You Can Use Hidden Recorders in Florida

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A Florida law that is among the most important to reporters may be one of the state’s most misunderstood.

I. Introduction

Twelve states, including Florida, prohibit the interception of wire, oral and electronic communications without the consent of all parties. The public has misunderstood these all-party consent rules as a prohibition on...
the use of hidden audio recorders by journalists, police, and ordinary citizens in face-to-face communications. The Florida law imposes no such restriction, but the courts have been terribly confused by the complex history and purpose of the law, including its origins in the United States Supreme Court’s Fourth Amendment jurisprudence. This article traces the origin of the state and federal laws governing interception of communications and explains how courts should interpret the Florida law to allow the use of hidden recorders. The Florida Supreme Court is expected to address this issue in a pending case, *McDade v. State*, involving a young girl who secretly recorded her stepfather making statements to her in his bedroom. The recording became a key piece of evidence used to convict him of sexual assaults on the girl. This article argues that the Florida Supreme Court should affirm the conviction, and hold that the use of hidden audio recorders is generally lawful in Florida. It also explains why a contrary result may violate the First Amendment. The Florida Supreme Court is expected to decide the case in 2015.

II. Background

I came to the realization that the Florida Security of Communications Act, chapter 934 of the Florida Statutes, is not well understood by many judges, reporters, or me before I was scheduled to make an oral argument on the topic in the Florida Supreme Court on March 6, 2014. The briefs in the case, including my own, had tried to sort through the difficult language and strange history of the Act, but they frankly left me with many gnawing questions. So, I arrived in Tallahassee a day early to hole up at the Doubletree hotel with a laptop, an Internet connection, and the usual complimentary warm chocolate chip cookie in the hope that isolation might give me some answers.

A. The Ice Cream Truck Driver

The argument promised to be interesting because the facts of the case were disturbing. In 2001, a Mexican woman and her young daughter moved to Florida’s west coast. The woman met and married Richard McDade, a sixty-year-old ice cream truck driver, when her daughter was eleven years old. McDade allegedly molested the young girl and threatened to have her and her mother deported if she told anyone. She nevertheless told her mother, a doctor, and two ministers. Her mother

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3. *Id.* at 468.
adamantly did not believe her, and when pressed, the girl recanted on more than one occasion. No one reported the allegations to police.⁴

When she turned 16, the girl told her boyfriend that she was still being abused. He gave her his MP3 player and urged her to secretly record her stepfather the next time he made advances toward her. She did just that while she and her stepfather were alone together in his bedroom. She then turned the recording over to police.⁵

After police filed charges against McDade, his lawyer moved to suppress the recording on grounds that it had been made in violation of chapter 934.⁶ The argument stirred up an issue that had plagued Florida residents for forty years: When, if ever, can hidden devices be used to record a conversation?⁷

Reporters have been especially troubled by that question because secret recordings of interviews provide a way to ensure that a source cannot disown what he or she has said once the source sees it in print. But chapter 934 was amended in 1974 to make interception, use, or disclosure of at least some wire and oral communications lawful only if all parties to a communication consented.⁸ Since then, Florida courts have gone to great lengths to avoid interpreting the law to produce catastrophic results as, for example, where a victim secretly recorded his own murder and the murderer argued the recording could not be used as evidence against him.⁹

The trial judge in McDade’s case held that the girl’s decision to secretly record her stepfather had not violated the law, and allowed the

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⁴. *Id.* at 467.
⁵. *Id.* at 467–68.
⁶. *Id.*
⁷. This issue has also plagued non-Florida residents who call into or out of Florida due to a long-simmering debate over extraterritorial application of the law. In *France v. France*, 90 So. 3d 860 (Fla. Dist. Ct. App. 2012), *pet. for rev. granted*, 107 So. 3d 404 (Fla. Nov. 6, 2012), *rev. dismissed by*, 120 So. 3d 962 (Fla. Oct. 21, 2013), the Fifth District Court of Appeal held that a person outside of Florida violates chapter 934 when she records a telephone call with a person in Florida and subjects herself to personal jurisdiction in Florida. The court certified its decision to the Florida Supreme Court, but the parties settled before the case was decided. The Fifth District’s opinion in *France* directly contradicts an earlier decision by the Second District Court of Appeal. *See Kountze v. Kountze*, 996 So. 2d 246 (Fla. Dist. Ct. App. 2008) (en banc) (chapter 934 cannot transform an out-of-state act of recording a telephone call that originated in Florida, standing alone, into a tortious act within Florida for jurisdictional purposes).
⁹. *State v. Inciarrano*, 473 So. 2d 1272, 1275 (Fla. 1985) (holding that the victim did not violate the law because his assailant could not have had a justifiable expectation that he was not being recorded).
recording into evidence. A jury convicted McDade of various crimes, and the Second District Court of Appeal affirmed by a vote of two to one.

All three appellate judges wrote separate opinions. For the majority, Judge Khouzam found that "suppressing the recordings pursuant to chapter 934 under the circumstances of this case would produce an absurd result—a result we cannot fathom was intended by the legislature." Judge Altenbernd, concurring, expressed doubt about deciding the case on those grounds. Under the heading "Bad Facts Sometimes Make for Bad Law," he suggested that the Florida Supreme Court should reconsider one of its earlier decisions that construed the law to allow secret taping when the person taped was engaged in illegal conduct. Together, Judges Khouzam and Altenbernd certified the case to the Florida Supreme Court as passing on a question of great public importance.

The dissenting judge insisted McDade’s conviction had to be overturned, as deplorable as that result might be, because the girl had violated the law when she recorded McDade without his consent. He argued that if the public and the legislature disliked this result, it was up to the legislature to fix the law, not the courts.

B. Taking Flight

Just five days after this decision was rendered, I lost a different chapter 934 case, Brugmann v. State. In this case, I had argued chapter 934 should be read to allow a client to secretly record the advice provided by his lawyer and a psychologist working with the lawyer. I reasoned that if the advice being delivered was unlawful or unethical, they could not have a justifiable expectation that they were not being recorded. The State took the position that the secret recording was illegal irrespective of the nature of the advice given to the client because the secret recordings were made in the offices of the lawyer and psychologist, and they had a justified expectation in this location that their communications would not be intercepted with a hidden device. The trial court reviewed one of the two

10. McDade, 114 So. 3d at 468.
11. Id. at 471.
12. Id.
13. Id. at 472 (Altenbernd, J., concurring).
14. Id. at 471 (majority opinion) ("Does a recording of solicitation and confirmation of child sexual abuse made by the minor child fall within the proscription of chapter 934, Florida Statutes (2010)?").
15. Id. at 475 (Villanti, J., dissenting).
17. The state has taken an inconsistent position regarding the admissibility of secret recordings. Compare Brugmann, 117 So. 3d at 45 (Rothenberg, J., dissenting) (state moves to suppress the secret recording), and McDade, 114 So. 3d at 467 (state offers the secret recording
secret tapes and ruled the taping illegal because it "contain[ed] no direct or indirect evidence of criminal actions by the attorney."\textsuperscript{18} Five judges of the \textit{en banc} Third District Court of Appeal allowed that ruling to stand without writing an opinion, but three judges joined in a ferocious, lengthy dissent by Judge Rothenberg.\textsuperscript{19} She held that the law does not prevent the secret recording of illegal conduct and the recording of the psychologist that had not been reviewed by the trial court might reveal the illegal conduct.\textsuperscript{20}

The Florida Supreme Court could not review the Third District Court of Appeal's decision in \textit{Bruggmann} because the majority had written no opinion.\textsuperscript{21} But the Second District Court of Appeal's certification of its \textit{McDade} decision created an alternative avenue for the Florida Supreme Court to review the workings of chapter 934.

Both the Florida Press Association and the Florida Society of News Editors expressed interest in filing an amicus brief in the Florida Supreme Court because reporters' activities could be affected by the Court's decision. I volunteered my services to those organizations as amicus counsel. The Florida Attorney General welcomed the support and also offered to share five minutes of her oral argument time.

Preparation for the argument forced me to take a deeper look at the law than I ever had before. I previously had thought—and often had advised reporters—that interception, use, and disclosure of wire, oral, and electronic communications\textsuperscript{22} without the consent of all parties would violate the law except in a few very narrow circumstances, such as at a public meeting or during a crime. This simple interpretation of chapter 934 meant that hidden recorders generally could not be used and, as a result, reporters typically chose to forego recording interviews altogether to avoid the ill effects of sticking a microphone in the face of a source.

But my preparation for the \textit{McDade} oral argument persuaded me that the law does \textit{not} prohibit, and never has prohibited, in-person recording of into evidence). This inconsistency could be explained by the fact that the suppression helped the state uphold a conviction in the former, but made a conviction more difficult or perhaps impossible in the latter.

\begin{itemize}
  \item \textsuperscript{18} State v. Casey, Nos. F01-7975 & F06-32686, slip op. at 8 (Fla. Cir. Ct. Aug. 18, 2009).
  \item \textsuperscript{19} \textit{Bruggmann}, 117 So. 3d at 40 (Rothenberg, J., dissenting).
  \item \textsuperscript{20} \textit{Id}.
  \item \textsuperscript{21} FLA. R. APP. P. 9.030(A); see also Jenkins v. State, 385 So. 2d 1356, 1357 (Fla. 1980) (stating that a dissenting opinion cannot provide the basis for express and direct conflict jurisdiction). It is highly unusual for a Florida appellate court to grant \textit{en banc} review, affirm the decision below, and not write an opinion. The majority may have elected to take this strange action to prevent the Florida Supreme Court from reviewing its decision, but the actual reason remains unknown.
  \item \textsuperscript{22} Prior to 1988, the law applied to "wire" and "oral" communications only. In 1988, the law was updated to include "electronic" communications when cell phone technology was developed. See Act of July 1, 1988, ch. 184, § 2, 1988 Fla. Laws 1019.
\end{itemize}
voices without consent using a hidden recorder. This interpretation is not readily apparent from the face of chapter 934. The wording of the law is complex and its history is tied to decades of litigation, a parallel federal law, and politics. To understand the law, it is critical to examine all three. During the oral argument in the McDade case, I had so little time to cover that ground that I frankly could not give the justices the full picture. With the luxury of more time and space here, I will explain how I reached my conclusion and how I hope the Florida Supreme Court will rule.

III. Evolution of Federal and State Laws

A. Bagging a Bootlegger

The story begins 96 years ago when the United States Supreme Court decided in Olmstead v. United States\(^\text{23}\) that police interception of wire communications—primarily telephone calls—did not violate the Fourth Amendment’s limits on searches and seizures. Wiretapping was relatively new at the time and distinct from the physical entry into homes and seizure of tangible property, which was the classic invasion of privacy that the Fourth Amendment had been adopted to prevent.

The wiretapping in Olmstead had uncovered a vast conspiracy to import, distribute, and sell liquor in violation of the National Prohibition Act.\(^\text{24}\) Eight lines connected to phones in the homes and offices of the defendants had been tapped over the course of five months.\(^\text{25}\) Agents listened to the phone conversations, took notes of what they heard, and then typed their notes.\(^\text{26}\) Olmstead, the lead defendant, had been caught dead to rights, so he insisted that police tapping of his phone lines was just as intrusive as police breaking into his home and seizing his diary without a search warrant.\(^\text{27}\)

The Supreme Court disagreed, concluding that the Fourth Amendment had been adopted to “prevent the use of governmental force to search a man’s house, his person, his papers and his effects,” not the tapping of phone lines outside of his home.\(^\text{28}\)

Because the telephone had been invented fifty years earlier and was already in widespread use in 1928, the Court’s holding was disturbing to

23. 277 U.S. 438 (1928).
24. Id. at 455–56.
25. Id. at 471 (Brandeis, J., dissenting).
26. Id.
27. Id.
28. Id. at 463–65 (Taft, C.J., majority opinion).
many. All of a sudden, anyone who used a phone had to expect that calls could be monitored by government agents irrespective of whether they had probable cause or a search warrant. The *Olmstead* decision itself, however, suggested how the privacy of telephone calls might still be protected. It held: "Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation."30

B. The 1934 Federal Act

Congress did just that by enacting section 605 of the Communications Act of 1934,31 which stated that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance... of such intercepted communication to any person."32 At the time, this law was interpreted as prohibiting admission of wiretaps as evidence if none of the parties to the wire communications had consented.33

Section 605 did not apply to the interception of strictly oral communications,34 and one reason for that omission may have been that the technology for electronically or mechanically recording face-to-face communications was not yet readily available.35

The law posed a serious challenge for law enforcement officers who wished to tap into telephone calls and then use the recordings in court as admissible evidence.36 One way to avoid the law was to place hidden microphones where officers could pick up spoken words without tapping into telephone lines themselves.37 This technique allowed agents to eavesdrop on oral statements of a person speaking into a phone, if not the person on the other end of the line. And once tape recording equipment became available, this technique also allowed agents to record at least one

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29. The decision infuriated Justice Louis Brandeis who, thirty-eight years earlier, had co-authored a famous law review article espousing his views in favor of privacy. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). In *Olmstead*, Brandeis wrote that the Fourth Amendment "conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).
30. *Id.* at 465 (Taft, C.J., majority opinion).
32. *Id.*
37. Goldman, 316 U.S. at 131–32.
side of a telephone call. The Fourth Amendment would not allow the placement of microphones in private homes and offices. But law enforcement officials felt that microphones placed in public places, such as on the exterior of public telephone booths, would not run afoul of either the wiretap law or the Fourth Amendment. Law enforcement officials wanted to listen in on public telephone booth calls because the caller might assume once he or she closed the phone booth door, no one would be privy to the call other than the person on the other end of the line.

C. Chasing Katz

Charles Katz claimed he made that assumption when making calls from a Los Angeles phone booth to Miami and Boston in violation of federal gambling laws. FBI agents were listening to his conversation and recorded his every word.

Katz challenged the recordings as violating his Fourth Amendment rights. The Supreme Court acknowledged that the FBI had played by the rules set out in Olmstead because it had not physically entered the phone booth, seized any tangible property, or tapped the phone line. Justice Potter Stewart, writing for the majority, then pulled that rug out, commenting that "we have since departed from the narrow view on which the Olmstead rested." He added that the underpinnings of Olmstead had been eroded, and that the FBI’s actions did violate the Fourth Amendment. Thus, a reversal of the conviction was required.

Justice Harlan added a critical concurrence explaining that he understood the majority’s opinion to mean that Fourth Amendment protection would exist where it could be shown “first that a person have [sic.] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” This two-pronged approach would set the standards for both the Fourth Amendment and statutory privacy protection for decades to come. Justice Harlan agreed that the FBI violated Katz’s rights because

40. Id.
41. Id.
42. Id. at 351.
43. Id. at 352–53.
44. Id. at 353.
46. Id.
47. Id. at 361 (Harlan, J., concurring).
he had closed the phone booth door behind him, thus exhibiting a subjective expectation that third parties would not overhear his communications.49 Katz was aware, of course, that the person on the other end of the line would hear what he had to say and might choose to disclose it to the government. Katz had accepted that risk, but he had not accepted the risk that unseen agents would be intercepting his oral communications.

Katz, like the Olmstead opinion before it, set off a firestorm of controversy. Now, not the law prohibited police from engaging in warrantless tapping of telephone communications, but they also could not engage in warrantless and clandestine interception of many oral communications. Justice Black dissented that eavesdropping carried on by electronic means simply did not constitute a search or seizure under the Fourth Amendment.50

Like Olmstead, the Katz decision invited a legislative solution to its critics. The Court wrote that “a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards,” the search at issue.51

D. The 1968 Federal Act

Congress immediately went to work, passing Title III of the Omnibus Crime Control and Safe Streets Act of 1968 just one year later.52 This law, unlike the 1934 Act, set forth a comprehensive framework for federal regulation of the interception of both wire and oral communications.53 It carefully distinguished these two types of communications in a manner that would be sure to outlaw both the third-party wiretapping that the 1934 Act prohibited, as well as the clandestine eavesdropping on oral communications that the Katz court found to violate the Fourth Amendment in Katz.54 The law also spelled out specific procedures through which law enforcement officers could apply for and obtain judicial authorization to intercept and disclose both wire and oral communications when they had probable cause to do so.55 The law

49. Id.
51. Id. at 354–55.
53. Id. at § 802 (codified as 18 U.S.C. § 2510(1)–(2)).
54. Id.
55. Id. (codified as 18 U.S.C. § 2516).
expressly prohibited the admissibility of any wire or oral communications intercepted in violation of the law as evidence.\textsuperscript{56}

Congress borrowed the language of Justice Harlan’s concurrence in \textit{Katz} to define the term “oral communication” as an “oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.”\textsuperscript{57} The Act thus excluded any oral statements\textsuperscript{58} where the speaker failed to exhibit an expectation that his words would not be intercepted, or any oral statements made under circumstances that would not justify such an expectation, even though the communication would, in a lay sense, still be an oral communication.\textsuperscript{59}

The Act defined the term “intercept” to mean “the aural acquisition of the content of any wire or oral communication through the use of any electronic, mechanical, or other device,”\textsuperscript{60} but excluded ordinary telephone equipment provided to a subscriber by telephone companies in the ordinary course of business from the definition of “electronic, mechanical, or other device.”\textsuperscript{61}

The Act also included a provision that it would “not be unlawful . . . for a person . . . to intercept a wire or oral 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.”\textsuperscript{62} This provision meant that even when a person exhibited an expectation of privacy in an oral communication, \textit{and} the circumstances would justify that expectation, interception using a hidden device and without consent would be allowed as long as the person intercepting the communication was a party to it.

The following example illustrates of how this would work. Friend A says to Friend B either in person or on a telephone call: “I have something to tell you but please swear you will not tell a soul.” Friend B responds: “I swear on my mother’s life that I will take your secret to my grave. What is your secret?” Under these circumstances, Friend A has exhibited an expectation that the secret he is about to tell will not be recorded or disclosed to others. Yet, Friend B is carrying a small recorder in his pocket or attaches a recording device to his phone, turns it on, and records

\begin{itemize}
  \item \textsuperscript{56} Id. (codified as 18 U.S.C. § 2515).
  \item \textsuperscript{57} Id. (codified as 18 U.S.C. § 2510(2)).
  \item \textsuperscript{58} The term “oral statements” refers to all forms of oral statements, whereas the term “oral communications” solely refers to oral statements which are restricted by chapter 934.
  \item \textsuperscript{60} Id. (codified as 18 U.S.C. § 2510(4)).
  \item \textsuperscript{61} Id. (codified as 18 U.S.C. § 2510(5)(a)).
  \item \textsuperscript{62} Id. (codified as 18 U.S.C. § 2511(2)(d)).
\end{itemize}
Friend A when he says: "I just murdered my wife." Friend B surrenders the recording to police, confident that police will arrest Friend A for murder and not Friend B for making the recording. The fact that Friend A admitted to committing a serious crime may have given Friend B confidence that his recording and disclosure were legally justified, but the reality is that the recording was lawful merely because Friend B was a party to the oral statement.

The operation of the statute in this fashion was of great practical importance because Friend B could not have known the secret that Friend A was about to convey. If the federal law allowed a party to record oral statements secretly only if the statements disclosed criminal acts, Friend B would not know whether he could secretly record the statement until its contents had been disclosed to him, and, at that point, it would be too late to record the disclosure. The exclusion ensured that Friend B could turn on his secret recorder and his interception of Friend A’s communication would be lawful, irrespective of whether Friend A disclosed that he had murdered his wife or that he had purchased his wife a new car.

Under this regime, every telephone call would be protected solely against third-party interception without a search warrant. Also, any strictly oral statement would be protected against interception without a search warrant only when the speaker exhibited an expectation that his or her words would not be intercepted and the circumstances justified this expectation. All oral statements without a justifiable expectation of privacy would be fair game for third-party interception, and so would any statement, whether by wire or oral, by any party to the statement.

E. States Copy the Federal Law

But the federal law did not provide a solution for state law enforcement officials who also wanted to engage in electronic eavesdropping. They needed a law that provided procedures to obtain judicial authorization for that sort of interception. Florida, like many other states, adopted such a law one year after the federal law was enacted, and it closely followed the federal law. Florida defined the term "oral communication" to mean only an oral communication “uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation.” The Florida law prohibited willful interception, use or disclosure of wire and oral communications, and it

64. Id. at § 2(2) (codified as Fla. Stat. § 934.02(2)).
65. Id. at § 3 (codified as Fla. Stat. § 934.03).
made it lawful for a person to intercept wire or oral communications “where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing a criminal act.”66 The Florida law also contained a provision similar to a provision in the federal act, which prohibited the use of communications intercepted in violation of the law as evidence.67

The structure of both the federal and state laws, employing definitions that were inconsistent with lay definitions of terms and double negatives to inform citizens of what was “not unlawful,” made them difficult to understand and apply. Yet, they were clear enough to make certain that any party to a wire or oral statement could use a hidden or undisclosed device to record the statement.

Even with both federal and state statutes in place, a question remained as to whether the Fourth Amendment might prohibit law enforcement officials from engaging in one activity that the laws expressly allowed: use of a body bug to transmit oral statements to others whom the unsuspecting speaker could not see.68 Statutory authorization of such interception could not override Fourth Amendment restrictions on warrantless government searches and seizures. The scenario of a government agent carrying a body bug was slightly different from both the wiretap in Olmstead and the phone booth bug in Katz, and it did not take long for a test case to arrive at the Supreme Court.

F. A Body Bug in White’s Home

In connection with a mid-1960s investigation, law enforcement agents placed a hidden transmitter on Harvey Jackson, a government informant.69 Jackson then had eight conversations with James A. White—four of them in Jackson’s home, and the remaining four in White’s home, Jackson’s car, and a restaurant.70

White incriminated himself and was charged with several federal drug offenses.71 When the case proceeded to trial, Jackson could not be found, so the prosecutor instead introduced the testimony of the agents who had listened remotely to the discussions via Jackson’s hidden transmitter.72
White objected that this type of electronic surveillance violated his Fourth Amendment rights in exactly the same way that the FBI had violated Katz's rights. The district court overruled the objection and the jury convicted White. The en banc United States Court of Appeals for the Seventh Circuit reversed. The court rejected the government's attempt to distinguish Katz on the grounds that the FBI had intercepted Katz's conversation without consent or knowledge of any party to the conversation, whereas the government intercepted White's conversation with the consent of Jackson who was a party to the conversation. The critical similarity which the court found in both cases, the government had listened in on a conversation without the consent of the person against whom the evidence would be introduced.

A four-justice plurality of the United States Supreme Court came to a different conclusion. It found that placing a bug on a person was different from placing a bug on the outside of a phone booth because, in the former case, the speaker was aware that he was speaking with someone who might disclose the communications to the government. Justice White, writing for the plurality, pointed out that the Court had held in an earlier case that the Fourth Amendment is not violated when an undercover government agent infiltrates a criminal organization, writes down what he hears, and then testifies against the organizations members in court. Justice White wrote:

[for] constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person, (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency.

He explained that the defendant could not have a reasonable expectation of privacy given the risk that Jackson himself would disclose

73. Id.
74. Id.
76. Id. at 842–43.
77. Id.
78. White, 401 U.S. at 750–51 (citing Hoffa v. United States, 385 U.S. 283 (1966)).
79. Id.
the confidential communications. He added that one contemplating illegal activities takes the risk that his companions may be reporting to the police. He also cautioned against erecting "constitutional barriers to relevant and probative evidence which is also accurate and reliable." The White plurality opinion firmly embraced the principle that while one who is speaking face-to-face with another person might have a subjective expectation that the other person would not disclose the contents of the communication, that expectation could not be considered reasonable. This principle was not limited by the nature of the contents of the communication or the location of the communication; it simply recognized that when a person speaks directly to another, there is always a significant risk that the other person would disclose what was discussed.

The Court went further and reasoned that because no expectation of this nature could be justifiable, the face-to-face speaker could not have a justifiable expectation that the person to whom he was speaking was not using a hidden device to record the conversation. This ruling effectively meant that neither the Fourth Amendment nor the recently enacted federal and state laws prohibited the secret recording of face-to-face oral communication by a party to the communication. The rationale of this ruling has been applied with equal force to secret recording of telephone calls because the person being recorded would know of the risk that the person on the other end could disclose the contents of the call from memory or notes, rendering any expectation that the call would not be recorded by that person using an electronic or mechanical device unjustifiable.

80. Id. at 751.
81. Id. at 752.
82. Id. at 753. Justice Black concurred in White, creating a majority for adhering to the view he expressed in Katz that electronic surveillance is simply not a search or seizure. Id.
83. Id. at 751-54.
84. White, 401 U.S. at 750-51.
85. Id. at 751.
86. In a subsequent decision, United States v. Caceres, 440 U.S. 741 (1979), the Supreme Court reaffirmed its position in White that undercover agents carrying radio equipment which transmitted the conversations with a suspect to either a recording equipment or to officers monitoring the transmitting frequency do not violate the Fourth Amendment. The Court held that "[n]either the Constitution nor any Act of Congress requires that official approval be secured before conversations are overheard or recorded by Government agents with the consent of one of the conversants." Id. at 744 (citation omitted). See also Lopez v. United States, 373 U.S. 427 (1963) (holding the Fourth Amendment provided no protection to an individual against the recording of his statements by the IRS agent to whom he was speaking).
87. See, e.g., Marietta v. Macomb Cnty. Enforcement Team, 141 F.3d 270, 276 n.5 (6th Cir. 1998) ("[N]either the United States Constitution nor any federal statute prohibits law enforcement officials from recording or listening to phone conversations so long as one of the parties to the conversation has consented."); United States v. McKneely, 69 F.3d 1067, 1073 (10th Cir. 1995)
The *White* decision is important for purposes of understanding the federal and state laws that had been enacted in the wake of *Katz* because they used Justice Harlan’s language from *Katz* to distinguish “oral communications” protected by the act from those not protected. After *White*, neither the federal act, the parallel state laws, nor the Fourth Amendment could be regarded as prohibiting the secret recording of any oral communication by a party to the communication because the speaker could not have a justifiable expectation that the intercepting party would not record, use or disclose it.

For journalists, police, and ordinary citizens, the Court’s decision worked in their favor. They could record their own calls and in-person conversations without consent, and, in those unusual circumstances where probable cause could be shown, they could seek and obtain judicial approval for a wiretap or hidden bug.

**IV. Florida Law**

**A. The Florida Wrench**

The Florida legislature threw a wrench into all of this in 1974 when something motivated it to amend chapter 934 to expressly allow interception of wire and oral communications only if all parties consented to the interception. This amendment would cast Florida with a minority of states to have such a restrictive statute.

Since 1969, Florida’s chapter 934, like its federal counterpart, had provided: “It is not unlawful . . . for a person . . . to intercept wire or oral communications when such person is a party to the communication or when one of the parties to the communication has given prior consent to

("[W]hen the government records a defendant’s conversation with another party, pursuant to that party’s consent, neither the Fourth Amendment nor 18 U.S.C. § 2511(2)(c) is violated.").


89. Lucy Ware Morgan, a legendary statehouse writer for the *St. Petersburg Times* tried to find out what motivated the change in 2005 when Jim DeFede, a *Miami Herald* reporter, was charged with violating chapter 934 for recording his conversation with former Miami City Commissioner, Art Teele, shortly before Teele committed suicide. *See* Lucy Morgan, *Forgotten Tape Law Takes Down a Journalist*, ST. PETERSBURG TIMES, Aug. 6, 2005, at 4B col. 1. According to the article, “DeFede had been sympathetic to Teele and started his tape recorder when he realized how distraught Teele was.” *Id.* Because DeFede admitted recording Teele without consent, *Miami Herald* fired DeFede and the State Attorney considered prosecuting him. *Id.* Morgan wanted to know why Florida even had a law that prohibited the recording. *Id.*


91. REPORTERS’ COMM. FOR FREEDOM OF THE PRESS, supra note 1.
The amendment changed the law to state: "It is lawful under this chapter for a person to intercept a wire or oral communication when all of the parties to the communication have given prior consent to such interception." The amendment effectively narrowed the scope of the exclusion that had previously existed from the ban on interception of wire and oral communications. Now, a party to a wire or oral communication could no longer intercept it simply because one was a party to it. Interception would be lawful only if all parties consented, the communication fell outside of the definitions of wire and oral communications, or prior judicial approval had been obtained. In order to prevent this amendment from interfering with law enforcement, the amendment also revised the statute to provide that it is lawful for a law enforcement officer or a person acting under the direction of a 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 communications has given prior consent to such interception and the purpose of such interception is to obtain evidence of a criminal act." This aspect of the 1974 amendment squarely targeted the law at journalists and ordinary citizens who recorded their telephone calls.

This amendment, however, did nothing to change the fact that oral communication would continue to be defined as an "oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." The definition of "oral communication" was not expanded, it should have remained clear that secret recordings by a party to an oral statement, whether a law enforcement officer or anyone else, would be lawful. As in White, the person whose statement was being intercepted could not have a justifiable expectation that another person would interrupt the statement. The 1974 amendment prohibited the secret recording of a

92. FLA. STAT. § 934.03(2)(d) (1972 Supp.).
95. Ch. 74-249 § 2, 1974 Fla. Laws 694 (codified as FLA. STAT. § 943.03(2)(c)).
96. Operation of the law in this fashion is demonstrated by cases such as Atkins v. State, 930 So. 2d 678 (Fla. Dist. Ct. App. 2006), which held that the alleged victim of a sexual assault had violated chapter 934 when she secretly recorded her telephone conversation with a witness.
97. While the amendment left the basic definition of "oral communication" unchanged, it clarified that the term "does not mean any public oral communication uttered at a public meeting." Act of June 19, 1974 ch. 249, § 1, 1974 Fla. Laws (codified as FLA. STAT. § 934.02(2)).
“wire communication” by a party to the call because the definition of “wire communication,” unlike the definition of “oral communication,” did not include an exclusion of communications based on expectations of privacy.98

B. The Press Misfires and Misleads

Shortly after the Florida legislature enacted, Sunbeam Television Corporation and the Miami Herald Publishing argued that the 1974 amendment violated the First Amendment by restricting their ability to gather information.99 Recording of telephone calls and in-person interviews were regarded as critical tools of the trade, and prohibiting their use unless the source expressly consented, was regarded as effectively banning their use.100 The Florida Supreme Court rebuffed the challenge in Shevin v. Sunbeam Television Corp., holding that “[t]his was a policy decision by the Florida legislature to allow each party to a conversation to have an expectation of privacy from interception by another party to the conversation.”101 The decision made no attempt to determine whether the 1974 amendment impacted both wire communications and oral communications in the same way. It simply held that whatever the impact might be, it did not run afoul of the First Amendment.102

The court’s treatment of the amendment as impacting wire and oral communications in the same way sowed confusion in three subsequent criminal cases: State v. Walls,103 State v. Tsavaris,104 and State v. Sarmiento.105

In Walls, the facts were similar to those in White, except that the person who made the recording, Francis Antel, was not acting under the direction of a law enforcement officer. Antel believed the defendants were extorting him, so he secretly recorded them when they came to his home to deliver the threat in person.106 The defendants argued that the recordings violated

98. The prohibition on interception of wire communications without the consent of all parties is tempered to some degree by Fla. Stat. § 934.02(4), which excludes equipment furnished by a provider of phone service and used in the ordinary course of business from the definition of “electronic, mechanical, or other device.” The definition—dubbed the “business extension exception”—has been interpreted to allow businesses to record customer calls without consent. Royal Health Care Servs., Inc. v. Jefferson-Pilot Life Ins. Co., 924 F.2d 215, 217 (11th Cir. 1991); Stalley v. ADS Alliance Data Sys., Inc., No. 8:11-CV-1652-T-33TB, 2014 WL 349489 (M.D. Fla. Jan. 13, 2014).


100. Id.

101. Id. at 726–27.

102. Id.


106. Walls, 356 So. 2d at 295.
chapter 934, and should have been turned away because the threats did not constitute an "oral communication" within the statutory definition of section 934.02(2), which excluded oral statements where an expectation of privacy could not be justified. Such an expectation could not have been justifiable under these facts because the oral statements, just like the oral statements in White, had been delivered to the person making the recording, and that person was free to disclose those statements to anyone.

Unfortunately, the Florida Supreme Court gave no consideration to the United States Supreme Court’s conclusion in White that a person cannot have a justifiable expectation that another party to the communication will not intercept and disclose the statement. Instead, it relied on Shevin and repeated the error from that decision by reading chapter 934 to prohibit interception of both oral and wire communications unless all parties consented or a judge approved. Although the court in Shevin had not expressly stated that its holding would apply in the context of face-to-face conversations, the court in Walls concluded that Shevin applied in this situation.

Walls also relied on Markham v. Markham for its conclusion, even though Markham involved interception by a person who was not a party to the communication, and on Katz, which also involved interception by a nonparty to the communication. The court made no mention of White, because White addressed the Fourth Amendment while Walls addressed chapter 934. Nevertheless, White should have been regarded as both instructive and dispositive because the language of chapter 934's definition of oral communications had been copied directly from the definition of that term found in the federal law, and that federal definition came straight from Justice Harlan’s concurrence in Katz explaining which oral statements would fall within the definition of oral communications. White made it clear that in-person oral statements would not constitute oral communications.

Although the Walls decision was plainly wrong, at least it did not require the Florida Supreme Court to free criminals who were caught red-handed. The court pointed out that "no harm derives from the suppression of the tape recording since the victim is free to testify as to the alleged extortionary threats." While this aspect of the case may have made it easier for the court to reach its flawed holding, its conclusion that chapter

107. Id.
108. Id. at 296.
109. Id. (quoting Shevin v. Sunbeam Television Corp., 351 So. 2d 723, 727 (1971)).
110. Markham v. Markham, 272 So. 2d 813 (Fla. 1973).
111. Walls, 356 So. 2d at 296–97.
112. Id. at 297.
934 requires suppression of intercepted statements where the speaker had no justifiable expectation of privacy should have caused the court to wonder whether its interpretation of the statute was correct. If the victim could testify to the extortionate threats, then how could the defendants have had a justifiable expectation that their threats were not being intercepted by the victim with a recorder or transmitter?

In its next chapter 934 case, Tsavaris, the Florida Supreme Court reached the right result, but used an overly broad justification for doing so, and perpetuated the perception that all parties must consent to the interception of any wire communication or oral statement. In that case, a sheriff’s detective was meeting with a medical examiner to inform him that a doctor was suspected of murdering one of his patients. During the meeting, the doctor called the medical examiner to inquire about the patient’s autopsy results.113 The medical examiner placed the call on a speakerphone and turned on a recording device.114 Since a portion of the statement had been made through the telephone, the statement constituted a “wire communication.”115 This precluded treatment of the interception as lawful under the rationale of the White decision because the definition of “wire communication,” unlike the definition of “oral communication,” did not exclude statements where the person failed to exhibit an expectation that the statement would not be subject to interception or the circumstances could not justify such an expectation.116

Instead of analyzing the case in this way, the Florida Supreme Court researched the legislative history and found that Representative Jack Shreve made this statement on the House floor: “‘[The operation of this bill] 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.’”117 The effect of the 1974 amendment was actually much narrower, however, since it had not brought within the definition of “oral communication” an oral statement, such as the statements in White where the speaker was addressing face-to-face the person intercepting the statement.

Both Walls and Tsavaris showed that the Florida Supreme Court intended to curtail increasingly aggressive efforts by law enforcement to

114. Id.
115. Id.
116. “Wire communication” had been defined as “any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications.” FLA. STAT. § 934.02(1) (1979).
117. Tsavaris, 394 So. 2d at 422.
gather information. A broad interpretation of chapter 934 was consistent with this approach. The court went even further down this road in *Sarmiento*, and held that article I, section 12 of the Florida Constitution provided even broader protection against searches and seizure than the Fourth Amendment of the U.S. Constitution.

In *Sarmiento*, a detective had arranged to meet a man at his mobile home to purchase heroin. The detective, equipped with a hidden electronic body bug, arrived at the mobile home, was invited inside, and bought the drugs. Two law enforcement officers monitored the conversations inside the home from outside. The facts of this case were thus almost exactly the same as those in the United States Supreme Court’s decision in *White*, which had concluded this type of investigative activity does not violate the Fourth Amendment. The Florida Supreme Court ruled that the Florida Constitution gave Floridians broader rights, and ordered the suppression of the evidence acquired through the body bug.

The court reached the outer limits of its embrace of privacy rights the following year in *Morningstar v. State* when it declined to extend the holding of *Sarmiento* to prohibit law enforcement officers from using body bugs to intercept oral communications in the business office of a suspect. The court explained that its ruling in *Sarmiento* was based on the fact that an undercover police officer had intercepted communications in the defendant’s own home and that the home is “an area specifically protected by Florida’s constitution.” By the date of this ruling, the Florida legislature and voters had had enough of the court’s restrictions on law enforcement, and amended article I, section 12 of the Florida Constitution in 1982 to state: “This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.” This amendment effectively overruled *Sarmiento* and prevented any further expansion of constitutional

119. Id. at 644.
120. Id.
121. Id.
123. Justice James Alderman dissented in *Sarmiento* on the basis that the Florida Supreme Court should have followed the United States Supreme Court’s decision in *White* and held that the defendants could not have had a justifiable expectation that their conversations were not being intercepted because the person intercepting the conversation was a party to the conversation. *Sarmiento*, 397 So. 2d at 646 (Alderman, J., dissenting).
125. Id. at 221. In *Hill v. State*, 422 So. 2d 816 (Fla. 1982), the Florida Supreme Court refused to extend *Sarmiento* to prohibit interception of oral communications in the defendant’s backyard.
protection against search and seizure. The amendment meant that if detectives could persuade suspects to invite them into their homes, they could wire themselves up and intercept all of the oral statements directed at them without prior judicial approval.

C. The Gushing of Blood

There remained, however, the pesky problem of chapter 934, which Walls mistakenly interpreted to prohibit the use of body bugs by persons not acting under the direction of law enforcement agents.\textsuperscript{127} State v. Inciarrano\textsuperscript{128} provided the Florida Supreme Court with an opportunity to address that problem. Anthony Paul Inciarrano entered the office of one of his business associate, discussed a business deal in which his associate no longer wanted a part, and then shot and killed the associate in premeditated fashion.\textsuperscript{129} The victim had had the foresight to install a hidden tape recorder in his office desk and recorded the whole transaction, including the conversation about the deal, the sound of a gun being cocked, five shots being fired by Inciarrano, the groans of the victim, the gushing of blood, and the victim falling from his chair.\textsuperscript{130} Inciarrano moved to suppress the recording, claiming that it had been made without his consent in violation of chapter 934, and that the court’s decisions in Walls and Tsavaris mandated this result. The granting of this motion, unlike the granting of the motion in Walls, would be far from harmless to the state because the only witness who had heard Inciarrano’s incriminating admissions in person was the deceased victim.

In response, the Florida Supreme Court could have acknowledged that Walls was a mistake, and ruled that any expectation Inciarrano had that his voice was not being intercepted was unjustifiable because his oral statements had been directed to the person who was doing the interception. Such a conclusion would have been consistent with the principle established in White that had been incorporated into the 1968 federal statute, that had been used in the Florida statute in 1969, that had been unchanged by the 1974 amendment to the Florida statute, and that the 1982 amendment to the Florida Constitution had required the court to accept as a constitutional principle.

Instead, the court tried to distinguish the prior cases. “In neither Walls nor Tsavaris,” Justice Alderman wrote for the majority, “did we address the requirement of section 934.02(2) that there be a reasonable expectation of

\begin{itemize}
\item \textsuperscript{127} State v. Walls, 356 So. 2d 294 (Fla. 1978).
\item \textsuperscript{128} State v. Inciarrano, 473 So. 2d 1272, 1273 (Fla. 1985).
\item \textsuperscript{129} Id. at 1273–74.
\item \textsuperscript{130} Id. at 1274.
\end{itemize}
privacy in the oral communication in order for it to be protected under the security of communication statute."^{131} Although this may have been true, it was not apparent from those decisions that the court had not made such a determination in those cases. Justice Alderman noted that "oral communication," as used in the statute meant only an oral communication made with an exhibited expectation the communication would not be intercepted. Under circumstances justifying the expectation, Justice Alderman wrote that whatever expectation Inciarrano may have had, it would not have been justifiable because "Inciarrano went to the victim’s office with the intent to do harm. He did not go as a patient."^{132}

This observation seemed to make sense. If a man is murdering his victim, it would be logical to conclude that he could not have a justifiable expectation that his victim was not recording him. On the other hand, treating chapter 934 as not prohibiting interceptions of oral statements only when the speaker is committing a crime would be similar to treating the Fourth Amendment as not barring any search and seizure so long as it produces evidence of a crime. Long ago, the United States Supreme Court recognized that this type of a rule would not provide much security against police searches because the ends could justify the means.^{133} If chapter 934 can effectively protect any oral statements at all, it must be applied based on the circumstances creating a justifiable expectation that the statements were not being recorded—not on whether the statements themselves revealed illegal activity or took place in a non-private setting.

Justice Ehrlich, concurring in the Inciarrano result, recognized this problem and wrote that the outcome should have been based simply on the fact that Inciarrano was speaking to the person making the recording.^{134} Echoing the United States Supreme Court's approach since White, he wrote, "when one speaks to another, even in circumstances in which one has a reasonable expectation of privacy, the speaker intends that the hearer received and thereafter has no control over the hearer's dissemination of that speech."^{135} He added that "[h]ere, the victim was the intended recipient of the conversation with the alleged murderer.... Once the

131. Id. at 1275. The assertion that neither Walls nor Tsavaris addressed section 934.02(2)’s requirement that there be a reasonable expectation of privacy in oral communications is contradicted by those decisions. In Walls, the court expressly held that the communication fell within the definition of oral communication under section 934.02(2). Walls, So. 2d at 296. The Tsavaris decision does not expressly address this issue. The court appears to assume that the communication at issue fell within the definition of “oral communication” and then expressly addressed whether the communication had been “intercepted” in a prohibited manner.
132. Inciarrano, 473 So. 2d at 1275.
134. Inciarrano, 473 So. 2d at 1276–77 (Ehrlich, J., concurring).
135. Id.
conversation was directed to him, it was in his possession, whether through memory or recording.  

Since Justice Alderman had dissented in Sarmiento, one might have expected him to go along with Justice Ehrlich and overrule Sarmiento and hold that chapter 934 does not prohibit the use of hidden recorders by a party to a communication of any type. Instead, his opinion seemed to depend on the fact that Inciarrano had been caught in the act of committing a crime in a location where he could not have much, if any, expectation of privacy. Justice Ehrlich’s concurrence, joined by Justice Shaw, also fueled the idea that any expectation of privacy is lost when the substance of the communication discloses illegal conduct by the speaker. He posed the rhetorical question: “Why were Walls’ privacy rights not ‘dissolved’ by his extortionate threats?” This aspect of the decision continued to focus subsequent decisions on the content of the communication and the location of the communication, rather than on the simple issue of whether the communication was directed to the person who secretly recorded it.

D. A Body Bug in Hume’s Bedroom

State v. Hume139 should have done away with any perception that location mattered because it duplicated the facts of White, and held police had not violated article I, section 12 of the Florida Constitution when they used a body bug on an undercover officer invited into the defendant’s bedroom to intercept without consent or warrant the defendant’s statements to the officer. The Florida Supreme Court recognized the recent amendment to article I, section 12, as overruling Sarmiento, and the court expressly adopted the United States Supreme Court’s reasoning in White that any expectation that a party to whom the

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136. Id.

137. Id. at 1277.

138. See Migut v. Flynn, 131 F. App’x 262, 265 (11th Cir. 2005) (stating that location is a significant factor); Cohen Bros., LLC v. ME Corp., S.A., 872 So. 2d 321, 325 (Fla. Dist. Ct. App. 2004) (“[W]e don’t believe that society would recognize, as reasonable, that ... an expectation of privacy exists in a conference call, specifically where the call is held to conduct the business of the company”); Jatar v. Lamaletto, 758 So. 2d 1167 (Fla. Dist. Ct. App. 2000) (holding that the alleged victim did not violate chapter 934 when he secretly recorded an attorney communicating an extortionate threat in a meeting at the alleged victim’s office); Stevenson v. State, 667 So. 2d 410, 412 (Fla. Dist. Ct. App. 1996) (“A significant factor used in determining the reasonableness of the defendant’s expectation of privacy in a conversation is the location in which the conversation or communication occurs”); Dep’t of Agric. & Consumer Servs. v. Edwards, 654 So. 2d 628, 633 (Fla. Dist. Ct. App. 1995) (concluding that a subordinate officer did not violate chapter 934 when he secretly recorded his conversation with his supervisors because the supervisors had no subjective expectation of privacy considering the number of officers present and the disciplinary nature of the interview).

139. State v. Hume, 512 So. 2d 185, 188 (Fla. 1987).
oral communication is directed would not be intercepting the communication is not justifiable.\footnote{140}

But \textit{Hume} did not address whether chapter 934 itself prohibited this type of interception even if the state constitution did not because the interceptor in \textit{Hume} was a law enforcement officer, and the 1974 amendment expressly allowed law enforcement officers to intercept to obtain evidence of a criminal act.\footnote{141} In \textit{State v. Smith},\footnote{142} the Florida Supreme Court held the nature of the location might itself extinguish a reasonable expectation that an oral communication was not being recorded; but again, the court did not have to decide whether a private party’s secret recording of an oral statement in a private location, such as the bedroom of the person being recorded, would violate chapter 934. In \textit{Smith}, Robert Smith had been riding as a passenger in a car on I-95 when police pulled it over for driving erratically.\footnote{143} Police asked Smith and the driver to sit in the back seat of a police car while the officers conducted a consent search of the suspect’s car.\footnote{144} The police also took the opportunity to secretly record Smith and the driver while they pondered their situation.\footnote{145} Their pondering included incriminating admissions, and the two were charged with crimes.\footnote{146} They challenged their convictions on both article I, section 12, and chapter 934 grounds.\footnote{147} The Florida Supreme Court rejected both challenges, holding that “there is no reasonable expectation of privacy in a police car.”\footnote{148} No police officer had been a party to the communications between Smith and the driver, so the decision had to rest on location rather than the participation of the interceptor in the communication. This focus on location left open the possibility that chapter 934 might be read to prohibit interception in more private locations by private actors, even if the person making the recording was a party to the communication, and even if neither the Fourth Amendment, article I, section 12 nor chapter 934 would prohibit the interception by undercover law enforcement officers.\footnote{149}

\begin{itemize}
\item \footnote{140} \textit{Id.} at 187–88.
\item \footnote{141} FLA. STAT. § 934.03(2)(d) (1972 Supp.).
\item \footnote{142} \textit{State v. Smith}, 641 So. 2d 849 (Fla. 1994).
\item \footnote{143} \textit{Id.} at 850.
\item \footnote{144} \textit{Id.}
\item \footnote{145} \textit{Id.}
\item \footnote{146} \textit{Id.}
\item \footnote{147} \textit{Id.} at 851.
\item \footnote{148} \textit{Smith}, 641 So. 2d at 852.
\item \footnote{149} The court of appeals in \textit{La Porte v. State}, 512 So. 2d 984 (Fla. Dist. Ct. App. 1987), also did not have to decide this issue because the interceptor was not a party to the communications. The interceptor hid a video and audio recorder in his studio to capture models changing clothes. \textit{Id.} at 986.
\end{itemize}
E. A Body Bug in Lawyers’ and Doctors’ Offices

The Fifth District Court of Appeal addressed this issue in *Horning-Keating v. State*,¹⁵⁰ a workers’ compensation fraud case. There, Louise Rothstein, a care provider for Barney Dreggors, acting pursuant to directions of an insurance carrier, secretly recorded her conversations with Dreggors and his wife, with the couple’s attorney, Faith Horning-Keating, in the attorney’s office.¹⁵¹ Rothstein then provided the tapes to a police officer.¹⁵² The rationale of *White* and *Hume* should have been applied here to hold that the Dreggors could not have had a justified expectation that Rothstein was not intercepting their oral communications because they had been directed specifically at Rothstein. Instead, the State admitted the tapes had been made by Rothstein in violation of chapter 934 and should be suppressed under section 934.06.¹⁵³ The court, not content with the concession, added its own gratuitous analysis that the facts led “inescapably to the conclusion that this conduct violates Ms. Keating’s protected privacy rights and the provisions of Chapter 934,”¹⁵⁴ noting that the facts of this case were analogous to those in *Katz*. Yet, that was a flawed analogy. In *Katz*, the United States Supreme Court had found a Fourth Amendment violation because the agents who listened through the device attached to the phone booth were not parties to the interception in that case.¹⁵⁵ Rothstein, on the other hand, was a party to the communication she recorded.¹⁵⁶ The court of appeals neither cited nor discussed *White* or *Hume*. If these cases had been given consideration, it seems likely that the court would have reached a different result.

*Brugmann v. State*¹⁵⁷ provided yet another opportunity for a Florida appellate court to clarify whether chapter 934 was consistent with state and federal search and seizure decisions, such as *White* and *Hume*. Similar to *Horning-Keating*, a five-judge majority of the en banc Third District Court of Appeal chose to affirm summarily a trial court’s order, which held that the secret recording of a lawyer in his office violated chapter 934.¹⁵⁸

Judge Rothenberg penned a strongly worded dissent in *Brugmann* and provided a clear recitation of the facts from which the case arose. She

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¹⁵¹. *Id.* at 440, 447.
¹⁵². *Id.* at 447.
¹⁵³. *Id.*
¹⁵⁴. *Id.* at 448.
¹⁵⁶. *Horning-Keating*, 777 So. 2d at 440, 447.
¹⁵⁸. *Id.* at 40.
explained that meetings took place between Sean Casey, a man charged with DUI manslaughter; his mother; Casey’s lawyer, Milton Hirsch; and a psychologist working with Hirsch, Michael Rappaport. Casey claimed that Hirsch and Rappaport had advised him, while he was free on bond and awaiting trial, to flee the country to avoid prosecution even though Casey insisted he was innocent. Casey also claimed that a secret tape had been made of Hirsch and Rappaport providing this advice when he later brought his mother to meet with Hirsch first, so that his mother could hear the recommendations herself and help Casey decide whether he should flee or face trial.

Casey ultimately fled, was apprehended in South America, returned to Florida to face trial, and pled guilty both to the original DUI charge and to a new charge of failure to appear while on bond. He received stiff sentences on both counts. Soon afterward, Casey retained a new lawyer and moved to vacate his plea. Casey argued Hirsch had unethically pushed him to plead guilty in order to prevent the state from learning of the advice that he and the psychologist had given Casey to flee the country.

After the new lawyer’s attempt to set aside the conviction failed, Casey, acting pro se, filed a further motion to vacate the plea accompanied by transcripts of what he claimed to be the secretly recorded tapes of Hirsch and Rappaport. The prosecution asked the court to seal the transcripts of the recordings and the recordings themselves on grounds that they had been made in violation of chapter 934. This statute not only provided that they were inadmissible, but also prohibited disclosure of their contents. The trial court granted the motion over the objection of Casey and members of press interveners, including Bruce Brugmann, a California publisher. The trial judge explained that he had reviewed the tape of Hirsch, and it did not contain evidence of criminal actions by Hirsch. The trial judge further concluded that the making of the recording violated chapter 934 and, therefore, chapter 934 prohibited anyone from disclosing its contents. The trial court ordered the recording sealed and enjoined

159. Id. (Rothenberg, J., dissenting).
160. Id. at 41.
161. Id. at 41–42.
162. Id.
163. Brugmann, 117 So. 3d at 41–42.
164. Id. at 40–41.
165. Id. at 45.
166. Id.
167. The author represented both Casey and the press intervenors in opposing the state’s motion to seal.
169. Id.
the disclosure of its contents.\textsuperscript{170} The trial court did not review the contents of the Rappaport recording, but ordered it sealed and prohibited the disclosure of its contents as well.\textsuperscript{171}

\textit{Brugmann} was another case in which secret recordings had been made in the private office of an attorney ostensibly by the person or persons to whom the attorney’s oral communications had been directed and without the direction of a law enforcement officer.\textsuperscript{172} Brugmann appealed the decision and argued that neither the lawyer nor the psychologist could have had a justifiable expectation that their client or his mother was not intercepting their oral advice and, thus, the secret taping was lawful. The appellate court agreed to decide the case \textit{en banc}, and then summarily affirmed without explanation.\textsuperscript{173} Judge Rothenberg took it upon herself, with the concurrence of two other judges, to explain why the majority had been dead wrong in affirming the order.

She began with the first prong of Justice Harlan’s \textit{Katz} concurrence, explaining that neither Hirsch nor Rappaport had a subjective expectation that their oral statements were not being intercepted because Casey and his mother were free to disclose whatever the lawyer or psychologist had said to them.\textsuperscript{174} Although the judge cited neither \textit{White} nor \textit{Hume}, her reasoning was similar to the rationale of those decisions. Her approach was different only in that the \textit{White} and \textit{Hume} decisions had rested on Harlan’s second prong—that the defendants were speaking directly to the persons who intercepted the communication—rather than an analysis of subjective expectations.

Judge Rothenberg could have stopped once she concluded that the lawyer and psychologist lacked a subjective expectation of privacy as required by Harlan’s first prong. Instead, she went on to consider Harlan’s second prong and confronted the confusing amalgam of state cases that had been spawned by \textit{Inciarrano}’s reliance on the location and contents of the communication.\textsuperscript{175} None of the decisions had seized on the simple point

\begin{itemize}
\item \textsuperscript{170} \textit{Id.}
\item \textsuperscript{171} \textit{Brugmann}, 117 So. 3d at 45–46.
\item \textsuperscript{172} Neither Casey nor his mother admitted that they had made the recordings. \textit{See generally id. at 41–43.}
\item \textsuperscript{173} Prior to the \textit{en banc} ruling, a three-judge panel denied review without opinion and then, on motion for reconsideration, concluded that it could not review whether chapter 934 had been violated. \textit{The panel came to this conclusion because the same issue had been raised and passed upon without opinion in an earlier appeal. Brugmann v. State, No. 3D09-2540, 2012 WL 1484102 (Fla. Dist. Ct. App. 2012), vacated, 117 So. 3d 39 (en banc). The panel relied on \textit{Tsavaris} and \textit{Walls} for this conclusion, even though the cases were overruled by \textit{Inciarrano} and neither had addressed the constitutionality of the statute. Id. at 20–21.}
\item \textsuperscript{174} \textit{Brugmann}, 17 So. 3d at 47 (Rothenberg, J., dissenting).
\item \textsuperscript{175} \textit{Id}.\end{itemize}
made in *White* and *Hume* that when a person is speaking directly to another person, the former cannot reasonably expect that his or her words are not being intercepted by the other person. Judge Rothenberg noted that the many cases wrestling with the Florida statute had relied on “an analysis of the location where the communication took place; the manner in which it was made; the nature, contents, and purpose of the communication; the intent of the speaker; and the conduct of the parties.”176 So it was logical, she continued, that all of these factors should be taken into account. She concluded that because the trial judge had not considered the contents of one of the tape recordings at issue, reversal was required so that the contents of the tape could be weighed with all of the other factors.177

The concurring and dissenting opinions in the *McDade* decision rendered just five days before the *Brugmann* decision laid bare the difficulties that this type of multifactor analysis would cause for trial judges and litigants.

Judge Altenbernd delineated five distinct reasons that the multi-factor test might not be appropriate. First, the test appeared to impose a burden on the defendant to prove his innocence in order to prevent the tapes from being admitted against him.178 Second, the test had its roots in *Inciarrano*, and that decision appeared to have been driven by the “bad fact” that the suppression would have required reversal of a murder conviction.179 Third, the test seemed to undermine the desire of the 1974 legislature to stop secret recordings other than when all parties consented.180 Fourth, *Inciarrano* had based its conclusions on Fourth Amendment case law.181 Fifth, the 1974 amendment had been adopted prior to innovations, such as smart phones and MP3 players that make interception of oral communications easy and common, so a strict interpretation of the amendment would make many Floridians criminals.182

All five of these factors do show that the multi-prong approach is unworkable.183 More important, however, is that such an approach shows

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176. *Id.* at 51 (emphasis in original).
177. *Id.* at 61.
179. *Id.* at 472–73.
180. *Id.* at 473.
181. *Id.* at 474.
182. *Id.* at 474–75.
183. One Florida trial judge quickly embraced this proposition. *State v. Loor*, No. F10-27774, 20 Fla. L. Weekly 1055a (Fla. Cir. Ct. July 11, 2013) (Hirsch, J.) (order granting prosecution’s motion to suppress). In *Loor*, the defendant had surreptitiously tape-recorded his conversation with his ex-wife and her mother in the back of his ex-wife’s home. He wanted to use the tape’s recorded conversation to defend against a charge that he had sexually assaulted his twelve-year-old daughter. The trial judge distinguished *Inciarrano* on the theory that an accused
the effectiveness and simplicity of the White and Hume approaches, which allow interception by anyone to whom an oral communication is directed. The multi-prong approach imposes no burden on a defendant to demonstrate innocence in a criminal trial because suppression would not be required, even if the defendant proved innocence. As such, Inciarrano was decided correctly even without reliance on the contents or location of the intercepted statements. That decision does not undermine the intention of the 1974 legislature, and is fully consistent with its objective of requiring all-party consent for interception of wire communications by persons not acting under the directions of law enforcement officers, but not in-person oral statements. It also shows that Inciarrano properly relied on Fourth Amendment analysis. Finally, it shows that the 1974 amendment does not prohibit the interception of oral statements with small, hidden devices by a party to an oral statement.

Ideally, the Florida Supreme Court will come to this realization when it reviews McDade, and will uphold the ice cream truck driver’s conviction simply because he knew he was speaking with his stepdaughter when she secretly recorded his statements. It did not matter whether he was admitting guilt or speaking in his own bedroom. The dispositive factor is that he knew he was speaking with his stepdaughter and that she was free to disclose to others whatever he said. Those circumstances alone could not reasonably justify any subjective expectation that his statements would not be intercepted and, therefore, the statements simply do not fall within the definition of “oral communication” in section 934.02(2).

V. Proposal to the Florida Supreme Court

The Florida Supreme Court may not decide McDade correctly. If so, then the question remains as to whether the First and Fourteenth Amendments of the United States Constitution or article I, section 4, of the Florida Constitution requires invalidation of chapter 934 in circumstances akin to the McDade case or any circumstance.

Although the Florida Supreme Court upheld the statute’s constitutionality in Shevin, the same result should not be reached due to subsequent decisions of the United States Supreme Court. Both the state

\[184. \text{ Shevin v. Sunbeam Television Corp., 351 So. 2d 723, 727 (Fla. 1977).}\]
and federal courts in Illinois have considered whether all-party consent statutes are constitutional today, and both have held they are not.

In *ACLU of Illinois v. Alvarez*, the United States Court of Appeals for the Seventh Circuit considered ACLU's argument claiming Illinois's all-party consent statute could not be constitutionally applied to prohibit citizens from intercepting the oral communications of police officers performing their duties in public. Illinois had adopted a law in 1961 that made it a crime to use an eavesdropping device to hear or record all, or part of, any oral conversation without the consent of any party thereto. Like Florida, Illinois amended its law to require the consent of all parties. After multiple judicial battles over the meaning of the amendment produced results like *Inciarrano* and *McDade*, which allowed parties to record communications without consent, the Illinois legislature amended its law again in 1994 to prevent ambiguity in the statute.

The ACLU sued to enjoin enforcement of the statute against audio recordings that the ACLU planned to make in connection with a “police accountability program,” which involved openly recording officers without their consent in public places while performing their duties and when speaking at a volume audible to the unassisted human ear. The district court dismissed the complaint, but the court of appeals reversed and directed entry of a preliminary injunction against enforcement of the Illinois law as it was being applied. Although the law operated to prevent interceptions of communications, rather than as a prior restraint on the dissemination of previously known information, the court of appeals, citing *Citizens United v. FEC*, held that this “is a straightforward application of the principle that ‘[l]aws enacted to control or suppress speech may operate at different points in the speech process.’” The court of appeals found the ACLU’s “First Amendment interests are quite strong” because the law interferes with free discussion of public affairs. Furthermore, the court of appeals held that the law “restricts a medium of expression—the use of a common instrument of communication—and thus

185. ACLU of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012).
189. Id. 588.
190. Id.
192. Alvarez, 679 F.3d at 589.
193. Id. at 597.
an integral step in the speech process.”\textsuperscript{194} The court surveyed the United States Supreme Court’s First Amendment jurisprudence from \textit{Branzburg v. Hayes}\textsuperscript{195} to \textit{Sorrell v. IMS Health Inc.}\textsuperscript{196} The court then concluded that although the statute was content neutral, it would likely fail intermediate scrutiny because it did not materially advance the privacy interests that it supposedly had been enacted to serve.\textsuperscript{197}

Most important for Florida, the court of appeals noted that its decision would not cast a shadow over the enforceability of the communications interception statutes of most states because “the Illinois statute is a national outlier.”\textsuperscript{198} While most states allow interception by any party to a communication, Illinois, like Florida, was one of the few all-party consent states.\textsuperscript{199}

While the court of appeals’ decision only directed entry of a preliminary injunction, the district court held on remand that the Illinois statute was unconstitutional as applied.\textsuperscript{200} The Illinois Supreme Court then did the federal courts one better in \textit{People v. Melongo},\textsuperscript{201} holding the statute unconstitutionally overbroad on its face. The court reasoned that the statute “burdens substantially more speech than is necessary to serve a legitimate state interest in protecting conversational privacy.”\textsuperscript{202} If Florida Statutes’ chapter 934 were interpreted as similarly broad, it also would facially violate the First Amendment.

The Florida Supreme Court should take these decisions into consideration when ruling in \textit{McDade}. Although the constitutionality of chapter 934 is not squarely at issue in that case,\textsuperscript{203} a familiar rule of statutory construction is that “[w]henever possible, statutes should be construed in such a manner so as to avoid an unconstitutional result.”\textsuperscript{204} Application of that rule in \textit{McDade} should lead the Florida Supreme Court to conclude that what the young victim did in \textit{McDade} was lawful because chapter 934 does not prohibit interception of oral statements without

\textsuperscript{194} \textit{Id.} at 601.
\textsuperscript{196} \textit{Sorrell v. IMS Health Inc.}, 131 S. Ct. 2653 (2011).
\textsuperscript{197} \textit{Alvarez}, 679 F.3d at 605–06.
\textsuperscript{198} \textit{Id.} at 607.
\textsuperscript{199} REPORTERS COMM. FOR FREEDOM OF THE PRESS, \textit{supra} note 1.
\textsuperscript{201} People v. Melongo, No. 114852, 2014 IL 114852, 6 N.E. 3d 1123 (Ill. Mar. 20, 2014).
\textsuperscript{202} \textit{Id.}
\textsuperscript{203} The defendant argued chapter 934 prohibits the interception and use of the recording at issue and the state lacked standing to argue that the statute is unconstitutional. \textit{See} Dep’t of Educ. v. Lewis, 416 So. 2d 455, 458 (Fla. 1982).
\textsuperscript{204} State v. Jefferson, 758 So. 2d 661, 664 (Fla. 2000).
consent by a party to the statements. Additionally, if the court properly applies precedent, then the court should conclude that the victim's actions were legal and the interception of oral statements by any party to those statements is and always has been legal in Florida.

For those fearful that such a ruling would encourage extensive secret recordings of private conversations and dissuade candid human exchanges, rest assured that even when interception is lawful without consent or a court order, public disclosure may be tortious if it simply draws extensive attention to truthful intimate facts that are not of public concern\textsuperscript{205} or defames by presenting words out of context\textsuperscript{206} The common law carefully developed these torts over centuries to strike a delicate balance between privacy and free expression.

VI. Conclusion

Understanding the operation of chapter 934 of the Florida statutes is a challenging task. Holing up in a Doubletree hotel with a warm chocolate chip cookie for a full day is what it takes to get the job done. If you do not have time to do that, or to digest this entire article, here are the conclusions I have reached:

Interception of wire and interception of oral communications without the consent of all parties raise Fourth Amendment concerns, but both are useful law enforcement techniques, and both implicate the First Amendment rights of journalists and ordinary citizens. When the Supreme Court first considered a police wiretapping case in Olmstead\textsuperscript{207} it found no Fourth Amendment violation because the agents had not physically entered a home. Congress reacted by banning warrantless wiretapping by both police and private citizens. This spurred law enforcement agencies to start using hidden microphones that could intercept oral communications without tapping wires. The advent of this listening technology escalated privacy concerns and persuaded the United States Supreme Court in Katz\textsuperscript{208} to hold that the Fourth Amendment prohibits unseen agents from intercepting oral communications with hidden devices. This decision threatened to undermine the effectiveness of law enforcement agencies for which Congress passed new legislation specifying procedures for obtaining judicial approval of interception of oral communications without consent.

\textsuperscript{205} See, e.g., Cason v. Baskin, 20 So. 2d 243 (Fla. 1945) (recognizing publication of private facts as a tort).

\textsuperscript{206} See, e.g., Jews for Jesus, Inc. v. Rapp, 997 So. 2d 1098 (Fla. 2008) (recognizing libel by implication through publication of stepmother's private communication with stepson regarding her religious beliefs).

\textsuperscript{207} Olmstead v. U.S., 277 U.S. 438, 464 (1928).

\textsuperscript{208} Katz v. United States, 389 U.S. 347, 359 (1967).
Some states, including Florida, followed suit by enacting similar legislation. These enactments accommodated most law enforcement needs, but warrantless use of hidden microphones by police in the form of body bugs remained a desirable law enforcement tool. When the United States Supreme Court was pressed to hold that use of such tools violates the Fourth Amendment, it refused to do so in White by arguing that a constitutional bar against body bugs would do nothing to protect privacy interests because the law enforcement agent on whom the bug was planted would be free to disclose the communication from memory.

In the 1970s, the Florida legislature amended its interception of communications law with the apparent objective of stopping journalists and other citizens, but not police, from recording telephone calls without the consent of all parties. It used confusing, unnatural definitions in an attempt to accomplish this goal, and the consequence was that journalists and the courts misunderstood the amendment as attempting to ban the nonconsensual recording of both telephone calls and face-to-face oral communications. This incorrect interpretation of the amendment threatened to require courts to free criminals who had been caught red-handed by citizens with hidden recorders. As a result, Florida courts created impractical common law exceptions to the law.

The McDade case is the most recent example of this phenomenon, and the Florida Supreme Court has an opportunity to correct its past mistakes. The court should hold that the young victim was legally allowed to record her stepfather’s oral statements, thereby allowing journalists and other citizens to use hidden recorders in without obtaining consent.

If the Florida Supreme Court declines to do so and overturns McDade’s conviction, the result will be a dramatic demonstration that a statute that prohibits in-person recording of oral communications without consent harms state interests without protecting legitimate privacy interests of any sort.

The United States Court of Appeals for the Seventh Circuit ruled in Alvarez that a statute with such pernicious results cannot stand in the face of modern First Amendment theory. Therefore, if the Florida Supreme Court fails in McDade to correct the problem its jurisprudence has created, it will be inviting a federal challenge to the law or an amendment clarifying that the law does not prohibit a party to an oral communication from recording it without consent.

210. ACLU of Ill. v. Alvarez, 679 F.3d 583, 608 (7th Cir. 2012).
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