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## Eavesdropping in Florida: Beware a Time-Honored But Dangerous Pastime

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## TABLE OF CONTENTS

- I. INTRODUCTION.....432
- II. WHAT IS THE REASON FOR TAPING?.....434
  - A. *To Blackmail or Embarrass* .....434
  - B. *To Entertain or to Satisfy One’s Prurient Interest* .....435
  - C. *To Gather Information* .....437
  - D. *To Gather Evidence of a Crime or a Tort*.....438
  - E. *To Improve the Workplace* .....441
  - F. *To Use in Domestic Disputes* .....442
  - G. *To Learn a Competitor’s Secrets* .....443
  - H. *Inadvertent Interception* .....443
- III. EAVESDROPPING: SELECTED UNITED STATES SUPREME COURT CASES AND THE FEDERAL ACT .....444
- IV. THE FLORIDA ACT.....447
  - A. *State v. Walls* .....449
  - B. *Tsavaris v. Scruggs* .....450
  - C. *State v. Inciarrano* .....453
  - D. *State v. Walls, Tsavaris v. Scruggs, and State v. Inciarrano* .....455
  - E. *People, Not Places* .....455
- V. FLORIDA—CONSTITUTIONAL PRIVACY PROVISIONS.....457
- VI. TWO-PARTY CONSENT .....461
- VII. CONCLUSION .....464

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## I. INTRODUCTION

In Florida, it is a third degree felony, punishable by up to five years imprisonment,<sup>1</sup> for a private party to tape a private conversation unless all participants consent.<sup>2</sup> Any tape made without the consent of all participants is inadmissible.<sup>3</sup> Anthony Paul Inciarrano least expected that Earvin Herman Trimble was taping Inciarrano when Inciarrano shot Trimble to death in Trimble's office on July 7, 1982.<sup>4</sup> Because the tape was the only evidence of the murder, the Florida courts were forced to decide whether they would apply the plain language of the Florida statutes or allow a cold-blooded murderer to go free.

Trimble had once been extremely successful in the real estate business in Riverside, California. Apparently, Trimble began losing profits from the business, and customers' down payments, gambling on the horse races. In 1979, when he was about to stand trial for thirteen counts of grand theft, Trimble left California for Florida and changed his name to Michael A. Phillips. First he became Reverend Phillips, a minister of the First Church of Utilitarian Science, whose mail order church sponsored a bingo parlor. Then, under phony credentials, he opened an office in Fort Lauderdale, Florida and practiced psychology as Dr. Michael A. Phillips.<sup>5</sup>

Inciarrano's bingo hall in Oakland Park, Florida, had been closed down by the police. Phillips met Inciarrano in 1982 through a newspaper ad and they struck a deal for Inciarrano to invest \$7000 and become a partner with Phillips in the bingo business. Later, Phillips decided not to go into business with Inciarrano. Inciarrano and Phillips argued about their business deal on July 1, 1982, in Phillips' office. Phillips tape recorded the conversation by hiding a microphone in a pencil holder, with the microphone connected by wire to a tape recorder in a desk drawer.<sup>6</sup>

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1. FLA. STAT. § 775.082(3)(d) (1995).

2. FLA. STAT. § 934.03(2)(d) (1995).

3. *See id.* § 934.03, .06 (1995). Section 934.10 would have allowed Inciarrano to recover statutory and punitive damages as well as attorney's fees and costs. FLA. STAT. § 934.10 (1995).

4. Barry Bearak, *Court to Consider Privacy Issue; Victim Taped His Murder but Slayer May Be Freed*, L.A. TIMES, Jan. 13, 1985, at 1.

5. *Id.*; Brian Dickerson, *Murder Tape is Allowed as Evidence*, NAT'L L.J., July 22, 1985, at 5.

6. Bearak, *supra* note 4, at 1.

On July 6, 1982, Inciarrano went to Phillips' office and they argued again, with the tape recorder running.<sup>7</sup> The tape caught Inciarrano yelling, "[w]e have a deal, yes or no?"<sup>8</sup> Then Inciarrano cocked his gun and fired five times at Phillips. Phillips groaned and fell to the floor beside his desk.<sup>9</sup> At approximately 3:30 to 3:40 p.m., a neighbor heard gunshots and called the police.<sup>10</sup> The police found Phillips' body, the tape recorder, and the tape. The tape was the sole piece of evidence against Inciarrano. "Nobody saw Inciarrano go in; nobody saw him go out. . . . The murder weapon was never discovered. There were no fingerprints."<sup>11</sup> Inciarrano claimed that he had the right to have the tape suppressed because it had been obtained illegally, even though he admitted it was his voice on the tape.<sup>12</sup> He based his claim on the Florida statute,<sup>13</sup> which allows tape recording of an "oral communication" only if all parties to the communication consent. As more fully explained in Part III of this article, the Florida courts struggled with this dilemma until the Supreme Court of Florida created a case law exception to the Florida law to keep Inciarrano in jail.<sup>14</sup>

This article examines how the Florida courts have interpreted the two party consent requirement of the Florida Security of Communications Act.<sup>15</sup> It concludes that because there are many legitimate reasons for a participant in a conversation to tape the conversation, the action should not carry civil and criminal penalties, and the tape should not be inadmissible because of the interception alone. If it benefits anyone, the two party consent requirement benefits the criminal element. Accordingly, this article argues that the Florida Act should be amended to allow taping upon the consent of one party to the conversation.

Part II of this article illustrates the many reasons for intercepting conversations. Part III examines selected provisions of the Omnibus Crime

7. *Id.*

8. Barry Bearak, *Conviction Upheld in Illegally Recorded Murder*, L.A. TIMES, June 28, 1985, at 22.

9. Dickerson, *supra* note 5, at 5.

10. *Inciarrano v. State*, 447 So. 2d 386, 387 (Fla. 4th Dist. Ct. App. 1984), *quashed*, 473 So. 2d 1272 (Fla. 1985); *Privacy for a Murder*, WASH. POST, Aug. 3, 1985, at A20.

11. Statement of the prosecutor, Richard T. Garfield; Bearak, *supra* note 4, at 1.

12. FLA. STAT. § 934.09(9)(a) (1995); Dickerson, *supra* note 5, at 5.

13. FLA. STAT. § 934.03(2)(d).

14. *Inciarrano*, 473 So. 2d at 1273.

15. Chapter 934, *Florida Statutes* is entitled "Security of Communications," and is commonly referred to as the Security of Communications Act. Sections 934.01-.10 of this Act will hereinafter be referred to as the "Florida Act."

Control and Safe Streets Act of 1968,<sup>16</sup> as amended,<sup>17</sup> and selected decisions of the United States Supreme Court to provide background for the balance of the article. Part IV analyzes the Florida Act, and Part V evaluates the privacy provisions of the *Florida Constitution*. Finally, Part VI explains how the two party consent requirement is irrational.

## II. WHAT IS THE REASON FOR TAPING?

The reasons for taping or intercepting conversations are many, ranging from blackmail or causing embarrassment, to entertainment, satisfaction of one's prurient interest, gathering information, gathering evidence of a crime or tort, improving workplace security or efficiency, to gathering evidence to use in divorce cases, as well as industrial espionage. In addition, some interception may be inadvertent. Still, some reasons for intercepting conversations are more legitimate than others.

The legitimate reasons include gathering information (possibly to later defend oneself) and gathering evidence of a crime or tort. At the other extreme, certain reasons for taping, such as blackmail and industrial espionage, are crimes or torts, even aside from the Florida Act. The argument made more fully in Part VI of this article is that the legitimate reasons for taping should not carry criminal and civil consequences, especially given the pervasiveness of taping.

Although illegal in Florida, if done by a private party,<sup>18</sup> intercepting conversations is pervasive, as shown by the following examples. The examples involve either nationally known personalities or interceptions in Florida. Some were collected from newspaper articles and others from reported cases.

### A. *To Blackmail or Embarrass*

Politics is rife with taping. Politicians are either taping or being taped. While President Nixon taped conversations in the oval office, Presidents Kennedy and Johnson tape recorded conversations as well. President

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16. Pub. L. No. 90-351, § 82, STAT. 197 (1968) (current version at 18 U.S.C. §§ 2510-22 (1994)).

17. The 1968 Act was amended by the Electronic Communications Privacy Act of 1986 and by the Communications Assistance for Law Enforcement Act of 1994. The 1968 Act as amended by the 1986 and the 1994 Acts shall hereinafter be referred to as the "Federal Act."

18. FLA. STAT. § 934.03(2)(d). This statute requires all participants to consent to the taping. However, section 934.03(2)(c) of the *Florida Statutes*, allows a police informant who is a party to a conversation to intercept the conversation. FLA. STAT. § 934.03(2)(c).

Kennedy could press a button under the cabinet table to tape record meetings or press a button for his secretary to record telephone calls he selected. The "selected" taping totaled 248 hours of meetings and twelve hours of telephone calls.<sup>19</sup> Gennifer Flowers tape recorded President Clinton "during four separate telephone conversations from December, 1990, when Clinton had just won reelection as governor, to December, 1991, the early weeks of the presidential campaign,"<sup>20</sup> and later sold copies of the tapes for \$19.95.<sup>21</sup> Ross Perot telephoned Colonel Oliver North and offered assistance, all the while taping the call.<sup>22</sup> HUD Secretary Henry Cisneros almost lost his job when Linda Medlar, with whom Cisneros had an affair, made available tapes of conversations between herself and Cisneros.<sup>23</sup> Medlar had taped their conversations over a period of almost four years.<sup>24</sup>

### B. *To Entertain or to Satisfy One's Prurient Interest*

Some people seem to enjoy learning private details of someone else's life. The private details are surreptitiously taped or listened to either to entertain or to satisfy one's prurient interest. According to a recent Liz Taylor biographer, Liz's third husband, Michael Todd, taped the sounds of

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19. William Safire, *Kennedy's Betrayal of Trust - 260 Hours Worth of Tapes*, N.Y. TIMES, Dec. 28, 1994, at A11. Mr. Safire comments:

Hundreds of people who spoke to the [P]resident with the reasonable expectation of privacy were betrayed. And a nation that was dismayed and infuriated at the revelation of the Nixon taping system in 1973 can see today where that sleazy business began in earnest: in 1962, at the personal direction of John Fitzgerald Kennedy.

*Id.*

20. William C. Rempel, *Flowers to Market Tapes of Conversations with Clinton*, L.A. TIMES, May 24, 1994, at A18.

21. *Id.*

22. William Safire, *Will Phone Taps for 'Protection' Turn Us Into a Nation of Spies?*, CHI. TRIB., Nov. 13, 1992, at C19.

23. *Cisneros to Remain, Fight Probe*, ORLANDO SENT., Mar. 15, 1995, at A1, A4.

24. *Excerpt from Reno's Letter on Cisneros*, N.Y. TIMES, Mar. 15, 1995, at B9.

The tapes, secretly recorded by Ms. Medlar over four years, showed that he had discussed payments to her that were higher than Mr. Cisneros had publicly acknowledged he had paid. In addition, the tapes indicated he had continued paying her after he joined the Cabinet in early 1993, which he had publicly denied.

David Johnston, *Concluding that Cisneros Lied, Reno Urges a Special Prosecutor*, N.Y. TIMES, Mar. 15, 1995, at A1.

he and Liz making love, “complete with ‘fervid moaning and groaning,’”<sup>25</sup> and made copies of the tape for his friends.<sup>26</sup>

In the 1980s, Anthony LaPorte was convicted of five felony counts under the Florida Act.<sup>27</sup> La Porte videotaped models in “modeling-video” sessions involving several changes of clothing. When LaPorte left the room to allow the models to change, he left the video camera running. The resulting videos captured what the models were saying as they undressed and dressed.<sup>28</sup>

Newspaper articles from January and February of 1995, chronicle a number of such instances. In January 1995, an Orlando, Florida, couple were charged with kidnapping and interception of oral communications, among other charges. They apparently had a practice of finding single women in a parking lot of a local nightclub, propositioning the women, and taking them home. On one occasion, the “thrill-seeking couple kidnapped a woman from a nightclub . . . and forced her to perform sex acts for seven hours while two children slept nearby. . . . At one point, they took a break so that [the female thrill-seeker] could drive to her mother’s house and get a tape recorder to make an audio recording of the event.”<sup>29</sup>

In January of 1995, in St. Petersburg, Florida, a suspected rapist was arrested. Police found some twenty tapes at the rapist’s home. The alleged rape assault for which the arrest was made was recorded on one videotape with the victim saying, “[n]o, don’t do that. I don’t want this to happen.”<sup>30</sup> Apparently, the same videotape shows the rape of another woman.<sup>31</sup>

In February of 1995, an Orlando area man pleaded no contest to unlawful interception of oral communication. The communications occurred at Walt Disney World’s Epcot Center. The man “would angle a video camera under the restroom stall to catch women disrobing and using the facilities.”<sup>32</sup> Also in February 1995, a man was looking for a television cable

25. *Bio Paints a Lurid Portrait of a Boozy, Pill-popping Liz*, ORLANDO SENT., Apr. 11, 1995, at A2.

26. *Id.*

27. *LaPorte v. State*, 512 So. 2d 984, 985 (Fla. 2d Dist. Ct. App. 1987), *review denied*, 519 So. 2d 987 (Fla. 1988).

28. *Id.* at 986. LaPorte was convicted of interception of oral communications. *Id.* at 985.

29. Tom Leithauser, *Couple Charged with Rape*, ORLANDO SENT., Jan. 7, 1995, at D1, D4.

30. *Suspect's Video has a Surprise*, ORLANDO SENT., Jan. 17, 1995, at C3.

31. *Id.*

32. *Man Who Taped Women in Restroom Gets Probation*, ORLANDO SENT., Feb. 8, 1995, at C3.

in the attic above an adjoining apartment. The man had crossed through a hole in the fire wall separating the attic above his apartment from the attic above his neighbors' apartment. Once above the neighbors' apartment, the man allegedly disconnected an air conditioning duct and "stole a peek . . . at [the] two neighbors having sex."<sup>33</sup>

### C. To Gather Information

With today's litigious atmosphere, how would you defend yourself against charges of sexual harassment or other types of impropriety? A tape might be vital where the testimony of witnesses are so conflicting that you know someone is lying. What would have happened if Clarence Thomas or Anita Hill had taped their conversations? A damaging tape would have kept him off the United States Supreme Court. If he had taped a particular conversation that she testified to in detail, he could use the tape to impeach her credibility. A tape of a conversation is often much more accurate than someone testifying as to that person's recollection of what happened. In Florida, you could serve up to five years in prison<sup>34</sup> if you tape a conversation without the other person's consent,<sup>35</sup> even though it may be the only means of gathering information or later defending yourself.

Scott Bentley was a star place kicker for the Florida State University ("FSU") football team and "kicked four field goals, including a game-winning 22-yarder, in FSU's national championship victory over Nebraska in the Jan. 1[, 1994] Orange Bowl."<sup>36</sup> Bentley, who is from Colorado, had seen his father tape conversations in Colorado when he wanted to protect himself. Bentley and his father talked about protecting oneself from charges of date rape. The father said, [in Tallahassee,] "Florida State is the focus of everything. You can be a target. If someone accuses you, how do you defend yourself? I've really talked to Scotty a lot about date-rape over the past couple of years."<sup>37</sup> Scott Bentley had a three week relationship with a Florida A&M pre-nursing student, which he described as a "one-night stand,

33. *Intruder Accused of Trying to Watch Neighbors in Bed*, ORLANDO SENT., Feb. 9, 1995, at C3.

34. Under section 775.082(3)(d), a third degree felony is punishable by up to five years imprisonment. FLA. STAT. § 775.082(3)(d) (1995).

35. FLA. STAT. § 934.03(2)(d).

36. Alan Schmadtke, *FSU's Bentley Fined, Penalized in Sex Tape Case*, FT. LAUD. SUN SENT., May 17, 1994, at 1C.

37. Clay Latimer & Curtis Eichelberger, *Rogers Ready to Step it Up; Nuggets Rookie Knows Team Needs Him to Have Big Game; Bentley Sentenced for Illegal Recording*, ROCKY MOUNTAIN NEWS, May 17, 1994, at 6B.



basically,"<sup>38</sup> at her apartment in February of 1994, near the end of the relationship. Scott Bentley taped the consensual sexual activity and later played the tape to two other football players and a friend. The woman pressed charges under the Florida statute, which prohibits taping without the prior consent of all parties.<sup>39</sup> After admitting he made the tape, Bentley pleaded no contest to a misdemeanor charge and was sentenced to forty hours community service and a \$500 fine. He was also ordered to pay \$150 in court costs and was placed on probation for six months. Scott Bentley stated, "the crime was to protect myself. What I did is legal in 48 states. If I had known it was illegal, I would never have done it. . . . I wanted to protect myself from date rape or potential allegations by her."<sup>40</sup>

The Florida Act also limits the media's ability to gather information. In a 1977 case, the media challenged the constitutionality of the Florida Act. In *Shevin v. Sunbeam Television Corporation*,<sup>41</sup> a television station and the *Miami Herald* challenged the Florida Act requirement of obtaining consent of all participants to tape a conversation. The news media claimed that the provision "impaired its news gathering dissemination activities and constituted a prior restraint in violation of the First Amendment,"<sup>42</sup> alleging that "three basic elements . . . necessitate the use of concealed recording equipment in investigative reporting: accuracy; candidness of person interviewed; and corroboration."<sup>43</sup> Investigation of "consumer fraud, housing discrimination, illegal abortion, [and] corruption of officials," among other topics, would be substantially impaired without the ability to make concealed recordings.<sup>44</sup> The Supreme Court of Florida held that the Florida Security of Communications Act was constitutional because the Act did not restrict what the news media could publish.<sup>45</sup>

#### D. *To Gather Evidence of a Crime or a Tort*

The Florida Act has become a ready tool of law enforcement, allowing officers to gather evidence of a crime. After detaining someone, a police officer might find the need to investigate further or to search a vehicle.

38. Scott Tolley, *Bentley Sentenced for Tape Recording*, PALM BCH. POST, May 17, 1994, at 1C.

39. FLA. STAT. § 934.03(2)(d).

40. *Tolley*, supra note 38, at 1C.

41. 351 So. 2d 723, 725 (Fla. 1977).

42. *Id.* at 725.

43. *Id.*

44. *Id.*

45. *Id.* at 726-27.

Although not under arrest, the officer may suggest that the detainee sit in the back seat of the patrol car for the individual's "safety" or "convenience." And, of course, after arrest, the arrested individual is placed in the back seat of the patrol car for transportation to the police station. While the individual is in the patrol car, the officer may have a tape recorder running, in hopes that the tape will intercept useful information or incriminating statements.

One Florida court considered the following pre-arrest scenario:

Some time after the police stopped the vehicle in which appellant traveled with two other males, the officer asked the driver if he could search the vehicle. When the driver consented to the search, the officer asked the driver and two passengers, one being appellant, if they would sit in the patrol car while he searched the vehicle. According to the officer, he advised these individuals that they did not have to sit in the police vehicle and that they were free to leave if they so desired. The officer admitted that he requested they sit in the patrol car because he wanted to tape record their conversations. The officer's search revealed no contraband, and the officer sent the three men on their way. When the officer listened to the tape recorded conversation, however, he heard one of the males tell the others that the contraband was in his shoe. The officer then radioed this information to the Okeechobee Sheriff's Office and that department later apprehended the three males.<sup>46</sup>

When the Supreme Court of Florida considered a similar pre-arrest situation, it applied article I, section 12 of the *Florida Constitution*<sup>47</sup> and held that "a person does not have a reasonable expectation of privacy in a police car and . . . any statements intercepted therein may be admissible as evidence."<sup>48</sup> Thus, because a person in a police car has no expectation of privacy in a police car, any communication made in a police car would not be protected by the Florida Act.

In June 1991, a Sarasota police detective obtained a court order allowing detectives to monitor numbers called into Roberta Jackson's display pager. The detectives intercepted the numbers by using a duplicate pager. Thus, when numbers were displayed on Jackson's pager, they were also

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46. *Barrett v. State*, 618 So. 2d 269, 270 (Fla. 4th Dist. Ct. App. 1993), *cause dismissed*, 623 So. 2d 495 (Fla. 1993). The fourth district ruled that the tape recording should have been suppressed. *Id.* at 270. However, *Barrett* is no longer good law. See also *State v. Smith*, 641 So. 2d 849, 852 (Fla. 1994).

47. See *infra* notes 144, 153 and accompanying text.

48. *Smith*, 641 So. 2d at 852.

displayed on the detectives' pager. "[T]he numbers included a two- or three-digit code that identified the caller, the caller's telephone number, and the amount of drugs the caller wanted to purchase from Jackson."<sup>49</sup> After conducting visual surveillance of Jackson in her car, the police searched her car pursuant to a search warrant and arrested Jackson after they found cocaine. In appealing her conviction, Jackson argued that the interception of numbers on the display pager was unconstitutional because the court order had been obtained without following the stringent wiretap procedures of the Florida Act.<sup>50</sup> The Supreme Court of Florida held that a wiretap order involving a display pager must follow the wiretap procedure of the Florida Act.<sup>51</sup> The court noted, "because the interception of a pager may disclose telephone numbers and coded messages as dialed by the caller, monitoring a pager with a duplicate digital display pager is more intrusive than using a pen register or a trap-and-trace device."<sup>52</sup>

In early 1995, a would-be hit man and police informant, Peter Laquerre, recorded conversations between himself and a Florida State University second year law school student, Joann Plachy. Plachy claimed a professor made unwanted sexual advances. A few days later a law school secretary accused Plachy of stealing a copy of a law school exam before it was given. Plachy allegedly called Laquerre to hire him to kill the secretary. Plachy stated:

If I don't take this person out of the picture, I'm just screwed. . . . I'm looking at losing my whole law career, and I'm just about a straight-A student. . . . I cannot emphasize how very important it is. It must look like a total accident. . . . I'm talking about a situation like, say, something like there's a one-car accident; the car leaves the road and hits a tree or whatever, and the driver has a broken neck.<sup>53</sup>

Plachy was arrested on February 20, 1995, and charged with the murder-for-hire scheme.<sup>54</sup> As more fully explained in Part III of this article, Laquerre's

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49. *State v. Jackson*, 650 So. 2d 24, 26 (Fla. 1995).

50. *Id.* at 26.

51. *Id.* at 28.

52. *Id.*

53. Jack Wheaton & Mark Silva, *Student Wanted to Murder School Snitch, Police Say*, TIMES PICAYUNE, Feb. 22, 1995, at A9.

54. Sharon Rauch, *A Law Degree to Kill For*, TALL. DEM., Feb. 21, 1995, at 1A.

tape would not run afoul of the Florida Act because Laquerre was a police informant.

### E. *To Improve the Workplace*

Apparently, many employers eavesdrop on employees. In a 1993 survey conducted by *Macworld Magazine*, more than twenty-one percent of the 301 businesses surveyed “engaged in searches of employee computer files, voice mail, electronic mail, or other networking communications.”<sup>55</sup> These searches were primarily conducted to monitor work flow, investigate thefts, or investigate espionage.<sup>56</sup> An exception to the wiretap statutes allows employers to tap phone and data lines. The exception applies if the “subscriber or user” of the electronic communication service intercepts communications “in the ordinary course of its business.”<sup>57</sup>

A recent example of employer eavesdropping that made headlines occurred in North Miami Beach. A North Miami Beach bank supervisor monitored telephone conversations of employees at the bank. The supervisor allegedly overheard a conversation between William McCarthy, a bank employee, and a potential customer. McCarthy claims that the supervisor “accused him [McCarthy] of trying to steer a prospective loan customer to a competitor,” fired McCarthy when he refused to disclose the potential loan customer’s name, and “challenged McCarthy’s application for unemployment compensation.”<sup>58</sup>

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55. *Survey Shows Snooping By Employers Widespread: Millions in the U.S. May Be Subject to Electronic Monitoring on the Job, a Magazine Reports*, ORLANDO SENT., May 23, 1993, at A13.

56. *Id.*

57. FLA. STAT. § 934.02(4)(a)(1) (1995). The business exception was the key in two Florida murder cases. In the two cases, the victims had received calls from the alleged murders while at work, the conversations were monitored on extension phones, and the victims were murdered shortly after the calls. The issue in each case was whether the testimony of the eavesdropper was admissible. *State v. Nova*, 361 So. 2d 411, 412–13 (Fla. 1978); *Horn v. State*, 298 So. 2d 194, 196 (Fla. 1st Dist. Ct. App. 1974), *cert. denied*, 308 So. 2d 117 (Fla. 1975). In *Nova*, the testimony of the eavesdropper, the victim’s supervisor, was held admissible because an earlier call had left the victim “visibly upset,” and the supervisor monitored the second call as the victim’s supervisor. *Nova*, 361 So. 2d at 413. In *Horn*, the court found that a co-worker had monitored the victim’s call out of curiosity and the co-worker’s testimony was therefore inadmissible. *Horn*, 298 So. 2d at 198–99.

The Federal Act contains the same exception. 18 U.S.C. § 2510(5)(a) (1994).

58. *Ex-worker Says Boss Bugged Telephone and Then Fired Him*, ORLANDO SENT., Jan. 4, 1995, at D5.

## F. To Use in Domestic Disputes

The temptation is great for one spouse to tape the other spouse when the spouses are separated or contemplating divorce. In addition, access makes the installation of an eavesdropping device relatively easy. Considering the Federal Act, courts have split, some holding that the Federal Act covers interspousal taping and others holding that the Federal Act is not applicable to interspousal taping.<sup>59</sup>

In two cases, the Supreme Court of Florida has held that the Florida Act is applicable to interspousal taping. In the first decision, the court ruled that a tape made surreptitiously by one spouse is inadmissible and that one spouse may recover civil damages against the other spouse who surreptitiously recorded a telephone conversation. In *Markham v. Markham*,<sup>60</sup> the Markhams had two telephone lines in their home. The first line was listed in Thomas Markham's name, and the second line was an extension of a line installed at the Nancy Markham School of Dance several blocks away. Thomas, a recording engineer, attached a tape recorder to the two lines and intercepted a number of telephone calls. Thomas offered several of the taped conversations into evidence in the Markhams' dissolution of marriage action.<sup>61</sup> The Supreme Court of Florida noted that the Florida Act contains no exception for domestic relations cases and affirmed the district court's decision holding the tapes inadmissible.<sup>62</sup>

In the second case, Mr. and Mrs. Burgess had separated when "Mr. Burgess stole into the family home, climbed into the attic, and spliced an electronic device onto the telephone lines in an effort to intercept and record Mrs. Burgess' telephone conversations. He then played these recordings to neighbors and used them for purposes of gaining an advantage for himself in the dissolution proceedings."<sup>63</sup> The court held "that the doctrine of interspousal tort immunity does not bar a civil cause of action for money damages brought by one spouse against the other under section 934.10."<sup>64</sup>

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59. Jonathan Niemeyer, *All in the Family: Interspousal and Parental Wiretapping Under Title III of the Omnibus Crime Act*, 81 KY. L.J. 237, 253 (1992-93); Cori D. Stephens, Note: *All's Fair: No Remedy Under Title III for Interspousal Surveillance*, 57 FORDHAM L. REV. 1035, 1037 (1989).

60. 265 So. 2d 59 (Fla. 1st Dist. Ct. App. 1972), *aff'd*, 272 So. 2d 813 (Fla. 1973).

61. *Id.* at 60.

62. *Markham*, 272 So. 2d at 814.

63. *Burgess v. Burgess*, 447 So. 2d 220, 221 (Fla. 1984).

64. *Id.* at 223.

### G. *To Learn a Competitor's Secrets*

Federal law makes it a crime to manufacture "any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications."<sup>65</sup> Even so, "spy shops" in a number of cities had been selling illegal "bugs" useful in industrial espionage. A sixteen month investigation ended on April 5, 1995, with United States Customs Service agents raiding spy shops in twenty-four cities across the country. Some of the bugs seized were radio transmitters concealed in pens, calculators, light sockets, telephone jacks, and electric power strips. In addition, some of the bugs could "pick up conversations and transmit them more than a mile away to a receiver the size of a pack of cigarettes."<sup>66</sup>

### H. *Inadvertent Interception*

Conversations may be picked up over an AM/FM radio or short wave radio inadvertently. In one Florida case, John Sion, who lived in a tenth floor apartment near Picciolo's Restaurant, woke up one morning at 2:50 a.m., switched on his ham radio receiver, and began reading a book. When he heard a conversation over the radio that seemed to concern a robbery, he began taping it. What he had intercepted was a walkie talkie conversation between officers Chandler and Granger of the Miami Beach Police Department.<sup>67</sup> When Picciolo's Restaurant opened for business on May 23, 1977, one of the cooks discovered that the floor safe was empty. Even though Granger was not working the May 22, 1977, 11:00 p.m. to 9:00 a.m. shift, another officer testified that he saw Granger at approximately 3:00 a.m. on May 23, 1977, driving a marked police car. Chandler claimed that he and Granger "staged a bogus burglary on the air as a part of a wager to see whether anyone was listening."<sup>68</sup> The court held that the Florida Act did not prohibit the interception because walkie talkie radio signals did not come

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65. 18 U.S.C. § 2512(1)(b) (1994).

66. James C. McKinley, Jr., *U.S. Agents Raid Stores in 24 Cities to Seize Spy Gear*, N.Y. TIMES, Apr. 6, 1995, at A1, B12; John Lantigua, *The Bug Stops Here: Raids Hit Spy Shops*, MIAMI HERALD, Apr. 6, 1995, at 1A, 10A.

67. *Chandler v. State*, 366 So. 2d 64, 66, 70 (Fla. 3d Dist. Ct. App. 1978), cert. denied, 376 So. 2d 1157 (Fla. 1979), aff'd on other grounds, 449 U.S. 560 (1981).

68. *Id.* at 66-67, 70.

within the Act, and because Chandler and Granger claimed to be staging a “bogus burglary,” they had no reasonable expectation of privacy.<sup>69</sup>

### III. EAVESDROPPING: SELECTED UNITED STATES SUPREME COURT CASES AND THE FEDERAL ACT

The 1967 United States Supreme Court opinion, *Katz v. United States*,<sup>70</sup> is the seminal privacy decision of this half of the century. In *Katz*, FBI agents suspected that Charles Katz was telephoning gambling information to persons in other states, in violation of federal law. Based upon visual surveillance, the agents predicted that Katz would use a public telephone booth to make the calls at approximately the same time each morning. The agents attached an electronic listening and recording device to the outside of the telephone booth and recorded six conversations, approximately three minutes long. During the conversations, Katz was visible through the glass panels of the telephone booth. The tapes were admitted at trial, and Katz was convicted.<sup>71</sup>

The issue in the United States Supreme Court was “whether the search and seizure conducted in this case complied with constitutional standards.”<sup>72</sup> The Court held that “[t]he Government’s activities in electronically listening to and recording [Katz’s] words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”<sup>73</sup> The Court reasoned,

the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . . No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in

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69. *Id.* at 70. At the time the case was decided, the Florida Act only covered those wire communications transmitted by “wire, cable, or other like connection.” *Id.* The Florida Act was subsequently amended to include protection for radio communications as an “electronic communication” but there is an exception for any radio communication “readily accessible to the general public.” FLA. STAT. § 934.02(12), .03(2)(h)(1) (1995).

70. 389 U.S. 347 (1967).

71. *Id.* at 354 n.14.

72. *Id.* at 354.

73. *Id.* at 353.

a telephone booth may rely upon the protection of the Fourth Amendment.<sup>74</sup>

The Court noted that the interception would have been constitutional if the agents had obtained a warrant.<sup>75</sup>

When later courts have had to decide whether the interception of a communication is constitutional, most have used the two-part test from Justice Harlan's concurrence, which is as follows:

[T]here is a twofold requirement, 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." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.<sup>76</sup>

*Katz* set forth the privacy framework in the context of search and seizure and led to the passage of the Omnibus Crime Control and Safe Streets Act of 1968 [hereinafter the "1968 Act"]. The 1968 Act filled in the *Katz* framework. The introductory language to Title III of the 1968 Act states:

In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.<sup>77</sup>

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74. *Id.* at 351–52 (citations omitted).

75. *Katz*, 389 U.S. at 354.

76. *Id.* at 361 (Harlan, J., concurring) (citations omitted).

77. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, Pub. L. No. 90-351, § 82, STAT. 197 (1968), reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 237, 253.



In passing the 1968 Act, Congress attempted to prevent the interception of oral and wire communications without the consent of at least one party to the communication. The Act required a court order to intercept a communication without the consent of any of the parties to the conversation.<sup>78</sup> Evidence obtained from unauthorized interception was inadmissible in court. The Act also provided criminal penalties for its violation and authorized civil damages.<sup>79</sup>

The Federal Act generally protects wire, electronic, and oral communications from interception, and the communications, once intercepted, are protected from being disclosed to others.<sup>80</sup> Wire and electronic communications are not protected if they are “readily accessible to the general public.”<sup>81</sup> Harlan’s two part test from *Katz* also comprises part of the definition of an “oral communication” under the Federal Act. Oral communications are protected if “uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”<sup>82</sup> Two exceptions to the Federal Act<sup>83</sup> allow a law enforcement officer or informant participating in the conversation, and a private party<sup>84</sup> to the conversation to record the conversation. Absent the consent of a participant, interception and disclosure may be done only after obtaining a court order.<sup>85</sup> Unlawfully intercepted communications are inadmissible,<sup>86</sup> and the person intercepting or disclosing the communications in violation of the Federal Act may be subject to fine, imprisonment, and civil damages.<sup>87</sup>

In the Plachy murder-for-hire scheme outlined in Part II, the would be hit man, Peter Laquerre, was working as an informant for the Florida Department of Law Enforcement (“FDLE”), allowing the FDLE to tape conversations between himself and Plachy.<sup>88</sup> Informants are often used by police to gather information. The informant meeting with a suspect is often fitted with a “bug,” located on the informant’s person, which transmits the

78. *Id.* at 253.

79. *Id.* at 253–54.

80. *Id.* at 253.

81. 18 U.S.C. § 2511(2)(g)(i) (1994).

82. *Id.* § 2510(2) (1994).

83. *Id.* § 2511(2)(c)–(d).

84. The private party exception applies “unless such communication is intercepted for the purpose of committing any criminal or tortious act . . .” *Id.* § 2511(2)(d).

85. *Id.* §§ 2516, 2517 (1994).

86. *Id.* § 2515 (1994).

87. *Id.* §§ 2511(4)–(5), 2520 (1994).

88. Wheaton & Silva, *supra* note 53, at A9.

conversation between the suspect and the informant, to an officer located at a distance. Under the Federal and Florida Act, an informant can intercept a conversation.<sup>89</sup> Although the constitutionality of the use of informants to gather information has been questioned, the United States Supreme Court has never held their use to be unconstitutional.<sup>90</sup>

The Federal Act preempted regulation of interception of communications by the states. Thus, the Florida Act must provide at least as much protection against interception of communications as does the Federal Act. In addition, the Florida Act can provide more protection against interception of communications than does the Federal Act.<sup>91</sup> In one major respect, the Florida Act does provide more protection than the Federal Act. Florida requires *all* participants to consent before a private party may tape a conversation even though the Federal Act only requires one party consent.

#### IV. THE FLORIDA ACT

In many respects, the Florida Act closely follows the Federal Act. The Florida Act also generally protects wire, electronic, and oral communications from interception, and the communications, once intercepted, are protected from being disclosed to others. Wire and electronic communications are not protected if they are "readily accessible to the general public,"<sup>92</sup> and oral communications are protected if "uttered by a person exhibiting an expectation that such communication is not subject to interception under circum-

89. FLA. STAT. § 934.03(2)(c) provides:

It is lawful under ss. 934.03–934.09 for an investigative or law enforcement officer or a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication or one of the parties to the communication has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act.

18 U.S.C. § 2511(2)(c) provides:

It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

90. *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. White*, 401 U.S. 745 (1971) (plurality decision), *cert. denied*, 406 U.S. 962 (1972); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952).

91. *State v. Rivers*, 660 So. 2d 1360, 1362 (Fla. 1995), *cert. denied*, 116 S. Ct. 1019 (1996).

92. FLA. STAT. § 934.03(2)(h)(1).

stances justifying such expectation.”<sup>93</sup> Two exceptions to the Florida Act<sup>94</sup> allow conversations to be recorded when either a law enforcement officer or informant is participating in the conversation, or where a private party to the conversation has obtained prior consent by the other parties involved in the conversation.<sup>95</sup> If a law enforcement officer or informant is a participant, only the law enforcement officer or informant need consent. In contrast to the Federal Act, the Florida Act requires all private parties to consent, if only private parties are participants. Absent consent, interception and disclosure may be done only after obtaining a court order.<sup>96</sup> The Florida Act also makes it unlawful “to intercept any communication for the purpose of committing any criminal act.”<sup>97</sup> Unlawfully intercepted communications are inadmissible,<sup>98</sup> and the person intercepting or disclosing the communications in violation of the Florida Act is guilty of a third degree felony punishable by not more than five years imprisonment or a \$5000 fine.<sup>99</sup> The person may also be subject to statutory damages of the greater of \$100 per day or \$10,000 in punitive damages, reasonable attorneys’ fees, and court costs.<sup>100</sup> The Florida Act contains a good faith defense not included in the Federal Act:

(2) A good faith reliance on:

....

(b) A good faith determination that federal or Florida law permitted the conduct complained of shall constitute a complete defense to any civil or criminal, or administrative action arising out of such conduct under the laws of this state.<sup>101</sup>

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93. *Id.* § 934.02(2).

94. *Id.* § 934.03(2)(c)–(d). For the content of subsection (2)(c), *see supra* text accompanying note 89. Section 934.03(2)(d) provides:

It is lawful under §§ 934.03–934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.

FLA. STAT. § 934.03(2)(d).

95. FLA. STAT. § 934.03(2)(c).

96. *Id.* §§ 934.07–08 (1995).

97. *Id.* § 934.03(2)(e).

98. *Id.* § 934.06.

99. *Id.* §§ 775.082(3)(d), .083(1)(c) (1995), 934.03(4)(a).

100. FLA. STAT. § 934.10(1) (1995).

101. *Id.* § 934.10(2)(b). Although effective October 1, 1989, the ambiguous wording of the good faith exception has received only very slight attention. Only two reported cases have referenced the good faith exception. *Wood v. State*, 654 So. 2d 218 (Fla. 1st Dist. Ct. App.

This article opened with the facts from *Inciarrano*, a case in which the murder victim taped his own murder. Prior to *Inciarrano*, the admissibility of surreptitious tapings had been the subject of *State v. Walls*,<sup>102</sup> an extortion case, and *State v. Tsavaris*,<sup>103</sup> a murder case. The taping in those cases would have been admissible under the Federal Act because one of the participants consented to the taping. In *Walls* and *Tsavaris*, the Supreme Court of Florida applied the plain language of the Florida Act and held that the tapings were inadmissible. This portion of the article will first review *Walls* and *Tsavaris* and will examine how the Florida courts dealt with *Inciarrano*.

#### A. *State v. Walls*

In *Walls*, Harold Walls and Stanley Gerstenfeld had been charged with extortion.<sup>104</sup> Walls and Gerstenfeld allegedly threatened Francis Antel in Antel's home on February 19, 1975. Antel had recorded the conversation between himself and the two suspects. Although Antel was ready to testify as to the contents of the conversation at trial, the State wanted to introduce the taping to bolster Antel's testimony.<sup>105</sup> The Supreme Court of Florida ruled the applicable portions of the Security of Communications Act constitutional and affirmed the trial court's order suppressing the tape.<sup>106</sup>

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1995); *Reliance Ins. Co. v. Lazzara Oil Co.*, 601 So. 2d 1241 (Fla. 2d Dist. Ct. App. 1992). The *Reliance* court noted that the exception was not applicable because the alleged recordings were made before the effective date of the exception. *Reliance*, 601 So. 2d at 1242 n.1. In *Wood*, Kevin Earl Wood had previously been involved in a federal lawsuit, and a state divorce and custody case and had taped two conversations in connection with those cases. *Wood*, 654 So. 2d at 219. He was later convicted of unlawful interception of communications. *Id.* At his trial, he attempted to introduce a good faith defense under section 934.10(2)(b) of the *Florida Statutes*. The trial court refused to allow testimony on the good faith defense, but the defense was allowed to proffer certain information. The proffer showed that, unable to initially afford an attorney, Wood researched case law and spoke with people involved in amending the Florida Act to include the good faith exception. When Wood finally obtained an attorney, the attorney "agreed with his interpretation of the Florida wire-tapping law, which was that if a federal law permitted the activity in question, the state law did so also." *Id.* On appeal, the court reversed and remanded for a new trial to allow evidence as to whether Wood "acted in good-faith reliance on a good-faith determination." *Id.* at 220.

Does the good faith exception in effect amend the Florida Act to allow a private party participant to record a conversation if the party has first obtained a legal opinion from an attorney?

102. 356 So. 2d 294 (Fla. 1978).

103. 394 So. 2d 418 (Fla. 1981), *review denied*, 424 So. 2d 763 (Fla. 1983).

104. *Walls*, 356 So. 2d at 295.

105. *Id.*

106. *Id.* at 297.

The language of the statutes in question is clear and unambiguous, and no exception for the situation we have before us is provided. This Court cannot substitute its judgment for that of the Legislature and create an exception which would encompass the instant circumstances. . . . *The function of this Court is to interpret the law and is neither to legislate nor determine the wisdom of the policy of the Legislature.*<sup>107</sup>

## B. *Tsavaris v. Scruggs*

In *Tsavaris*, Dr. Louis J. Tsavaris, a psychiatrist, was charged with the first degree murder of one of his patients and his alleged lover, Cassandra Burton.<sup>108</sup> On April 19, 1975, Dr. Tsavaris called an ambulance to Burton's apartment. Burton was already dead when the ambulance arrived. Initially, Dr. Tsavaris suggested that Burton had died of a drug overdose and emphasized that he and Burton were no more than patient and psychiatrist.<sup>109</sup>

The next day, however, a friend of Miss Burton told a sheriff's deputy that Miss Burton and Dr. Tsavaris had been having an affair; that she had become pregnant; and that she had undergone an abortion only four weeks earlier. According to the deputy's informant, Miss Burton had not wanted the abortion, but Dr. Tsavaris insisted; the couple's relationship was a stormy one, and they had recently quarreled over Miss Burton's demand that Tsavaris obtain a divorce in order to marry her.<sup>110</sup>

On Sunday, April 20, 1975, Detective Poindexter of the Hillsborough County Sheriff's Department was conferring with Dr. Feegel at the morgue. Feegel was the forensic pathologist who was performing Burton's autopsy. Poindexter had told Feegel about the alleged relationship between Tsavaris and Burton, and Burton's abortion. Dr. Tsavaris called for the autopsy results and Feegel took the call on speaker phone. After Dr. Tsavaris identified himself, Feegel and Poindexter exchanged glances and Feegel turned on a tape recorder, which would pick up sounds in the room. When Feegel explained that he did not have the results of the autopsy, Tsavaris asked if he could call back and Feegel suggested Tsavaris call at 1:30.

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107. *Id.* at 296 (emphasis added) (citations omitted).

108. *Tsavaris v. Scruggs*, 360 So. 2d 745, 747 (Fla. 1977).

109. *Id.* at 747-48.

110. *Id.* at 748.

Tsavaris called two more times that day, and each time the sheriff's officers recorded the conversations.<sup>111</sup> Dr. John Feegel testified at trial that Burton died from manual strangulation.

Although he found no bruises or other evidence of strangulation on the skin of the neck, he stated that a strangulation can occur without leaving marks on the neck.

Feegel apprised the court and jury of a technique of reducing the blood flow to the brain to enhance pleasure during a sexual experience. This technique . . . involves partial strangulation. The technique is also used by cardiologists to change or stop heart rhythm. It is a dangerous procedure to be used only under controlled conditions, since the loss of oxygen to the brain (which is what increases sexual enjoyment) can lead to unconsciousness, and heart stoppage can also occur. There [is] some indication that [Tsavaris] was familiar with this technique, and there was testimony that he had once said he knew how to strangle a person without leaving marks. And there was evidence found by Feegel that Burton had engaged in sexual activity shortly before her death.<sup>112</sup>

While the autopsy was in progress, Dr. Tsavaris called the morgue to inquire about the results of the autopsy and reiterated his claim that he only knew the deceased professionally. He was told to call back later. When Dr. Tsavaris called the second time, he was told that the autopsy was not complete but that the pathologist had concluded that an abortion had recently been performed. He denied having any knowledge of the abortion. By the time a third telephone call came from Dr. Tsavaris, the medical examiners had satisfied themselves that Miss Burton's death was caused by strangulation. This was kept from Dr. Tsavaris, however, who was told instead that the official report might be inconclusive because no cause of death had been discovered. At this point, the person at the other end of the line said, he "could tell the change in Tsavaris' voice. I could sense the relief."<sup>113</sup>

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111. *State v. Tsavaris*, 382 So. 2d 56, 60 (Fla. 2d Dist. Ct. App. 1980), *review denied*, 424 So. 2d 763 (Fla. 1983).

112. *Tsavaris v. State*, 414 So. 2d 1087, 1088 (Fla. 2d Dist. Ct. App. 1982), *review denied*, 424 So. 2d 763 (Fla. 1983).

113. *Tsavaris*, 360 So. 2d at 748.

The trial judge suppressed Feegel's tape.<sup>114</sup> The Second District Court of Appeals affirmed and certified the following question to the Supreme Court of Florida: "[d]oes the recording of a conversation by one of the participants constitute the interception of a wire or oral communication within the meaning of chapter 934 Florida Statutes (1979)."<sup>115</sup> The Supreme Court of Florida held that the recording was made in violation of the Florida statute requiring all parties to consent to the recording of a conversation.<sup>116</sup> In reaching its decision, the court noted that the Florida statute had been amended in 1974 to require consent of all parties prior to an interception.<sup>117</sup>

On the floor of the Florida House of Representatives, the only recorded debate on the two-party consent requirement of section 934.03(2)(d) was this comment by Representative Shreve:

'[What this bill does] is to prevent, make it illegal, for a person to record a conversation, even though he's a party to it, without the other person's consent.'

With no further debate, the bill passed the House 109-1.<sup>118</sup>

The court rejected the district court's interpretation of "interception" to mean an interception by wiretap of the conversation before reaching the intended recipient.<sup>119</sup> Justice Alderman, concurring in part and dissenting in part, would have accepted the district court's interpretation of "interception."<sup>120</sup> He also noted the seriousness of the offense of interception of communications to which Antel and Feegel could be subject, considering that the tapings were evidence of extortion and murder.<sup>121</sup>

I cannot believe that the legislature intended to brand as a third-degree felon the victim of extortionary threats, who, while in his home, electronically records the threats made against him. *E.g. State v. Walls*. Likewise, I do not believe the legislature intended that a public-spirited citizen like Dr. Feegel, who, in the course of

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114. *State v. Tsavaris*, 394 So. 2d 418, 420 (Fla. 1981).

115. *Id.*

116. *Id.* at 427.

117. *Id.* at 422.

118. *Id.* (citations omitted).

119. *Tsavaris*, 394 So. 2d at 422.

120. *Id.* at 430 (Alderman, J., concurring in part and dissenting in part).

121. *Id.* at 432.

his employment as medical examiner, records a lawfully received telephone communication relevant to a pending murder investigation, should be subjected to the possibility of criminal prosecution. . . .

The majority says that the legislature intended that for this public-spirited action Dr. Feegel is guilty of a third-degree felony. Surely, the legislature did not intend such an absurd result.<sup>122</sup>

### C. State v. Inciarrano

The trial judge denied Inciarrano's motion to suppress.<sup>123</sup> Inciarrano pleaded no contest and appealed the denial of his motion to suppress. On appeal, the Fourth District Court of Appeal, feeling constrained by the plain wording of the statutes and prior case law, reversed.<sup>124</sup> The Supreme Court of Florida then had to decide whether to create a case law exception to the Florida statutes or to let a cold-blooded murderer go free. The court phrased the issue as "whether the tape recording made by a victim of his own murder must be excluded from evidence pursuant to chapter 934,"<sup>125</sup> and held "that under the circumstances of this case the subject tape recording does not fall within the statutory proscription of chapter 934."<sup>126</sup> The court concluded that the statutes did not apply because Inciarrano had no reasonable expectation of privacy.<sup>127</sup> This conclusion was unsupported by any analysis to offer guidance in future cases.<sup>128</sup>

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122. *Id.*

123. The definition of "oral communication" is "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." FLA. STAT. § 934.02(2) (1995). In reaching its decision, the trial court noted "the quasi-public nature of the premises within which the conversations occurred, the physical proximity and accessibility of the premises to bystanders, and the location and visibility to the unaided eye of the microphone used to record the conversations." *State v. Inciarrano*, 473 So. 2d 1272, 1274 (Fla. 1985).

124. *Inciarrano v. State*, 447 So. 2d 386, 390 (Fla. 4th Dist. Ct. App. 1984), *quashed by* 473 So. 2d 1272 (Fla. 1985).

125. *Inciarrano*, 473 So. 2d at 1273.

126. *Id.* at 1274.

127. *Id.* at 1276.

128. *Id.* at 1275. Four Supreme Court of Florida Justices joined in the opinion and three concurred, two joining in one concurrence and one authoring another concurrence. *Id.* at 1276.



Inciarrano went to the victim's office with the intent to do him harm. He did not go as a patient. The district court, in the present case, correctly stated:

One who enters the business premises of another for a lawful purpose is an invitee. At the moment that his intention changes, that is, if he suddenly decides to steal or pillage, or murder, or rape, then at that moment he becomes a trespasser and has no further right upon the premises. Thus, here, if appellant ever had a privilege, it dissolved in the sound of gunfire.<sup>129</sup>

Accordingly, we hold that because Inciarrano had no reasonable expectation of privacy, the exclusionary rule of section 934.06 does not apply.<sup>130</sup>

The two concurrences "flesh out" the majority opinion, though in quite different ways. Justice Overton wrote:

I concur and write to emphasize that when an individual enters someone else's home or business, he has no expectation of privacy in what he says or does there, and chapter 934 does not apply. It is a different question, however, when the individual whose conversation is being recorded is in his own home or office.<sup>131</sup>

In his concurrence, Justice Ehrlich is much more critical of the majority's reasoning:

Privacy rights attach to individuals, not to actions . . . , [T]o hold, as the majority does, that the commission of a criminal act waives a privacy right requires an entirely new legal definition of privacy rights which would, in turn, shake the foundation of fourth amendment analysis. . . . It would be more judicially honest to admit the error and recede from *Walls* and *Tsavaris* and to hold that the statute is inapplicable. The victim no more "intercepted" the conversation than he "intercepted" the bullets that ended his life. . . .

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129. *Inciarrano*, 473 So. 2d at 1275-76 (citing *Inciarrano v. State*, 447 So. 2d at 389).

130. *Id.* at 1276.

131. *Id.* (Overton, J., concurring).

If criminal acts waive privacy rights, as the majority implies, police have the right and duty to intrude without a warrant into a bedroom where the owner/resident is smoking marijuana, reasoning that the fourth amendment protection has “gone up in smoke.”<sup>132</sup>

What Justice Ehrlich seems to suggest is that Florida interprets its statute as requiring “all of the parties to the communication [to] have given prior consent to such interception,”<sup>133</sup> in order to allow a participant to a conversation to lawfully record the conversation.

#### D. *State v. Walls*, *Tsavaris v. Scruggs*, and *State v. Inciarrano*

*Inciarrano* was a very difficult case for the Supreme Court of Florida. If the court applied the plain language of the statute, then the tape recording of *Inciarrano* murdering Trimble would have been inadmissible. The available evidence was much different in *Inciarrano* than in *Walls* and *Tsavaris*. In *Walls* and *Tsavaris*, at least one party to the conversation, other than the defendant, could testify, and in *Tsavaris*, there was documentary and medical evidence. There was no other evidence in *Inciarrano* to tie *Inciarrano* to Trimble’s murder except for the tape recording. *Inciarrano* admitted it was his voice on the tape. Faced with a difficult decision, the Supreme Court of Florida created a case law exception to the plainly worded Florida statute. The *Inciarrano* majority decided that the tape was admissible because *Inciarrano* had no expectation of privacy. True, the Florida statute, like the Federal Act, defines an “oral communication” as a conversation in which the participants have a justified expectation of privacy. But why did *Inciarrano* have no expectation of privacy? Was it because he was committing a crime, or was it because of the physical surroundings—that *Inciarrano* and Trimble were in *an office*, subject to being interrupted at any time, or was it because it was *Trimble’s office*? The court never adequately explained its rationale for deciding that Trimble had no expectation of privacy.

#### E. *People, Not Places*

*Katz v. United States*<sup>134</sup> changed prior search and seizure law to protect people, not places. The Supreme Court of Florida, with little analysis, has ruled that a suspect has a reasonable expectation of privacy recognized by

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132. *Id.* at 1277 (Ehrlich, J., concurring).

133. FLA. STAT. § 934.03(2)(d) (1995).

134. 389 U.S. 347 (1967). See discussion *supra* pp. 444–50.

society in the suspect's home (*Mozo*),<sup>135</sup> but not in a private office (*Inciarrano*).<sup>136</sup> Contrary to *Katz*, the court seems to be protecting places, not people. The Florida Act should be interpreted consistently with *Katz* to make a person's privacy depend on the person's reasonable expectation of privacy, as recognized by society, and not on the person's location. In interpreting the Florida Act, the Florida courts have considered conversations originating in a variety of locations. These locations range from the home (*Wall* and *Mozo*), to the office (*Inciarrano*), to the patrol car (*Smith*),<sup>137</sup> to the jail. The First District Court of Appeal of Florida created a case law exception to the Florida Security of Communications Act to allow a prison guard to monitor an inmate's outgoing call.<sup>138</sup> In *Katz*, the United States Supreme Court recognized an expectation of privacy in a glass paneled telephone booth and, in dicta, said that an expectation of privacy could apply to other locations such as "in a business office, in a friend's apartment, or in a taxicab."<sup>139</sup> In *Mozo*, the Florida Supreme Court recognized that the Mozos had an expectation of privacy to talk on a cordless phone in their own apartment without being intercepted.<sup>140</sup> *Inciarrano* had no expectation of privacy in Trimble's office, nor did Smith in a patrol car, nor did prisoners in jail, except perhaps if a prisoner had recently invoked his right to an attorney.<sup>141</sup> If Floridians have any expectation of privacy,

135. See *infra* notes 149–51 and accompanying text.

136. See *supra* notes 123–33 and accompanying text.

137. See *supra* notes 48–49 and accompanying text.

138. In *Pires v. Wainwright*, 419 So. 2d 358, 359 (Fla. 1st Dist. Ct. App. 1982), a guard monitored Pires' telephone call to someone outside the prison. Pires, an inmate at Union Correctional Institute, was calling to arrange an escape and was disciplined because of the information learned by the monitoring officer. The court found that society's interest in prison security outweighed Pires' expectation of privacy and created a case law exception to the Florida Security of Communications Act. *Id.* at 359. "[W]e hold there is an exception to the Security of Communications Act permitting prison officials to wiretap telephone calls from prisoners incarcerated in our prisons." *Id.*

139. *Katz*, 389 U.S. at 352 (citations omitted).

140. *State v. Mozo*, 655 So. 2d 1115, 1117 (Fla. 1995).

141. In *State v. Calhoun*, 479 So. 2d 241, 242–43 (Fla. 4th Dist. Ct. App. 1985), David and McCall Calhoun, brothers, were in jail. When the brothers were placed in an interview room, the officers monitored their conversation. When McCall was removed, an officer again gave David his Miranda rights and David requested his public defender. Upon denying David his request, McCall was placed back in the interview room with David. The officers both video and audio taped their fifteen minute conversation. The court held that the videotape should have been excluded. *Id.* at 245. The court based its decision on sections 12 and 23 of article I of the *Florida Constitution*, the Florida Security of Communications Act, David's Fifth Amendment right to remain silent and his Sixth Amendment right to an attorney. *Id.*

which will be recognized by the Supreme Court of Florida, it is apparently only in one's own home.

Thus far, Florida courts have not recognized that it is possible to have a reasonable expectation of privacy in a location other than one's home. Apparently, the conversation between Inciarrano and Trimble was private. A neighbor did hear gunshots, but no one heard the sound of their voices nor saw Inciarrano enter or exit Trimble's office. Even ruling that Inciarrano had no expectation of privacy because he was in Trimble's office and not in his own office, is contrary to *Katz*. If Trimble had gone to Inciarrano's office instead, but still had recorded his own murder, the court probably would have ruled that Inciarrano had no expectation of privacy because it was an office and not a home. The real problem with *Inciarrano* is that it was such a difficult case because of the two party consent requirement of the Florida Act.

## V. FLORIDA—CONSTITUTIONAL PRIVACY PROVISIONS

This section examines the two privacy provisions of the *Florida Constitution* and their applicability to protecting communications. Article I, section 12 of the *Florida Constitution*, Florida's search and seizure provision, prohibits "unreasonable interception of private communications by any means" and article I, section 23, contains an explicit right to privacy.<sup>142</sup> In 1968, article I, section 12 of the *Florida Constitution* provided:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing

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A jailhouse conversation may be overheard if a suspect's voice is so loud that it carries through a closed door. *Taylor v. State*, 292 So. 2d 375, 376 (Fla. 1st Dist. Ct. App.), *cert. denied*, 298 So. 2d 415 (Fla. 1974). Taylor was in a line up room being used as a conference room when he said in a loud voice: "[t]hat mother ... couldn't identify me; I had a stocking over my face." *Id.* at 376. Two officers heard the statement through the closed door. The trial court had allowed testimony about the statement into evidence and the appellate court affirmed, ruling that overhearing the statement was not in violation of the Florida Security of Communications Act. *Id.* at 377.

142. Joseph W. Little & Steven E. Lohr, *Textual History of the Florida Declaration of Rights*, 22 STETSON L. REV. 549, 629 (1993).

or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained.<sup>143</sup>

In 1980, article I, section 23, was added to the *Florida Constitution*.<sup>144</sup> Article I, section 23 provides:

Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.<sup>145</sup>

In *State v. Sarmiento*,<sup>146</sup> a Supreme Court of Florida landmark decision, the issue before the court was "whether the warrantless, electronic interception by state agents of a conversation between defendant and an undercover police officer in defendant's home is an unreasonable interception of defendant's private communications in violation of article I, section 12, Florida Constitution."<sup>147</sup> The court concluded that the interception was unreasonable, even though section 934.03(2)(c) allowed interception by a law enforcement officer or informant.<sup>148</sup> "Our response to this contention is simple; insofar as that statute authorizes the warrantless interception of a private conversation conducted in the home, it is unconstitutional and unenforceable."<sup>149</sup> Thus, the court interpreted the *Florida Constitution* to provide more protection than the *United States Constitution*.

Although *subsequent* decisions limited *Sarmiento's* ban on the use of informants to the home,<sup>150</sup> article I, section 12, was amended in 1982,<sup>151</sup> to

143. *Id.* at 629.

144. *Id.* at 635 (citations omitted).

145. *Id.*

146. 397 So. 2d 643 (Fla. 1981).

147. *Id.* at 644.

148. *Id.* at 645.

149. *Id.*

150. The right of privacy does not extend to one's private business office. For similar cases involving failure to extend the right of privacy, *see, eg.*, *Morningstar v. State*, 428 So. 2d 220 (Fla. 1982), *cert. denied*, 464 U.S. 821 (1983) (discussing privacy in a private business office); *Zacke v. State*, 418 So. 2d 1118 (Fla. 5th Dist. Ct. App. 1982), *review denied*, 426 So. 2d 29 (Fla. 1983) (discussing privacy in a suspect's back yard); *State v. Vanyo*, 417 So. 2d 1104 (Fla. 4th Dist. Ct. App. 1982) (discussing privacy in a parking lot); *Ruiz v. State*, 416 So. 2d 32 (Fla. 5th Dist. Ct. App. 1982) (discussing privacy in a motel room); *Miller v. State*, 411 So. 2d 944 (Fla. 4th Dist. Ct. App.), *review denied*, 419 So. 2d 1199 (Fla. 1982) (discussing privacy in a suspect's truck); *Hurst v. State*, 409 So. 2d 1059 (Fla. 1st Dist. Ct.

do away with *Sarmiento* by appending the following two sentences to the end of the provision:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.<sup>152</sup>

Thus, after the effective date of the amendment, an informant or police officer would be able to tape a conversation, even if the conversation occurred in the suspect's home.

A suspect arguing that an intercepted communication should be suppressed would have no better luck relying on article I, section 23, than relying on article I, section 12. The Supreme Court of Florida has held that article I, section 23, does not expand the protection afforded a suspect in the search and seizure context. "[O]ur right of privacy provision, article I, section 23, does not modify the applicability of article I, section 12, particularly since section 23 was adopted prior to the present section 12."<sup>153</sup> The decision thus limits the protection of article I, section 23, against government intrusion to situations other than those involving search and seizure.

Since *Sarmiento*, the Supreme Court of Florida has been loath to protect communications under either of the *Florida Constitution's* privacy provisions. This is so even though either or both of the provisions arguably could provide more protection than the Florida Act. In an April 1995 cordless telephone case, *Mozo*,<sup>154</sup> the court used convoluted reasoning to base its holding on the Florida Act rather than on sections 12 or 23 of article I of the *Florida Constitution*, as had the lower court. "[W]e adhere to the settled

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App. 1982) (discussing privacy in an informant's home); *Chiarenza v. State*, 406 So. 2d 66 (Fla. 4th Dist. Ct. App. 1981), *review denied*, 413 So. 2d 875 (Fla. 1982) (discussing privacy in a motel room); *Padgett v. State*, 404 So. 2d 151 (Fla. 1st Dist. Ct. App. 1981) (discussing privacy in a restaurant, a truck, and an outdoor setting); *Pittman v. State*, 397 So. 2d 1205 (Fla. 1st Dist. Ct. App.), *review denied*, 407 So. 2d 1105 (Fla. 1981). The right of privacy did extend to the suspect's apartment. *Copeland v. State*, 435 So. 2d 842 (Fla. 2d Dist. Ct. App. 1983) (application of amendment to article I, section 12, prospective in effect), *review denied*, 443 So. 2d 980 (Fla. 1983).

151. Little & Lohr, *supra* note 142, at 629.

152. *Id.*

153. *State v. Jimeno*, 588 So. 2d 233, 233 (Fla. 1991).

154. 655 So. 2d 1115 (Fla. 1995).

principle of constitutional law that courts should endeavor to implement the legislative intent of statutes and avoid constitutional issues.”<sup>155</sup>

*Mozo* involved the following facts. In 1991, in Plantation, Florida, police detectives were using a scanner to intercept cordless telephone calls near an apartment complex. When they picked up a suspicious conversation, they continued to monitor the same radio frequency and taped calls. They obtained a search warrant for the Mozos’ apartment in the complex based on the intercepted information and the unusual amount of activity observed at the apartment. The Mozos were arrested after drugs and drug paraphernalia were found in the search. When their motion to suppress was denied, they pled *nolo contendere*, reserving their right to appeal the denial of their motion to suppress.<sup>156</sup> On appeal, the Supreme Court of Florida held that “oral communications conducted over a cordless phone within the privacy of one’s own home are protected by Florida’s Security of Communications Act” because the Mozos had a reasonable expectation of privacy that cordless telephone calls originating in their home would not be intercepted.<sup>157</sup> “Oral communication” in the Florida Act is defined as:

any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting or any electronic communication.<sup>158</sup>

Two concurring justices would have based the decision on article I, section 23 of the *Florida Constitution*, rather than the Florida Act. They noted that the definition of an “electronic communication” in the Florida Act specifically excludes “[t]he radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit.”<sup>159</sup>

[B]ecause cordless telephone communications are expressly excluded from the definition of electronic communications, it makes little sense to construe the definition of oral communications as including cordless telephone communications. Further, the Florida

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155. *Id.* at 1117.

156. *Id.* at 1116.

157. *Id.* at 1117.

158. FLA. STAT. § 934.02(2) (1995).

159. *Id.* § 934.02(12)(a).

Act was patterned after federal legislation, and it is clear from the legislative history that Congress intended to exclude cordless telephone communications from the purview of the federal Act.<sup>160</sup>

It seems more appropriate to base the decision on an available constitutional provision, as the concurring justices would have, than on tortured language of the Florida Act.

Aside from the lack of a sound statutory basis for its decision, *Mozo* provides little guidance for future decisions involving cordless telephones. The court ruled that the interception of the cordless telephone conversation occurred where it "originated" and that the Mozos had a reasonable expectation of privacy in their own home.<sup>161</sup> The court again seems to be protecting places, not people, which is contrary to *Katz*. The other problem was in the ruling that the conversations originated in the Mozos' home. Although the court did not explain why this was so, the conversations apparently originated in the Mozos' home because that was the end of the conversation in which the officers were interested. What if the other party had called the Mozos first? What if the other end of the conversation was not in a home? If the officers had intercepted what the Mozos were saying by accident, only after conducting surveillance of an alleged drug buyer calling from a pay phone, would the Mozos' conversations still be protected?

## VI. TWO-PARTY CONSENT

The Florida Act should be amended to allow taping upon the consent of one party to the conversation. The Florida Act two-party consent requirement has caused the Florida courts to legislate in difficult cases. In *Walls*, the Supreme Court of Florida emphatically declared that it should not legislate.<sup>162</sup> Even so, it and the lower courts have done so in hard cases like *Inciarrano*. The *Inciarrano* court ruled that, since *Inciarrano* was in Trimble's office, *Inciarrano* had no reasonable expectation of privacy.<sup>163</sup> As explained in this portion of the article, the reasons for allowing taping on the consent of one participant far outweigh the reasons for requiring all participants to consent.

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160. *Mozo*, 655 So. 2d at 1117 (Grimes, C.J., concurring).

161. *Id.*

162. *Walls*, 356 So. 2d at 296.

163. *Inciarrano*, 473 So. 2d. at 1275-76.



The principle arguments supporting two party consent are that surreptitious taping will have a chilling effect on conversation and that it is unfair. Those who focus on the chilling effect emphasize that surreptitious taping will make people feel that they cannot say what they really mean, let off steam, complain, tell jokes, or criticize without running afoul of the “thought police.” “Big brother” will be monitoring what you say and you will be punished if your speech is not politically correct. Another facet of the argument is that taping without the other person’s consent is ethically and morally wrong. There must be some devious purpose if one has to tape without receiving the other party’s consent. Why can’t you just ask for consent if you want to gather information or have the taping serve as a memory aid? One discovering later that the conversation has been taped will regard the taping as a betrayal of confidence.

There are many legitimate reasons for allowing one participant to tape. Examples include aiding one’s memory, having an accurate record, gathering information of a crime or tort, and defending oneself. After all, how else could you protect yourself against charges such as sexual harassment or employment discrimination? It is irrational to allow someone to testify about a conversation but not allow a tape recording of the same conversation to be admitted into evidence. A tape recording is much more accurate than someone testifying as to that person’s recollection of what happened because it captures statements in context. In addition, a tape may be vital where the testimony of witnesses is so conflicting that you know someone is lying. What would have happened if Clarence Thomas or Anita Hill had taped their conversations?

The statute requiring two party consent follows someone’s perceived idea of morality and sweeps too broadly, potentially capturing public-minded citizens like Antel and Feegel within its grasp. The ambiguous “good faith” defense is not enough to protect the person with a legitimate reason to tape. Wiretapping and eavesdropping statutes are the only “search and seizure” proscription against private action. Otherwise, state action has to be involved to have evidence excluded. Criminals like Walls, Tsavaris, and Inciarrano are the ones to benefit if the plain language of the Florida Act is followed. Walls, Tsavaris, and Inciarrano could have sued Antel, Feegel, and Trimble’s estate for civil damages, and Walls and Tsavaris could have pressed for third degree felony charges. Public figures, and people such as Walls, Tsavaris, and Inciarrano, who have the right to be distrustful that a confidence will be betrayed, are the ones who will be more careful anyway and will perhaps guard themselves against surreptitious interception. Otherwise, if there is nothing illegal taking place, the likelihood of someone

taping a private conversation is small. It is usually too cumbersome to set up a taping and it is too difficult to infiltrate a group and gain the group's confidence. The risk that someone will tape is approximately the same or less than the risk that the party will divulge the contents of a confidential conversation.

In Florida, the private party who tapes a conversation is likely to be punished much more severely than a police officer or an informant. A police officer is allowed to tape a conversation and to have the conversation admitted into evidence if the police officer is a party to the conversation or an informant/participant has consented to the taping.<sup>164</sup> In contrast, a private party is prohibited from taping without all participants' consent, and a conversation taped with only one party consent is inadmissible. This, in effect, sanctions the entrance of big brother into the conversation, but allows someone taping a conversation for innocent reasons to be prosecuted for the taping.

Some people foolishly trust the other party to the conversation not to record the conversation, and they have the unpleasant surprise later of learning that the conversation was recorded. Other people, who may or may not have something to hide, are shrewd enough to know that things that are not said cannot be taped. In 1990, in California, a daughter testified from her repressed memory that years before she had seen her father murder her best friend, then eight. The father was tried and convicted.<sup>165</sup> Before trial, the daughter went to visit the father in prison. In the prison visitation room, the daughter asked the father to admit he had murdered her friend.<sup>166</sup> The father pointed to the sign on the wall, "Conversations May Be Monitored" and refused to answer.<sup>167</sup> At trial, the daughter was allowed to testify about her father's refusal to answer. On April 4, 1995, a federal judge ruled that the conviction could not stand.<sup>168</sup> One of the errors ruled reversible by the judge was the admittance into evidence of comments on the father's refusal to answer the daughter's question.<sup>169</sup>

Why single out audio taping for statutory protection and not also protect against videotaping? There are certain situations in which videotaping is

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164. FLA. STAT. § 934.03(2)(a)(3)(c) (1995).

165. *Franklin v. Duncan*, 884 F. Supp. 1435, 1438 (N.D. Cal.), *aff'd*, 70 F.3d 75 (9th Cir. 1995).

166. Tamar Lewin, *Judge Upsets Murder Conviction Focused on 'Repressed Memory'*, N.Y. TIMES, Apr. 5, 1995, at A18.

167. *Franklin*, 884 F. Supp. at 1445.

168. Lewin, *supra* note 166, at A18.

169. *Id.*

more invidious than audio taping. Scott Bentley's taping of consensual sexual activity was prosecuted criminally, whereas a videotaping of the same event may not have had attendant criminal charges. If the reason for the taping is one's prurient interest, a videotaping of a romantic episode may be much worse than the audio tape. The section of Part II of this article entitled "*To Entertain or to Satisfy One's Prurient Interest*" contains a number of "revealing" incidents which were taped or videotaped. Although an audiotape of the incidents was certainly an invasion of privacy, a videotaped picture of the incidents would be an even more serious invasion of privacy.

Does the all party consent requirement coincide with the public's expectations? Many individuals in all party consent states may not realize the state has such a requirement. Thus, they may inadvertently subject themselves to being prosecuted and to being sued civilly. For most other crimes with similarly severe punishment, there is at least a feeling that the action is wrong. In contrast, participant taping of a conversation may be entirely innocent. People's idea of morality is changing. Surreptitious taping is not perceived by many to be wrong. This is the electronic age. Like Scott Bentley, most people would not imagine that clicking on a tape recorder without asking the other person for consent would be illegal. For an action that many people do not realize is illegal, the punishment is severe. Disclosure of taped material is also illegal and carries the same penalties. Thus, Gennifer Flowers may have legally recorded her conversations with President Clinton, but she could face criminal charges if she sold her tapes in Florida.

Why does Florida need interception of communications dealt with both criminally and civilly? Most "bad" interception is already dealt with in other criminal statutes, or there is a tort action available. For example, an individual may be charged with blackmail or sued for invasion of privacy. The Florida Act forces the courts to legislate in the difficult cases. Because it is very difficult to draw the line between legitimate and illegitimate reasons for taping, it would be almost impossible to draft an appropriate statute.

## VII. CONCLUSION

The two-party consent requirement is irrational and the statute should be amended to eliminate it. The rationale supporting the two-party consent requirement is far outstripped by the reasons, detailed above, for eliminating it. In Florida, it is a third degree felony for a private party to tape a conversation unless all participants consent. Any tape made without the consent of

all participants is inadmissible and a nonconsenting party can recover civil damages from the person who taped the conversation.

Presumably, all parties are required to consent because surreptitious taping may be considered unfair. Another reason given is that allowing surreptitious taping may have a chilling effect on conversation. The broad sweep of the two party consent requirement has caught up many unsuspecting, otherwise-innocent people within its grasp. The requirement forecloses taping for legitimate reasons such as gathering information (possibly to later defend oneself) and gathering evidence of a tort or crime.

In contrast, criminals, like Walls, Tsavaris, and Inciarrano, stand to benefit from it. *Inciarrano* is an example of a difficult case, in which the application of the two-party consent requirement could have allowed the only evidence of a murder to be suppressed. Thus, a court faced with a similarly difficult case would probably enlarge the case law exception created by *Inciarrano*.