

THE LATEST PRESS FREEDOM BATTLE IN FLORIDA

August 23, 2010 (Miami, FL) - Press freedom advocates worldwide are in an uproar over Italian Prime Minister Silvio Berlusconi's latest attempt to curb the journalist's ability to gather news by proposing an "all-party consent" clause to tape-recorded conversations. Yet, this same clause exists in 12 states in this country, including Florida, where it is a felony to tape record someone without their consent.

Under Federal law and the law of 38 states and the District of Columbia, the recording of a conversation is legal as long as at least one party to the conversation has consented to the recording. The rationale behind these statutes is that when one is speaking to another person, there is no reasonable expectation of privacy because either party to the conversation would be free to disclose the contents of the conversation.[1]

Florida originally had aligned itself with the majority of states. As first enacted in 1969, Florida Statute 934 (The Florida Security of Communications Act) stated: "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 consent to such interception."

The Florida legislature amended the law, however, on October 1, 1974, so that it would read to the contrary 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."

The precise reason for the change is unknown. "Some think it involved Senate President Dempsey Barron and a tape recording made of him by a *Miami Herald* reporter." [2] "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 farmer's market." [3] Many of such origin stories suggest that legislators sought the change in the law so that they could deny statements that they made to reporters who were tape recording them.

Whatever the origin, Florida Statute 934 has been problematic since this change and has severely restricted the journalist's ability to gather news in Florida. It has always been questionable whether the law serves a legitimate public purpose because it often serves only to protect the ability of one party to a conversation to lie about what was being said during that conversation.

Here is an example. Sean Casey, an employee at the Inter American Press Association (IAPA), based in Miami, was charged with DUI manslaughter. He hired prominent criminal defense attorney Milton Hirsch, who in turn hired Miami psychotherapist, Dr. Michael E. Rappaport, to assist in the case. Following his conviction, Casey alleged that both Hirsch and Rappaport unlawfully advised him to flee the country to avoid going to trial.[4] Casey claimed that conversations he had with Hirsch and Rappaport prior to his flight had been recorded without Hirsch and Rappaport's knowledge and consent. These recordings may reveal that Casey is telling the truth and that both Hirsch and Rappaport committed perjury under oath in open court when they denied the allegations.

The Florida courts have prevented Casey from introducing the tape recordings into evidence or revealing their contents and blocked the press from having access to them. Relying on Florida Statute 934, the Eleventh Judicial Circuit Court in Miami-Dade County, Florida, sealed the tape recordings and transcripts of the tape recordings to prevent anyone from listening to them.

Therefore, the press has been unable to fulfill its role of reporting the news and investigating this case of great public interest. After all, Milton Hirsch will begin his first term as circuit court judge in Miami-Dade County in January 2011 - after he ran unopposed for the seat in this year's election. If Casey's allegations are true, Hirsch does not deserve the public's trust to hold public office and Rappaport's license should be revoked before he is able to counsel other patients facing criminal prosecution to skip bail. The public deserves to know about the misconduct of these professionals.

It is in this context that Bruce B. Brugmann, founder, editor, and publisher of the *San Francisco Bay Guardian* in California sought to intervene by filing a petition in the Third District Court of Appeal of Florida, located in Miami, to unseal these tape recordings.[5] Brugmann learned of this case through his service on the Executive Committee of the Inter American Press Association where Casey was a young staff member at the time he was arrested.

Brugmann, through *pro bono* counsel, Thomas R. Julin, partner in the law firm of Hunton & Williams and chair of The Florida Bar Media and Communications Law Committee, has argued that the tape recordings should be made public and that Florida Statute 934 does not require that these records remain sealed.

Brugmann v. State is not the first case to challenge Florida Statute 934 and its "all-party consent" clause to recording conversations. In *Inciarrano v. State*, the Fourth District court of Appeal of Florida attacked the interpretation of this law.[6] The Court raised the following question of great public importance to the Florida Supreme Court:

"Does the recording of a conversation by one of the participants constitute the interception of an oral communication within the meaning and intent of Chapter 934?"[7]

The Fourth District reasoned that a person participating in a conversation was not "intercepting" the conversation and, thus, the secret recording of the conversation would not be unlawful. In its opinion, the court made the following analogy:

"A reasonable layman familiar with the game of football might well comment that if a pass from the quarterback to the tight end of the team on offense was scored as an interception, the quarterback might be more than a little chagrined. It would be assumed that such a play is more properly scored a reception. On the other hand, if the offensive quarterback throws a pass and it is received by a defensive guard, an interception occurs. Thus, in common parlance, the term interception implies a stopping by someone other than the intended receiver."[8]

The ruling continues to highlight the problems with Florida Statute 934:

"The term intercept is not really defined in Chapter 934. What passes for a definition simply designates the means of interception with no consideration as to the parties involved or their relationship to the communication being intercepted. Therefore, the definition is incomplete. On the other hand, the vagueness of the definition and thus of the statute is overcome if we ascribe to the word the meaning customarily assigned to it. Doing so would, we believe, change the result in those cases where a party to a wire or oral communication records the same without any intervention by a third party. Such an interpretation applied in the present case would obviate any objection to admissibility based upon Chapter 934."[9]

The Florida Supreme Court reviewed this lower court ruling, but did not answer the certified questions presented by the Fourth District. Instead, it addressed the more narrow issue in the *Inciarrano* case of whether a tape recording of Anthony Inciarrano made by Michael Phillips from a pocket tape recorder in Phillips' desk drawer in his office that recorded Inciarrano murdering Phillips was made in violation of Florida Statute 934 and, thus, inadmissible as evidence in Inciarrano's trial for first-degree murder, when Inciarrano never consented to the recording while he was committing the murder. The court held that the statute does not prohibit recording without consent the voice of someone who is committing a crime because society is not prepared to recognize any expectation of privacy under such circumstances.

In Justice Ehrlich's concurring opinion, he wrote:

"Here, the victim was the intended recipient of the conversation with the alleged murderer. The victim could not 'intercept' that which was knowingly and intentionally directed at him. He also recorded it. Once the conversation was directed to him, it was in his possession, whether through memory or recording."[10]

Brugmann is the latest case that seeks to review the applicability of Florida Statute 934 in an attempt to bring Florida back in line with Federal law and the law of the majority of the states.

In this case, *Brugmann* argues that the tape recordings of Milton Hirsch and Michael Rappaport are not required to remain confidential if they record the commission of a crime, i.e. advising a defendant to flee the country to avoid prosecution.[11]

In *Inciarrano*, Anthony Inciarrano was not protected by Florida Statute 934 when he shot and killed Michael Phillips, who was secretly recording him. The tape recording was admissible in court to be used in the prosecution against him. Similarly, Milton Hirsch and Michael Rappaport should not be protected by Florida Statute 934 if they were recorded committing a crime by advising Casey to flee the country to avoid prosecution. These tape recordings should then be admissible in court, the prosecutors should be able to use them as evidence against these individuals, and the press should have access to them to investigate this case.

Brugmann should be commended for taking on this battle and fighting for the rights of Florida's journalists to investigate and report the news without restrictions. "This is what I and many others consider a miscarriage of justice," *Brugmann* remarked.

The free press groups - when they come back from Italy after challenging that country's move to impose an "all-party consent" clause in its law - should join this latest battle for press freedom in Florida.

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For more information, please visit www.freeseancasey.org, or contact Thomas R. Julin, Esq., Hunton & Williams LLP, 1111 Brickell Avenue, Suite 2500, Miami, Florida 33131, Tel: (305) 810-2516, Fax: (305) 810-2460, E-mail: tjulin@hunton.com.

Footnotes:

1. "Can We Tape? A Practical Guide to Taping Phone Calls & In-Person Conversations in the 50 States & D.C." - <http://rcfp.org/taping/>
2. Lucy Morgan, Forgotten Tape Law Takes Down a Journalist, *St. Petersburg Times*, B1, Col. 1, Aug. 6, 2005.
3. *Id.*
4. Although Hirsch and Rappaport had evidence and even expert testimony that Casey may not have been the driver of the vehicle at the time of the accident, as with any trial, the outcome is never certain and both were convinced that Casey, who had lived a life far removed from the criminal elements of society, would not survive a day in prison if convicted.
5. *Brugmann v. State*, Third District Court of Appeal, Docket/Case No. 3D09-2540
6. *Inciarrano v. State*, 447 So. 2d 386 (Fla. 4th DCA 1984)
7. *Id.* at 391.
8. *Id.* at 388.
9. *Id.* at 388-389.
10. *State v. Inciarrano*, 473 So. 2d 1272, 1276 (Fla. 1985)
11. "Whoever commits any criminal offense against the state ... or aids, abets, counsels, hires or otherwise procures such offense to be committed ... is a principal in the first degree and may be charged, convicted, and punished as such." Fla. Stat. 777.011. Lay persons as well as attorneys are prohibited from "encourag[ing] ... another to engage in a crime" or "counsel[ing an] offense to be committed." Fla. Stat. 777.04(2).