeals and the Wisconsin Supreme Court added the article "a" to the phrase, "die in [a] car accident." See *Rewolinski*, 464 N.W.2d at 404; *Rewolinski*, No. 88-2312-CR, 1989 WL, (Wis. Ct. App. 1989). Native speakers of ASL do not use any articles in their conversations. See TOM HUMPHRIES, CAROL PADDEN & TERENCE O'ROURKE, A BASIC COURSE IN AMERICAN SIGN LANGUAGE 15 (1980) [hereinafter HUMPHRIES]. The addition of this article by the courts seems to prove that they do not understand the nature of ASL.

9. The Fourth Amendment to the United States 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 persons or things to be seized.

This provision is applicable to the states through the Fourteenth Amendment to the United States Constitution. Rewolinski claimed that in his case there was both a search and a seizure. The alleged seizure occurred first, when the dispatcher forcibly took the printouts from Rewolinski's hand. The alleged search occurred later when the dispatcher, without a warrant, read the printout after the crime had occurred. See *Rewolinski*, 464 N.W.2d at 419 (Bablitch, J., dissenting).

Rewolinski also claimed that the actions of the government violated his rights under the Wisconsin Constitution. As the Wisconsin Supreme Court correctly pointed out, the standard is the same for interpreting both the United States and the Wisconsin constitutional provisions. *Id.* at 405, n.5.

10. *Id.* at 403, 411.

cludes that the result in *Rewolinski*, that deaf people in Wisconsin can no longer be secure in the privacy of their TDD calls, is a departure from established Fourth Amendment precedent.

Part I: The Fourth Amendment

The United States Supreme Court considered the Fourth Amendment's search and seizure provision in 1928 in *Olmstead v. United States*.¹¹ In *Olmstead*, the Federal Bureau of Investigation (FBI) placed wiretaps on the defendants' home and office telephones from outside the premises. The Court held that there was no search or seizure because the FBI agents had not entered the premises. This holding provided that for a search or seizure to occur, the government must trespass on some tangible property or invade upon some tangible property interest.¹² Justice Brandeis dissented, claiming that interference with privacy could constitute a violation whether or not a trespass had occurred and furthermore that words could be "seized."¹³

The Supreme Court cited *Olmstead* in 1942 in *Goldman v. United States*.¹⁴ In *Goldman*, the Court held that no search or seizure occurred when the government overheard a conversation in an adjacent room by placing an electronic listening device against the wall.¹⁵ The Court found "no logical or reasonable distinction" between these facts and the wiretapping in *Olmstead* because the government had not entered the premises in either case.¹⁶

In 1961, the Supreme Court reexamined both of these holdings in *Silverman v. United States*.¹⁷ In the *Silverman* case, the court, without expressly overruling *Olmstead* and *Goldman*, held that the protection of the Fourth Amendment extends to the recording of oral statements overheard without any "technical trespass under . . . local property law."¹⁸ In this case, government agents used a spike microphone which entered the premises one-sixteenth of an inch. The agents, however, did not enter the premises. Since there was some, albeit slight, entrance into the premises by the microphone, the Court justified this holding without

11. 277 U.S. 438 (1928).

12. *Id.* at 464-66.

13. *Id.* at 478 (Brandeis, J., dissenting).

14. 316 U.S. 129 (1942).

15. *Id.*

16. *Id.* at 135.

17. 365 U.S. 505 (1961).

18. *Id.* at 511.

overruling *Olmstead* and *Goldman*.¹⁹

In 1967, in *Katz v. United States*,²⁰ the Supreme Court again looked at its Fourth Amendment holdings. The Court held that *Silverman* had eroded the previous decisions to the point where trespass was no longer the valid test for a search or seizure inquiry. Thus, the *Katz* Court expressly overruled the *Olmstead* and *Goldman* holdings.²¹ The Court stated "[t]he premise that property interests control the right of the government to search and seize has been discredited."²² In *Katz*, the FBI had taped microphones on top of a public telephone booth and recorded several long distance calls that Katz had made to place gambling bets. The trial court admitted these recordings into evidence against Katz at his trial and the jury convicted Katz for interstate gambling. The United States Supreme Court reversed Katz's conviction, holding that the Fourth Amendment "protects people, not places" and further, "what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."²³ The Court believed that "[t]he Government's activities. . .violated the privacy upon which [Katz] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the Fourth Amendment."²⁴ The Court, therefore, believed that by invading Katz's privacy and recording his words, the government had committed both a search and a seizure.²⁵

In *Katz*, the Court, although finding the government's conduct defensible, held that the judge should not have admitted the recordings into evidence at trial because the FBI had not obtained a warrant before taping Katz's call.²⁶ The Court said "warrantless searches are *per se* unreasonable under the Fourth Amendment," subject only to very limited exceptions.²⁷ The Court believed that

19. *Id.* at 511-12.

20. 389 U.S. 347 (1967).

21. *Id.* at 353.

22. *Id.* (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)) (brackets in original).

23. *Id.* at 351-52.

24. *Id.* at 353.

25. Justice Black dissented in *Katz*, because he did not want the prior property analysis to be disregarded. He felt that the Court should not rewrite the fourth amendment "to bring it into harmony with the times." *Id.* at 364 (Black, J., dissenting).

26. *Katz*, 389 U.S. at 354-57.

27. These exceptions are the "hot pursuit" exception and the "incident of arrest" exception. *Id.* at 357. Neither of these exceptions would apply in Rewolinski's case because at the time of the alleged seizure, Rewolinski was not under arrest. Furthermore, the crime had not yet been committed. At the time of the alleged search, the deputy already was in possession of the printouts. As Justice Babbitch correctly pointed out, the deputy could have obtained a warrant before

the government could have taken steps to get a judicial warrant without notifying the defendant ahead of time.²⁸

In his *Katz* concurrence, Justice Harlan referred to what he considered to be the two-fold requirement of the Fourth Amendment when determining whether an illegal search or seizure occurred: "first that a person have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as reasonable."²⁹ The Supreme Court adopted the wording of this concurrence in *California v. Ciraolo*, and it has become the test for a search or seizure analysis.³⁰ Each part of this two-part test must be proven by a "preponderance of the credible evidence."³¹ Courts agree that the defendant must prove an actual, subjective expectation of privacy to meet the first part of the legitimate expectation of privacy test.³² There is, however, debate over whether the defendant or the government bears the burden of proof on the second part of the legitimate expectation of privacy test, *i.e.*, whether defendant's subjective expectation of privacy is objectively legitimate.³³ Once a court establishes that a search or seizure occurred, the government bears the burden to prove that it was justified in performing this search or seizure.³⁴

Two United States Supreme Court decisions appear at first glance to settle the burden of proof debate. In *Rakas v. Illinois*,³⁵ the state sought to admit into evidence weapons seized by police from a car in which the defendant had been a passenger. The Supreme Court stated "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged Search or Seizure."³⁶ Further, in *Rawlings v. Kentucky*,³⁷ the government charged the defendant with possession of drugs which were found in someone else's

reading the printouts to look for evidence. *Rewolinski*, 464 N.W.2d at 419 (Bablitch, J., dissenting). The printouts were not going to leave the officer's presence so there was no immediate urgency. *Id.* Furthermore, the police did not need evidence to arrest and hold *Rewolinski*. *Rewolinski* was not denying that he killed Teeters. In fact, he reported the incident. *Id.* at 403.

28. *Katz*, 389 U.S. at 357-58.

29. *Id.* at 361 (Harlan, J., concurring).

30. 476 U.S. 207, 211 (1986) (*quoting Katz*, 389 U.S. at 360 (Harlan, J., concurring)).

31. *See Rewolinski*, 464 N.W.2d at 407.

32. *Id.*

33. *Id.* at 406.

34. *Rewolinski*, 464 N.W.2d at 405.

35. 439 U.S. 128 (1978).

36. *Id.* at 131, n.1.

37. 448 U.S. 98 (1980).

purse. The Court stated that the defendant "bears the burden of proving that he had a legitimate expectation of privacy" in the item searched or seized.³⁸

Although these cases initially appear to place the burden on the defendant to prove that an expectation of privacy is legitimate, these cases actually involved a different issue: whether the defendant had "standing" to sue as the victim of a search or seizure.³⁹ There was no such problem in *Rewolinski*. The issue there was whether a search occurred. This question is not reached by a court unless it resolves the question of "standing" in favor of the defendant.⁴⁰ In other words, a court need not undertake a search or seizure analysis if the defendant did not have standing to raise the issue in the first place. The Supreme Court has not resolved the question of who bears the burden on the objective legitimacy of the expectation in a case where standing is not an issue.⁴¹

In 1989, the Supreme Court faced this issue in *Florida v. Riley*.⁴² In *Riley*, the police saw marijuana growing in the defendant's greenhouse, while hovering 400 feet over the defendant's property in a helicopter. The issue in *Riley* was whether this constituted a search subject to Fourth Amendment protection.⁴³ The Court held that although *Riley* may have had a subjective expectation of privacy, it was not legitimate because the helicopter was within legal distance and in a public airway.⁴⁴ The *Riley* court divided on who should bear the burden to prove the objective legitimacy or illegitimacy of the subjective privacy expectation. Four justices said that the state should bear the burden given the facts of the *Riley* case. Justice Blackmun, in dissent, wrote "none of our prior decisions tell us who has the burden of proving whether *Riley's* expectation of privacy was reasonable."⁴⁵ Justice Blackmun "would impose upon the prosecution the burden of proving contrary facts necessary to show that *Riley* lacked a reasonable expectation. . . ."⁴⁶ Justice Brennan, in a dissent joined by Justices Marshall and Stevens, claimed "the burden of proof properly rests

38. *Id.* at 104.

39. In *Arkansas v. Sanders*, 442 U.S. 753, 762, n.8 (1979), the Court wrote the "respondent concedes that the suitcase [which the government searched] was his property. . . so he had standing to challenge the search." Thus, after *Rakas*, the Court still saw standing as a separate issue based on property ownership.

40. See *Rewolinski*, 464 N.W.2d at 406.

41. *Id.*

42. 488 U.S. 445 (1989).

43. *Id.* at 447-48.

44. *Id.* at 450-52 (plurality opinion); *id.* at 452 (O'Connor, J., concurring).

45. *Id.* at 467 (Blackmun, J., dissenting).

46. *Id.* at 468.

with the state and not with the individual defendant."⁴⁷ Justice White's plurality opinion did not address the burden of proof question.⁴⁸ Justice O'Connor, concurring only in the judgment, was the only justice who clearly assigned this part of the burden to the defendant.⁴⁹ She wrote "the defendant must bear the burden of proving that his expectation of privacy was a reasonable one, and thus that a 'search' within the meaning of the Fourth Amendment even took place."⁵⁰ She did not mention either the *Rakas* or the *Rawlings* decisions as justification for this holding.⁵¹

In summary, *Katz* conclusively established that a court should perform a search or seizure inquiry by first determining whether the defendant had a legitimate expectation of privacy in the item which the government allegedly searched or seized. This item need not be tangible; even words can be "searched" or "seized." Under *Katz*, a search or seizure analysis ordinarily consists of two parts: 1) whether the defendant had a "legitimate expectation of privacy"⁵² in the item in question and 2) whether the government's conduct was reasonable in searching for and seizing the item. The first part determines whether a search or seizure exists, and the second part establishes whether a given search or seizure was reasonable.⁵³ The Supreme Court has determined that the defendant bears the burden of proof on the first part of this two-part test, but has not yet clearly determined whether the defendant or the government bears the burden of proof on the second part. It is settled, however, that if a court determines through this two-part test that the defendant did have a legitimate expectation of privacy in the item, then a search or seizure has occurred. As a final step in the analysis, the government has the burden to show that its conduct was reasonable, making the search or seizure legal.

47. *Id.* at 465-66 (Brennan, J., dissenting).

48. *Id.* at 450.

49. *Id.* at 455 (O'Connor, J., concurring).

50. *Id.*

51. *Id.* The *Rewolinski* court cites other decisions which agree with the view that the defendant always bears the burden of proof on this issue. *Rewolinski*, 464 N.W.2d at 406. However, neither the Wisconsin courts nor the United States Supreme Court had conclusively placed the burden on either party. *Id.*

52. The courts sometimes use the words "reasonable" or "justifiable" rather than "legitimate." As the Wisconsin Supreme Court correctly pointed out, these terms are interchangeable in the case law. *Id.* at 405, n.6 (citing *United States v. McKennon*, 814 F.2d 1539, 1543, n.5 (11th Cir. 1987)). The author of this Comment has chosen to use the term "legitimate" in order to avoid confusion, since the second part of a search or seizure inquiry requires an examination of the "reasonable" of the government's conduct.

53. See *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Wisconsin v. Monahan*, 251 N.W.2d 421 (1977).

Part II: Wisconsin v. Rewolinski: Case Description

It was against this backdrop that the Wisconsin courts decided *Wisconsin v. Rewolinski*.⁵⁴ The case provided the unique opportunity to decide the question of whether a search and seizure occurred when the sheriff forcibly took, and later read, two TDD printouts containing the words from phone conversations between two deaf people.

Before trial, Rewolinski filed three pre-trial motions to suppress the TDD transcripts.⁵⁵ The trial judge deferred ruling on these pre-trial motions deciding instead to rule on them when the state called its first witness to testify about the TDD printouts.⁵⁶ Consequently, Rewolinski was not granted a pre-trial suppression hearing.⁵⁷ When the state called its first witness, the trial judge

54. *Wisconsin v. Rewolinski*, No. 88-2312-CR, 1989 WL (Wis. Ct. App (1989), *aff'd* 464 N.W.2d 401 (1990), *cert. denied*, — U.S. —, 111 S.Ct. 1694 (1991).

55. The first two suppression motions, filed several months before trial, asked the judge to suppress this evidence but added that a hearing would be requested at a later date if defense counsel found it necessary. The third motion was filed one day before trial; this time a hearing was requested. *Id.* at 413.

56. This witness was Deputy Sheriff Sandra Roed, the officer who had taken the TDD printouts from Rewolinski's hand on June 9, 1987. *Id.* at 404.

57. Since the state had no witnesses available the day before trial, the judge refused to hold a hearing at that time. WISC. STAT § 971.31 (1986) requires in relevant part:

(1) Any motion which is capable of determination without the trial of the general issue may be made before trial.

(2) Except as provided in sub. (5), defenses and objections based on . . . the use of illegal means to secure evidence shall be raised before trial by motion or be deemed waived. The court may, however, entertain such motion at the trial, in which case the defendant waives any jeopardy that may have attached. The motion to suppress evidence shall be so entertained with waiver of jeopardy when it appears that the defendant is surprised by the state's possession of such evidence.

(3) The admissibility of any statement of the defendant shall be determined at the trial by the court in an evidentiary hearing out of the presence of the jury, unless the defendant, by motion, challenges the admissibility of such statement before trial.

(4) Except as provided in sub. (3), a motion shall be determined before trial of the general issue unless the court orders that it be deferred for determination at the trial. All issues of fact arising out of such motion shall be tried by the court without a jury.

(5)(a) Motions before trial shall be served and filed within 10 days after the initial appearance of the defendant in a misdemeanor action or 10 days after arraignment in a felony action unless the court otherwise permits.

The Wisconsin Supreme Court held that Rewolinski had waived his right to an evidentiary hearing under this statute. *Rewolinski*, 464 N.W.2d at 403. The court admitted however, that "[t]he procedure used below was not perfect." *Id.* at 413. The court refused to remand for an evidentiary hearing because they believed that Rewolinski should not be given a remand for "the opportunity to do what [he] should have done before, that is, to show a legitimate expectation of privacy." *Id.* This argument begs the question. Rewolinski claimed specifically that he should

decided to admit the printouts into evidence.⁵⁸

The trial judge, in a statement for the record, said that Rewolinski had no legitimate expectation of privacy in these calls because Rewolinski did not push the privacy button which would have prevented the TDD machine from making a printout of the calls.⁵⁹ Since the judge found that the printouts were neither searched nor seized, he did not need to take the next step and decide whether, under the facts of the case, such a search or seizure would have been reasonable. The judge also found it significant that it was not only Rewolinski's call but also Teeters'.⁶⁰ In addition, the judge thought that the printouts belonged to the sheriff's department.⁶¹ The judge did not find the defendant's analogy to *Katz* persuasive because he did not consider this a case of government eavesdropping.⁶² Since the judge found that no search or seizure had occurred, he did not take the next step of determining whether such a search would have been reasonable.⁶³

The Wisconsin Court of Appeals for the Third District, in an unpublished decision, affirmed the trial court.⁶⁴ Judge Thomas Cane concurred in the judgment only and wrote separately.⁶⁵ The majority opinion placed the burden on the defendant to prove that he had a subjective expectation of privacy and that it was objectively legitimate.⁶⁶ The court also held that because Rewolinski did not push the privacy button on the TDD, he "failed to rebut the permissible inference that confidentiality was not anticipated when the calls took place."⁶⁷ The opinion did not define the term "permissible inference" nor did it explain for future cases which

have been given an evidentiary hearing to determine whether a search and seizure occurred. He was not given such an opportunity. The Wisconsin Supreme Court's argument states that Rewolinski should have proven his legitimate expectation of privacy before the time of his appeal. The question at issue is at what time before appeal this legitimate expectation should have been proven. Rewolinski argued that it should have been at a suppression hearing before trial. In other words, Rewolinski also thought he should have proven this element prior to appeal. Since he was not given a suppression hearing, however, he was not given this opportunity. For this reason, on appeal, Rewolinski requested a remand for a hearing. A remand for a hearing would not be inconsistent with the court's argument. A remand for a suppression hearing is permitted by the holding in *Upchurch v. Wisconsin*, 219 N.W.2d 363 (1974).

58. *Rewolinski*, 464 N.W.2d at 413.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See *supra* note 34 and accompanying text.

64. *Wisconsin v. Rewolinski*, No. 88-2312-CR, 1989 WL (Wis. Ct. App. 1989).

65. *Id.*

66. *Rewolinski*, 452 N.W.2d at 585 (text in Westlaw).

67. *Id.*

inferences it would permit to override a defendant's evidence regarding a subjective expectation of privacy.

The majority opinion also stated that Rewolinski's attempt to take the printouts provided some evidence of his subjective expectation. Moreover, the opinion acknowledged that it was reasonable to believe that Rewolinski may not have known about the privacy button. However, Rewolinski failed to carry his burden on the subjective part of the test because he did not take the stand or otherwise show why he did not invoke the privacy option.⁶⁸ It appears that the majority did not find it necessary to explore the objective legitimacy of his expectation of privacy since it did not find that Rewolinski had a subjective expectation.

Judge Cane disagreed with the majority's conclusion that Rewolinski did not have a legitimate expectation of privacy.⁶⁹ He, like the majority, placed the burden on the defendant to prove both the subjective expectation of privacy and that the expectation was objectively legitimate. He believed however, that Rewolinski had met these burdens.⁷⁰ Judge Cane did not believe that failure to push the privacy button was significant. In his view, Rewolinski had proven his expectation conclusively when he tore off the printouts and refused to release them until forced to do so.⁷¹ Judge Cane also believed that this expectation was legitimate, since Rewolinski was in a private area of the department where the deputies were not able to see his calls.⁷² Although Judge Cane found the decision to admit the TDD printouts to be error, he thought it harmless error because the rest of the evidence allowed no reasonable possibility that the printouts contributed to the conviction.⁷³

Fourth Amendment precedent dictates that whether a defendant had a legitimate expectation of privacy depends on the totality of the circumstances.⁷⁴ Under this standard, a court should balance the defendant's privacy interest in the item with society's interest in the government's conduct.⁷⁵ The majority did not explicitly state that this was the standard they used. However, its analysis was in accord with this standard because the court ex-

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. See *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Rawlings v. Kentucky*, 448 U.S. 97 (1980).

75. See *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Rawlings v. Kentucky*, 448 U.S. 97 (1980).

amined Rewolinski's behavior to determine whether it demonstrated a privacy interest. Also in accordance with precedent, the court of appeals declined to weigh the property interests involved.

In a four to three decision, the Wisconsin Supreme Court affirmed the court of appeals' decision.⁷⁶ The supreme court agreed with the court of appeals that the defendant bears the burden to prove both that he had a subjective expectation and that it was objectively legitimate.⁷⁷ The majority of the court put dominant emphasis on the objective element of the test and made no conclusive finding on Rewolinski's subjective expectation.⁷⁸ Because the court did not conclusively state whether Rewolinski had any subjective expectation of privacy,⁷⁹ it only had to decide whether Rewolinski's expectation of privacy was objectively legitimate to determine whether a search or seizure had occurred. Thus, the majority opinion of the Wisconsin Supreme Court skipped the subjective prong of the test and only examined whether such an expectation was objectively legitimate.

The majority believed that Rewolinski's subjective expectation in the privacy of his TDD call was not an expectation that society would deem legitimate.⁸⁰ The Wisconsin Supreme Court majority, unlike the court of appeals, specifically stated that the expectation must be legitimate based on the totality of the circumstances.⁸¹ The majority opinion stated that six factors were relevant to defining the totality of the circumstances:

- (1) Whether the defendant had a property interest in the premises;
- (2) whether he was legitimately (lawfully) on the premises;
- (3) whether he had complete dominion and control and the right to exclude others;
- (4) whether he took precautions customarily taken by those seeking privacy;
- (5) whether he put the property to some private use;
- (6) whether the claim of privacy is consistent with historical notions of privacy.⁸²

The Wisconsin Supreme Court took these six factors from its 1981 decision in *Wisconsin v. Fillyaw*.⁸³ The *Fillyaw* court claimed these factors resulted from the United States Supreme Court's de-

76. *Rewolinski*, 464 N.W.2d at 403.

77. *Id.* at 405-06.

78. *Id.* at 407.

79. The opinion stated that, "he arguably did not" have such an expectation but did not give any reasons. The opinion therefore focused only on whether such an expectation, if Rewolinski had it, would be legitimate. *Id.* Two of the dissenting Justices believed that Rewolinski had proven a subjective expectation of privacy. *Id.* at 416 (Bablitch, J., dissenting).

80. *Id.*

81. *Id.*

82. *Id.* at 407.

83. *Id.* (citing *Wisconsin v. Fillyaw*, 312 N.W.2d 795 (1981)).

cision in *Rakas*.⁸⁴ The *Rewolinski* majority found that analysis of these factors showed that Rewolinski did not have a legitimate expectation of privacy.⁸⁵

For factor one, the Wisconsin Supreme Court majority found it significant that Rewolinski did not own the TDD machine, the ink or the paper.⁸⁶ In concluding that Rewolinski did not have a property interest in the premises, the court also pointed to the strong police interest and the "public presence" which "pervaded" the area.⁸⁷ For factor two, although admitting that Rewolinski was legitimately on the premises, the majority found it significant that Rewolinski's initial purpose for being at the station was an arrest for a traffic offense.⁸⁸ Addressing factor three, the majority pointed out that Rewolinski clearly had no control over the TDD machine itself or the dispatch area and had no right to exclude others.⁸⁹ The majority found that Rewolinski did not meet factor four because he knowingly exposed his call to the deputy who might have been able to read the TDD, as well as to another person, "Bob," who Rewolinski knew was at Teeters' house during the call.⁹⁰ The majority also pointed out that Rewolinski could have limited the length of the call, thereby assuring that the words were never written.⁹¹ The court speculated that he could have walked home, used public transportation or had the police place the call for him.⁹² The majority believed that Rewolinski did not meet factor five because the dispatcher had given Rewolinski permission to use the TDD to find a ride. Thus, the dispatcher was aware of Rewolinski's purpose and knew that the call was ongoing, leading the majority to find that Rewolinski had not put the property to private use.⁹³ Finally, the majority held that Rewolinski did not meet factor six because "[t]he dispatch area of a police station, by definition and necessity, is an area pervaded by government intrusion; [t]elephone calls placed to and from police dispatch areas are routinely monitored and recorded."⁹⁴ In addition, the majority noted that Teeters was a co-conversationalist. The majority claimed that Rewolinski could not expect privacy in

84. *Fillyaw*, 312 N.W.2d at 801, n.6.

85. *Rewolinski*, 464 N.W.2d at 407.

86. *Id.*

87. *Id.*

88. *Id.* at 408.

89. *Id.*

90. *Id.*

91. *Id.* at 409.

92. *Id.*

93. *Id.*

94. *Id.* It should be noted that this fact was assumed by the court. It was not a fact in the record. *Id.* at 415 (Abrahamson, J., dissenting).

Teeters' words, which were also on the TDD printouts.⁹⁵ The majority thus concluded that the taking of the TDD printouts and the subsequent reading of them was not a search and seizure protected by the Fourth Amendment.⁹⁶

The majority, therefore, did not continue its search or seizure analysis. The majority added, however, that even if the Fourth Amendment protected the printouts, the government's conduct in taking them was reasonable and therefore did not represent an illegal search and seizure.⁹⁷ Finally, the majority wrote that even if the government had obtained the TDD printouts by an illegal search and seizure, the decision to admit them into evidence was harmless error.⁹⁸ The majority refused to remand for an evidentiary hearing, stating that Rewolinski had waived his statutory right to a suppression hearing.⁹⁹

Justice Shirley Abrahamson dissented. She argued that a proper analysis under the totality of the circumstances required a balancing of society's interest in the government's conduct with the defendant's privacy interest.¹⁰⁰ She did not believe the record was complete enough to perform such a test and wanted to remand

95. *Id.* at 409 (majority opinion).

96. *Id.* at 410.

97. *Id.* The majority stated that one factor to be considered in determining the reasonableness of the government's conduct is whether or not the government's purpose in the alleged searching or seizing was to look for evidence of a crime. *Id.* The majority stated that since the officer did not know at the time of the taking of the printouts that a crime would occur, the government's conduct must be seen as reasonable. *Id.* This argument could also be used to say that the government's conduct was irrational. If the police had no reason to suspect that the printouts were evidence of a crime, then it is hard to justify the taking of these printouts which represented a call made between Rewolinski and his girlfriend. It is difficult to imagine the police's need to read or hear every call which is made from the police station by a citizen to a boyfriend or girlfriend. Furthermore, the actual reading of the printouts occurred after the police had knowledge of the crime. At that time, the police were looking for evidence. By the court's own logic, therefore, the alleged search would be unreasonable and thus illegal.

The court also believed that the officer's conduct was reasonable because the officer may have needed the printouts for logging purposes. *Id.* This "fact" was pure speculation by the court. Finally, the court correctly pointed out that the TDD machine had been malfunctioning by printing some words or phrases two times or by pulling up words from other calls. *Id.* at 411. As will be discussed later, this fact seems to indicate that the printouts themselves may be inaccurate as evidence. See *infra* notes 196-198 and accompanying text.

98. *Id.* at 412-13. The majority believed that the error was harmless because they thought there was enough other evidence showing that there was not sufficient provocation for a finding of manslaughter. This other evidence included the nature of Teeter's death, which was caused by strangulation with a belt, followed by submergence in water. The court believed that this would have taken too much time to be manslaughter. *Id.* at 413.

99. *Id.* at 413. See also *supra* note 57 and accompanying text.

100. *Id.* at 414 (Abrahamson, J., dissenting).

for an evidentiary hearing.¹⁰¹

Justices William Bablitch joined by Justice Nathan Hefferman dissented, stating that the majority erred because it did not "take into account the very different world that is the world without sound."¹⁰² Justice Bablitch argued that because TDD's are not widely available and because Rewolinski had no alternative means of communication, his expectation of privacy in these calls must be seen as legitimate.¹⁰³ They, like Justice Abrahamson, believed that the proper mode of analysis was a balancing test.¹⁰⁴ They argued that *Katz* changed the search and seizure test so that property and trespass are no longer determining factors and that consequently, words are protected by the Fourth Amendment.¹⁰⁵ In addition, they claimed that the *Fillyaw* factors are not applicable to the *Rewolinski* case because *Fillyaw* questioned whether there was standing, not whether a search occurred.¹⁰⁶ Furthermore, they found the *Fillyaw* factors to be inapplicable because, as in *Katz*, the issue in the *Rewolinski* case had nothing to do with privacy of space¹⁰⁷ but rather a privacy interest in words.

Part III: Analysis

This analysis will examine the court's holding in the *Rewolinski* case. This Comment concludes that this holding represents flawed reasoning which is inconsistent with precedent.

1. Rewolinski had a subjective expectation of privacy.

Some commentators, including Justice Harlan, author of the two-part test, argue that the courts should remove the subjective prong from the test. These commentators contend the inclusion of this prong could conceivably allow the government to announce that all people will be under surveillance from this time forward, thus precluding any challenges to government action under the Fourth Amendment.¹⁰⁸ Justice Harlan, eventually came to this same conclusion in his *United States v. White*¹⁰⁹ dissent.¹¹⁰

101. *Id.*

102. *Id.* at 416 (Bablitch, J., dissenting).

103. *Id.* at 416-17.

104. *Id.* at 418.

105. *Id.*

106. *Id.* at 420.

107. *Id.*

108. See 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE OF THE FOURTH AMENDMENT § 2.1(c) (1978) (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 354 (1979)).

109. *United States v. White*, 442 U.S. 735 (1979).

110. 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

Although the United States Supreme Court still generally requires proof of this prong, in *Smith v. Maryland*,¹¹¹ the majority conceded that the subjective test may not always yield adequate protection. For example, the *Smith* court indicated that the subjective prong would be inapplicable if the government categorically announced that all people would be under surveillance at all times.¹¹² The *Smith* court further stated that in those cases where a subjective expectation inquiry is not appropriate "[i]n determining whether a 'legitimate expectation of privacy' existed. . . a normative inquiry would be proper."¹¹³ The Wisconsin Supreme Court majority did not, however, make any conclusion on the issue of whether Rewolinski had a subjective expectation of privacy.¹¹⁴

In the *Rewolinski* case, there can be no genuine dispute about whether Rewolinski had a subjective expectation of privacy. The court of appeals majority was the only opinion which conclusively stated that Rewolinski did not have a subjective expectation of privacy.¹¹⁵ The court of appeals admitted, however, that by trying to take the printouts with him, Rewolinski had demonstrated some desire for confidentiality.¹¹⁶ There is agreement among the various *Rewolinski* opinions that the defendant bears the burden of proof on the question of whether the defendant had a subjective expectation of privacy.¹¹⁷ Because the question of what was in the defendant's mind is a question only the defendant can answer, it seems logical to make the defendant prove such an expectation. The problem in this area, however, is that the court of appeals did not apply the appropriate standard for meeting that burden.

Three standards are available for burden of proof analysis: preponderance of the evidence, clear and convincing evidence, and evidence beyond a reasonable doubt.¹¹⁸ The Wisconsin Supreme Court correctly stated that the standard for the legitimate expectation of privacy test is a preponderance of the credible evidence.¹¹⁹ The court's majority did not decide the issue of whether Rewolinski actually had a subjective expectation of privacy and it is not clear, therefore, what the result would be if they had done so.¹²⁰

111. *Smith v. Maryland*, 442 U.S. 735 (1979).

112. *Id.* at 740 n.5.

113. *Id.*

114. See *supra* notes 78-80 and accompanying text.

115. See *supra* note 68 and accompanying text.

116. See *supra* note 68 and accompanying text.

117. See *supra* notes 66, 77 and accompanying text.

118. See EDWARD J. IMWINKELRIED ET AL., COURTROOM CRIMINAL EVIDENCE, § 2916 (1987) [hereinafter INWINKELRIED].

119. See *Rewolinski*, 464 N.W.2d at 407-08.

120. See *supra* notes 78-80 and accompanying text.

The court of appeals majority, which did rule on this issue, did not specify which standard of proof it had chosen. However, it allowed Rewolinski's failure to rebut a permissible inference to undermine the evidence of an expectation of confidentiality which it admitted Rewolinski had shown.¹²¹ If a court allows a permissible inference to override the defendant's proof, the standard used by the court of appeals left unclear the amount of proof required of a defendant to overcome the presumption. The amount of proof mandated by the court of appeals, therefore, may not be the required "more likely than not" (i.e. preponderance of the evidence) standard.¹²² Without further definition of which permissible inferences can override the defendant's offered proof, the court of appeals' decision provides no guidance to future courts faced with this issue.

The Wisconsin Supreme Court majority also performed a flawed analysis. It suggested that Rewolinski may not have had a subjective expectation of privacy because all calls to and from the police station are "routinely monitored and recorded."¹²³ This was not a "fact" in the record nor is there any evidence that Rewolinski was aware of any such practice. The majority's statement, if true, means that all citizens are now on notice that there can be no private calls, under any circumstances, from a police station because all calls are routinely monitored and recorded. However, the majority's conclusion was incorrect. As each court stated, Rewolinski could have pushed the privacy button if he had wanted to avoid making a printout of his calls.¹²⁴ Thus, it is clear that the police will not monitor some calls. Specifically, the police will not monitor those calls where the TDD caller invokes the privacy option. The record indicates that prior to reading the printouts, the deputy was unaware of the contents of Rewolinski's calls.¹²⁵ It is not clear from the record that calls were otherwise being monitored. Rather it seems that the court merely assumed that they were.

All the courts agreed that Rewolinski had proven some evidence of a subjective expectation of privacy. Since such an expectation of privacy is in the defendant's mind, it can never be known for sure whether the defendant actually had such an expectation. However, it need only appear more likely than not that defendant had a subjective expectation of privacy.¹²⁶ Rewolinski, by attempt-

121. See *supra* notes 67-68 and accompanying text.

122. INWINKELRIED, *supra* note 153, at § 2916.

123. See *supra* note 94 and accompanying text.

124. See *supra* notes 59, 67 and accompanying text.

125. See *Rewolinski*, 464 N.W.2d at 404, 410.

126. See *supra* note 31 and accompanying text.

ing to take the printouts and by not giving them up until forced to do so, proved that it was more likely than not that he had an actual, subjective expectation of privacy.

2. Rewolinski had a legitimate objective expectation of privacy.

The key issue in this case centered around Rewolinski's legitimate objective expectation of privacy. Neither the United States Supreme Court nor the Wisconsin courts had assigned the burden of proof for this issue to either party.¹²⁷ The parties asked the *Rewolinski* courts to decide both who bears the burden of proof on this issue and whether that party had met its burden.

- A. *The defendant should not always bear the burden on the legitimacy issue.*

In *Rewolinski*, the burden of proof on this issue became crucial because the lack of a suppression hearing made the record very sparse.¹²⁸ In *Florida v. Riley*, at least four Supreme Court justices believed that in some cases the burden should be on the government to prove that an expectation of privacy is illegitimate.¹²⁹ The cases cited by the Wisconsin Supreme Court in support of its holding that the defendant carries the burden, are, as previously noted, considered to be "standing" cases.¹³⁰ The question of whether a person has standing to challenge a search or seizure may, in fact, depend on the kind of property interest the person has in the item searched or seized.¹³¹ This makes standing a much simpler question. However, once a court decides that if anyone was a victim of a search or seizure, it was the defendant, the question becomes more difficult. In essence, the question then becomes whether society will recognize the privacy interest in that item. A court must determine this by balancing the defendant's privacy interest in the item with society's interest in the government's conduct based on the totality of the circumstances.¹³² This is a broad standard which requires full fact finding. Some of the information may be within the exclusive knowledge of the government.

Much is unknown about the facts of the *Rewolinski* case.

127. See *supra* notes 33-51 and accompanying text.

128. *Rewolinski*, 464 N.W.2d at 415 (Abrahamson, J., dissenting).

129. See *supra* notes 42-51 and accompanying text.

130. See *supra* notes 39-41 and accompanying text.

131. See *supra* notes 35-51 and accompanying text.

132. See *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *Rawlings v. Kentucky*, 448 U.S. 97 (1980).

The courts speculated about the motives of the deputy in taking the printouts (e.g., stating that the police department may have needed them for logging or that the department may routinely record all calls).¹³³ However, since all three state courts continually asserted that Rewolinski could have pushed the "privacy button" had he desired to protect his privacy interests, the existence of these motives is unlikely.¹³⁴ As Justice Abrahamson noted in dissent:

the record does not furnish adequate information about the operation of the TDD, the department's practice of monitoring incoming and outgoing conversations (of the hearing and the hearing impaired) on telephones located in the department or in the dispatch areas, and the needs of law enforcement to monitor telephone calls of both the hearing and hearing impaired who happen to be in the department but who are not under arrest.¹³⁵

Much of the information to which Justice Abrahamson refers is in the exclusive control of the government. To place the burden on the defendant to rebut all possible government motives is patently unfair. According to the court of appeals, a defendant must also prove the legitimacy of her expectation to overcome a "permissible inference." It is not clear that this is the required preponderance of the evidence standard.¹³⁶ Placing the burden on the party having better access to the facts, as the four justices in *Riley* suggested,¹³⁷ is one possible approach to this problem. This would also be consistent with the holding in *Smith*, which suggested that sometimes a normative approach is appropriate to determine whether a defendant had a legitimate expectation of privacy.¹³⁸

B. The defendant met the burden on the legitimacy issue.

The Wisconsin Supreme Court majority incorrectly used the *Fillyaw* factors¹³⁹ to answer this question. The majority should not have used these factors because, as stated previously, they apply only to "standing" cases.¹⁴⁰ Without acknowledging the full power of this extension, the Wisconsin Supreme Court majority broadened the use of these factors to include cases where standing was not at issue. The *Fillyaw* factors emphasize property control.

133. See *Rewolinski*, 464 N.W.2d at 410-11.

134. See *supra* notes 59, 67 and accompanying text.

135. *Rewolinski*, 464 N.W.2d at 415 (Abrahamson, J., dissenting).

136. See *supra* notes 67, 122 and accompanying text.

137. See *supra* notes 42-51 and accompanying text.

138. See *supra* notes 111-114 and accompanying text.

139. See *supra* note 82 and accompanying text.

140. See *supra* notes 35-51 and accompanying text.

In *Katz*, the United States Supreme Court made it clear that an analysis of trespass and property ownership is not the proper way to decide search and seizure questions.¹⁴¹ There may be reasons to require ownership and control to be factors in determining whether a person has a right to claim that the government violated her Fourth Amendment rights. *Katz*, however, has conclusively held that whether a search or seizure has occurred depends upon notions of privacy interests.¹⁴² Privacy will not always depend on property control.¹⁴³ Since *Katz*, it has become clear that words can be searched or seized.¹⁴⁴ That fact alone means that trespass can no longer be the dominant mode of analysis. The *Katz* type of analysis provides more expansive Fourth Amendment protection. The Wisconsin Supreme Court majority in its *Rewolinski* decision has limited that protection.

- C. *Even if the Wisconsin Supreme Court majority had been correct in its use of the Fillyaw factors, the court did not properly analyze these factors.*
- a. Whether the defendant had a property interest in the premises

The majority of the court found it significant that *Rewolinski* did not own the TDD machine, the paper or the ink.¹⁴⁵ Since the court did not state that it was disregarding *Katz* and its progeny, it must have admitted that search and seizure of words themselves is possible. Indeed, it is the admission into evidence of his seized words which *Rewolinski* challenged.¹⁴⁶ It is hard to believe that the court intended to hold that the original owner of a piece of paper and a writing utensil owns any words subsequently written on the paper. Furthermore, by permitting *Rewolinski* to use the TDD, knowing that its use would require ink and paper, the police had given him permission to control and own the ink and paper used.

The majority of the court characterized the police station as "public."¹⁴⁷ *Rewolinski*, however, was in a limited access area not open to the public.¹⁴⁸ Moreover, *Katz* had held that a person can

141. See *supra* notes 20-25 and accompanying text.

142. See *supra* notes 20-25 and accompanying text.

143. See *supra* notes 23-24 and accompanying text.

144. See *supra* note 25 and accompanying text.

145. See *supra* note 86 and accompanying text.

146. See *supra* note 9 and accompanying text.

147. See *supra* note 87 and accompanying text.

148. See *supra* note 6 and accompanying text.

have a legitimate expectation of privacy even in a public place.¹⁴⁹

b. Whether he was legitimately (lawfully) on the premises

The majority found it significant that Rewolinski initially entered the police station because of an arrest.¹⁵⁰ Yet the court could not deny that he was lawfully on the premises at the time of the calls.¹⁵¹ After he was released, the police gave Rewolinski permission to use their TDD machine;¹⁵² Rewolinski was free to leave the police station at any time.¹⁵³ He went into the limited access area to use the TDD machine to call for a ride home because the police had given him permission to do so.¹⁵⁴ He was certainly lawfully using the TDD machine. At the time of the calls, Rewolinski was like any other civilian walking in off the street. The natural extension of the *Rewolinski* holding is that any citizen who uses a police telephone, for any purpose, can have the contents of that call admitted into evidence at a later trial.

c. Whether he had complete dominion and control and the right to exclude others

The majority of the court correctly concluded that Rewolinski could not exclude the deputy from the limited access area nor did he have dominion and control over that area.¹⁵⁵ Yet, he had control over the TDD machine at the time of the calls. He could have covered the screen and the paper thereby excluding others from his calls. Furthermore, the courts and the state consistently argued that Rewolinski could have pushed the privacy button to avoid making printouts of the calls.¹⁵⁶ This fact alone gave Rewolinski control.

d. Whether he took precautions customarily taken by those seeking privacy

The majority stated that Rewolinski knowingly exposed his calls to the deputy who might have been able to read the visual display on the TDD machine.¹⁵⁷ The validity of this assertion de-

149. See *supra* note 23 and accompanying text.

150. See *supra* note 88 and accompanying text.

151. *Rewolinski*, 464 N.W.2d at 408.

152. See *supra* notes 5-6 and accompanying text.

153. *Rewolinski*, 464 N.W.2d at 408.

154. See *supra* notes 5-6 and accompanying text.

155. *Rewolinski*, 464 N.W.2d at 408.

156. See *supra* notes 59, 67 and accompanying text, and *Rewolinski*, 464 N.W.2d at 404.

157. See *supra* note 90 and accompanying text. This argument, at first glance, appears to be like other cases where the Court found no legitimate expectation of

depends upon the answer to the first question of whether Rewolinski actually had a subjective expectation of privacy. If he did, then by definition, he did not knowingly expose the calls. It is also significant that the deputy did not know anything Rewolinski and Teeters said until after the printouts were taken.¹⁵⁸

The majority also stated that its decision was influenced by Rewolinski's knowledge that "Bob" was at the house when Teeters and Rewolinski were communicating.¹⁵⁹ This does not appear relevant to whether Rewolinski had a legitimate expectation of privacy as to the police's knowledge of the contents of his calls. Whenever there is a two-way phone conversation, the people involved know that their words are not private from at least one other person. This fact, in itself, does not give the police a right to search and seize a call. If it did, all calls could be taken and admitted into evidence. Under this rationale, Katz's call would have been properly admitted into evidence. Thus, this holding in the *Rewolinski* case cannot be justified on this basis without overruling *Katz*. Furthermore, this was not a case where Bob or Teeters was coming forward to testify. There is no evidence that Bob saw any of the conversation. Thus, Bob's presence was not relevant to the legitimacy of Rewolinski's expectation of privacy.

The majority also noted that Rewolinski could have kept his calls brief and to the point, taken alternate transportation or had the police place the calls for him.¹⁶⁰ Unfortunately, this statement gives Rewolinski, as a deaf person requiring a TDD to communicate, very limited options. As Justice Bablitch points out in his dissent:

privacy because members of the public could have seen the area or the item searched. For example, in *Florida v. Riley*, 488 U.S. 445, 451, see *supra* notes 42-51 and accompanying text, the Court said "Any member of the public could legally have been flying over the Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. The police officer did no more." The *Riley* case involved a wide open field which is distinguishable from a piece of paper and the visual display on the TDD machine, both of which Rewolinski could have covered using his own body in order to hide it from view. Similarly, in *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1237 (8th Cir. 1990) the court held that Wabun-Inini had no legitimate expectation of privacy in film left at a one hour film developing store because each print was exposed to the public for ten to fifteen seconds during the drying process. In the *Wabun-Inini* case, Wabun-Inini was not even present during the developing process. Thus, he clearly could not prevent the prints from being viewed by the general public. Rewolinski, on the other hand, was in the room during the TDD calls and could easily have prevented the deputy, who was the only other person present, from viewing the printouts and the TDD display.

158. *Rewolinski*, 464 N.W.2d at 415 (Bablitch, J., dissenting).

159. *Id.* at 408.

160. *Id.* at 408-09.

the majority advises deaf citizens that if they wish to rely on a technology that will enable them to lead more independent and productive lives in a hearing dominated world, they must subject themselves to the choices of either opening up their conversation for public examination, limiting their conversation to purposes this court finds appropriate, returning to their former dependence on others to make their phone calls for them, or bypassing the technology's advantages altogether.¹⁶¹

These printouts were only available to the government because Rewolinski is deaf and needs the use of a TDD to communicate by telephone. Due to the *Katz* holding, hearing people can walk down the street to a pay phone to be secure in their privacy. The *Rewolinski* holding means that deaf people cannot be secure in the privacy of their TDD calls. There is no justification for this kind of discrimination. Furthermore, as will be seen,¹⁶² it is inconsistent with recent legislation in the area of the rights of the deaf.

e. Whether he put the property to some private use

The majority argued that Deputy Roed gave Rewolinski permission to use the TDD machine and thus, knew about both the purpose of the calls and that they were ongoing.¹⁶³ In fact, the deputy had no idea what Rewolinski and Teeters said during the calls until later when she read the printouts.¹⁶⁴ Furthermore, the deputy knew only what Rewolinski had asserted as his purpose for the calls. Once the calls began, the conversation turned to other topics. Thus, the purpose of the call changed. By the court's own logic, Rewolinski had put the property to private use.

In addition, under *Katz*, even if the government knew that the calls were ongoing and also knew the purpose of the calls, such knowledge does not strip a defendant of her legitimate expectation of privacy.¹⁶⁵ In *Katz*, the government tapped the pay phone specifically because they knew that Katz had been placing bets from that phone.¹⁶⁶ The government thus had knowledge of the purpose and ongoing nature of the calls. *Rewolinski*, therefore, is inconsistent with the Supreme Court's holding in *Katz*.

f. Whether the claim of privacy is consistent with historical notions of privacy

The majority argued that phone calls placed to and from the

161. *Rewolinski*, 464 N.W.2d at 417 (Bablitch, J., dissenting).

162. See *infra* notes 201-208 and accompanying text.

163. *Rewolinski*, 464 N.W.2d at 409.

164. See *supra* note 97 and accompanying text.

165. *United States v. Katz*, 389 U.S. at 354-57.

166. *Id.* at 354.

police station are routinely monitored and recorded by police.¹⁶⁷ This was not a fact in evidence; the court made this assumption *sua sponte*.¹⁶⁸ Moreover, it was contradictory for the court to find that the state "needed" these TDD printouts and then to repeatedly claim that Rewolinski could have pushed the privacy button and avoided making the printouts altogether.¹⁶⁹ Finally, the court held that Teeters was also a party to the calls and Rewolinski could not expect privacy in her words.¹⁷⁰ The problem here is that a court could apply this same argument to any two-way call. This logic would mean that the government could search and seize any call, including the call at issue in *Katz*,¹⁷¹ and enter it into evidence. Therefore, this argument also is inconsistent with *Katz*.

The logic of this argument further suggests that, once seized, the government could use the call against either party to the call. Thus, the majority's argument indicates that if the situation were reversed and Rewolinski had said something incriminating against Teeters, the government could use the statement later in a trial against her. It may be that after the *Rewolinski* holding, no person has a legitimate expectation of privacy in their telephone calls. If this is the case, then *Katz* is no longer the law in Wisconsin, making Wisconsin's interpretation of the Fourth Amendment a violation of the United States Constitution as interpreted by the Supreme Court.

3. The government's conduct was unreasonable.

As Justice Abrahamson wrote, a suppression hearing would have helped determine the reasonableness of the government's conduct.¹⁷² However, the court would only reach the reasonableness question if it had already decided that a search or seizure had occurred.¹⁷³ In *Rewolinski*, the supreme court ruled that no search or seizure had taken place. However, the majority went on to state that even if Rewolinski did have a legitimate expectation of privacy in the TDD printouts, the search undertaken by the government was nevertheless reasonable.

When determining whether the government acted reasonably, *Katz* requires the burden be placed on the government to

167. *Rewolinski*, 464 N.W.2d at 409.

168. *Id.* at 415 (Abrahamson, J., dissenting).

169. *See supra* notes 17, 59, 67 and accompanying text, and *Rewolinski*, 464 N.W.2d at 404.

170. *Rewolinski*, 464 N.W.2d at 409.

171. *See supra* notes 20-25 and accompanying text.

172. *Rewolinski*, 464 N.W.2d at 414 (Abrahamson, J., dissenting).

173. *See supra* notes 52-53 and accompanying text.

show the reasonableness of its conduct. The majority of the Wisconsin Supreme Court allowed all speculation, in the form of a "permissible inference," to benefit the state rather than the defendant.¹⁷⁴ Essentially, by allowing this "permissible inference" to operate in favor of the government, the court placed the burden of proving whether the search was reasonable on the defendant. This placement of the burden directly conflicts with the Court's holding in *Katz*.

The government's conduct was reasonable, according to the majority of the Wisconsin Supreme Court, because the deputy did not know of the existence of a crime when she allegedly seized the printouts.¹⁷⁵ This argument can cut either way.¹⁷⁶ The deputy's conduct in forcibly taking two printed transcripts of calls between two people, the contents of which she knew nothing about, could also be seen as irrational, and thus unreasonable. The court asserted that the deputy "reasonably" thought that calls other than Rewolinski's and Teeters' were on the printouts, due to the malfunction of the TDD machine.¹⁷⁷ This belief proves too much; it arguably provides proof that TDD printouts are not reliable as evidence. In addition, even if the alleged seizure occurred before the crime, the alleged search (reading the transcripts) occurred after the police knew of the crime and were looking for evidence.¹⁷⁸ The police would have had time to get a warrant before reading the printouts.¹⁷⁹ Failure to do so violated the principle that "warrantless searches are *per se* unreasonable."¹⁸⁰

If the *Rewolinski* court had held that there was a search and seizure but that the government's conduct was reasonable, making it a legal search and seizure, the holding would have been less damaging than the actual holding that the government's actions did not even constitute a search or seizure. Such a holding would have required future courts to perform a case by case analysis of whether the government's conduct was reasonable given a particular context. The *Rewolinski* holding, on the other hand, ignores the impact of the government's conduct in any search and seizure analysis. Furthermore, since the government bears the burden on the reasonableness of test, a holding that there was a search and seizure would incorporate a presumption of privacy in the

174. See *supra* notes 121-122 and accompanying text.

175. *Rewolinski*, 464 N.W.2d at 410-11.

176. See *supra* note 97 and accompanying text.

177. See *supra* note 97 and accompanying text.

178. See *supra* note 97 and accompanying text.

179. See *supra* note 97 and accompanying text.

180. See *supra* note 27 and accompanying text.

printouts. At least if it had performed such an analysis the court would be affirming deaf persons' rights to privacy in their TDD calls.

4. The decision to admit the TDD printouts was not harmless error.

Judge Cane of the court of appeals stated that even if the government's conduct was unreasonable, the admission of the printout was harmless error. Even though the supreme court in *Rewolinski* was not required to rule on this question, it did address the issue.¹⁸¹ Under *Wisconsin v. Dyess*,¹⁸² evidence improperly admitted is harmless error if there is "no reasonable probability that it contributed to the conviction." With all the "mights" and "coulds" that the Wisconsin Supreme Court employed against *Rewolinski*, it is hard to believe that it did not find any reasonable probability that the admission of these TDD printouts contributed to *Rewolinski's* conviction. The state pointed out the importance of the TDD printouts during closing arguments.¹⁸³ These printouts contained Teeters' expression of her fear of *Rewolinski*.¹⁸⁴ Thus, the jury was able to hear the victim's fear of the accused in the victim's own words. Under the *Dyess* standard the question is whether the evidence likely contributed to the conviction.¹⁸⁵ The mere existence of other strong evidence does not make the admission of the evidence in question harmless error as long as it is still likely that the evidence in question helped in any way to convict the defendant. The United States Supreme Court denied certiorari in the *Rewolinski* case.¹⁸⁶ It is at least possible that they did so because they knew that *Rewolinski's* conviction would stand even if they reversed the other holdings in the case. However, the *Rewolinski* case now stands as precedent in Wisconsin and it will affect deaf people's rights to privacy in their TDD calls.

Part IV: Public Policy Considerations

5. *Rewolinski* does not define its limits.

Another problem with the *Rewolinski* holding is that it does not define its boundaries. The facts of the *Rewolinski* case may

181. See *supra* note 98 and accompanying text.

182. 370 N.W.2d 222 (1985).

183. *Rewolinski*, 464 N.W.2d at 413.

184. See *supra* note 8 and accompanying text.

185. See *supra* note 183 and accompanying text.

186. *Rewolinski v. Wisconsin*, 111 S.Ct. 1694 (1991).

have compelled the decision because Rewolinski killed Teeters and because the TDD printouts contained proof of Rewolinski's violent tendencies.¹⁸⁷ *Rewolinski*, however, in addition to calling *Katz* into question, sets precedent for future cases.

For example, one of the requirements of attorney-client privilege is that the words be spoken in confidence.¹⁸⁸ Given the holding in *Rewolinski* that the defendant has no legitimate expectation of privacy under the circumstances, one cannot help but think that TDD calls from the police station are no longer covered under attorney-client privilege. If all of the facts of the *Rewolinski* case were the same, except that Rewolinski had called an attorney instead of Teeters, the Wisconsin Supreme Court majority's arguments for supporting a finding of no legitimate expectation of privacy would still apply. The court's analysis under the *Fillyaw* factors¹⁸⁹ would be virtually the same. If the defendant has no legitimate expectation of privacy in a call to an attorney, then it cannot be said that the call was made in confidence. If the attorney-client privilege does not apply, it would mean not only that the attorney could voluntarily testify to those words but also that she could be compelled to do so.¹⁹⁰ This would be the case even if the sheriff neither saw the TDD conversation nor took the printout afterward.¹⁹¹

The *Rewolinski* court also fails to limit against whom the government can use the document once it has been taken by the police.¹⁹² Most calls have at least two participants. If the Wisconsin Supreme Court is correct that the existence of a co-conversationalist always means that you know you are exposing your call,¹⁹³ then no caller can have a legitimate expectation of privacy. It was just this kind of interpretation that Justice Harlan and the others were worried about when they argued to remove the requirement that a subjective expectation of privacy be proven.¹⁹⁴

Another problem with *Rewolinski* is that none of the courts performed a hearsay analysis on these documents. This fact leaves the impression that TDD statements are not equivalent to other out of court statements which are not under oath. If so, this is a very dangerous holding for deaf people who need to use TDDs reg-

187. See *supra* note 8 and accompanying text.

188. See INWINKELRIED, *supra* note 118, § 1608 at 403.

189. See *supra* note 82 and accompanying text.

190. See INWINKELRIED, *supra* note 118, § 1605 at 398.

191. See *supra* note 97 and accompanying text.

192. See *supra* note 172 and accompanying text.

193. *Rewolinski*, 464 N.W.2d at 409.

194. See *supra* notes 108-114 and accompanying text.

ularly. It may open the door to the use of these calls in criminal and civil cases. It is possible that many, if not all, of the statements at issue in the *Rewolinski* case would have been admitted into evidence anyway but a proper analysis would have made this a less damaging holding.

2. There are problems with using TDD printouts as evidence.

Some TDD machines do not print the time and date of the call on the printout. Indiscriminate use of these printouts may make forgery of evidence possible. Without knowing the identity of the typist or viewing the call as it occurs, the court has no method of authenticating a TDD printout. To add to the unreliability of the printouts, the sheriff's machine in *Rewolinski* had been malfunctioning by repeating words and old calls.¹⁹⁵ The repeating of words may add unintended emphasis to parts of the call and the repeating of old calls may add words that are not those of the present callers. Since no one oversaw the calls,¹⁹⁶ the courts had no way of knowing whether the printouts were an accurate reflection of the calls. Additionally, not all machines have the same features¹⁹⁷ and a person may not know about the printout feature until he or she is suddenly confronted with a printout of a prior call in court.

Furthermore, deaf people who speak American Sign Language (ASL) use a different grammar structure than people who speak English.¹⁹⁸ The grammar of ASL may not always be understandable to speakers of English.¹⁹⁹ Some ASL sentences may even provide an unintended meaning to speakers of English. For example, the sentence "You come here you," to a speaker of English may seem to indicate an emotion of urgency or anger because of the extra pronoun. However, this sentence to a speaker of ASL implies no such emotion. Speakers of ASL often repeat the pronoun at the end of a sentence to provide clarity.²⁰⁰ If the courts intend to use these TDD printouts as evidence, it would be wise and just to provide a translator to interpret them. The *Rewolinski* court, although it provided translators for the testimony, made no mention of using experts to interpret the printouts for the jury.

195. *Rewolinski*, 464 N.W.2d at 411.

196. *See supra* note 97 and accompanying text.

197. *Rewolinski*, 464 N.W.2d at 415.

198. *See supra* note 8 and accompanying text.

199. *Id.*

200. *See HUMPHRIES, supra* note 8, at 15.

3. Public policy compels a different result.

The purpose of taking and reading the printouts of Rewolinski's calls was clearly not for logging. These were personal calls, not police business. The courts proved this fact by stating that Rewolinski could have pushed the privacy button and avoided making the printouts.²⁰¹ Deaf people cannot simply walk around the corner to a pay phone. However, a hearing person who found herself in Rewolinski's position could have walked to a pay phone with the *Katz* holding to shield her privacy.²⁰² *Rewolinski* has broken new ground in Fourth Amendment law: it means that police can record all calls coming to and from the station even when the person calling is not under arrest.²⁰³

Apart from the inequality of the decision, the Americans With Disabilities Act of 1990 (ADA)²⁰⁴ has made the holding of the *Rewolinski* case contrary to public policy. The ADA's purpose "is to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."²⁰⁵ Title IV of the act requires all states to set up a telecommunications relay service (TRS) by July 26, 1993.²⁰⁶ This relay service will, using operators translating verbatim, provide a way for deaf people and hearing people to communicate with each other.²⁰⁷ The law makes clear that these operators must not keep any printed record of the call beyond the call and must keep the contents of the call private.²⁰⁸ Yet the deaf person using the TDD, because of the holding in *Rewolinski*, may still not have a right to privacy in a call. "The intent of Title IV of the ADA is to further the Act's goal of universal service by providing to individuals with hearing or speech disabilities telephone services that are functionally equivalent to those provided to individuals without hearing or speech disabilities."²⁰⁹ Despite this act, TDD machines themselves are not widely available. Many deaf people may still find it necessary to use the TDDs which federal law requires police departments to have available at their stations.²¹⁰ Wisconsin courts have created a blatant inequality in their treatment of searches and

201. See *supra* notes 59, 67 and accompanying text.

202. See *supra* notes 20-25 and accompanying text.

203. See *supra* note 94 and accompanying text.

204. Americans With Disabilities Act, Pub.L. 101-336 (July 26, 1990) [hereinafter ADA].

205. ADA, 42 U.S.C. § 12101.

206. ADA, 47 U.S.C. § 225(c).

207. *Id.* at § 225(a)(3).

208. *Id.* at § 225(d)(1)(F).

209. *Id.* at § 225(a)(3).

210. See *supra* note 5 and accompanying text.

seizures. If a hearing person uses a pay phone to call a deaf person at a police station, or vice versa, the deaf person may have diminished constitutional rights, solely because of a disability that requires the use of a TDD printout, which once seized, is admissible against both parties to the call.²¹¹

Conclusion

Rewolinski represents a departure from search and seizure precedent. If the *Rewolinski* courts had correctly balanced the interests of society in the government's conduct with the privacy interest asserted by the individual based on the totality of the circumstances, they would not have placed the burden of proof conclusively on the defendant for all cases to prove the legitimacy of his expectation of privacy. The totality of the circumstances standard implies full fact finding. Full fact finding requires that the party having better access to the information relevant to an issue bear the burden of proof on that issue. In addition, precedent before the *Rewolinski* case had removed the property mode of analysis from fourth amendment claims and looked towards privacy interests in the item allegedly searched or seized. The *Rewolinski* decision reverses that trend. Finally, the *Rewolinski* decision has called into question deaf people's rights to confidential TDD calls, and has created an inequality in the law's treatment of the deaf community. Future courts must realize *Rewolinski's* inequities and decline to follow them.

211. See *supra* notes 171-172 and accompanying text.