No. 114852

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County,
	)	Criminal Division.
v.	)	No. 10 CR 8092
	)	
ANNABEL MELONGO,	)	_____
	)	
Defendant-Appellee.	)	The Honorable
	)	Steven J. Goebel,
	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLANT
PEOPLE OF THE STATE OF ILLINOIS

_____

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POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant Annabel Melongo was charged with six counts of eavesdropping under indictment No. 10 CR 8092. (C. 30-35) Prior to trial, defendant moved to dismiss the charges and declare the Illinois Eavesdropping Statute (720 ILCS 5/14-2) unconstitutional. (C. 77) On December 13, 2010, the Honorable Mary Margaret Brosnahan denied the motion, and the matter proceed to trial. (C. 6; R. N17) However, a mistrial was declared on January 14, 2011, after the jury was unable to reach a verdict. (R. R16)

Thereafter, the matter was reassigned to the call of the Honorable Steven J. Goebel. (C. 10) On November 14, 2011, defendant filed an amended motion to declare the eavesdropping statute unconstitutional (C. 172), and on June 19, 2012, the court granted defendant's motion. (R. QQQ13) Then, on June 22, 2012, defendant filed an "Emergency Motion" requesting that the trial court amend its order in order to comply with Supreme Court Rule 18. (C. 397) On July 26, 2012, the trial court issued a written order in compliance with Rule 18, finding the Illinois Eavesdropping Statute (720 ILCS 5/14), unconstitutional. (C. 406) The People filed a timely Notice of Appeal on August 9, 2012. (C. 245) No question is raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the eavesdropping statute (720 ILCS 5/14-2) is unconstitutional as applied to a defendant who knowingly and intentionally records a telephone conversation without the consent of the other party to the conversation.

STANDARD OF REVIEW

"A statute's constitutionality presents a question of law. Accordingly, [this Court] review[s] the circuit court's decision declaring a statute unconstitutional de novo." *People v. Molnar*, 222 Ill. 2d 495, 508 (2006).

JURISDICTION

In accordance with Illinois Supreme Court Rule 18, on July 26, 2012, the trial court declared 720 ILCS 5/14-2 unconstitutional on its face and as applied to defendant. On August 9, 2012, the People filed a notice of appeal. Jurisdiction lies in this Court pursuant to section 4(b) of article VI of the Illinois Constitution of 1970 and Supreme Court Rules 603 and 606.

STATUTES INVOLVED

720 ILCS 5/14–1. Definitions.

> (d) Conversation. For the purposes of this Article, the term conversation means any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.

720 ILCS 5/14–2. Elements of the Offense.

> (a) A person commits eavesdropping when he:
> (1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication or (B) in accordance with Article 108A or Article 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, [725 ILCS 5/108A-1, et seq. or 725 ILCS 5/108B-1, et seq.], as amended; or
>
> * * *
>
> (3) Uses or divulges, except as authorized by this Article or by Article 108A or 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended [725 ILCS 5/108A-1 et seq. or 725 ILCS 5/108B-1 et seq.], any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

720 ILCS 5/14-3. Exemptions.

> The following activities shall be exempt from the provisions of this Article:
> (i) Recording of a conversation made by or at the request of a person, not a law enforcement officer or agent of a law enforcement officer, who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may be obtained by the recording.

STATEMENT OF FACTS

In December 2009, defendant Annabel Melongo was facing charges of computer tampering under Case No. 08 CR 10502. Believing that there was a discrepancy between the docket sheets and the official transcripts for the June 18, 2008 proceedings, defendant called the Cook County Court Reporter's Office on multiple occasions and recorded three separate telephone conversations with Pamela Taylor, the Assistant Administrator of the Criminal Division, without Ms. Taylor's knowledge or consent. (R. Q45-52) After defendant posted those recordings and transcripts of the conversations on her website, illinoiscorruption.net, she was charged by indictment with three counts of eavesdropping under 720 ILCS 5/14-2(a)(1) and three counts of divulging information knowingly obtained through the use of an eavesdropping device under 720 ILCS 5/14-2(a)(3). (C. 30-35)

A jury trial was held in January 2011. At trial, Laurel Laudien, an official court reporter, testified that in December 2009, defendant called her to complain that the transcript for the June 18, 2008 proceedings erroneously stated that she was present at the arraignment before Judge Schreier when a superseding indictment in the computer tampering case was released, even though the clerk's docket sheets from the assignment call in the presiding judge's courtroom that day indicated that she was not present. (R. Q16-17, 24-27) After Laudien told defendant that the transcript was accurate and would not be changed, defendant "started yelling at [her] and threatening [her]." (R. Q25) Laudien then referred the matter to her supervisor, Pamela Taylor. (R. Q28)

Taylor initially called defendant in an attempt to explain both the policy of the Court Reporter's Office and "why she thought she was in one place and not the other." (R. Q45) However, after defendant "hung up" on her, Taylor called back and left a voice

mail message stating that "[i]f you want to discuss this further then just deal with me." (R. Q45) Taylor explained that she felt such an instruction was necessary because defendant had been calling Laudien and the clerical staff "on a continual basis." (R. Q45)

Taylor subsequently had three separate conversations with defendant. Each time, defendant called Taylor. At no time did defendant inform Taylor that she was recording the conversation, ask for her permission to do so, or state that she would be posting a transcript of the conversation and the recorded audio on her website. (R. Q45-53)

At the trial, defendant did not contest this testimony and in fact, stipulated that she recorded those conversations and posted the audio recordings and accompanying transcripts on her website on or about December 18, 2009. (R. P193-95) However, she claimed that such recordings were authorized under the statutory exemption to the eavesdropping statute that permits the "[r]ecording of a conversation made by . . . a person . . . who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person . . . and [where] there is reason to believe that evidence of the criminal offense may be obtained by the recording." 720 ILCS 5/14-3(i). (R. P184-192; Q172-82) At defendant's request, the trial court instructed the jury with non-pattern instructions that described the exemption and informed the jury that defendant should not be convicted if it determined that the exemption applied. (R. Q80-82, 195-97; C. 97-99) The court declared a mistrial after the jury was unable to reach a unanimous verdict. (R. R16)

Thereafter, the matter was reassigned to a different judge. (C. 10; R. V2, X3) Defendant subsequently discharged her attorney and elected to proceed pro se. (R. HH16,

II4-5) Then, on November 30, 2011, defendant filed a pro se "Amended Motion to Declare Statute Unconstitutional and to Dismiss." (C. 172; R. W2) In the motion, defendant acknowledged recording her telephone conversations with Taylor and posting the recordings on her website, but claimed that the Illinois Eavesdropping Act was unconstitutional under the First Amendment and the Due Process Clauses of both the Federal and State constitutions. (C. 172-83) She further asserted that the recordings were necessary because she had "explicitly threatened to file a complaint against Laudin [sic] long before the recordings were made," and that she therefore "recorded the conversations [with Taylor] to gather evidence of a crime committed against her." (C. 182)

The court heard extensive argument on the motion on March 19, 2012, and took the matter under advisement. (R. EEE1-24) Subsequently, on June 19, 2012, the court granted defendant's motion. (R. QQQ12-13) The court ruled that pursuant to the then-recent decision in *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), as well as the order of the Honorable Stanley Sacks in *People v. Christopher Drew*, No. 10 CR 00046, the statute was unconstitutional. The court stated:

> On Page 47 of the United States District [sic] Court of Appeals opinion, it does say, and I quote, "Of course, the First Amendment does not prevent the Illinois General Assembly from enacting greater protection for conversational privacy than the common law tort remedy provides nor is the legislature limited to using the Fourth Amendment reasonable expectation of privacy doctrine as a benchmark, but by legislating this broadly by making it a crime to audio record any conversation, even those that are not in fact private, the State has severed the link between the eavesdropping statute's means and its end. Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy Illinois has banned nearly all audio recording without consent of the parties including audio recording that implicates no privacy interests at all."
>
> The Court is relying on that language as well as the Court does not believe that it can be severed out. This case obviously -- the appeals case from the

> Federal District [sic] Court obviously dealt with recording police officers and not specifically to the facts of this case; however, I do not believe that the statute can be severed out like that.
>
> And additionally this Court is adopting Judge Sacks' opinion in the People of the State of Illinois versus Christopher Drew [case]. Obviously not the facts cause the facts are different, but I'm adopting Judge Stacks -- Judge Sacks', SACKS, opinion in 10 CR 00046 in People of the State of Illinois versus Christopher Drew. [1]
>
> And thus Miss Melongo's motion to declare the statute -- the eavesdropping statute unconstitutional is granted.

(R. QQQ12-13)

Defendant then filed an "Emergency Motion" requesting that the trial court amend its order declaring the Illinois Eavesdropping Statute unconstitutional in order to comply with Supreme Court Rule 18. (C. 397) On July 26, 2012, the trial court issued a written order in compliance with Rule 18 finding that the Illinois Eavesdropping Statute, 720 ILCS 5/14, is unconstitutional. (C. 406-11) In that order, the court explained its earlier reliance on *Alvarez* and *Drew*, and then concluded:

> Here, this court also finds that the Statute appears to be vague, restrictive and makes innocent conduct subject to prosecution. At this stage, this court will not conduct any fact-finding nor will this court filter the Statute and deem certain sections to be constitutional and others to be unconstitutional.
>
> Therefore, based on the foregoing discussion, this court finds that the Illinois Eavesdropping Statute is unconstitutional on its face and as applied to defendant pursuant to Illinois Supreme Court Rule 18. This court holds that the Illinois Eavesdropping Statute lacks a culpable mental state, subjects wholly innocent conduct to prosecution, and violates substantive due process under the Fourteenth Amendment to the United States Constitution (U.S.

[1] Judge Sacks' order is included in the appendix to this brief. Also, although it was not included in the instant record on appeal, it was included in the record prepared in *People v. Drew*, No. 114023. See *People v. Jackson*, 182 Ill.2d 30, 66 (1998) ("a court will take judicial notice of its own records"). Defendant Christopher Drew died while the People's appeal to this Court was pending, and on June 26, 2012, this Court granted the People's motion to dismiss the appeal as moot.

> Const. Amend. XIV) and Article I, Section 2 of the Illinois Constitution (Ill. Const. 1970, Art. 1, See. 2). This court further finds that the statute cannot be constructed [sic] in a manner that would preserve its validity, and judgment cannot rest upon an alternative ground.

(C. 410-11)

ARGUMENT

The Trial Court Erred In Ruling That The Illinois Eavesdropping Statute Is Unconstitutional On Its Face And As Applied To Defendant's Case Where The Statute Includes A Culpable Mental State And Where Defendant Admitted That Her Conduct Was Intentional And Knowing Rather Than Innocent And Inadvertent.

The trial court found the Illinois Eavesdropping Statute (720 ILCS 5/14-2) unconstitutional both facially and as applied to defendant's case because it lacks a culpable mental state, subjects wholly innocent conduct to prosecution and thereby violates substantive due process. However, in reaching this conclusion, the court failed to recognize that unlike *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), and *People v. Christopher Drew*, case number 10 CR 00046 (Mar. 2, 2012), the instant case involves the surreptitious recording of telephone calls rather than the open recording of publicly audible conversations, and thus cannot be mistaken for innocent conduct. Moreover, the trial court overlooked the fact that defendant has consistently relied upon a statutory exemption to the eavesdropping statute to justify her conduct. Specifically, by claiming that the recording was permissible because she had "reasonable suspicion that another party to the conversation [was] committing . . . a criminal offense against [her], and there [wa]s reason to believe that evidence of the criminal offense [might] be obtained by the recording" (720 ILCS 5/14-3(i)), defendant has acknowledged that she not only intentionally recorded her telephone conversations with Pamela Taylor without Taylor's consent, but also that she knew that her actions were otherwise prohibited by the statute. As such, the trial court's ruling is erroneous and should be reversed.

Illinois law is well-settled that there is a "strong presumption" that a legislative enactment passes constitutional muster, and a party challenging the constitutionality of a statute bears the burden of clearly establishing its invalidity. *People v. Thurow*, 203 Ill. 2d 352, 367 (2003). "A statute is unconstitutional on its face only if no set of circumstances exists under which it would be valid." *People v. Kitch*, 239 Ill. 2d 452, 466 (2011). "Thus, so long as there exists a situation in which a statute could be validly applied, a facial challenge must fail." *Hill v. Cowan*, 202 Ill. 2d 151, 157 (2002). As a result, this Court will "construe the statute in a manner that upholds [its] validity and constitutionality, if it can be reasonably done." *People v. Hollins*, 2012 IL 112754, ¶13. Finally, whether a statute is constitutional is a question of law, which this Court reviews de novo. *People v. McCarty*, 223 Ill. 2d 109, 135 (2006).

Further, an as-applied challenge represents a defendant's protest against how a statute was applied in the particular context in which the defendant acted or proposed to act. *See Napelton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008). Accordingly, if a defendant succeeds in an as-applied claim, he may enjoin the objectionable enforcement of the statute only against himself. *Id*. In contrast, a facial challenge represents a defendant's contention that a statute is incapable of constitutional application in any context. *In re C.E.*, 161 Ill. 2d 200, 210-211 (1994). Hence, a facial challenge to a statute is the most difficult challenge to mount successfully, since the defendant must establish that "no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *C.E.*, 161 Ill. 2d at 210-211. Significantly, "[e]mbedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to

challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). In other words, if a statute is constitutionally applied as to the challenger, his facial challenge necessarily fails as well. *Salerno*, 481 U.S. at 745; *C.E.*, 161 Ill. 2d at 210-211.

Here, the trial court held that the eavesdropping statute violates principles of substantive due process.[2] Where a statute does not implicate a fundamental right, substantive due process review proceeds under the "highly deferential rational basis test." *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011). "Under that test, a statute will be sustained if it bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective." *Id*. (internal quotation marks omitted); see also *Hollins*, 2012 IL 112754, at ¶15 ("A statute will be upheld under the rational basis test so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable.").

However, contrary to the trial court's conclusion, the eavesdropping statute as applied to defendant's case does not violate substantive due process. At a minimum, the statute's prohibition on the nonconsensual recording of telephone conversations is rationally related to the legitimate and important public interest of protecting

[2] Although defendant also asserted that the eavesdropping statute implicated her First Amendment rights, the trial court cited extensively to *Alvarez*, which was resolved on First Amendment grounds, the trial court here did not resolve the First Amendment issue but, instead, relied exclusively on the substantive due process clause. (C. 410) ("This court holds that the Illinois Eavesdropping Statute lacks a culpable mental state, subjects wholly innocent conduct to prosecution, and violates substantive due process under the Fourteenth Amendment to the United States Constitution (U.S. Const. Amend. XIV) and Article I, Section 2 of the Illinois Constitution (Ill. Const. 1970, Art. 1, See. 2).").

conversational privacy. See *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001) ("Privacy of communication is an important interest"); *Alvarez*, 679 F.3d at 605 ("conversational privacy . . . is easily an important governmental interest"). To that end, the eavesdropping statute generally bars the nonconsensual recording of oral communications. See 720 ILCS 5/14-2(a)(1) (2010) (prohibiting "[k]nowingly and intentionally using an eavesdropping device for the purpose of hearing or recording all or any part of any conversation" without "the consent of all of the parties to such conversation"). The eavesdropping statute's ban on nonconsensual audio recording of conversations is rationally related to the important public purpose of protecting conversational privacy and is a reasonable method of accomplishing that purpose.

Admittedly, the statute is broad, as it prohibits nonconsensual recording regardless of whether the parties to the conversation "intended their communication to be of a private nature under circumstances justifying that expectation." 720 ILCS 5/14-1(d). It was precisely for this reason that the Seventh Circuit ruled that the statute could not be enforced against persons who "openly make audiovisual recordings of police officers performing their duties in public places and speaking at a volume audible to bystanders." 679 F.3d at 586. Likewise, Judge Sacks' order in *Drew*, addressed situations of *open* recording. See Order at 11 (citing examples of a "juror using an audio recorder to record directions to the courthouse," the "recording of a police officer's instructions on where to pay a speeding ticket or pick up a towed vehicle," and "[a] parent making an audio recording of their child's soccer game, but in doing so, happens to record nearby conversations"). However, as the *Alvarez* court made clear, open recording is very

different from surreptitious recording, and its decision "ha[d] nothing to do with private conversations or surreptitious interceptions." 679 F.3d at 606.

Moreover, the legislature enacted the current eavesdropping statute to protect all persons from having their conversations – including their telephone conversations – recorded without their knowledge or consent. After this Court decided in *People v. Herrington*, 163 Ill. 2d 507 (1994), holding that the consent of only one party to a telephone conversation was necessary to permit surreptitious recording of the conversation under the eavesdropping statute (*id.* at 510 ("there can be no expectation of privacy by the declarant where the individual recording the conversation is a party to that conversation") (citing *People v. Beardsley*, 115 Ill. 2d 47, 56 (1986)), the legislature amended the definition of conversation in section 14-1(d) to clarify that it applies to "any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation." Public Act 88-677 (eff. Dec. 15, 1994). As the Seventh Circuit recognized, "this amendment effectively overrode the *Beardsley* and *Herrington* decisions." *Alvarez*, 679 F.3d at 587. Furthermore, in doing so, the legislature essentially heeded the admonition in Justice Bilandic's dissent in *Herrington*, that under the majority's interpretation of the eavesdropping statute, every "telephone conversation may be recorded without [the other party's] knowledge or consent." 163 Ill. 2d at 512.

Further, the surreptitious recording of telephone conversations is wholly distinct from the open recording of audible conversations occurring in public places, in that with open recording, the totality of the circumstances permit the other party to decide whether or not to consent to the recording, either expressly or impliedly. See *People v. Ceja*, 204

Ill. 2d 332, 349 (2003) (holding that consent under eavesdropping statute "may be either express or implied"). In contrast, where a silent and unseen device is used to record a telephone conversation, the other party is unable to make any knowing and intelligent choice regarding the giving of consent. Thus, the legislature's decision to prohibit recording of telephone conversations absent the consent of all parties was reasonably related to its goal of protecting conversational privacy in such instances. See *United States v. Comstock*, 130 S. Ct. 1949, 1966 (2010) (Kennedy, J., concurring) (citing *Williamson v. Lee Optical of Okla., Inc*., 348 U.S. 483, 487-88 (1955)) ("the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

In fact, while "the Illinois statute is the broadest of its kind," in that "no other wiretapping or eavesdropping statute prohibits the open recording of police officers lacking any expectation of privacy" (*Alvarez*, 679 F.3d at 595, n.4), the same cannot be said of its prohibition on the surreptitious recording of telephone calls. Instead, in addition to Illinois, at least 11 other States require the consent of every party to a phone call before the conversation may be lawfully recorded:

> **Cal. Penal Code § 632** ("Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.").

Conn. Gen. Stat. § 52-570d ("Action for illegal recording of private telephonic communications. (a) No person shall use any instrument, device or equipment to record an oral private telephonic communication unless the use of such instrument, device or equipment (1) is preceded by consent of all parties to the communication and such prior consent either is obtained in writing or is part of, and obtained at the start of, the recording, or (2) is preceded by verbal notification which is recorded at the beginning and is part of the communication by the recording party, or (3) is accompanied by an automatic tone warning device which automatically produces a distinct signal that is repeated at intervals of approximately fifteen seconds during the communication while such instrument, device or equipment is in use.").

Del. Code Ann. tit. 11, § 1335(a)(4) ("A person is guilty of violation of privacy when, except as authorized by law, the person: . . . Intercepts without the consent of all parties thereto a message by telephone, telegraph, letter or other means of communicating privately, including private conversation.").

Fla. Stat. § 934.03 (d) ("It is lawful under section 934.03-934.09 for a person to intercept a wire, oral, or electronic communication when all of the parties to the communication have given prior consent to such interception.").

Md. Code Ann., Cts. & Jud. Proc. § 10-402(3) ("It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.").

Mass. Gen. Laws ch. 272, § 99.4 ("The term "interception" means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication.").

Michigan Comp. L.S. § 750.539 Eavesdropping upon private conversation ("Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment

in a state prison for not more than 2 years or by a fine of not more than $ 2,000.00, or both.").

Mont. Code Ann. § 45-8-213 ("Privacy in communications. (1) Except as provided in 69-6-104, a person commits the offense of violating privacy in communications if the person knowingly or purposely: (c) records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation. This subsection (1)(c) does not apply to: (i) elected or appointed public officials or to public employees when the transcription or recording is done in the performance of official duty; (ii) persons speaking at public meetings; (iii) persons given warning of the transcription or recording, and if one person provides the warning, either party may record).

N.H. Rev. Stat. Ann. § 570-A:2 ("I. A person is guilty of a class B felony if, except as otherwise specifically provided in this chapter or without the consent of all parties to the communication, the person: (a) Wilfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any telecommunication or oral communication").

18 Pa. Cons. Stat. § 5704(4) ("It shall not be unlawful and no prior court approval shall be required under this chapter for . . . A person, to intercept a wire, electronic or oral communication, where all parties to the communication have given prior consent to such interception.").

Wash. Rev. Code § 9.73.030(1) "Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any: (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.").

Thus, the Illinois eavesdropping statute's broad ban on recording oral communications without the consent of all the parties to the conversation, regardless of whether those parties "intended their communication to be of a private nature under circumstances justifying that expectation" (720 ILCS 5/14-1(d) (2010)), is neither

unusual nor an arbitrary or unreasonable method of safeguarding conversational privacy in the context of telephone conversations. Accordingly, the trial court's finding of "facial" unconstitutionality was clearly erroneous. See *In re Rodney H.*, 223 Ill. 2d 510, 521 (2006) ("A facial challenge to a statute must fail if it could be validly applied in any instance.").

Likewise, relying upon Judge Sacks' order in *People v. Christopher Drew*, the trial court also incorrectly found that the eavesdropping statute potentially punishes innocent conduct and thus is unconstitutional. Judge Sacks concluded, for instance, that a "parent making an audio recording of their child's soccer game, but in doing so, happens to record nearby conversations" could be prosecuted under the eavesdropping statute, and that the statute is therefore unconstitutional under *People v. Madrigal*, 241 Ill. 2d 463 (2011), *People v. Carpenter*, 228 Ill. 2d 250 (2008), *People v. Wright*, 194 Ill. 2d 1 (2000), *In re. K.C.*, 186 Ill. 2d 542 (1999), *People v. Zaremba*, 158 Ill. 2d 36 (1994), and *People v. Wick*, 107 Ill. 2d 62 (1985). (See Order at 11) However, such a conclusion misreads the statute and misapplies this Court's precedent.

In *Madrigal*, this Court noted that the identity theft statute required merely that the defendant "'knowingly . . . use any personal identification information or personal identification document of another for the purpose of gaining access to any record of the actions taken, communications made or received, or other activities or transactions of that person.'" *Id*. at 469-70 (quoting 720 ILCS 5/16G-15(a) (2005)). The Court explained that this broad language, and its lack of a culpable mental state, was problematic because it applied to otherwise innocent conduct, such as doing an internet search of a friend's name, calling a repair shop to see if a spouse's car is ready, or calling a friend's employer

to see if she was at work. *Id.* at 471-72. Accordingly, the Court concluded that the statute was unconstitutional because it "criminalize[d] the use of mere names, or other commonly and publicly available information such as addresses and phone numbers, for the purpose of gaining access to innocent information about people without any criminal intent, purpose or knowledge." *Id.* at 474.

Similarly, in *Carpenter,* the challenged statute made it a felony to own or operate a vehicle that one knew to contain a false or secret compartment, where the compartment was intended and designed to conceal items from law enforcement. 228 Ill. 2d at 268. The purpose of the law was to protect police by punishing people who use such compartments to conceal weapons or contraband from the police. *Id.* The statute, however, did not require the "contents of the compartment . . . to be illegal for a conviction to result." *Id.* As this Court found, a person's "intent to conceal" something inside their vehicle does not necessarily involve illegal conduct, particularly since people often do – and sensibly so – conceal their lawful "worldly possessions" from the general public, which includes, as a subset, law enforcement officers. *Id.* In finding that the statute violated due process, this Court reasoned that if the legislature wanted to punish people who hide firearms or contraband in concealed compartments, "it would seem that the rational approach might have been to punish . . . those who actually did that." *Id.* at 273.

In *Wright,* the challenged statute criminally punished people, such as owners of auto junkyards, who knowingly fail to maintain records of their acquisition and disposition of vehicles and parts. 194 Ill. 2d at 28. The statute was designed to combat the transfer or sale of stolen vehicles or parts. *Id.* However, as this Court explained, the

statute penalized even minor lapses in record-keeping attributable to innocent reasons, including disability or family crisis. In the end, this Court found that the statute flunked the rational basis test because the method it used to combat transactions involving stolen vehicles and parts broadly swept in, and irrationally penalized, conduct unrelated to stolen vehicles or parts. *Id.* at 28-29.

Likewise, in *K.C.*, this Court addressed a provision of the Illinois Motor Vehicle Code that imposed absolute liability for a trespass to a vehicle. 186 Ill. 2d at 551-52. The purpose of the law was to punish vandalism of motor vehicles. *Id.* However, as this Court found, because the statute did not demand a culpable mental state, it could punish "the Good Samaritan who enters an unlocked car to turn off the headlights," or people who "decorate the bride and groom's car during a wedding celebration, get in a traffic accident, or inadvertently hit a baseball through a neighbor's windshield" *Id.* at 552. In striking down the statute, this Court reasoned that none of these innocent yet potentially punishable activities could sensibly relate to the vandalism the statute sought to combat. *Id.* at 552-53.

In *Zaremba*, this Court invalidated a provision of the Illinois theft statute that defined theft as the knowing act of obtaining or exerting control over property in the custody of law enforcement that has been represented to have been stolen. 158 Ill. 2d at 39-40. The law was designed to facilitate fencing stings but did not require the person in control of the property to be part of a fencing operating or otherwise be acting with an unlawful purpose. *Id.* at 42. As this Court explained, without a provision requiring either that the control be unauthorized or that it be accompanied by an intent to deprive the rightful owner of permanent possession, the statute irrationally reached activities as

innocent as "a police evidence technician who took from a police officer for safekeeping the proceeds of a theft." *Id.* at 38. This Court therefore concluded that the method employed by the statute to combat fencing operations – the activity the legislation intended to punish – unconstitutionally captured conduct unrelated to its purpose. *Id.* at 41-42.

Finally, in *Wick*, this Court invalidated a portion of the aggravated arson statute making it a Class X felony to use fire or explosives knowingly to damage property, thereby causing injury to a firefighter or police officer acting in the line of duty at the scene. 107 Ill. 2d at 64-65. The purpose of the statute was to punish arsonists "more severely when their conduct results in personal injury to firemen or policemen than when it results in property damage alone." Id. at 67. However, the unlawful purpose required for simple arson – that the offender knowingly damages by fire either the property of another without his consent or any property with the intent to defraud an insurer – was not required for the aggravated arson. *Id.* at 64. This Court explained that, by excluding the requirement of an unlawful purpose in setting a fire, the statute "swept too broadly by including innocent as well as culpable conduct in setting fire." *Id.* at 66. As an example, this Court noted that "a farmer who demolishes his deteriorated barn to clear space for a new one is liable for a Class X felony if a fireman standing by is injured at the scene." *Id.* at 66. This Court therefore held that the method chosen by the legislature to combat arsonists swept too broadly because the set of activities penalized by the aggravated arson statute was much greater than the set of activities penalized by the simple arson statute. *Id.* at 66-67.

The eavesdropping statute, in stark contrast to the statutes at issue in those earlier cases, applies only where the defendant "knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation" without "the consent of all of the parties to such conversation." 720 [LCS 5/14-2(a)(1). The eavesdropping statute thus requires a defendant to act with both *knowledge* and *intent*, and for the *purpose* of recording a conversation without the parties' consent, and therefore satisfies the demand that a criminal statute "require a criminal purpose in addition to the general knowledge that one is committing the actions specified." *Madrigal*, 241 Ill. 2d at 470. Moreover, as it applies to the non-consensual recording of telephone conversations, there is no otherwise innocent conduct which would fall under the statute.

In fact, defendant here has repeatedly admitted that she acted with the requisite knowledge, intent and purpose. Specifically, by claiming that the otherwise unlawful recording was permissible because she had a "reasonable suspicion that another party to the conversation [was] committing . . . a criminal offense against [her], and there [wa]s reason to believe that evidence of the criminal offense may be obtained by the recording" (720 ILCS 5/14-3(i)), defendant has acknowledged that she not only intentionally and purposefully recorded her telephone conversations without Taylor's consent, but also that she knew her actions were otherwise prohibited by the statute.

Moreover, even if defendant had not acknowledged that she acted with knowledge, intent and purpose, the trial court erred in finding that the eavesdropping statute fails to contain a culpable mental state. Obviously, such an analysis requires more than simply locating words such as "intent," knowledge," or "purpose" in the statute. The

statute at issue in *Madrigal*, to be sure, required the defendant to act with both knowledge and purpose, but it was the statute's theoretically limitless reach — despite the knowledge and purpose requirements — on which this Court relied for its decision. The statute's language, as this Court noted, would have prohibited a person from doing an Internet search of a friend's name to see how that friend did in the Chicago Marathon. It would have prohibited a husband from calling a car repair shop to see if his wife's car was ready to be picked up. And it would have prohibited a person from calling a friend's place of business to see if that friend was at work. *Madrigal*, 241 Ill. 2d at 471-72. The possibilities were endless, and the threat that the statute could be used to punish innocuous conduct that the General Assembly could not possibly have intended to punish was substantial.

Following Judge Sacks' order, the trial court here apparently thought the eavesdropping statute was likewise susceptible to such limitless overreach, even applying to a parent's recording of a child's soccer game. But such accidental or incidental recording would not be subject to prosecution under the eavesdropping statute, for the statute is triggered only where a person "uses an eavesdropping device *for the purpose* of hearing or recording all or any part of any conversation." 720 ILCS 5/14-2(a)(1) (emphasis added). The parents in the Judge Sacks' hypothetical used their recording device not for the purpose of recording the conversations of other spectators, but for the purpose of recording their child's game. Thus, the concern with statutory overreach was based on a misreading of the statute.

Judge Sacks' further concern that "a juror recording directions given by a police officer" would be subject to prosecution under the eavesdropping statute likewise

misreads the statute. The statute prohibits only the *nonconsensual* recording of conversations. See 720 ILCS 5/14-2(a)(1) (2010); see also *People v. Ceja*, 204 Ill. 2d 332, 349 (2003) (holding that consent under eavesdropping statute "may be either express or implied"). The juror in the hypothetical need only ask the officer for permission to record their conversation in order to lawfully record it. And even short of receiving the officer's express consent, if the officer speaks with the juror under circumstances evincing his implied consent to be recorded, the juror would be permitted to record the conversation. See *Ceja*, 204 Ill. 2d at 349-50.

Judge Sacks also misapplied *Madrigal*. He believed that the possibility that the statute would prohibit "a juror recording directions given by a police officer," presumably without the officer's express or implied consent (because if the officer consented to the recording the statute would not apply), meant that the statute impermissibly extended to "innocent conduct" and thus ran afoul of *Madrigal*. *Madrigal* struck down a provision of the identity theft statute because it "lack[ed] a culpable mental state" and thus "potentially punished a significant amount of wholly innocent conduct not related to the statute's purpose." 241 Ill.2d at 472-73. As this Court explained in *Hollins*, in this context, "innocent conduct" does not mean conduct that is innocent in some abstract sense, or that is guiltless in the eyes of a court, but rather "conduct not germane to the harm identified by the legislature, in that the conduct was wholly unrelated to the legislature's purpose in enacting the law." 2012 IL 112754, at ¶28. The broad language of the identity theft statute, and its lack of a culpable mental state, was therefore problematic precisely because it applied to conduct — like doing an internet search of a friend's name, calling a repair shop to see if a spouse's car is ready, or calling a friend's employer

to see if she was at work, see *Madrigal*, 241 Ill. 2d at 471-72 — that bore no relation to the purpose of preventing identity theft and that the legislature therefore could not possibly have intended to criminalize.

In contrast, the eavesdropping statute's broad reach — and in particular its provision criminalizing the nonconsensual recording of an oral communication "regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation," 720 ILCS 5/14-1(d) (2010) — was specifically intended to further the public interest in protecting conversational privacy. *See Alvarez*, 679 F.3d at 587 (explaining that 1994 amendment to eavesdropping statute adding section 14-1(d) was designed to override prior decisions of this Court interpreting eavesdropping statute to prohibit recording of conversation only if parties to conversation had expectation that conversation was private). Thus, in the circuit court's hypothetical, the juror's recording, done without the officer's express or implied consent, is not "wholly innocent conduct" within the meaning of *Madrigal*, because it is not "wholly unrelated to the legislature's purpose in enacting the [eavesdropping statute]." *Hollins*, 2012 IL 112754, at ¶28.

In sum, the eavesdropping statute's prohibition on the nonconsensual recording of telephone conversations is rationally related to the legitimate and important public interest in protecting conversational privacy. Moreover, because the statute prohibits nonconsensual recording only when done with knowledge, intent, and purpose, it does not criminalize wholly innocent conduct unrelated to the statute's aims. For these reasons, the statute survives rational basis review and does not violate substantive due

process. Therefore, this Court should reverse the trial court's ruling and remand the matter to the circuit court for further proceedings.

CONCLUSION

The People of the State of Illinois respectfully request that this Honorable Court reverse the trial court's judgment declaring the eavesdropping statute unconstitutional and remand the case to the trial court for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages containing the Rule 341 (d) cover, the Rule 341 (h)(1) statement of points and authorities, the Rule 341 (c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 26 pages.

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