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IN THE
SUPREME COURT OF FLORIDA

Case No. SC13-1248

RICHARD R. McDADE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Review of a Decision of the
Second District Court of Appeal of Florida Passing on a
Question Certified to be of Great Public Importance

Amicus Curiae Brief of the Florida Press Association and the Florida Society of News Editors in Support of the State of Florida

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INTRODUCTION

Chapter 934, Florida Statutes, is of special concern to the press because reporters commonly use electronic devices to record their conversations with their sources. They make the recordings in order to protect both themselves and the source from the dangers of inaccuracy. The recording reduces the risk that a reporter will make a mistake in reporting the contents of the communication and the risk that the source later will be able to deny having made the statement and impugn or sue the reporter. The making of recordings is especially important where the recording shows that the person recorded is in the act of committing a crime or is admitting the commission of a crime. The recording ensures that the person making the admission will be unable to refute the admission easily.

Both federal law, 18 U.S.C. § 2510-22 and 47 U.S.C. § 605,[1] and the law of

[1] The U.S. Supreme Court ruled in *Olmstead v. United States*, 277 U.S. 438 (1928), that wiretapping – interception of electronic communications by a person or entity not a party to the communication – does not violate the Fourth Amendment search and seizure prohibition. Congress reacted with the Communications Act of 1934, Pub. L. No. 416, Act of June 19, 1934, ch. 652, 48 Stat. 1064 (73rd Cong. 1934) codified as 47 U.S.C. § 605, which prohibited third-party wiretapping. The statute did not, however, prohibit a party to a wire communication from recording it. Then, in *Katz v. United States*, 389 U.S. 347 (1967), the Court effectively overruled *Olmstead*, holding the Fourth Amendment prohibits police from using an eavesdropping device without a warrant in a public payphone. This precipitated a scramble to enact state and federal laws establishing procedures to issue warrants for such eavesdropping. *See, e.g.*, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 197, codified in part at 42 U.S.C. § 2510-20; Ch. 69-17, Laws of Florida. Neither the federal nor state

40 states and the District of Columbia,[2] allow reporters to make and use these recordings without the consent of the source. The federal law and the laws of these other states do prohibit persons who are not a party to a conversation from intercepting it electronically, but they pose no impediment to any party recording and disclosing the communication using electronic devices just as they might use a pad and paper or human memory alone.

Florida law, unlike federal and most other state laws, directly interferes with a reporter's effort to create a clear and irrefutable record of a conversation with a

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laws prohibited a party to a communication from electronically recording it without the other party's consent. Today, federal law still does not prohibit any party to a communication from electronically recording or disclosing it.

[2] (1) Ala. Code § 13A-11-30; (2) Alaska Stat. §§ 42.20.300 to 42.20.320; (3) Ariz. Rev. Stat. Ann. § 13-3005; (4) Ark. Code § 5-60-120; (5) Colo. Rev. Stat. §§ 18-9-303, 18-9-304; (6) Del. Code tit. 11 § 2402; (7) D.C. Code § 23-542; (8) Ga. Code § 16-11-66; (9) Hawaii Rev. Stat. §§ 711-1111, 803-42; (10) Idaho Code § 18-6702; (11) Ind. Code Ann. § 35-33.5-5-5; (12) Iowa Code Ann. § 808B.2; (13) Kan. Stat. Ann. § 21-6101; (14) Ky. Rev. Stat. § 526.010; (15) La. Rev. Stat. Ann. § 15:1303; (16) Me. Rev. Stat. Ann. tit. 15 § 709; (17) Md. Cts. & Jud. Pro. Code Ann. § 10-402; (18) Minn. Stat. Ann. § 626A.02; (19) Miss. Code Ann. § 41-29-501-537; (20) Mo. Ann. Stat. § 542.402; (21) Neb. Rev. Stat. § 86-290; (22) N.J. Stat. Ann. §§ 2A:156A-4; (23) N.M. Stat. Ann. §§ 30-12-1; (24) N.Y. Penal Law § 250.00; (25) Nev. Rev. Stat. §§ 200.620, 200.650; (26) N.C. Gen. Stat. § 15A-287; (27) N.D. Cent. Code §§ 12.1-15-02; (28) Ohio Rev. Code § 2933.52; (29) Okla. Stat. Ann. tit. 13 § 176.4; (30) Ore. Rev. Stat. § 165.540 (one party consent for wiretapping and all parties must consent for other forms of electronic eavesdropping); (31) R.I. Gen. Laws § 11-35-21; (32) S.C. Code Ann. § 17-30-30; (33) S.D. Comp. Laws §§ 23A-35A-20; (34) Tenn. Code Ann. § 39-13-601; (35) Tex. Penal Code § 16.02; (36) Utah Code Ann. § 77-23a-4; (37) Va. Code § 19.2-62; (38) Vermont: no statute; (39) W. Va. Code § 62-1D-3; (40) Wis. Stat. Ann. § 968.31; (41) Wyo. Stat. § 7-3-702.

source by banning electronic interception without consent and this directly interferes on occasion with their ability to report news of public concern. Some sources refuse to speak with reporters if they are made aware that their conversations with reporters are being recorded. Some reporters will not report newsworthy statements made to them by sources, but not electronically recorded, for fear that the source will deny having made the statement and impugn the reporter's accuracy, integrity and reputation by denying having made the statement or, worse, sue the reporter for defamation by misattribution.[3]

The amici curiae, organizations that represent the press, therefore urge the Court to interpret chapter 934 so that it does not operate to prohibit recording of oral communications without consent in circumstances such as those here. The victim had an important reason to record the defendant without his consent and to disclose the recording to authorities, just as reporters often have important reasons to record sources without their consent and to report what they said.

SUMMARY OF ARGUMENT

Point I. This Court's holding in *State v. Inciarrano,* 473 So. 2d 1272 (Fla. 1985), *Morningstar v. State*, 428 So. 2d 220 (Fla. 1982), *State v. Hume*, 512 So. 2d 185 (Fla. 1987), and *State v. Smith*, 641 So. 2d 849 (Fla. 1994), lay the

[3] *See, e.g., Masson v. New Yorker Magazine, Inc.,* 501 U.S. 496 (1991) (misattribution of quotation to public figure can show publication of a false and defamatory statement).

foundation for examination of any claim that an intercepted communication must be suppressed pursuant to chapter 934, Florida Statutes. They do not mandate a blinkered focus on location, but rather direct courts to evaluate an array of factors to determine whether a claimed expectation of privacy is justified. The trial judge in this case did not abuse his discretion in determining on the basis of the evidence before him that Richard McDade lacked a justifiable expectation that his voice was not being recorded. The conviction should be affirmed on this basis.

Point II. Although the constitutionality of Florida's chapter 934 is not directly at issue in this case,[4] 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." *State v. Jefferson*, 758 So. 2d 661, 664 (Fla. 2000). A recent decision invalidating Illinois' all-party consent statute shows chapter 934 would be unconstitutional if applied as McDade requests.

ARGUMENT AND STANDARD OF REVIEW

I.

The Courts Bellow Properly Applied Chapter 934 to the Facts

The defendant acknowledges that the exclusionary rule of the Fourth

[4] McDade argues chapter 934 prohibits the interception and use of the recording at issue. Initial Brief at 11-40. The Attorney General lacks standing to argue that the statute is unconstitutional, *see Dep't of Educ. v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982), so she contends only that it was properly interpreted and applied below. Answer Brief at 21-36.

Amendment does not apply to the actions of private actors such as the recording that is at issue in this case. Initial Brief at 19. Consequently, he sought exclusion below on the basis of section 934.02, Florida Statutes, as it has been interpreted in *State v. Inciarrano*, 473 So. 2d 1272 (Fla. 1985). Initial Brief at 19. He argues here that in *Inciarrano* this Court "applied the Fourth Amendment standard to non-state agents" and then contends that the Fourth Amendment's exclusionary rule requires suppression because the interception took place in the defendant's bedroom. Initial Brief at 20-22 & 29-31.

Assuming that Fourth Amendment analysis should be used in interpreting chapter 934, this argument for reversal must be rejected because this Court has been clear that when one person is knowingly speaking to another, he or she cannot reasonably expect under either the Fourth Amendment of the U.S. Constitution or article I, section 12 of the Florida Constitution, that the communication is not being recorded or that the recording would not be disclosed. The Court first addressed this issue in *Morningstar v. State*, 428 So. 2d 220 (Fla. 1982), holding that an individual's Fourth Amendment rights are *not* violated by the nonconsensual recording of one's voice in one's private office by one using a "body bug" on a person engaged in a conversation with the person whose voice is recorded. The Court then went one step further in *State v. Hume*, 512 So. 2d 185 (Fla. 1987), holding that one's Fourth Amendment rights had not been violated even by the

recording of one's voice in one's own home through the use of a "body bug" on a person engaged in a face-to-face conversation with the person whose voice was being recorded without knowledge or consent. Neither *Morningstar* nor *Hume* dealt specifically with chapter 934, but in *State v. Smith*, 641 So. 2d 849 (Fla. 1994), the Court crossed the bridge from the Fourth Amendment to chapter 934 holding that recording without consent of a person in a police car did not violate chapter 934 because the recording did not violate the Fourth Amendment.

More recently, three judges made a similar point in *Brugmann v. State,* 117 So. 3d 39, 40-62 (Fla. 3d DCA 2013) (en banc) (Rothenberg, J., joined by Salter & Fernandez, JJ., dissenting). The *Brugmann* case involved a recording that allegedly had been made of a lawyer in his office advising his client to flee the country to avoid prosecution. *Id.* at 40-41. The client, upon the advice of that same lawyer pled guilty to various crimes, but then later moved to set aside the plea on the ground that the lawyer had a conflict of interest in advising the client to plea because acceptance of the plea would reduce the risk that the lawyer's own wrongdoing would be detected. *Id.* In support of this contention, the client asserted that recordings had been made of the lawyer and the lawyer's assisting psychologist without their knowledge or consent. *Id.* at 44. The trial court disallowed use of the recordings to challenge the plea, *id.*, and also sealed them to prevent public review, *id.* at 45-46. Brugmann, a newspaper publisher, challenged

the sealing on grounds that if they in fact recorded the lawyer and psychologist advising the defendant to flee, chapter 934 would not prohibit their disclosure. *Id.* at 45. He relied on this Court's ruling in *State v. Inciarrano,* 473 So. 2d 1272 (Fla. 1985), and alternatively argued chapter 934 would violate the First and Fourteenth Amendments if chapter 934 were interpreted as prohibiting the recording and disclosure of oral communications showing or admitting to the commission of a crime. A panel of the Third District distinguished *Inciarrano* as involving the recording of one speaking in another's office rather than one's own office and held the First Amendment does not prohibit the state from banning the recording of oral communications without consent, even if the recording would show criminal activity. *See Brugmann v. State,* No. 3D09-2540, 2012 WL 1484102 at *10 & *13 (Fla. 3d DCA Apr. 27, 2012), *vacated*, 117 So. 3d 39 (Fla. 3d DCA 2013) (en banc). A five-member majority of the en banc Third District summarily vacated this panel decision, but still denied the petitioner any relief without explaining why. *Brugmann,* 117 So. 3d at 40. Three judges wrote a lengthy and passionate dissent arguing, among other things, that reversal was required because this Court had held in *Inciarrano* that interception of communications showing unlawful activity are not prohibited by chapter 934[5] and in *Morningstar* that one has no

[5] The Third District had applied *Inciarrano* and reached the same result in *Jatar v. Lamaletto*, 758 So. 2d 1167 (Fla. 3d DCA 2000) (interception or oral communication in office of the interceptor).

reasonable expectation under the Fourth Amendment that one's voice is not being recorded by a person to whom one is speaking and pointing out that this interpretation of the law had been used to decide chapter 934 issues in numerous cases.[6] *Brugmann*, 117 So. 3d at 49-51.

The dissenters synthesized this Court's Fourth Amendment and chapter 934 cases and the variety of decisions applying them to conclude that when chapter 934 is invoked to suppress or seal intercepted communications, "The trial court [is] . . . required to consider . . . 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." *Id.* at 51 (emphasis in original). This is a sound approach which the amici urge the Court to follow here.[7]

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[6] The dissenters cited and discussed *Cohen Bros., LLC v. ME Corp., S.A.*, 872 So. 2d 321, 324-25 (Fla. 3d DCA 2004) ("[s]ociety does not recognize an absolute right of privacy in a party's office"); *Dep't of Agric. & Consumer Servs. v. Edwards*, 654 So. 2d 628 (Fla. 1st DCA 1995) (employee's secret recording of supervisors); *Migut v. Flynn*, 131 Fed. Appx. 262 (11th Cir. 2005) (motorist's secret recording of police officer during stop); *Stevenson v. State*, 667 So. 2d 410 (Fla. 1st DCA 1996) (warrantless police interception of communications using "bionic" ears).

[7] Amici contend that a sounder approach would be to hold chapter 934 facially overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577 (2010) (internal quotation marks omitted). Thirty-six years ago this Court rejected a facial challenge in *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977), but the many problems the

When the *Brugmann* dissenters applied this standard, they concluded that the trial judge erred in failing to evaluate the contents of the tape recordings at issue, *Id.* at 52 & 53-54. They also asserted that the majority's failure to reverse "is in conflict with article I, section 24 of the Florida Constitution, Rule 2.420 of Florida Rules of Judicial Administration, and Florida case law" and "the sealing of these court records implicates [the] constitutional right to due process and the public's right of access to the court." *Brugmann*, 117 So. 3d at 62 (Rothenberg, J., dissenting, with Salter & Fernandez, JJ., concurring). They wrote that "the Florida Supreme Court has jurisdiction to review this case on conflict jurisdiction and as a case of exceptional importance." *Id.* But because dissenting opinions may not provide a basis for this Court to assert jurisdiction, *see Jenkins v. State*, 385 So. 2d 1356, 1357 (1980), Brugmann had no basis for seeking review here and he did not do so.[8] Because the Third District majority did not explain its actions, Judge Rothenberg's dissent stands as an unrebutted and thorough examination of chapter 934 jurisprudence.

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law has caused since and the paucity of evidence that it has much, if any, legitimate sweep, warrants reconsideration of that issue in an appropriate case.

[8] Brugmann did ask the Third District to issue a written opinion and to certify that case, pointing out that the Second District had certified *McDade* on Friday, June 7, 2013, just five days before the Third District issued its en banc decision on Wednesday, June 12, 2013, but this motion also was summarily denied.

When the *Brugmann* approach is applied here, it easily allows affirmance because the communication did reflect that McDade had engaged in unlawful activity and because he was speaking directly to the person who was making the recording at issue. Under these circumstances, he had no justifiable expectation of either privacy or that his voice was not being recorded.

McDade nevertheless attacks the decision of the Second District as inconsistent with Fourth Amendment jurisprudence, Initial Brief at 23-24, and argues that chapter 934 does not, by its language, allow an exception to its exclusionary rule for "heinous crimes," Initial Brief at 24-29, nor is it possible for courts to apply such an exception because a defendant in McDade's circumstances is presumed innocent, unlike the defendant in *Inciarrano*, where undisputed facts showed that he was trespassing when he was recorded allegedly committing murder. Initial Brief at 29-41.

These arguments are flawed principally because they fail to take into consideration this Court's rulings in cases such as *Morningstar*, *Hume* and *Smith* or the lower court decisions applying them that were analyzed by the *Brugmann* dissenters.

Two members of the Second District panel below considered and rejected McDade's arguments, but not because they ran afoul of *Morningstar*, *Hume* and *Smith*. Instead, they grounded their decision solely on a reading of *Inciarrano* and

then expressed concern that *Inciarrano* may not have been decided correctly. Judge Khouzam, for the majority, concluded that *Inciarrano* was indistinguishable because "this case [also] involves recordings made by a victim of the very criminal acts by which she was victimized." *Id.* at 470. Judge Altenbernd concurred specially to express his view that this Court's decision in *Inciarrano* may have been wrong. His concurrence recited a history of the evolution of chapter 934 from the time that it required only one party to consent to a recording, to its amendment in 1974 to require the consent of all parties, to its interpretation in *Inciarrano* in 1985. In so doing, he expressed concern about how *Inciarrano* impacts Fifth Amendment rights; whether the supposed "bad facts" of *Inciarrano* (the victim recorded the defendant committing a murder) had induced this Court to misinterpret chapter 934; whether *Inciarrano* had weakened a legislative policy to protect privacy; whether this Court in *Inciarrano* erred in reliance on Fourth Amendment precedents, *id.* at *7, and how technological changes since 1974 should be taken into account. *Id.* at *8. With respect to the latter concern he also noted that privacy expectations have changed dramatically because we now "live in a society where practically every teenager and even many senior citizens carry small, concealed recording devices on their persons." *Id.* He noted:

> The modern smartphone can record video as well as audio and transfer it immediately to the Internet. It is likely that the "all parties" requirement in chapter 934 now results in hundreds of illegal recordings and perhaps thousands of illegal disclosures on the Internet

in Florida every day.

Id. at *8. His opinion may be read as questioning whether chapter 934 should have been interpreted as allowing no exceptions based on societal expectations of privacy so that this would force the Legislature to re-examine whether Florida should maintain its all-party consent rule. Together, Judges Khouzam and Altenbernd certified the case as passing on a question of great public importance.

Judge Villanti's dissent distinguished *Inciarrano* as focusing on the location of the recording, not the content of the recording, and noted that Inciarrano was at the victim's business location, while McDade was in his own bedroom when his step-daughter taped him. *Id.* at *8-9. In Judge Villanti's view, McDade had a reasonable expectation that he was not being recorded while propositioning his step-daughter in his own bedroom, but the defendant in *Inciarrano* could not have such an expectation because he was in the victim's office.

At bottom, then, this trio of opinions seems to present a call for this Court to reconsider the fundamentals of how chapter 934 should be interpreted as well as whether the difficulties it creates are better left to the Legislature than the courts. None of the three opinions, however, gave any consideration to this Court's Fourth Amendment jurisprudence as the *Brugmann* dissenters did and none of them considered the view of the *Brugmann* dissenters since it was not released until five days after they released their decision. If they had considered these decisions and

the *Brugmann* dissent, amici believe they would not have seen any need to question *Inciarrano*.

Significantly, the Second District panel also did not give close consideration to *why* Florida law was amended in 1974 to require the consent of all parties or, put differently, why Florida law is stricter than both federal law and the laws of 40 other states even though an explanation might have shed light on whether McDade's call for strict application of the law to suppress the recording of his communications is to be preferred over the State's view that chapter 934 neither prevented the recording nor introduction in evidence of the recordings. All three opinions from the Second District's *McDade* decision appear to assume that the Florida Legislature, unlike Congress and other state legislatures simply had a greater reverence for privacy rights and that this reverence warrants continued respect through strict interpretation and application of chapter 934 as amended in 1974. This may not, however, be the case.

No definitive explanation for the dichotomy between Florida law and the laws of other jurisdictions has been found by the amici curiae, but one renowned Florida journalist, Lucy Ware Morgan of the Times Publishing Company, chronicled her effort to find an explanation in 2005 when a Miami Herald reporter, Jim DeFede, was facing charges of having violated chapter 934 when he recorded his conversation with former Miami City Commissioner Art Teele shortly before

Teele committed suicide. As noted, Florida originally had aligned with federal law and the majority of states. Lucy Morgan, "Forgotten Tape Law Takes Down a Journalist," *St. Petersburg Times* 4B col. 1 (Aug. 6, 2005) (available through Google News). According to the article, "DeFede had been sympathetic to Teele and started his tape recorder running when he realized how distraught Teele was." *Id.* Because DeFede admitted recording Teele without consent, The Miami Herald fired DeFede and the State Attorney considered prosecuting him.[9] Morgan wanted to know why Florida even had a law that prohibited the recording.

She found that when Florida first enacted chapter 934 in 1969 it stated in relevant part: "It shall *not* be unlawful . . . for a person . . . to intercept a wire or oral communication 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 . . ." Ch. 69-17 § 3(2)(d), Laws of Florida (emphasis added). It seems readily apparent that this provision was adopted in the wake of *Katz v. United States*, 389 U.S. 347 (1967), *Berger v. New York*, 388 U.S. 41 (1967), *see* note 1 *supra*, to ensure that oral communications intercepted without consent could be introduced in evidence as long as the interceptor was a party to the communication. The Florida law as adopted in 1969 did not allow eavesdroppers – persons not a

[9] The state attorney ultimately declined to prosecute Mr. DeFede on the basis of her conclusion that prosecution of him would serve no public benefit.

party to a conversation – to intercept, it simply allowed individuals like McDade's step-daughter or journalists or police who were speaking directly to the person recorded to make the recordings without consent and without a search warrant.

Why then was the law amended to make that type of recording unlawful? Morgan found that the Legislature amended the law on October 1, 1974, so that it would read that: "It is lawful . . . 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." Ch. 74-249 § 2, Laws of Florida (codified as Fla. Stat. § 934.03(2)(d) (2008)). After completing the research for her column, Morgan wrote: "Some think it involved Senate President Dempsey Barron and a tape recording made of him by a Miami Herald reporter. . . . Others believe it arose out of a Miami scandal involving a circuit judge and other officials who were indicted on bribery charges in 1973 after a series of tape recordings were made involving bags of money produced at a farmers market."[10] *Id.* She pointed out that the "change in the law came in a bill sponsored by Sen. W. D. Childers, then a wily Democrat from Pensacola. . . . There were eight other sponsors of the bill which won almost unanimous passage in the House and Senate. One House member voted against the bill, and he no longer remembers why." *Id.* "Mark Herron, a

[10] *See* Clarence Jones, *They're Gonna Murder You – War Stories From My Life at the News Front* at 137-41 (Winning News Media Inc. 2012) (discussing the referenced investigation).

lawyer and lobbyist in Tallahassee who was the attorney for the House Criminal Justice Committee," according to her research, "recalls hearing Childers talk about a particularly nasty divorce in West Florida that involved one spouse tape recording another." Her article further reported: "Some recall a House member who got into trouble after a reporter tape recorded a conversation with him and some speculate that it was a product of Watergate and all the tape recordings that surrounded the downfall of President Richard Nixon." *Id.*

Although Morgan was unable to find a definitive explanation for the 1974 change in the law, her reporting suggests that legislators may not have been acting out of the noblest of motives. Her reporting in fact suggests that legislators may have been motivated by a desire to prevent reporters and others from recording persons who implicated either themselves or others in wrongdoing.

At a minimum, Morgan's work calls into question the Second District panel's suggestion that this Court may have erred in deciding *Inciarrano.* The plain language of the statute allowed this Court to prevent application of the statute to work a horrible injustice in *Inciarrano* and that same language allows the Court to prevent the same type of injustice here.

II.

Chapter 934 Would be Unconstitutional as Applied
if it Were Interpreted as Prohibiting the Interception at Issue

As indicated, when the Court evaluates chapter 934, it should steer clear of

interpretations that would render the statute unconstitutional. Lucy Ware Morgan's research for her 2005 column had something to say about this, too. She noted that the facial constitutionality of chapter 934 had been challenged by the press soon after its enactment and that this Court turned away the challenge. *See Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977). She then observed that a more recent U.S. Supreme Court decision had held a federal law violated the First Amendment by creating a civil damage claim against a journalist who disclosed the contents of an intercepted cell telephone call that had been delivered to him by a third party and that contained evidence that a public official had committed a serious crime. *See Bartnicki v. Vopper*, 532 US 514 (2001). *Bartnicki* and an even more recent decision recognizing First Amendment protection for the gathering of information, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011), implied that even if this Court's ruling in *Shevin* on the facial constitutionality of chapter 934 were correct, it would not be constitutional to apply chapter 934 and similar state laws to prohibit interception of communications in circumstances such as those here.

That proved to be the case when the constitutionality of Illinois' all-party consent statute, Ill. Comp. Stat. Ann. ch. 720 §§ 5/14-2, 5/14-3, was challenged as

applied to citizens recording without consent of police officers in public places.[11] The Seventh Circuit held the Illinois law "restricts an expressive medium used for the preservation and dissemination of information and ideas," that on the facts of the case, the law "does not serve the important governmental interest of protecting conversational privacy," and "applying the statute in the circumstances alleged here is likely unconstitutional." *Id.* at *21. On remand, the district court held that law was unconstitutional as applied.

The Illinois law, like the Florida law, first had been enacted to allow interception of an oral communication by any party to the communication. *Id.* at *2. Illinois, following Florida's lead, amended its law to require all parties to consent. *Id.* The Illinois Supreme Court negated the amendment in *People v. Herrington*, 645 N.E.2d 957, 958 (Ill. 1994), holding "there can be no expectation of privacy by the declarant where the individual recording the conversation is a party to that conversation." But the Illinois legislature then amended the law further to require all parties to consent to the recording "regardless of whether one or more parties intended their communication to be of a private nature under circumstances justifying that expectation." Ill. Pub. Act 88-677 (1994) (codified at

[11] *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir.) (preliminarily enjoining Illinois statute), *cert. denied*, 133 S. Ct. 651 (2012), *on remand*, No. 10 C 5235, 2012 WL 6680341 (N.D. Ill. Dec. 18, 2012) (holding Illinois statute unconstitutional as applied).

720 Ill. Comp. Stat. 5/14-1(d)). The Seventh Circuit held "The expansive reach of this statute is hard to reconcile with basic speech and press freedoms." *Alvarez*, 2012 WL 1592618 at *9 (emphasis in original). *Id.* The Court explained:

> The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary to the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected, as the State's Attorney insists.

Id. at *10. In a detailed analysis of First Amendment precedents, the Seventh Circuit held that while protecting conversational privacy is an important government interest, this interest would not be served by prohibiting interception of communications, such as those at issue in the case. *Id.* at *19. The court wrote that its decision would not call into question most other states' laws because "the Illinois statute is a national outlier" which contained no exception for the recording of communications when the parties to the communication could not have a reasonable expectation of privacy. *Id.* at 21.

Florida's chapter 934 would be precisely the same type of national outlier if it were interpreted to prohibit recording and disclosure of the communications at issue in this case and it would be unconstitutional as applied. This conclusion is not inconsistent with *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723 (Fla. 1977), because this Court was not attempting there to adjudicate the

constitutionality of any specific applications of the statute.[12] The plaintiffs in that case, two news organizations, filed a declaratory judgment action shortly after the 1974 amendment made chapter 934 an all-party consent statute. Plaintiff Sunbeam alleged "the amendment impaired its news gathering dissemination activities and constituted a prior restraint in violation of the First Amendment" and that privacy interests protected by the statute were subordinate to their First Amendment rights. *Id.* at 725. At trial, the plaintiffs offered testimony displaying generally the value of concealed recordings, but they did not contend that they had engaged in violations of the statute or ask the Court to pass upon any specific application of the statute. *Id.* The trial court declared the statute unconstitutional in all of its applications and the plaintiffs appealed. This Court reversed, but did not address whether the statute would be constitutional in *every* application.

CONCLUSION

The Court should adopt the approach of the *Brugmann* dissenters and affirm the conviction of the defendant because the trial court did not abuse its discretion in finding chapter 934 did not require suppression of the recording at issue.

[12] The result sought here also would not contravene *State v. Walls*, 356 So. 2d 294, 296 (Fla. 1978), or *State v. Tsavaris*, 394 So. 2d 418 (Fla. 1981). Neither case addressed the requirement that there be a reasonable expectation of privacy in an oral communication for it to be protected, *Inciarrano*, 472 So. at 1274-76), nor whether chapter 934 would violate state and federal free speech guaranties by prohibiting recording of oral communications when no such expectation exists.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this amicus brief has been furnished on December 9, 2013, through the Florida Courts eFiling electronic service to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2)

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