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IN THE SUPREME COURT OF FLORIDA

RICHARD R. McDADE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.
_____/

Case No. SC13-1248

L.T. Nos. 2D11-5955
11-CF-16331

On Appeal from the Second District Court of Appeal

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PREFACE

The Petitioner, Richard R. McDade, is the Appellant in the Second District Court of Appeal and the Defendant in the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida. The Petitioner will be referred to as the Petitioner or the Defendant; the Respondent will be referred to as the State of Florida or the State. The following symbols will be used:

(R.____) - Record on Appeal

(T.____) - Trial Transcript (in three volumes).

JURISDICTION

This Court has jurisdiction over this direct appeal pursuant to Article V, § 3(b)(4), Florida Constitution, Fla. R. App. P. 9.030(a)(2)(A)(v), and the order of this Court entered 10 September 2013 in this case.

STATEMENT OF THE CASE AND FACTS

This case arose when the Defendant was accused of repeatedly molesting his step-daughter one "B.S."[1], whose date of birth was 12 December 1994 (hereinafter the "Complaining Witness"). The Complaining Witness was sixteen

[1] The Complaining Witness is identified by name in the record on appeal and in the trial transcript. R.033; T.207, lines 14-15, et al. Nevertheless the Complaining Witness is identified only by her initials in this brief. See Art. I, § 24(a), Fla. Const. and § 119.071(2)(h) Fla. Stat. (2010).

years old at the time of the accusation. R.004-05. The Defendant was charged by Information with a variety of offenses including: (1) sexual battery on a child of less than 12 years (by penile penetration),[2] a capital felony pursuant to § 794.011(2) Florida Statutes (2004)[3], (2) solicitation of sexual activity with a child,[4] a third degree felony pursuant to § 794.011(8)(a) Florida Statutes (2004),[5] and (3) sexual activity with a child,[6] a first degree felony pursuant to § 794.011(8)(b) Florida Statutes (2006). R.006-07. On the day of trial, by amended information, the State Attorney added three additional counts, (4) lewd or lascivious molestation,[7] a life felony pursuant to § 800.04(5)(b) Florida Statutes (2004), (5) sexual battery on a child of less than 12 years (by digital penetration),[8] a capital felony pursuant to § 794.011(2) Florida Statutes (2004), and (6) sexual

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[2] Alleged to have occurred between 14 February 2005 and 11 December 2006.

[3] The substance of § 794.011 Florida Statutes was unchanged between 2004 and 2011.

[4] Alleged to have occurred between 14 February 2005 and 06 May 2011.

[5] The State orally amended the initials of the alleged victim in count two to "B.S." T.038, lines 6-12.

[6] Alleged to have occurred between 12 December 2006 and 01 May 2011.

[7] Alleged to have occurred between 14 February 2005 and 14 February 2006.

[8] Alleged to have occurred between 14 February 2005 and 11 December 2006.

activity with a child (by digital penetration),[9] a first degree felony pursuant to § 794.011(8)(b) Florida Statutes (2006). R.101-02.

At trial the State called the Complaining Witness' boyfriend, Joseph Taher, to testify. T.322 et seq. Taher (hereinafter "the Boyfriend") was a sixteen year old high school student. T.322, lines 10-13. He knew the Complaining Witness from school. T.322, lines 19-20. He had been the Complaining Witness' boyfriend for about a year. T.323, lines 6-13.

In response to a question from the prosecutor, the Boyfriend testified that the Complaining Witness had told him that the Defendant, who was the Complaining Witness' step-father, had been having sex with her. T.324, lines 16-20. Counsel for the Defendant immediately objected as to hearsay. T.324, lines 21-22. After some discussion the trial court overruled the objection. T.329, lines 4-5.

The Boyfriend then testified that he suggested to the Complaining Witness that she record a conversation with the Defendant. T.329, line 23 - T.330, line 7. The Boyfriend then testified that he had procured a recording device and gave it to the Complaining Witness. T.330, lines 8-11. He testified that the Complaining Witness used the recording device to record conversations with the Defendant.

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[9] Alleged to have occurred between 12 December 2006 and 01 May 2011.

T.330, line 24 - T.331, line 1. The Boyfriend copied the recordings to his computer, and took them to the school resource officer. T.330, line 24 - T. 332, line 22. The school resource officer listened to the recordings, and called a sheriff's deputy who took another copy. T.332, line 25 - T.334, line 11.

The Complaining Witness made the recordings of her conversations with the Defendant in an effort to obtain incriminating statements from the Defendant. R.004-05, R.035-47; T.260, line 21 - T.261, line 18. Nothing was presented to the trial court to show that the Complaining Witness had any authority of any nature to intercept oral communications pursuant to § 934.03(2)(c) or § 934.07 Florida Statutes (2010). Nothing was presented to the trial court to show that the Complaining Witness or anyone else had any authority of any nature to disclose the contents of such communications pursuant to § 934.08 Florida Statutes (2010).

Prior to the trial of this case, the Defendant, through counsel, moved to suppress the contents of any such recordings pursuant to the Fourth Amendment to the United States Constitution and § 934.06 Florida Statutes (2010). R.017-19. He later amended the same motion. R.023-26. That motion was denied by the trial court. R.027.

The prosecutor mentioned the recordings in her opening statement. T.207, lines 10-13. The recordings were played in the presence of the jury during the State's case in chief. T.270, line 16 - T.291, line 7. Transcripts of the recordings

were provided to the jury when the recording was played. T.267, line 15 - T.270, line 15. The recordings were played again in the presence of the jury during the State's rebuttal. T.508, line 5 - T.528, line 23. One Leandro Navarro, who was an employee of the State Attorney, testified over objection to his opinion that the recording "was never modified". T.506, line 12 - T.507, line 14. The prosecutor addressed the recordings repeatedly and at length in her closing argument. T.533, lines 21-22; T.539, lines 5-8; T.545, line 2 - T.546, line 4; T.547, lines 14-17; T.563, line 9; T.567, lines 16-23; T.568, line 6 - T.573, line 16; T.573, line 24 - T.574, line 4.

The trial jury found the Defendant guilty of all charged offenses except the lewd or lascivious molestation in count four. R.125-127. The Defendant was adjudicated guilty and sentenced to incarceration for life on the capital felonies, incarceration for five years on the third degree felony, and incarceration for fifteen years on the first degree felonies, all sentences to run concurrently. R.160-72. A final judgment for all outstanding monetary obligations in the amount of $4,773.50 was entered. R.175. A timely notice of appeal to the Second District Court of Appeal was filed. R.177-78.

The Second District Court of Appeal issued its opinion on 07 June 2013 in McDade v. State, 114 So. 3d 465 (Fla. 2d DCA 2013). Therein a two judge

majority of the district court panel (Khouzam, J., joined by Alternbernd, J.) held that the

> boyfriend's testimony about the victim's statements was not hearsay because it was not offered to prove that [the Defendant actually raped the victim. [Citation omitted.] Instead, the statements at issue here were offered to explain why the victim's boyfriend gave her his MP3 player to record her conversations with [the Defendant]. The statements were relevant to rebut the defense theory that the victim and her boyfriend fabricated the abuse allegations so that they could spend more time together.

114 So. 3d at 469.

The district court also held that the recordings were admissible in evidence, citing this Court's opinion in State v. Inciarrano, 473 So. 2d 1272 (Fla. 1985):

> this case involves recordings made by a victim of the very criminal acts by which she was victimized. The minor victim recorded [the Defendant] soliciting her for sexual acts, as he had done for years. And though the conversation took place in [the Defendant]'s home, it was also the victim's home. Considering these circumstances and consistent with the analysis and holding in Inciarrano, we conclude that any expectation of privacy [the Defendant] may have had is not one which society is prepared to accept as reasonable. Indeed, society has a special interest in protecting children from sexual abuse, and exceptional treatment of sex crimes in other areas of the law reflects these societal values.

114 So. 3d at 470.

> This case involves the rape of a child in her own home by her own stepparent. It is precisely because the rape of

> a child is such a heinous crime which is so often difficult to detect that society has a special interest in guarding children from it and exceptions in the law exist to further this goal. Considering these values and the already existing legal exceptions that reflect them, we conclude 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.

114 So. 3d at 471. Therefore the district court affirmed the conviction. Id.

Judge Altenbernd concurred. He concluded that in Inciarrano this Court "relied on the 'objective' test within the definition of 'oral communication' [in § 934.02(2) Florida Statutes] to provide a societal-approval test that allows for case-by-case outcomes when statutory suppression of evidence seems unnecessary", then questioned "whether the societal-approval test is an erroneous importation of the Fourth Amendment into this statute." 114 So. 3d at 473. He then suggested that "by shifting the analysis of this statute from the strong language in section 934.03(1) to the definition of 'oral communication' in section 934.02(2), the decision in Inciarrano weakened the legislative policy protecting privacy." 114 So. 3d at 473. Therefore Judge Alernbernd opined: "By relying on section 934.02(2) instead of section 934.03, the holding in Inciarrano flips the burden of proof and persuasion from the party seeking an exception to the statute to the party seeking the protection of the statute." 114 So. 3d at 473.

Judge Altenbernd appears to have concluded that this Court's opinion in Inciarrano does not require enforcement of the original strong language of the statute, i.e. the prohibition in § 934.03(1), but instead takes "an 'all the circumstances' approach that permits some use of seemingly private recordings is a decision that must be made in the context of the modern digital world." 114 So. 3d at 474-75.

Concurring in part and dissenting in part, Judge Villanti agreed that "the trial court did not abuse its discretion by admitting the victim's boyfriend's statements." 114 So. 3d at 475. However he dissented "from the portion of the majority's opinion that could be interpreted as creating an exception to section 934.06 for victims of child sexual abuse." 114 So. 3d at 475. Judge Villanti reasoned that where a stature is free from ambiguity, a court should follow the plain meaning of the statute. Id. He opined:

> the majority's decision has declared that, despite the statute's plain language, the legislature did not intend for audiotaped evidence gathered by a victim of child sexual abuse without the alleged abuser's consent to be excluded even though the exclusion of such evidence is mandated by a duly enacted statute. While I would like the law to be so, I do not believe that it is so.

114 So. 3d at 475.

Judge Villanti reasoned that § 934.06 specifically prohibits courts from receiving in evidence any part of an intercepted communication or any evidence

derived therefrom if the disclosure of the information would violate the provisions of chapter 934. Section 934.03 prohibits interception of oral communications and lists certain exceptions. "Notably, however, the interceptor's status as a victim of child sexual abuse is not included in that list. Thus, the plain language of sections 934.03 and 934.06 prohibits the admission of the recordings at issue in this case." 114 So. 3d at 475. Therefore Judge Villanti "would reverse [the Defendant]'s conviction and remand for a new trial without the admission of the audiotaped evidence. 114 So. 3d at 477.

The district court certified the following question of great public importance to this Court:

> 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)?

114 So. 3d at 471. The instant petition follows.

SUMMARY OF ARGUMENT

Admission to evidence of the recordings made by the Complaining Witness was error. The Complaining Witness made recordings of her conversations with the Defendant without his knowledge or consent. The Complaining Witness had no authority to do so. Section 934.03 Florida Statutes (2010) explicitly prohibits

recording such oral communications and disclosing the content of recordings of such oral communications. The same statute makes it a felony to do so. Section 934.06 Florida Statutes (2010) explicitly requires that "no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court...." No exception in Chapter 934 has application to the facts in this case. Therefore the trial court erred by allowing tht testimony and the certified question should be answered in the negative.

The trial court also erred by allowing a State's witness, Joseph Taher, the Complaining Witness' boyfriend, to repeat, over objection, out-of-court statements made by the Complaining Witness. That testimony was inadmissible hearsay and was not within any exception to the hearsay rule. The statements which were repeated by the boyfriend were not admissible as prior consistent statements to rebut a defense theory of recent fabrication. To be admissible as a prior consistent statement, the statement must have been made prior to the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify. These statements were made after such facts (the Complaining Witness' relationship with the boyfriend) came about.

ARGUMENT

I. Admission to Evidence of Illegally Recorded Conversations

THE RECORDING MADE BY THE COMPLAINING WITNESS IN THIS CASE FALLS WITHIN THE PROSCRIPTION OF CHAPTER 934, FLORIDA STATUTES (2010). (RESTATED)

THE TRIAL COURT ERRED BY DENYING THE DEFENDANT'S MOTION TO SUPPRESS RECORDINGS MADE BY THE COMPLAINING WITNESS.

Standard of Review

In reviewing a trial court's ruling on a motion to suppress evidence, this Court requires that an appellate court conduct a two-step analysis to determine (1) whether competent, substantial evidence supports the trial court's findings of historical fact; and (2) whether the trial court reached the correct legal conclusion. See Thomas v. State, 894 So. 2d 126, 136 (Fla. 2004), cert. denied, 544 U.S. 1003 (2005), citing Connor v. State, 803 So. 2d 598, 608 (Fla. 2001). In the instant case the issue is purely a question of law because the facts were undisputed.

The facts surrounding the questions presented to this Court in this case are undisputed. Therefore the questions presented are pure questions of statutory law. In this analysis, legislative intent is the polestar by which the Court is guided. "To discern legislative intent, a court must look first and foremost at the actual

language used in the statute." Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008). Therefore review by this Court is de novo. See Kephart v. Hadi, 932 So. 2d 1086, 1089 (Fla. 2006), certiorari denied, Toward v. Florida, 549 U.S. 1216 (2007).

Surreptitious Recording of Conversations

Prior to the arrest of the Defendant in this case, the Complaining Witness surreptitiously recorded two conversations between herself and the Defendant. The same were published to the jury twice during the trial. T.270, line 16 - T.291, line 7; T.508, line 5 - T.528, line 23. When the recordings were first published to the jury the State also provided the jurors with copies of a transcript of the conversations which had been prepared by the Sheriff of Lee County "to use as a demonstrative aid." R.033-047; T.268, lines 11-12.

Prior to the trial of this case the Defendant, through counsel, addressed that evidence in a "Motion to Suppress on Fourth Amendment and Other Grounds", and later amended the same motion. R.017-19; R.023-26. Therein the Defendant argued that the Complaining Witness had recorded oral communications with the Defendant at the home of the Defendant without the consent of all parties to the communications. Those recordings were obtained illegally and in violation of Chapter 934, Florida Statutes. R.019; R.025. The Defendant's motion to suppress the recordings was denied by the trial court prior to trial. R.027.

Through counsel the Defendant renewed his objection prior to introduction of that evidence at trial. T.266, line 25 - T.267, line 1. The trial court overruled the objection. T.267, lines 2-3.

At trial the Complaining Witness testified that the recordings had been made on two separate days in May, presumably of 2011. T.262, lines 17-23; T.263, line 4; T.263, lines 11-14. She testified that she made the recordings in the Defendant's bedroom at the Defendant's residence. T.263, lines 11-14; T.264, lines 13-20.

The Defendant's comments to his step-daughter in the course of the recorded conversations were very prejudicial to the Defendant, and could have been taken as admissions of guilt. At the very beginning of the first challenged recording was the following exchange:

> Complaining Witness: Like seriously, man, like, when – when is this going to stop?
>
> Defendant: I don't know, [B.S.]. I don't even want to do it....

T.270, lines 22-25; T.508, lines 10-13. A bit later was the following exchange:

> Complaining Witness: Seriously, man, you need – man, how many times do I have to tell you, man?
>
> Defendant: I know, and I don't want to upset you. I – I don't know what to do.

> Complaining Witness: Do you know – do you know what you're doing to me?
>
> Defendant: I don't know what to do, [B.S.]; that's all I –
>
> Complaining Witness: Yeah, you – you do it and you expect me to forget about it? I can't even forget about it.
>
> Defendant: Well, you need to try.
>
> Complaining Witness: I need try to forget about it?
>
> Defendant: Yeah; that's all I can say. Just you, know, you just come do it for five minutes and do what you gotta do and –
>
> Complaining Witness: How –
>
> Defendant: – just – and –
>
> Complaining Witness: Whatever, dude.
>
> Defendant: – and forget it happened.
>
> Complaining Witness: How am I going to forget it happened?
>
> Defendant: I know, but you need to try.

T.272, lines 4-24; T.509, line 17 - T.510, line 12.

Although neither speaker unambiguously or explicitly mentioned any sexual activity, a juror could certainly infer or presume sexual activity to be the referent for "this", "it", and "what you're doing to me". That is especially true in the instant case because the Complaining Witness had testified about sexual acts

involving the Defendant a few minutes earlier. T.226, line 7 - T.237, line 8; T.239, line 8 - T.241, line 11; T.243, line 22 - T.249, line 18; T.251, lines 3-12.

The recordings were obtained in violation of the plain language of § 934.03 Florida Statutes (2010)[10]. The same provides:

> (1) Except as otherwise specifically provided in this chapter, any person who:
>
> (a) Intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, oral, or electronic communication;
>
> ....
>
> (c) Intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) Intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection....
>
> shall be punished as provided in subsection (4).
>
> ....

[10] No relevant change to the provisions of § 934.03 Florida Statutes occurred between 2004 and 2011.

> (4)(a) Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree....

Definitions of certain relevant terms used in § 934.03 are provided in § 934.02[11]:

> (2) ***"Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation*** and does not mean any public oral communication uttered at a public meeting or any electronic communication. [Emphasis added.]
>
> (3) ***"Intercept" means the aural or other acquisition of the contents of any*** wire, electronic, or ***oral communication through the use of any electronic, mechanical, or other device***. [Emphasis added.]
>
> ....
>
> (5) ***"Person" means*** any employee or agent of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, and ***any individual***, partnership, association, joint stock company, trust, or corporation. [Emphasis added.]
>
> ....
>
> (7) ***"Contents," when used with respect to any*** wire, ***oral***, or electronic ***communication, includes any***

[11] No substantive change to the provisions of § 934.02 Florida Statutes occurred between 2004 and 2011.

> ***information concerning the substance, purport, or meaning of that communication***. [Emphasis added.]

By enacting § 934.03 Florida Statutes, the Legislature has made both interception of an oral communication and intentional disclosure to any other person of the contents of any oral communication a felony. § 934.03(4)(a) Fla. Stat. (2010). Certain exceptions in the statute have no application to the instant case.

The legislature employed clear language to require suppression of evidence obtained in violation of the provisions of Chapter 934:

> ***In order to protect effectively the privacy of*** wire and ***oral communications***, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, ***it is necessary for the Legislature*** to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and ***to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts*** and administrative proceedings.

§ 934.01(2) Fla. Stat. (2010)[12] (emphasis added). The Legislature emphatically prohibited use of improperly intercepted oral communications as evidence:

> ***Whenever any*** wire or ***oral communication has been intercepted, no part of the contents of such***

[12] No change to the provisions of § 934.01 Florida Statutes was made between 2004 and 2011.

> ***communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court***, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, ***if the disclosure of that information would be in violation of this chapter***.

§ 934.06 Fla. Stat. (2010)[13] (emphasis added).

This Court has properly followed the same rule. In State v. Smith, 641 So. 2d 849, 851 (Fla. 1994), this Court analyzed the application of the Florida Security of Communications Act, Chapter 934, Florida Statutes, in the light of the Fourth Amendment: "The Fourth Amendment right to privacy is measured by a two-part test: 1) the person must have a subjective expectation of privacy; and 2) that expectation must be one that society recognizes as reasonable." In support this Court cited Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). In Smith, this Court applied the reasonableness standard incorporated in the Fourth Amendment to expectations of privacy in oral communications defined in § 934.02(2):

> In order to fall within the ambit of chapter 934, an oral communication must be "uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral

[13] No change to the provisions of § 934.06 Florida Statutes was made between 2004 and 2011.

> communication uttered at a public meeting or any electronic communication."

Smith at 852, quoting § 934.02(2).

The provisions of the Fourth Amendment apply only to state agents, and not to persons who are not state agents and are not acting on behalf of state agents. See Welsh v. Wisconsin, 466 U.S. 740, 748 (1984); see also United States v. Heard, 367 F.3d 1275, 1278 (11th Cir. 2004), cert. denied, 543 U.S. 913 (2004), citing United States v. Dunn, 345 F.3d 1285, 1288 (11th Cir. 2003), cert. denied, 542 U.S. 906 (2004). Nevertheless, in State v. Inciarrano, 473 So. 2d 1272, this Court applied the Fourth Amendment standard to non-state agents for the purpose of determining whether oral communications as defined in § 934.02(2) are admissible in evidence. This Court held that from the statutory language

> it is clear that the legislature did not intend that every oral communication be free from interception without the prior consent of all the parties to the communication.
>
> ....
>
> This expectation of privacy does not contemplate merely a subjective expectation on the part of the person making the uttered oral communication but rather contemplates a reasonable expectation of privacy. A reasonable expectation of privacy under a given set of circumstances depends upon one's actual subjective expectation of privacy *as well as whether society is prepared to recognize* this expectation as reasonable.

Inciarrano at 1275 (emphasis as in original).

Thus this Court requires analysis of two elements in the instant case: (1) whether the Defendant's expectation of privacy in his conversation with his stepdaughter was reasonable, and (2) whether society is prepared to recognize this expectation as reasonable. Both are true, therefore exclusion of the recorded conversations is required.

Unlike the conversation in Smith, the challenged conversations in the instant case were recorded without the Defendant's knowledge or permission in the Defendant's own bedroom in the Defendant's residence. T.263, lines 11-14. In United States v. Karo, 468 U.S. 705, 714-15 (1984), the United States Supreme Court has held the expectation of privacy in one's own residence to be "obvious":

> At the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable. Our cases have not deviated from this basic Fourth Amendment principle. Searches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances. Welsh v. Wisconsin, 466 U.S. 740, 748-749... (1984); Steagald v. United States, 451 U.S. 204, 211-212... (1981); Payton v. New York, 445 U.S. 573, 586... (1980).

Applying the rule in Karo to § 934.02(2) and to the facts in the instant case, the conversations recorded in the instant case were under circumstances justifying a reasonable expectation of privacy.

In Katz v. United States, the Court considered privacy in recorded conversations. Katz was a bookie; he had been convicted of transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute. 389 U.S. at 348. To do so he used a public telephone. Katz' conversations were recorded by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he placed his calls. Id. The Court considered whether the government agents who had attached an electronic listening and recording device to the outside of the public telephone booth did so in violation of the right to privacy of the user of the telephone booth. Id. at 348-49.

The Katz Court held that the FBI agents violated Katz' right to privacy when they recorded his telephone conversations without a warrant. Id. at 359. The Court reasoned that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. at 351.

Of course in the instant case the Complaining Witness was not subject to the requirement of a warrant because she was not a government agent or working on behalf of a government agent. However this Court has applied the Katz standard

to the language in § 934.02(2) which provides that "to fall within the ambit of chapter 934, an oral communication must be 'uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation'". Smith at 852, quoting § 934.02(2).

The challenged conversations in the instant case were recorded in the Defendant's bedroom in the Defendant's residence. T.263, lines 11-14; T.264, lines 13-20. It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. See, e.g., Payton v. New York, 445 U.S. 573, 586 (1980), and cases cited therein at 586 n.25 . Without doubt a person has an actual expectation of privacy in his own residence and that expectation is one that our society recognizes as reasonable. See, e.g., Minnesota v. Carter, 525 U.S. 83, 109 (1998).

Therefore, applying the rule in Katz to the facts in the instant case, the challenged conversations were within the constitutional protection of the Fourth Amendment because they were conversations the Defendant sought "to preserve as private, even in an area accessible to the public." Katz at 511. Of course the challenged conversations in the instant case were not in an area accessible to the public.

Reasonable Expectation of Privacy

In the instant case the district court concluded "that any expectation of privacy [the Defendant] may have had is not one which society is prepared to accept as reasonable." 114 So. 3d at 470. The court reasoned:

> This case involves the rape of a child in her own home by her own stepparent. It is precisely because the rape of a child is such a heinous crime which is so often difficult to detect that society has a special interest in guarding children from it and exceptions in the law exist to further this goal. Considering these values and the already existing legal exceptions that reflect them, we conclude 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.

114 So. 3d at 471. In a footnote the Court explained further:

> We note that in reaching this conclusion, we have considered State v. Walls, 356 So.2d 294, 296 (Fla.1978), in which the Florida Supreme Court held that an extortion threat delivered personally to the victim in the victim's home was an "oral communication" within chapter 934. Though Walls dealt with a recording of a criminal act made by a victim in his home, its holding does not control here because it does not implicate society's special interest in protecting children from sex abuse. Moreover, the reasoning in Walls has been called into doubt. See Inciarrano, 473 So.2d at 1275 (distinguishing Walls because it did not address the requirement that any expectation of privacy in a communication must be reasonable for chapter 934 to apply); Jatar v. Lamaletto, 758 So.2d 1167, 1169 (Fla. 3d DCA 2000) (questioning the continued validity of Walls in light of Inciarrano and holding that Jatar's extortion

> threat was not a protected "oral communication" under chapter 934 because his expectation of privacy was not justified).

114 So. 3d at 471, n.25.

The opinion of the district court that "any expectation of privacy [the Defendant] may have had is not one which society is prepared to accept as reasonable" is error for several reasons. First, the district court held that suppression of the challenged recordings would be "an absurd result – a result we cannot fathom was intended by the legislature." 114 So. 3d at 470.

In Chapter 934 the Legislature enacted certain exceptions to the statute requiring exclusions of improperly obtained oral communications. See § 943.03(2) and (3); § 943.08. "[W]hen a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded." Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla. 1997), citing Industrial Fire & Casualty Insurance Co. v. Kwechin, 447 So. 2d 1337, 1339 (Fla. 1983). In Chapter 934 the Legislature did not create any exception for "rape of a child", for any other "heinous crime", or for any specific criminal offense. The Legislature did provide an exception for "a person acting under the direction of an investigative or law enforcement officer to intercept a wire, oral, or electronic communication when such person is a party to the communication...."

§ 934.03(2)(c). However no evidence of action "under the direction of an investigative or law enforcement officer" was presented in the instant case.

Where the legislature could have chosen to write a statute a different way, but did not do so, courts cannot disregard language the legislature chose to use. Courts may not add additional terms. When interpreting a statute, "courts must look first to the plain language of the statute." Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000), citing State v. Iacovone, 660 So. 2d 1371 (Fla. 1995); see also Miele v. Prudential-Bache Securities, 656 So. 2d 470, 471 (Fla. 1995); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

Section 934.01 explains the purpose of Chapter 934 and the manner in which the statute should be interpreted to effectuate that purpose. The stated purpose and statutory construction directive are clear:

> In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the Legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings.

§ 934.01(2) Fla. Stat. (2010)[14].

[14] The statute is unchanged from its enactment in 1969.

Legislation by the District Court

The Legislature expressly allowed certain exceptions "under which the interception of wire and oral communications may be authorized". § 934.01(2); see also § 943.03(2). However the Legislature chose not to create any exception for "rape of a child", for any other "heinous crime", or for any specific criminal offense. The "courts of this state are 'without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.'" Holly v. Auld, 450 So. 2d at 219, quoting American Bankers Life Assurance Company of Florida v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968).

Because the plain language of the statute at issue here is clear and unambiguous

> ***this Court must give the "statutory language its plain and ordinary meaning***," Seagrave v. State, 802 So.2d 281, 286 (Fla.2001), and is not "***at liberty to add words ... that were not placed there by the Legislature***." Hayes v. State, 750 So.2d 1, 4 (Fla.1999). Further, "statutes which afford the government the right to appeal in criminal cases should be construed narrowly." State v. Jones, 488 So.2d 527, 528 (Fla.1986).

Exposito v. State, 891 So. 2d 525, 528 (Fla. 2004)(emphasis added); see also Borden v. East-European Insurance Co., 921 So. 2d 587, 595 (Fla. 2006), and

cases cited therein; Velez v. Miami-Dade County Police Department, 934 So. 2d 1162, 1164-65 (Fla. 2006).

The Second District Court stated in the opinion below:

> we have considered State v. Walls, 356 So.2d 294, 296 (Fla.1978), in which the Florida Supreme Court held that an extortion threat delivered personally to the victim in the victim's home was an "oral communication" within chapter 934. Though Walls dealt with a recording of a criminal act made by a victim in his home, ***its holding does not control here because it does not implicate society's special interest in protecting children from sex abuse***.

114 So. 3d at 471, n.25 (emphasis added). Thus the district court explicitly attempted to create an exception to Chapter 934 which the Legislature has not incorporated into the statute. In §§ 934.03 and 934.08[15], the Legislature clearly incorporate several exceptions to the rule in § 943.06. The Legislature could have included an exception for protecting children from sex abuse, but it did not.

In construing statutes, courts may not invoke a limitation or add words to the statute not placed there by the legislature. See, e.g., Chaffee v. Miami Transfer Co., Inc., 288 So. 2d 209, 215 (Fla. 1974); State ex rel. Lee v. Buchanan, 191 So. 2d 33, 36 (Fla. 1966). To do so would be to perform a lawmaking function in violation of the separation of powers clause of the Florida Constitution,

[15] No relevant change to the provisions of either statute occurred between 2004 and 2011.

Article II, § 3. State v. Barquet, 262 So. 2d 431, 434 (Fla. 1972); Keaton v. State, 371 So. 2d 86, 89 (Fla. 1971), see also cases cited therein. "If the legislature did not intend the results mandated by the statutes plain language, then the appropriate remedy is for [the legislature] to amend the statute", not the courts. Overstreet v. State, 629 So. 2d 125, 126 (Fla. 1993). This Court explained the principle of executing the intent of the legislators in elegant language: "we are to effectuate their purpose from the words employed in the document. We are not permitted to color it by the addition of words or the engrafting of our views as to how it should have been written." Ervin v. Collins, 85 So. 2d 852, 855 (Fla. 1972).

Therefore the district court was in error when it created a public policy exception to Chapter 934 for "rape of a child" and other "heinous crimes". The Legislature might create such exceptions. A court can not.

Legislative Rejection of District Court Analysis

In § 943.08(4) Florida Statutes (2010) the Legislature explicitly rejected the reasoning of the district court:

> No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character, provided that a communication otherwise lawfully intercepted pursuant to this chapter is not privileged when such communication is in furtherance of the commission of a crime.

Therein the legislature explained that ***only*** when a "communication [is] otherwise lawfully intercepted pursuant to this chapter" ***and*** it is "not privileged when such communication is in furtherance of the commission of a crime" does it lose its privileged character. In the instant case the district court correctly recognized that the challenged recordings were not "lawfully intercepted pursuant to" Chapter 934 as written by the legislature. To avoid "an absurd result" the district court added a public policy exception for "the rape of a child". 114 So. 3d at 471. That exception is clearly not within the language of the statute. Therefore, under § 943.08(4), the recordings do ***not*** lose their privileged character because they were ***not*** "lawfully intercepted ***pursuant to this chapter***".

Application of the Exclusionary Rule

In State v. Garcia, 547 So. 2d 628 (Fla. 1989), this Court held:

> ***The exclusionary rule... is statutorily mandated. Chapter 934, Florida Statutes, pertaining to security of communications, unequivocally expresses the Legislature's desire to suppress evidence obtained in violation of that chapter***:
>
> > Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court ... if the

> disclosure of that information would be in violation of this chapter.
>
> § 934.06, Fla.Stat. (1985).

547 So. 2d at 630 (emphasis added). Likewise, in Jenkins v. State, 978 So. 2d 116 (Fla. 2008), this Court agreed with the opinion of the Fourth District Court in Davis v. State, 529 So. 2d 732, 734-35 (Fla. 4th DCA 1988), approved, State v. Garcia, 547 So. 2d 628 (Fla. 1989). In Jenkins this Court agreed that because "the legislature had unequivocally announced its intention to suppress evidence obtained in violation of chapter 934, Florida Statutes (1985)" there was no "good faith exception" to that rule. 978 So. 2d at 129.

In Alderman v. United States, 394 U.S. 165, 180 (1969), the Court held that "conversations as well as property[16] are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home." See also Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978), citing Alderman. The violation of the right to privacy does not depend upon a property right in the invaded place but instead upon whether the person who claims the protection has a legitimate expectation of privacy in the invaded place. See Kyllo v. United States, 533 U.S. 27, 32, 44 (2001).

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[16] Rendered as "property" in the printed report of the case, 394 U.S. at 180, 89 S.Ct. at 970, but as "properly" in the electronic versions of the West reporter.

Sections 934.03 and 934.08 Florida Statutes provide that the contents of an oral communication or evidence derived therefrom can be lawfully disclosed only under certain specified circumstances. However none of the specified circumstances existed in the instant case. In addition, to be lawfully disclosed, the information must have been obtained by "means authorized by this chapter". § 934.08(1), (2), and (3). As explained supra, the content of the communications was not so obtained. In the instant case neither the Complaining Witness nor anyone else had authority to disclose the contents of such communications pursuant to § 934.08 Florida Statutes.

Therefore the trial court erred by not granting the motion to suppress the recordings. Likewise the district court erred by affirming the judgment of the trial court. The Complaining Witness intentionally intercepted oral communications and subsequently disclosed and used the contents of those communications. Section 934.06 Florida Statutes requires that "***no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court....***" (emphasis added). In addition § 943.03(4) provides that those acts, when done without statutory authority, were felonies.

Application of the Rule in State v. Inciarrano

In the trial court the State argued that the rule in State v. Inciarrano controls the instant case. T.030-31. The State made the same argument to the district court. Answer Brief at 16-19. When it affirmed the judgment of the trial court, the district court relied almost entirely on this Court's opinion in Inciarrano. The district court majority opinion did not address Katz v. United States; none of the opinions in the district court addressed State v. Smith or Jenkins v. State. Essentially the district court used this Court's opinion in Inciarrano to graft an additional provision into Chapter 934, Florida Statutes.

The relevant plain language of § 934.03 Florida Statutes (2010) provides:

> (1) ***Except as otherwise specifically provided in this chapter, any person who***:
>
> (a) ***Intentionally intercepts***, endeavors to intercept, or procures any other person to intercept or endeavor to intercept ***any*** wire, ***oral***, or electronic ***communication***; [emphasis added]
>
> ....
>
> (c) ***Intentionally discloses***, or endeavors to disclose, ***to any other person the contents of any*** wire, ***oral***, or electronic ***communication***, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; [emphasis added]
>
> (d) ***Intentionally uses***, or endeavors to use, ***the contents of any*** wire, ***oral***, or electronic ***communication***,

> knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection.... [emphasis added]
>
> shall be punished as provided in subsection (4).
>
> ....
>
> (4)(a) Except as provided in paragraph (b), whoever violates subsection (1) is guilty of a felony of the third degree....

Definitions of certain terms used in § 934.03 are provided in § 934.02:

> (2) ***"Oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation*** and does not mean any public oral communication uttered at a public meeting or any electronic communication. [Emphasis added.]
>
> (3) ***"Intercept" means the aural or other acquisition of the contents of any*** wire, electronic, or ***oral communication through the use of any electronic***, mechanical, or other ***device***. [Emphasis added.]
>
> ....
>
> (5) ***"Person" means*** any employee or agent of the State of Florida or political subdivision thereof, of the United States, or of any other state or political subdivision thereof, and ***any individual***, partnership, association, joint stock company, trust, or corporation. [Emphasis added.]
>
> ....

> (7) ***"Contents," when used with respect to any*** wire, ***oral***, or electronic ***communication, includes any information concerning the substance, purport, or meaning of that communication***. [Emphasis added.]

The Legislature employed clear language to require suppression of evidence obtained in violation of the provisions of Chapter 934:

> ***In order to protect effectively the privacy of*** wire and ***oral communications***, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, ***it is necessary for the Legislature*** to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and ***to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts*** and administrative proceedings.

§ 934.01(2) Fla. Stat. (2010) (emphasis added).

The Legislature emphatically prohibited use of improperly intercepted oral communications as evidence:

> ***Whenever any*** wire or ***oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court***, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, ***if the disclosure of that information would be in violation of this chapter***.

§ 934.06 Fla. Stat. (2010) (emphasis added).

As explained supra, it is the well established law of Florida that when the language of a statute conveys a meaning which is clear, the statute must be given its plain meaning.

> "As this Court has often repeated, '[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning ... the statute must be given its plain and obvious meaning.'" Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd., 894 So.2d 954, 960 (Fla.2005) (quoting A.R. Douglass, Inc. v. McRainey, 102 Fla. 1141, 137 So. 157, 159 (1931)). Further, we are "without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." McLaughlin v. State 721 So.2d 1170, 1172 (Fla.1998) (quoting Holly v. Auld, 450 So.2d 217, 219 (Fla.1984)).

Velez v. Miami-Dade County Police Department, 934 So. 2d at 1164-65. See also Greenfield v. Daniels, 51 So. 3d 421, 425 (Fla. 2010); Polakoff Bail Bonds v. Orange County, 634 So. 2d 1083, 1084 (Fla. 1994); Streeter v. Sullivan, 509 So. 2d 268, 271 (Fla. 1987).

Here, however, the district court grafted an entirely new element into Chapter 934. Citing Inciarrano, the district court held that the Defendant's expectation of privacy was not reasonable:

> any expectation of privacy McDade may have had is not one which society is prepared to accept as reasonable. Indeed, ***society has a special interest in protecting children from sexual abuse, and exceptional treatment***

> ***of sex crimes in other areas of the law reflects these societal values***.

114 So. 3d 470 (emphasis added). The district court reasoned:

> This case involves the rape of a child in her own home by her own stepparent. ***It is precisely because the rape of a child is such a heinous crime which is so often difficult to detect that society has a special interest in guarding children from it and exceptions in the law exist to further this goal.*** Considering these values and the already existing legal exceptions that reflect them, we conclude 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.

114 So. 3d 471.

The reasoning of the district court is flawed at least two ways. First the "rape of a child" was not an established fact when the testimony was admitted in the trial court. The Defendant had been accused of an offense similar to "the rape of a child", but at the time the evidence was admitted no court had determined whether or not such an act had ever occurred. No authority of law would allow a trial court to use mere accusation of a crime to bootstrap the challenged recordings into evidence. The district court approved the action of the trial court to admit the challenged recordings to evidence over objection. That was error because no authority of law would allow admission of evidence over objection simply and solely because the evidence might tend to prove a material fact at issue.

In addition, the plain language of the statute excludes from evidence "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation". § 934.02(2). Thus to admit the recording, the proponent of that evidence would be required to demonstrate, presumably from facts presented in evidence, that the recording was made under circumstances which would allow it to be admitted to evidence under the provisions of Chapter 934. As explained supra, the circumstances of the conversations which were recorded (private discussions between two family members in a bedroom in the family residence with no one else present) justified an expectation of privacy. See Katz v. United States, Payton v. New York, Minnesota v. Carter.

In essence, to admit the challenged recordings to evidence, the district court added a provision to Chapter 934 based on public policy. The district court first held that "society has a special interest in protecting children from sexual abuse, and exceptional treatment of sex crimes in other areas of the law reflects these societal values." 114 So. 3d 470. The Court then reasoned: "It is precisely because the rape of a child is such a heinous crime which is so often difficult to detect that society has a special interest in guarding children from it and exceptions in the law exist to further this goal." 114 So. 3d 471.

The district court justified its action by this Court's opinion in Inciarrano:

> As in Inciarrano, this case involves recordings made by a victim of the very criminal acts by which she was victimized. The minor victim recorded [the Defendant] soliciting her for sexual acts, as he had done for years. And though the conversation took place in [the Defendant]'s home, it was also the victim's home. Considering these circumstances and consistent with the analysis and holding in Inciarrano, we conclude that any expectation of privacy [the Defendant] may have had is not one which society is prepared to accept as reasonable.

114 So. 3d at 470. However the different facts make the holding in Inciarrano easily distinguishable from the instant case.

Inciarrano went to the office of the victim and murdered him. 473 So. 2d at 1274. The transaction was recorded on a tape found by the investigating officer in the victim's desk. Id. The recording included a conversation between the victim and Inciarrano regarding a business deal in which the victim no longer wanted a part, the sound of a gun being cocked, five shots being fired by Inciarrano, several groans by the victim, the gushing of blood, and the victim falling from his chair to the floor. Id. Inciarrano was indicted for the first-degree premeditated murder of the victim. He moved to suppress the tape of the conversation between himself and the victim on the basis that § 934.03 Florida Statutes (1981) proscribed the interception of these oral communications and § 934.06 requires that these proscribed interceptions be excluded from evidence at trial. Id.

This Court considered "whether the tape recording made by a victim of his own murder must be excluded from evidence pursuant to chapter 934." Id. at 1273. This Court held that the recording need not be excluded from evidence; "under the circumstances of this case the subject tape recording does not fall within the statutory proscription of chapter 934." Id.

In Inciarrano this Court reasoned that it is clear from the statutory language that "the legislature did not intend that every oral communication be free from interception without the prior consent of all the parties to the communication." Id. at 1275. To suppress the recording this Court adopted the reasoning of the Fourth District Court:

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

Inciarrano at 1276-75, quoting Inciarrano v. State, 447 So. 2d 386, 389 (Fla. 4th DCA 1984).

The facts in the instant case are easily distinguishable. Unlike Inciarrano the instant Defendant did not trespass on a victim's premises to do harm to a victim; the Complaining Witness came to him in his own bedroom. Unlike Inciarrano, the recording in the instant case was not made during the commission

of a crime on the business premises of another, a situation where the perpetrator could not claim a reasonable expectation of privacy. Unlike Inciarrano, the party who sought to suppress the recording was carrying on a conversation in his own home, and therefore had a reasonable and actual expectation of privacy both in that place and in the conversation itself. See Smith, Katz, Carter, Alderman, Rakas, Kyllo.

The district court made no effort to consider the different facts in Inciarrano. The district court saw no distinction between Incarriano, who went to the business premises of another to commit a crime, and the Defendant in the instant case, who was approached in the bedroom of his own home by a family member who recorded a conversation. When Inciarrano committed a murder on the business premises of another, whatever reasonable expectation of privacy he may have had when he entered ceased when he started shooting.[17] The Defendant in the instant

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[17] In Ray v. State, 522 So. 2d 963 (Fla. 3rd DCA), rev. den., 531 So. 2d 168 (Fla. 1988), the Third District Court held that a victim's consent to enter and remain in a premises would be deemed to have been withdrawn when a visitor begins to commit a crime in the presence of the owner. This Court reached the same conclusion in Robertson v. State, 699 So. 2d 1343, 1346-47 (Fla. 1997). However in Delgado v. State, 776 So. 2d 233, 239 (Fla. 2000), this Court rejected that construction of the statute because "a number of crimes that would normally not qualify as felonies would suddenly be elevated to burglary." This Court held that the change was necessary to "fulfill the purpose for which the crime of burglary was intended." Id. at 236. After Delgado was decided, the 2001 Florida Legislature amended the burglary statute. Ch. 2001-58, § 1, at 404, Laws of Fla. created § 810.015 Florida Statutes (2002), which legislatively abrogated Delgado and announced that the intent of the Legislature was to construe the statute in conformity with Ray, Robertson, et al. See generally State v. Ruiz, 863 So. 2d 1205, 1207 (Fla. 2003).

case never entered any premises of another at any relevant time; the Complaining Witness approached him in his own bedroom. Therefore, unlike Incarriano, the district court was not justified in concluding that "any expectation of privacy [the Defendant] may have had is not one which society is prepared to accept as reasonable." 114 So. 3d 470.

Therefore this Court should answer the certified question in the negative. The challenged recording did not fall within any of the exceptions in Chapter 934. Therefore admission of the recording to evidence was prohibited by § 934.06. The district court had no authority to create a new statutory exception.

II. Objection to Hearsay Testimony by State's Witness

THE TRIAL COURT ERRED BY ALLOWING A STATE'S WITNESS TO TESTIFY TO OUT-OF-COURT STATEMENTS MADE BY THE COMPLAINING WITNESS.

Once this Court has accepted jurisdiction over a cause of action in order to resolve a legal issue in conflict, this Court may, in its discretion, consider other issues properly raised and argued before this Court. See Price v. State, 995 So. 2d 401, 406 (Fla. 2008); Savoie v. State, 422 So. 2d 308, 301 (Fla. 1982). Therefore the Defendant asks this Court to consider whether certain testimony in the trial court repeating out of court statements was properly admitted to evidence.

The State called Joseph Taher as a witness. T.322 et sec. Taher (hereinafter "the Boyfriend") was a sixteen year old high school student. T.322, lines 10-13. He knew the Complaining Witness from school; he had been the Complaining Witness' boyfriend for about a year. T.322, line 7 - T.323, line 13.

In response to a question from the prosecutor, the Boyfriend testified that the Complaining Witness had told him that the Defendant, who was the Complaining Witness' step-father, had been having sex with her:

> Q [by Ass't. State Attorney Hutchison:] Okay. At some point did [B.S.]tell you that her step dad, Richard McDade, had been having sex with her?
>
> A [by Joseph Taher:] Yeah. She told me that she was being raped when she was younger. She said –
>
> MS. BOYSEN [Counsel for the Defendant]: Objection, Your Honor. It's calling for hearsay.

T.324, lines 16-22. After some discussion the trial court overruled the objection. T.329, lines 4-5. The inquiry of the Boyfriend by the State Attorney continued:

> Q Did there come a time after you met [B.S.] that she told you that her stepdad had been, as you put it, I guess raping her, but sexually abusing her?
>
> A Yes.
>
> Q Okay. How did you feel when she told you that?
>
> A Horrified.
>
> Q Did you tell her to do anything with that information?

A I told her the best thing to do is call the cops, but she would tell me that her mother would say, oh, I would go to Mexico if she were to do anything.

Q Did there come a point when you told her she should tape it on an MP3 player?

A Yes.

Q Why did you do that?

A Because if she was gonna – if she is gonna call the cops, I wanted the guy gone. The best way to do it is to get direct evidence from the person who basically is doing the crime.

Q Was that your idea or her idea?

A Mine.

T.329, line 9 - T.330, line 7.

The Boyfriend then testified that he had procured a recording device and gave it to the Complaining Witness. T.330, lines 8-11. He testified that the Complaining Witness used the recording device to record conversations with the Defendant. The Boyfriend copied the recordings to his computer, and took them to a school resource officer. T.330, line 24 - T. 332, line 22. The school resource officer listened to the recordings, and called a sheriff's deputy who was provided with another copy. T.332, line 25 - T.334, line 11.

In the discussion of the Defendant's objection, the prosecutor stated several times that the testimony was not offered for the truth of the matter asserted. T.324,

lines 23-24; T.325, lines 7-9, lines 17-18; T.326, lines 8-16. She suggested that it was "to set up the stage for his involvement." T.326, line 9. She also suggested that it was relevant to the witness' "[s]tate of mind." T.326, line 25.

The trial court opined that the statements were relevant, then inquired:

> THE COURT: It's dangerous because it's not real material. He's going to say – he already said she told him. Okay, you want to see it again? Okay. I can see some relevance, I guess, but I'm not sure where it is or that I can articulate it. You simply say it's offered for the truth of the matter and therefore it's hearsay?
>
> MS. BOYSEN: But he can also tell his involvement without saying what she said.
>
> THE COURT: Pardon?
>
> MS. BOYSEN: He can tell his side of the story without saying what she said.
>
> THE COURT: In other words, did you talk to her, after you talked to her did you suggest to her that she do this?
>
> MS. BOYSEN: Yes. Correct.

T.327, line 25 - T.328, line 16.

The prosecutor then argued that the hearsay was offered to rebut "that this is a fabricated story made up because these two met and couldn't see each other" and "to rebut the theory of the recent fabrication made by both of them together." T.328, lines 20-21; T.329, lines 1-3. Immediately thereafter the Court ruled "I'm skeptical. I'm going to overrule the objection." T.329, lines 4-5.

The district court affirmed the trial court, holding that the testimony was non-hearsay:

> The boyfriend's testimony about the victim's statements was not hearsay because it was not offered to prove that [the Defendant] actually raped the victim.... Instead, the statements at issue here were offered to explain why the victim's boyfriend gave her his MP3 player to record her conversations with [the Defendant]. The statements were relevant to rebut the defense theory that the victim and her boyfriend fabricated the abuse allegations so that they could spend more time together.

114 So. 3d at 469. That conclusion was error.

The Boyfriend's testimony recounting the Complaining Witness' statements about her sexual contact with the Defendant was clearly repetition of her out-of-court statements. Therefore, if the statements were offered to prove the truth of the matters asserted, they were hearsay. See § 90.801 Fla. Stat. (2004)[18].

The prosecutor's and the district court's protestations to the contrary, no proper non-hearsay use of the Boyfriend's repetition of the Complaining Witness' statements was suggested to the trial court. The Complaining Witness had testified about making the recordings and how she did it. No need existed to "set up the stage for [the Boyfriend's] involvement". T.326, line 9. The prosecutor also suggested that the testimony was relevant to the witness' "[s]tate of mind."

[18] No substantive change to the provisions of § 90.801 Florida Statutes occurred between 2004 and 2011.

T.326, line 25. Even if there were such need that could easily be done without repeating statements of others. A witness could properly state "I came to believe that there might be some improper contact between my friend and another, so I gave my friend a recording device...."

Rebuttal of Recent Fabrication

In the instant case the trial court admitted the Boyfriend's testimony about the out-of-court statements under the guise of a prior consistent statement "to rebut the theory of recent fabrication...." T.328, lines 17-25; T.329, lines 1-2. Although neither the prosecutor nor the court cited § 90.801(2)(b) Florida Statutes, only that statutory provision would allow admission of such hearsay.

The attempt "to rebut the theory of the recent fabrication" was not a reason to admit the Boyfriend's hearsay testimony. The facts in the instant case are very similar to the facts in Lazarowicz v. State, 561 So. 2d 392 (Fla. 3d DCA 1990), where the court addressed the sexual battery of a child. The defense in Lazarowicz, as here, was based in part on the claim that the victim had an improper motive for accusing the defendant. Id. at 393. The trial court "admitted hearsay testimony as to statements made by [the victim] prior to trial which were consistent with her in-court testimony but in fact were made after the existence of factors indicating the possibility of improper motive on her part...." Id.

On appellate review the district court held: "section 90.801(2)(b) permits the admission of only prior consistent statements made before the existence of the facts said to indicate an improper influence." Id. (Emphasis an in original.) The victim's "prior consistent statements admitted at the trial through other witnesses regarding the sexual battery do not come within the foregoing exception because all of her out-of-court statements occurred after [the victim]... had a motive for feasibly fabricating the charges. Accordingly, those statements were inadmissible under the statute." Id. at 394 (emphasis in original). See also Preston v. State, 470 So. 2d 836, 837 (Fla. 2d DCA 1985)(to be admissible, a prior consistent statement must have been made prior to the existence of a fact said to indicate bias, interest, corruption, or other motive to falsify); Peterson v. State, 874 So. 2d 14, 17 (Fla. 4th DCA 2004)(prior consistent statements made after the existence of motivation to fabricate testimony are not admissible because they are not being offered to rebut an allegation of recent fabrication); Columtino v. State, 620 So. 2d 244, 245 (Fla. 3d DCA 1993)(same).

The same is true in the instant case for the same reason. The statements by the Complaining Witness to the Boyfriend were made long after the beginning of that relationship. The Complaining Witness' mother disapproved of and had attempted to forbid her involvement with the Boyfriend. T.392, lines 2-4; T.394, lines 16-23. The trial testimony also demonstrates that the Complaining Witness'

step-father strongly disapproved of her involvement with the Boyfriend. T.427, line 24 - T.428, line 23.

That trial testimony demonstrates that both the Defendant and the Complaining Witness' mother believed that the Boyfriend was a bad influence on the Complaining Witness, and his involvement with her gave rise to bad behavior and bad motives. Nevertheless the Boyfriend was allowed, over objection, to repeat very prejudicial out-of-court statements by the Complaining Witness to him. T.329, line 9 - T.330, line 7. As in Lazarowicz at 393, in the instant case "the trial court erroneously admitted hearsay testimony as to statements made by [the Complaining Witness] prior to trial which were consistent with her in-court testimony but in fact were made after the existence of factors indicating the possibility of improper motive on her part...."

Improper Bolstering of Complaining Witness' Testimony

The facts in the present case also parallel the facts in Hitchcock v. State, 636 So. 2d 572, 574 (Fla. 4th DCA 1994). The Hitchcock court held: "The jury had to decide whether to believe the victim's testimony or that of his stepfather. No one else who testified at trial witnessed the alleged offense. There was no physical evidence supporting the victim's testimony, and no incriminating statements were made by Appellant. With this credibility determination at the

heart of the trial, the improper admission of statements bolstering the victim's testimony constituted prejudicial error necessitating reversal."

In the instant case the district court held that "this case rested on the relative credibility of the victim and [the Defendant]". 114 So. 3d at 468. Therefore the rule in Hitchcock has direct application to the instant case. The admission of the out of court statements of the Complaining Witness to the Boyfriend, and the Boyfriend's testimony about his reaction to the statements of the Complaining Witness (he was "horrified"), had the effect of bolstering the credibility of the Complaining Witness.

Provenance of the Recording Device

The district court affirmed admission of the Boyfriend's testimony as "not hearsay" because the testimony "was not offered to prove that [the Defendant] actually raped the victim". 114 So. 3d at 469. "Instead, the statements at issue here were offered to explain why the victim's boyfriend gave her his MP3 player to record her conversations with [the Defendant]." Id. The reason that the Boyfriend gave the Complaining Witness the recording device is completely irrelevant to the issues in this case.

It was uncontested that the Complaining Witness made certain recordings. She could, and did, testify that she used a recording device to do so. T.262,

lines 17-21. She identified the recordings, which were admitted to evidence (over the Defendant's objection). T.266, line 3 - T.267, line 5.

Where the Complaining Witness obtained the recording device did not tend to prove or disprove anything at issue in this case. The provenance of the recording device was not relevant to the predicate for admission of the recordings. Whether the Boyfriend gave the recording device, or why, had no bearing on proof or disproof of any element in this case.

Therefore the district court erred when it admitted the testimony containing repetition of the Complaining Witness' out of court statements to the Boyfriend. Admission of that testimony constituted prejudicial error necessitating reversal.

CONCLUSION

WHEREFORE, because unlawfully obtained recordings of his conversations were improperly admitted to evidence over the Defendant's objection, and because hearsay statements were improperly admitted over the Defendant's objection, the Defendant requests that the judgment and sentence of the trial court be reversed, and that the case be remanded for a new trial, or such other relief as may be reasonable, just, and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief on the Merits has been furnished to the Attorney General of Florida by email (to CrimAppTPA@myfloridalegal.com), and by U.S. mail, postage prepaid, at 3507 East Frontage Road, Suite 200, Tampa, Florida 33607, on this 7th day of October, 2013.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is printed in Times New Roman 14 point type.

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