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Scott O. Reed

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EAVESDROPPING REGULATION IN ILLINOIS

SCOTT O. REED*

For many years, Illinois has had one of the country's most stringent statutes regulating the use of eavesdropping devices.[1] The statute prohibits what in many states and the federal system would not be considered eavesdropping.[2] Illinois law unconditionally prohibits the use of an eavesdropping device without the consent of one party to a conversation,[3] and permits, under certain conditions, the use of an eavesdropping device with the consent of one party.[4]

In 1976, in an effort to strengthen the regulation of eavesdropping and wiretapping activity, the Illinois General Assembly amended Illinois' eavesdropping statutes.[5] While the prohibition of non-consensual eavesdropping continued, these amendments placed the supervision of consensual eavesdropping within the discretion of the state's circuit judges. In essence, the legislature outlawed consensual eavesdropping undertaken without a court order. To permit public monitoring of the operation of the eavesdropping acts, judges and State's Attorneys were required to submit reports on eavesdropping activity with which they were involved.

Members of the Illinois General Assembly saw these changes as

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* Associate, Pretzel & Stouffer, Chartered, Chicago, Illinois. A.B. 1976, J.D., 1980, University of Illinois. The author was previously a staff attorney for the Administrative Office of the Illinois Courts. The views expressed are solely those of the author.

1. STANDARDS RELATING TO ELECTRONIC SURVEILLANCE general commentary at 20 n.38 (1971).

2. The Illinois Supreme Court, in describing Lopez v. United States, 373 U.S. 427 (1963), stated that " 'eavesdropping,' in its proper sense, was not involved in the case" because "the government did not use the electronic device to listen in on conversations it could not otherwise have heard." People v. Beardsley, 115 Ill. 2d 47, 55-56, 503 N.E.2d 346, 350-51 (1986); *see also* People v. Nahas, 9 Ill. App. 3d 570, 577-78, 292 N.E.2d 466, 471 (1973).

3. ILL. REV. STAT. ch. 38, ¶ 14-2(a)(1) (1985).

4. *Id.* ¶ 14-2(a)(2).

5. 1975 Ill. Laws 3561. The reason that the plural "eavesdropping statutes" is used is that this amendment resulted in two separate locations for the statutes regulating eavesdropping activity. Article 14 of the Criminal Code of 1961 contains the provisions relating to the substantive offense of eavesdropping as well as the civil remedies resulting from violation of those provisions. ILL. REV. STAT. ch. 38, ¶¶ 14-1 to -9 (1985). Article 108A of the Code of Criminal Procedure of 1963, which was added by the 1975 amendment, consists of provisions establishing the judicial supervision of the use of eavesdropping devices. *Id.* ¶¶ 108A-1 to -11.

providing effective control of consensual eavesdropping activity.[6] The statute's drafters envisioned that the court-order procedure would allow meaningful review of requests for the use of eavesdropping devices with one party's consent. But has it?

The thesis of this article is that, because of the reviewing courts' construction of the eavesdropping statutes and the application of the statutes in the trial courts, the Illinois laws have been less effective in controlling consensual eavesdropping than the proponents of these reforms had hoped.[7] This article consists of a survey of court decisions construing the Illinois statutes, which have limited or prohibited the use of eavesdropping devices. It also includes an analysis of the annual statistics of the Administrative Office of the Illinois Courts. These statistics are based on the eavesdropping activity reports submitted by State's Attorneys and circuit court judges. Finally, the article questions the need for statutory regulation of consensual eavesdropping in Illinois, and cautions the proponents of nonconsensual eavesdropping schemes to regard the construction of the terms of the existing statutes.

I. Historical Antecedents

As it did in many states, eavesdropping regulation began in Illinois in the last century. These early statutes addressed the problem of the destruction or mutilation of telegraph companies' lines and property.[8] Illinois law went further than the eavesdropping statutes of other states, by imposing a penalty of fine or imprisonment upon anyone who tapped or connected into a telephone or telegraph wire for the purpose of wrongfully taking or making use of the news transmitted upon it.[9] The State brought few prosecutions for "wiretappings" despite the broad sweep of this law. The statute was generally invoked against those who caused physical damage to telephone and telegraph lines.[10] Virtually no reported opinions under

6. With a floor amendment added, H.B. 212, which, as amended, became P.A. 79-1159, passed the house with 123 members voting "aye," 5 members voting "nay," and 1 voting "present." It passed the senate after amendment with 52 senators voting "aye," 1 voting "nay," and 2 voting "present." The house and senate accepted, by similarly large margins, the changes suggested in the Governor's amendatory veto. *See* Jaffe, *Limit Eavesdropping,* Chicago Tribune, Mar. 21, 1975, § 2, at 2, col. 3.

7. Of course, it is always difficult to measure with precision the effectiveness of any prohibition or regulation of an activity as surreptitious as eavesdropping.

8. These statutes have been labeled "malicious mischief" statutes. They were typically construed to prohibit activity which resulted in damage to telegraph or telephone lines, but not to prohibit wiretapping which did not damage the lines. *See* Standards Relating to Electronic Surveillance general commentary at 19 (1971).

9. A fine of up to $2000 or imprisonment of up to one year, or both, could be imposed for this offense. Ill. Rev. Stat. ch. 134, ¶ 15 (Hurd 1897). This section was renumbered in 1927. *See id.* ¶ 16 (Smith-Hurd 1927).

10. *See, e.g.,* People v. Markley, 340 Ill. App. 191, 91 N.E.2d 630 (1950) (prose-

this law considered the issue of the admissibility of evidence obtained by surreptitious electronic surveillance.[11] Thus, these early provisions were rarely applied to prohibit a party from gaining information by electronic means.

In 1957, the General Assembly undertook an extensive revision of the statutes regulating electronic surveillance. The General Assembly did not repeal the existing laws, but enacted a new five-section statute.[12] The 1957 statute was the source for much of the language in the current article 14 of the Criminal Code of 1961.[13] The term "electronic eavesdropping" was defined as "the use of any device employing electricity to hear or record, or both, all or any part of any oral conversation . . . without consent of any party thereto, whether such conversation is conducted in person or by telephone . . . ."[14] The statute listed several exceptions, including public broadcasts,[15] common carriers by wire,[16] and emergency communications involving certain institutions.[17] For the first time,[18] anyone who used or divulged information "which he [knew] or reasonably should [have known] was obtained by illegal eavesdropping" was

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cution for breaking into the coin boxes of pay telephones); Sullivan v. Chicago Bd. of Trade, 111 Ill. App. 494 (1911) (plaintiff denied injunction to restore terminated Board of Trade quotation service because he violated ILL. REV. STAT. ch. 134, ¶ 15 by splicing the defendant's telegraph wires in an attempt to restore service).

11. An exception to this statement is Morton v. United States, 60 F.2d 696 (7th Cir. 1932). In this Volstead Act prosecution, evidence obtained through the use of a nonconsensual telephone tap was introduced at trial. The circuit court stated that the defendant was erroneously prevented from asking the prohibition agents whether their conduct violated Illinois law, but this error was held to have been harmless.

12. 1957 Ill. Laws 2362, enacting, "An Act to regulate electronic eavesdropping and to provide for penalties and remedies for the violation thereof" (repealed 1961). This statute was codified at ILL. REV. STAT. ch. 38, ¶ 206.1-.5 (1957).

13. *Id.* ¶¶ 14-1 to -9 (1985).

14. *Id.* ¶ 206.1 (1957).

15. The statute exempted "listening to radio, wireless and television communications of any sort where the same are publicly made" and "any broadcast by radio, television or otherwise whether it [is] broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are being made." *Id.* ¶ 206.1. Both of these exemptions are retained in current law. *Id.* ¶¶ 14-3(a), (c) (1985).

16. Also exempted was "hearing conversation when heard by employees of any common carrier by wire incidental to the normal repair of the equipment of such common carrier by wire so long as no information obtained thereby is used or divulged by the hearer." *Id.* ¶ 206.1 (1957). This exemption is retained in current law. *Id.* ¶ 14-3(b) (1985).

17. "[T]he recording or listening with the aid of an electronic device to any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency or institution dealing in emergency services . . ." was also exempted. *Id.* ¶ 206.1 (1957). Like the exemptions described *supra* notes 15 and 16, this exemption remains in effect. *Id.* ¶ 14-3(d) (1985).

18. Under the previous statute, Illinois, along with a majority of the states, did not prohibit the divulgence of intercepted communications. Bernstein, *The Fruit of the Poisonous Tree*, 37 ILL. L. REV. 99, 108 n.20 (1942).

made as criminally responsible as the person who performed the eavesdropping.[19] A party to an illegally overheard conversation was entitled to an injunction against the offending party, actual or punitive damages, or all three remedies.[20]

Reviewing courts construed few of the terms unique to the statute during the statute's short life. For example, the phrase "any device employing electricity" was never defined.[21] Nor is it known if the phrase "whether such conversation is conducted in person or by telephone" meant that eavesdropping on a conversation conducted by a nonelectronic means would have been permissible. If a party to the conversation cooperated with the police, however, by letting an officer listen to an extension telephone, that party was deemed to have consented to the overhearing.[22]

This brief overview of eavesdropping regulation in Illinois before the adoption of the Criminal Code of 1961 illustrates that drawing any conclusions about the effectiveness of the 1957 statute is a precarious business, at best. Since the last quarter of the previous century, Illinois has had statutes that could have been invoked against wiretapping and eavesdropping in a number of situations. Whether they were so used is another matter. Court decisions on this subject are sparse, and trial court statistics are not available. There is no evidence to show either that the statutes discouraged surreptitious monitoring of conversations or that these practices were widespread in the first place.

II. The Substantive Offense of Eavesdropping

When it was enacted in 1961, article 14[23] of Illinois' Criminal Code[24] contained provisions regulating electronic surveillance. Article 14 consisted largely of the provisions of the 1957 law, rearranged

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19. Ill. Rev. Stat. ch. 38, ¶ 206.4 (1957).

20. *Id.* ¶ 206.3. Subparagraphs (a) through (e) of this statute were recodified at Ill. Rev. Stat. ch. 38, ¶ 14-6 (1985). Under subparagraphs (d) and (e) of both provisions, a landlord, owner or building operator, or common carrier by wire who aids, abets or knowingly permits the eavesdropping could also be held liable. *Id.* ¶¶ 14-6(d), (e) (1985); ¶¶ 206.1(d), (e) (1957).

21. It was held, though, in People v. Dixon, 22 Ill. 2d 513, 177 N.E.2d 224 (1961), *cert. denied*, 368 U.S. 1003 (1962), *rev'd on other grounds*, 34 Ill. 2d 387, 216 N.E.2d 154 (1966), *rev'd*, 115 Ill. 2d 47, 503 N.E.2d 346 (1986), that an extension telephone does not constitute such a device.

22. *Id.* Federal criminal and civil decisions have followed *Dixon's* holding that the consent of one party to the conversation bars a claim of violation of the statute. Magee v. Williams, 329 F.2d 470 (7th Cir. 1964); United States v. Pullings, 321 F.2d 287 (7th Cir. 1963), *rev'd*, 405 F.2d 838 (1969), *rev'd*, 401 U.S. 745 (1971), *cert. denied*, 406 U.S. 962 (1972). Both *Pullings* and *Magee* were decided under the subsequent version of the statute.

23. Ill. Rev. Stat. ch. 38, ¶¶ 14-1 to -9 (1985).

24. 1961 Ill. Laws 1983 (codified at Ill. Rev. Stat. ch. 38, ¶¶ 1-1 to 42-1 (1961)).

to fit the format of the Code.[25] Some of the changes, however, were substantive. For example, the definition of the term "eavesdropping device" was broadened. Under the new version of the law, the term encompassed "any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by other means."[26]

Paragraph 14-2 contained the heart of the regulatory scheme.[27] Like its predecessor, this paragraph prohibited the hearing or recording of any conversation "without the consent of any party thereto."[28] It also prevented the use or divulgence of information so obtained.[29] The Criminal Code retained, virtually verbatim, the exemptions to the offense listed in the previous statute,[30] as well as the civil remedies for the violation of the statute.[31] The new law continued to prohibit the use in trials, administrative proceedings, legislative inquiries and grand jury proceedings of any illegally obtained evidence.[32] Finally, the statute required common carriers by wire to furnish their customers, upon request, with "whatever services may be within [their] command for the purpose of detecting any eavesdropping involving its wires which are used" by those customers.[33]

A reading of article 14 in its entirety reveals that there are four

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25. ILL. ANN. STAT. ch. 38, ¶ 14-1 committee comments at 607 (Smith-Hurd 1979).

26. ILL. REV. STAT. ch. 38, ¶ 14-1(a) (1961). This provision changed existing law in two respects. First, the device need not have "employed electricity," and, second, the provision protected conversations conducted "in person, by telephone, *or by other means*" (emphasis added).

27. *Id.* ¶ 14-2.

28. *Id.* ¶ 14-2(a).

29. *Id.* ¶ 14-2(b).

30. *Id.* ¶ 14-3.

31. *Id.* ¶14-6. The definitions of "eavesdropper" and "principal," those liable for injunctive relief or damages under paragraphs 14-6(a)-(c), were altered slightly. Under the new law, an eavesdropper was defined as "any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this [a]rticle." *Id.* ¶ 14-1(b). A principal was defined as any person who: "Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; [k]nowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or [d]irects another to use an eavesdropping device illegally on his behalf." *Id.* ¶ 14-1(c).

32. *Id.* ¶ 14-5. The following, and quite necessary, exception was added to this paragraph by 1965 Ill. Laws 3198, § 1: "[P]rovided, however, that so much of the contents of an allegedly unlawfully intercepted, overheard or recorded conversation as is clearly relevant, as determined as a matter of law by the court in chambers, to the proof of such allegation may be admitted into evidence in any criminal trial or grand jury proceeding brought against any person charged with violating any provision of this [a]rticle." It should be noted that the proviso does not extend to civil trials, which leads one to ask whether the failure to mention those proceedings means that illegally made recordings are not admissible in civil proceedings under article 14. Such reasoning would, of course, effectively nullify those civil remedies. That argument, however, does not appear to have been made in reviewing courts.

33. *Id.* ¶ 14-7. This provision was adopted verbatim from ILL. REV. STAT. ch. 38, ¶ 206.5 (1957).

elements of an eavesdropping action, whether it is a criminal prosecution or a civil action. Eavesdropping is committed if (1) an eavesdropping device is used (2) to hear or record (3) all or any part of any conversation (4) in the absence of some form of consent.[34] Of these elements, only the third is intuitive and has generated no reported decisional law. This section of this article traces the history of these elements of eavesdropping in an attempt to define the substantive offense of eavesdropping in Illinois.[35]

A procedural matter makes it somewhat difficult to define the boundaries of the offense of eavesdropping. Very few of the reported decisions involve a prosecution for the offense of eavesdropping or a civil action for damages or other relief. Most opinions under article 14 present a defendant's claim that evidence introduced against him in a prosecution for another offense was obtained by law enforcement officials in violation of the provisions of the article. Some might argue that these circumstances should render definition of the offense no more difficult than if most of the reported opinions involved prosecution of the offense. After all, the defendant carries the burden of proving that the eavesdropping was conducted illegally.[36] Therefore, the reported opinions address the question of whether a party has met that burden, whether that party is the state, a civil plaintiff, or a criminal defendant.

Although one could claim that there is little theoretical difference between the state's or a civil plaintiff's contention that article 14 has been violated and a similar claim by a criminal defendant, there may be a substantial practical difference. Because the fourth amendment places no restrictions on consensual eavesdropping, the Illinois restrictions on that practice are purely statutory.[37] When a

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34. The phrase "some form of consent" is used because the type of consent sufficient to defeat an eavesdropping claim has varied significantly since the adoption of the Criminal Code. As noted above, in the 1961 version of paragraph 14-2, eavesdropping was committed if performed "without the consent of any party thereto." *Id.* ¶ 14-2(a) (1961). Between 1969 and 1976, eavesdropping was not committed if a person heard or recorded a conversation "unless he [did] so with the consent of any one party to such conversation and at the request of a State's Attorney . . . ." *Id.* ¶ 14-2(a) (1969). Under the current version of this paragraph, effective in 1976, a person commits eavesdropping by hearing or recording a conversation "unless he does so (1) with the consent of all of the parties to such conversation or (2) with the consent of any one party to such conversation and in accordance with [a]rticle 108A of the 'Code of Criminal Procedure of 1963' . . . ." *Id.* ¶ 14-2(a) (1985).

35. The alternative offense of "use or divulgence" of information obtained by eavesdropping has been raised only occasionally. Because claims of violation of this subparagraph usually arise in civil cases, *see, e.g.*, Cebula v. General Elec. Co., 614 F. Supp. 260 (N.D. Ill. 1985); McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 439 N.E.2d 475 (1982), they will be discussed in connection with those cases.

36. People v. Moore, 90 Ill. App. 3d 760, 764, 413 N.E.2d 516, 520 (1980).

37. Consensual eavesdropping, or the "wired informant" issue was resolved in United States v. White, 401 U.S. 745 (1971). In *White*, the United States Supreme Court held that the fourth amendment was not implicated where one party to the

defendant relies upon article 14 as a defense to a criminal prosecution, that argument may, as a result, be treated with disfavor.[38] Rightly or wrongly, some courts view article 14, when raised against law enforcement officers, as an obstacle to the admission of otherwise legal and trustworthy evidence. Consequently, reviewing courts have accepted few article 14 claims made by criminal defendants. This leaves a body of decisional law consisting, for the most part, of unsuccessful attempts to demonstrate that illegal eavesdropping has occurred. It is difficult to define what eavesdropping is when the reported decisions merely state what eavesdropping is not.

The procedural posture of most cases presenting article 14 claims can also explain why that statute has been construed restrictively. Those decisions illustrate that the courts have been generous in expanding exceptions to the statute. One example of that process is the development of the "extension telephone" exception to the element of the offense, which requires that an eavesdropping device be used.

A. *Eavesdropping Devices*

Article 14 does not expressly include a telephone extension as an eavesdropping device, nor does it exclude it. Given society's reliance upon the telephone, it was inevitable that the question of its definition as an eavesdropping device would be raised. In one of the earliest cases presenting the issue, *People v. 5948 West Diversey Avenue*,[39] the court held that no eavesdropping device was used when a police officer shared a single extension telephone with an informer who used it to place bets. The officer in *5948 Diversey* did not hear the conversation at the other end of the line. The principle from this case was extended slightly in several other cases, which held that a person who listens on an extension telephone to the conversation at the other end of the line has not used an eavesdropping device, whether that person shares a single extension telephone with a party

conversation consented to its recording or transmission. Following the reasoning of *White*, Illinois courts have observed that article 14 "has not diminished the defendant's rights but has in fact increased the protection of his rights." People v. Richardson, 60 Ill. 2d 189, 195, 328 N.E.2d 260, 264 (1975), *appeal dismissed*, 423 U.S. 805 (1975).

38. "The shield provided by constitutional or statutory safeguards cannot and must not be converted into an opportunity for a defendant to perjure himself impunibly while the prosecution remains shackled by a rule of exclusion." People v. Winchell, 140 Ill. App. 3d 244, 247, 488 N.E.2d 620, 622 (1986). In *Winchell*, the state introduced the video portion of an audio-videotape during its case-in-chief. *Id.* at 245, 488 N.E.2d at 621. The defendant referred to the contents of the recorded conversation during his case, and then objected when the state presented the audio portion of the tape in rebuttal. *Id.*

39. 95 Ill. App. 2d 479, 238 N.E.2d 229 (1968).

to the conversation or uses a separate extension.[40]

The results reached in these cases should not prove problematic, even if paragraph 14-1 does not exempt extension telephones from the definition of an eavesdropping device. To include the extension telephone within the proscriptions of article 14 may be a greater invasion of privacy by the state than to permit siblings, coworkers and others to overhear conversations by picking up an extension telephone with the consent of a party to a conversation. The fault with these cases is instead in the reasoning used to exclude the extension telephone, and with the results that flow from that reasoning.

In *People v. Gaines*,[41] the Illinois Supreme Court explained why an extension telephone should not be considered an eavesdropping device. The court based this reasoning upon *People v. Dixon*,[42] which was decided under the prior eavesdropping statute. In *Dixon*, the court explained that the basis for such a conclusion was not that the extension telephone was not a "device employing electricity," but "was rather that the statute is directed against the use of devices other than the telephone itself when the latter has not been functionally altered."[43]

With the "functionally altered" language, the court read into the statute an additional characteristic for use in defining an eavesdropping device. According to this reasoning, if a device can be used to transmit conversations between consenting parties, it will be a proscribed "eavesdropping device" only if it is functionally altered. But what does functional alteration mean? Certainly, if the device no longer transmits or receives sound, it has been "functionally altered." We also know that if the microphone has been removed from the device so that it can no longer transmit sound, an extension tele-

40. The first of these cases, decided under prior law, was People v. Dixon, 22 Ill. 2d 513, 177 N.E.2d 224 (1961) (police listened on a different extension), *cert. denied*, 368 U.S. 1003 (1962), *rev'd on other grounds*, 34 Ill. 2d 387, 216 N.E.2d 154 (1966), *rev'd*, 115 Ill. 2d 47, 503 N.E.2d 346 (1986). To the same effect are People v. Gaines, 88 Ill. 2d 342, 430 N.E.2d 1046 (1981) (police listened on a different extension); People v. Petrus, 98 Ill. App. 3d 514, 424 N.E.2d 755 (1981) (police listened on the same extension); People v. Giannopoulos, 20 Ill. App. 3d 338, 314 N.E.2d 237 (1974) (same extension); and People v. Brown, 131 Ill. App. 2d 244, 266 N.E.2d 131 (1970) (same extension).

41. 88 Ill. 2d 342, 430 N.E.2d 1046 (1981).

42. 22 Ill. 2d 513, 516, 177 N.E.2d 224, 226 (1961).

43. *Gaines*, 88 Ill. 2d at 363, 430 N.E.2d at 1056. Justice Clark dissented, arguing that while an extension telephone is not usually an eavesdropping device, it becomes one when it is used surreptitiously. *Id.* at 390, 430 N.E.2d at 1070. According to his opinion, " 'It is not what the telephone extension *is* that may make it illegal in certain circumstances, but the *use* to which it is put.' " *Id.* (Clark, J., dissenting) (quoting Commonwealth v. Murray, 423 Pa. 37, 50, 223 A.2d 102, 109 (1966) (emphasis in original)).

phone can become an eavesdropping device.[44] If a device within a telephone system can intercept calls between two nonconsenting parties, however, is it not an eavesdropping device if it can still transmit sound and has not been altered? The Illinois appellate court held as such in *People v. Bennett*.[45]

In *Bennett*, the operator of a motel's telephone switchboard overheard a conversation between a guest and another party outside the motel.[46] Normally, the operator disconnected the switchboard's mouthpiece after she verified that the connection had been made, but she failed to do so during the call in question.[47] The operator overheard the parties to the conversation discuss narcotics.[48] The appellate court held that the motel's switchboard was not an eavesdropping device because, following the reasoning in *Gaines*, the switchboard could transmit sound as well as receive it.[49] Carrying *Bennett* to its logical conclusion would lead to a result probably not anticipated by other courts faced with the extension telephone issue. If a device is capable of transmitting sound from the person who is overhearing the conversation of two nonconsenting parties, then *Bennett* would seem to suggest that that device would not be an "eavesdropping device."

At least, that is the conclusion one could draw until the recent appellate court opinion in *People v. Shinkle*.[50] In *Shinkle*, the court held that an extension telephone became an eavesdropping device when a police officer held his hand over the mouthpiece. It was reasoned that "functional alteration" of a telephone occurs when the telephone no longer performs one of its two functions—to transmit sound. Whether that alteration is made by "physical or mechanical means" as in *Gervasi*, or by the act of holding one's hand over the receiver, the court found that the fact remains that the function of the telephone has been changed and it has thus become an eavesdropping device. In other words, even if an extension telephone is capable of transmitting sound, it is an eavesdropping device if the user prevents it from transmitting sound.

Any attempt to reconcile *Gaines*, *Gervasi*, *Bennett* and *Shinkle* reveals that the use of the "functional alteration" test to define when an extension telephone becomes an eavesdropping device is arduous, at best. A rigid application of that test to other devices would require that a wiretap with a microphone installed as a means of

44. People v. Gervasi, 89 Ill. 2d 522, 434 N.E.2d 1112 (1982).
45. 120 Ill. App. 3d 144, 457 N.E.2d 986 (1983).
46. *Id.* at 147, 457 N.E.2d at 988.
47. *Id.*
48. *Id.*
49. *Id.* at 149, 457 N.E.2d at 990.
50. 160 Ill. App. 3d 1043, 513 N.E.2d 1072 (1987).

avoiding definition as an eavesdropping device would not be prohibited, while the muffling of the mouthpiece on an extension telephone would be prohibited. One must question whether society's interest in protecting individual privacy is truly served by an analysis that leads to such a result.

Videotaping equipment has received some treatment in the reviewing courts, but unlike extension telephones, the significant distinction has to do with the device's capacity to *receive* sound.[51] Cameras which cannot record sound (or, apparently, those which fail to record it properly when crime is afoot) are outside the scope of the act.[52] If a video camera can and does record sound, it is an eavesdropping device.[53] There is apparently a point at which the capacity to record sound is of such poor quality that it renders the camera not an eavesdropping device, but this would seem to be a question of fact, albeit one that is for the court to resolve.[54]

Intercom systems can be fairly characterized as eavesdropping devices, whether they are one-way or two-way systems. As one may expect, these devices usually appear in cases involving inmates of jails. These cases have typically assumed, without expressly deciding, that jail intercom systems are eavesdropping devices.[55] In its most recent construction of the eavesdropping acts, however, the Illinois Supreme Court left open the question of whether devices that transmit conversations to third parties are necessarily eavesdropping devices.[56]

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51. Since the act of eavesdropping is the act of overhearing sounds, rather than transmitting them, this distinction makes more sense than that drawn in the extension telephone cases.

52. Cassidy v. American Broadcasting Cos., 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978) (video camera's operating noise prevented it from hearing conversation of subject being filmed in adjoining room).

53. *See, e.g.*, People v. Ardella, 49 Ill. 2d 517, 276 N.E.2d 302 (1971); People v. Winchell, 140 Ill. App. 3d 244, 488 N.E.2d 620 (1986); People v. Evans, 78 Ill. App. 3d 996, 398 N.E.2d 326 (1979); People v. Childs, 67 Ill. App. 3d 473, 385 N.E.2d 147 (1979); People v. Klingenberg, 34 Ill. App. 3d 705, 339 N.E.2d 456 (1975); People v. Knight, 28 Ill. App. 3d 232, 327 N.E.2d 518 (1975).

54. *See* People v. Eddington, 47 Ill. App. 3d 388, 391, 362 N.E.2d 103, 105-06 (1977). An opinion of the same district of the appellate court attempted to draw a similar distinction between "sound" and "silent" recordings in *Knight*, when it was noted in passing that the video portion of the recording was admissible because it was used to obtain physical evidence against the defendant (evidence of his physical condition following a DUI arrest) rather than testimonial evidence (recordings of incriminating statements).

55. People v. Rhodes, 38 Ill. 2d 389, 231 N.E.2d 400 (1967) (violation of act held harmless error); People v. Clark, 125 Ill. App. 3d 608, 466 N.E.2d 361 (1984) (act not violated because defendant lacked a reasonable expectation of privacy in his conversations).

56. People v. Beardsley, 115 Ill. 2d 47, 59, 503 N.E.2d 346, 352 (1986). In *Beardsley*, the Illinois Supreme Court held that a man who recorded conversations between two police officers while he sat in the rear seat of their squad car did not violate the eavesdropping act because the conversations were not recorded surrepti-

Although Illinois' eavesdropping statutes have their roots in the telegraph and early telephone eras, an expansive reading of those acts could extend them to much of the new electronic communication technology. To date, however, such a reading has not occurred. Devices such as telephone traps and pen registers, which simply record the numbers dialed to and from a certain telephone, are not considered eavesdropping devices.[57] But, devices that amplify the earphone of a telephone are proscribed devices under the act.[58]

Illinois courts will continue to struggle with the issue of what constitutes an eavesdropping device, an issue which, it can be argued, is the most basic issue in interpreting the act. As that definition is worked out on a case-by-case basis, communications technology continues to advance and renders past precedent meaningless.[59] Those who consider amending Illinois eavesdropping law to permit nonconsensual eavesdropping would be well advised to draft a comprehensive and consistent definition of an "eavesdropping device" rather than to impose a nonconsensual eavesdropping procedure upon the patchwork definition of that term which has emerged from the construction of existing law.

B. *"Hearing or Recording" Conversations*

The primary form of the offense of eavesdropping is committed when a person uses a proscribed device to "hear or record all or any part of any conversation."[60] This definition is the same one that ap-

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tiously. *Beardsley* creates a difficulty in delineating what constitutes an eavesdropping device, because the focus of its analysis was not on the device itself, but on the method in which it was used. Thus, a tape recorder is an eavesdropping device when used surreptitiously, but it is not when it is used openly.

57. People v. Turner, 35 Ill. App. 3d 550, 342 N.E.2d 158 (1976); People v. Smith, 31 Ill. App. 3d 423, 333 N.E.2d 241 (1975), *cert. denied*, 425 U.S. 940 (1976). This construction is consistent with the definition of an eavesdropping device as a device which can "hear or record oral conversation," ILL. REV. STAT. ch. 38, ¶ 14-1(a) (1985), as well as with the holding that the results of a telephone "trap" are not hearsay. People v. Holowko, 109 Ill. 2d 187, 486 N.E.2d 877 (1985).

58. People v. Perez, 92 Ill. App. 2d 366, 235 N.E.2d 335 (1968). It is difficult to reconcile the result in *Perez* with those decisions stating that extension telephone devices are eavesdropping devices. *See supra* notes 39-44. *Perez* also warns those with cordless telephones to close their ears when in the vicinity of the speaker during the conversation of another person. Finally, the *Perez* opinion implies that the Illinois legislation can be interpreted to give privacy protection to the users of cellular and other mobile telephones. This protection has been the subject of some scholarly comment. *See* Note, *Title III Protection for Wireless Telephones*, 1985 U. ILL. L. REV. 143-61.

59. There is good cause to wonder whether the Illinois statutes do and should cover electronic computer messages transmitted over telephone lines. Perhaps the question for the future of these issues is not whether a telephone constitutes an eavesdropping device, but what constitutes a "conversation." *See* Berlet, *Technology Races Ahead, Law Stumbles*, Chicago Lawyer, June, 1987, at 17.

60. ILL. REV. STAT. ch. 38, ¶ 14-2(a) (1985).

pears in article 14 of the Criminal Code of 1961. Different language appears in the later-enacted article 108A of the Code of Criminal Procedure of 1963. In paragraph 108A-9(a),[61] one of the grounds for suppressing a recording is that the conversation was "unlawfully overheard *and* recorded."[62] A later subparagraph of that section, however, establishes that an aggrieved party may base a suppression motion on the fact that "the *recording or interception* was not made in conformity with the order of authorization."[63]

How can these sections be reconciled? Is overhearing prohibited by statute or only overhearing and recording? And what is an "interception"? The Bill of Rights of the Illinois Constitution of 1970 provides that "[t]he people shall have the right to be secure . . . against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means."[64] That language may not be an accurate guide to the meaning of the eavesdropping statutes for several reasons. First, the drafters of this provision intended that it be the outer limit on the power of the General Assembly to permit electronic eavesdropping. As the debates at the constitutional convention make clear, the existing statutes are considerably more restrictive than the constitutional provision.[65] Second, this provision applies not only to electronic eavesdropping but also to interception "by other means."[66] The term "interception" thus must have a generic meaning, which would apply to electronic and nonelectronic activity, in order for the provision to have meaning.

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61. *Id.* ¶ 108A-9(a).
62. *Id.* ¶ 108A-9(a)(1) (emphasis added).
63. *Id.* ¶ 108A-9(a)(3) (emphasis added).
64. ILL. CONST. art. I, § 6.
65. The following interchange indicates, for example, that the drafters did not intend the provision to serve as a ban on non-consensual eavesdropping:

> MRS. KINNEY: Mr. Dvorak, we've been over this I guess, but I am-I would like to have it clarified once more, if you would. Where no person to the conversation consents, if the legislature were to pass a law allowing law enforcement officials to intercept telephone conversations after obtaining a court order, would that legislation be constitutional under this provision?
> MR. DVORAK: Did you say where no party consents?
> MRS. KINNEY: Yes.
> MR. DVORAK: If they would pass such a statute, yes.
> MRS. KINNEY: It would be constitutional?
> MR. DVORAK: Yes.

3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1528 [hereinafter PROCEEDINGS].

66. Some of the comments made at the constitutional convention suggest that the term "other means" was used not only to anticipate advances in investigative technology, *see* PROCEEDINGS, *supra* note 65, at 1525 (remarks of Mr. Dvorak), but also to cover interceptions of conversations without the use of any devices, see *id.* at 1527 (remarks of Mr. Foster). An example of the latter would be the physical interception of a letter. *See infra* note 67 for a discussion of this issue at the constitutional convention.

These cautions about using the constitutional language to read the statute aside, the constitutional debates are useful in construing the word "interception." In one of the debates, the question arose as to whether a party to a conversation could intercept the conversation. The response was that he cannot.[67] This debate was quoted in *People v. Giannopolous*[68] as a means of rejecting a constitutional claim made when a police officer, who shared a telephone receiver with the other party to the conversation, overheard the defendant's conversation.

If this authority supports the proposition that a party to the conversation can permit other parties to share it once he has received it, the question of whether that party can record the conversation is far from resolved. In *People v. Nahas*,[69] the trial court admitted evidence of a telephone conversation tape recorded by a police officer who was a party to it. However, in *McDonald's Corp. v. Levine*,[70] the Illinois appellate court held that one party to a telephone conversation stated a civil cause of action against the other party who recorded the conversation. The court stated that the factual issues that the complaint raised were whether the recorded declarant intended his statements to be private, and whether those intentions were reasonable. If the answer to both questions was affirmative, then the declarant could recover damages. The opinion mentioned neither *Giannopolous* nor the constitutional use of the term "interception."

To confuse the issue even further, the Illinois Supreme Court in *People v. Beardsley*,[71] recently absolved of criminal responsibility

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67. The following exchange took place at the constitutional convention:
MR. KAMIN: The concept of an interception somehow seems to imply something that comes between the two ends of something, and I'm curious what happens when somebody is at the end. If somebody is at the receiving end, it seems to me it is not an interception.
MR. FOSTER: I would agree with that. If you take the mail out of your mailbox and hand it to me, I haven't intercepted. If I take it out of your mailbox, steam it, read it, and put it back in, I have intercepted. If you invite me into a room where there is a speaker-phone, for example, and we all sit around and listen to a conversation that the other guy at the other end doesn't know we are listening to, that's not interception. If I am sitting in the basement of your house without you knowing I'm there with some kind of a [sic] induction device listening to that conversation, it is an interception.
Interception, I think, implies, first of all, that it involves a third party to the communication before the communication has been completed, and also I think interception implies lack of consent.
MR. KAMIN: But it does not apply—it does not apply, then, to one of the parties to the conversation?
MR. FOSTER: A party cannot intercept a communication.
PROCEEDINGS, *supra* note 65, at 1530.

68. 20 Ill. App. 3d 338, 343-44, 314 N.E.2d 237, 240-41 (1974).

69. 9 Ill. App. 3d 570, 292 N.E.2d 466 (1973).

70. 108 Ill. App. 3d 732, 439 N.E.2d 475 (1982).

71. 115 Ill. 2d 47, 503 N.E.2d 346 (1986).

the subject of a traffic stop who recorded conversations between the two arresting officers while he sat with them in their squad car. This opinion does not directly answer the question of whether a party to a conversation may ever commit eavesdropping by recording a conversation because the defendant in *Beardsley* was not a party to the recorded conversation. The court did state, however, that "clearly our eavesdropping statute should not prohibit the recording of a conversation by a party to that conversation *or* one known by the parties thereto to be present."[72] *Beardsley* holds that the issue of a reasonable expectation of privacy is relevant, but the expectation at issue is that of all parties to the conversation, not, as suggested in *McDonald's*, that of the party who did not know about the recording.[73]

Returning to the original inquiry about the use of the different terms "hear," "record," "overhear" and "intercept" throughout the statutes, it seems that the law prohibits none of those acts when a party to the conversation performs them. As a practical matter, there is no legal significance between these terms, since a person who is not a party to a conversation commits eavesdropping by learning the contents of that conversation through an eavesdropping device, whether the device records, or merely transmits, sound. While the indiscriminate use of these terms could have caused inconsistency under a pre-*Beardsley* interpretation of the statutes, that difference in language is now no more than evidence of sloppy legislative drafting, without substantive effect.

C. *Without Some Form of Consent*

The third element of the substantive offense of eavesdropping is that the act be performed without some form of consent. As noted earlier, the type of consent required to comply with the statutes has varied over the last three decades.[74] Essentially, from 1957 through 1969, the sufficient consent was that of one or more parties to the conversation; from 1969 through 1976, the consent of one party and the State's Attorney were required; and since 1976, the significant "consent" has been that of a party, with approval of a circuit judge.

The first "consent" language that the General Assembly drafted appeared in the 1957 statute. It prohibited the hearing or recording

72. *Id.* at 56, 503 N.E.2d at 351 (emphasis in original).

73. After *Beardsley*, the reasoning of *McDonald's* is suspect, as is the reasoning of other opinions suggesting, in *dicta*, that the taping of telephone conversations by parties to those conversations is prohibited. *See, e.g., In re* Estate of Stevenson, 44 Ill. 2d 525, 256 N.E.2d 766 (1970) (declarant held to have consented to recording), *cert. denied*, 400 U.S. 850 (1970); Fears v. Fears, 5 Ill. App. 3d 610, 283 N.E.2d 709 (1972) (violation held to be harmless error).

74. *See supra* note 34 for a discussion of "consent."

of a conversation "without consent of any party thereto."[75] This language, which was carried over into the 1961 version of the statute,[76] was construed to mean that the consent of one party to the conversation defeated a claim of eavesdropping.[77] But then the supreme court intervened.

In *People v. Kurth*,[78] the court held that a tape recording made by one of the parties to the recorded conversation was not admissible against the parties who had not consented to the recording. The majority posited the example of a recording of a four-party conversation in which three of the parties consent to the recording and the fourth is unaware of it. It explained that the recording would be admissible "[a]s to 'any party' who has consented . . . but as to the one party who has not consented, the recording is inadmissible."[79] Justice Underwood's concurrence proved that the majority's opinion was result-oriented. In that opinion, he asked whether, in the hypothetical four-party conversation, the substantive offense had been committed. There is no easy answer to his question, or to his argument that the majority effectively construed the term "any party" to mean "all parties," despite a recent gubernatorial veto of proposed legislation intended to do exactly that.[80] The *Kurth* opinion has been extensively criticized elsewhere, and there is no need to do so here.[81]

In 1969, the General Assembly amended paragraph 14-2(a) to re-define the offense of eavesdropping. After August 28, 1969, a person committed that offense "unless" the hearing or recording was done "with the consent of any one party to such conversation and at the request of a State's Attorney."[82] The insertion of the word "one" between the words "any" and "party" appears to be a legislative attempt to overrule *Kurth*, but on the issue of consent of the parties, *Kurth* was followed for several years, even after the effective date of the amendment.[83]

The most significant change this amendment wrought was the

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75. ILL. REV. STAT. ch. 38, ¶ 206.1 (1957).
76. *Id.* ¶ 14-2(a) (1961).
77. *See supra* note 22 for a discussion of *Dixon* holding.
78. 34 Ill. 2d 387, 216 N.E.2d 154 (1966), *rev'd*, 115 Ill. 2d 47, 503 N.E.2d 346 (1986).
79. *Id.* at 395, 216 N.E.2d at 157.
80. *Id.* at 400, 216 N.E.2d at 160-61 (Underwood, J., concurring).
81. *See, e.g.*, Henzi, *Electronic Eavesdropping*, 56 ILL. B.J. 938, 940-43 (1968).
82. 1969 Ill. Laws 2239, codified at ILL. REV. STAT. ch. 38, ¶ 14-2(a) (1969).
83. *See, e.g.*, People v. Rhodes, 38 Ill. 2d 389, 231 N.E.2d 400 (1967); Fears v. Fears, 5 Ill. App. 3d 610, 283 N.E.2d 709 (1972); People v. Perez, 92 Ill. App. 2d 366, 235 N.E.2d 335 (1968); Edna Mae Dev. Co. v. Chicago Title and Trust Co., 79 Ill. App. 2d 251, 223 N.E.2d 285 (1966). In fact, the *Kurth* opinion was not overruled until the decision in People v. Beardsley, 115 Ill. 2d 47, 59, 503 N.E.2d 346, 352 (1986).

requirement of a State's Attorney's request. In effect, this is a type of consent, although this "consent" does not come from one who is a party to the conversation. During the seven years that this requirement was a part of the law, several reported decisions attempted to answer questions about the nature of that request.

One of the most natural issues to arise under the language of the 1969 amendment was whether an assistant State's Attorney could make a request, or whether only the State's Attorney could. The answer depended on which appellate district decided the question. Opinions from downstate districts held that, because assistant State's Attorneys are cloaked with the powers of the State's Attorney, they could make the statutory request.[84] In Cook County, however, the courts refused to grant that authority to every assistant State's Attorney in the county.[85] The supreme court has not had the opportunity to resolve this issue.[86]

The proper form of the State's Attorney's request was also debated. In *People v. Porcelli*,[87] the court held that State's Attorney's requests were subject to strict scrutiny. The treatment of the request in that opinion suggested that these requests should be viewed as analogous to complaints for search warrants. Other opinions took great pains to distinguish *Porcelli*.[88] Those cases held that the document need only note the facts of the party's consent and the State's Attorney's request. The supreme court did not expressly overrule *Porcelli* and its strict construction standard, but the results reached

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84. People v. George, 67 Ill. App. 3d 102, 384 N.E.2d 377 (1978) (recordings made in 1975), *cert. denied*, 444 U.S. 925 (1979); People v. Holliman, 22 Ill. App. 3d 95, 316 N.E.2d 812 (1974); People v. Nahas, 9 Ill. App. 3d 570, 292 N.E.2d 466 (1973).

85. People v. Swimley, 57 Ill. App. 3d 116, 372 N.E.2d 887, *cert. denied*, 439 U.S. 911 (1978); People v. Marlow, 39 Ill. App. 3d 177, 350 N.E.2d 215 (1976). In *Marlow*, the court, in disavowing "a construction of the statute that would permit any assistant to act in place of the State's Attorney," noted that "[i]n large counties where there are many assistants, allowing all of them to act in lieu of the State's Attorney would result in a diffusion of responsibility that would weaken the control of State-sponsored eavesdropping far beyond the contemplation of the legislature." *Marlow*, 39 Ill. App. 3d at 179, 350 N.E.2d at 217.

86. In cases in the first district of the Illinois appellate court, this issue continues to arise. Paragraph 108A-1 permits the "State's Attorney" to authorize an application to a circuit judge for an eavesdropping authorization order. ILL. REV. STAT. ch. 38, ¶ 108A-1 (1985) . Several recent cases have held that this article means that an assistant State's Attorney can authorize the application only "where there has been a good faith attempt to contact the State's Attorney and he is unavailable for a reason such as illness." People v. Silver, 151 Ill. App. 3d 156, 159, 502 N.E.2d 1141, 1144 (1986); *see also* People v. Lewis, 84 Ill. App. 3d 556, 406 N.E.2d 11 (1980).

87. 25 Ill. App. 3d 145, 323 N.E.2d 1 (1974).

88. *See* People v. Mosley, 63 Ill. App. 3d 437, 440, 379 N.E.2d 1240, 1243 (1978); *see also* People v. Knight, 28 Ill. App. 3d 232, 327 N.E.2d 518 (1975). These opinions found it significant that "the statute does not provide any specific limitations as to the content or form of a State's Attorney's request for the overhearing or recording of any conversation with the consent of any one party thereto." *Mosley*, 63 Ill. App. 3d at 440, 379 N.E.2d at 1243.

in two cases certainly implied disapproval of it. In *People v. Richardson*,[89] the court approved of a State's Attorney's request, which suffered from some of the same defects as the one in *Porcelli*. In *People v. Kezerian*,[90] the court reversed an appellate court opinion[91] that applied *Porcelli*'s standards to a request and found it lacking. These opinions suggest that the request form—or, for that matter, an application under article 108A—should not be scrutinized like a search warrant.[92]

Two final technical points can be made about the State's Attorney's request under the 1969 amendment. First, that request was allowed to be continuous in nature, as, for example, in a request to videotape all persons arrested for driving while intoxicated.[93] Second, the source for the request did not have to be within the State's Attorney's office; a request from another law enforcement agency approved by the State's Attorney was sufficient.[94]

In 1976, the legislature again amended paragraph 14-2. Under this amendment, which remains in force, a person commits eavesdropping "unless he does so (1) with the consent of all of the parties to such conversation or (2) with the consent of any one party to such conversation" in accordance with the newly enacted article 108A.[95] One might argue that the word "all" in the first of these clauses has been read to mean "any" by *Beardsley*'s requirement that the recording be surreptitiously made. Nevertheless, the definition of a party's consent continues to be a litigated issue under current eavesdropping law.

What is the valid consent of a party? In an early case, the supreme court held that cooperation with the police is synonymous with consent to eavesdropping.[96] The standard for testing the adequacy of consent has been said to be that of "knowing acquiescence."[97] A "showing of the type of informed consent necessary for a

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89. 60 Ill. 2d 189, 328 N.E.2d 260, *appeal dismissed*, 423 U.S. 805 (1975).

90. 77 Ill. 2d 121, 395 N.E.2d 551 (1979).

91. People v. Kezerian, 63 Ill. App. 3d 610, 379 N.E.2d 1246 (1978), *rev'd*, 77 Ill. 2d 121, 395 N.E.2d 551 (1979).

92. There is conflicting authority on this issue under current law. One case has held *Porcelli* applicable to article 108A. *See* People v. Monoson, 75 Ill. App. 3d 1, 393 N.E.2d 1239 (1979). Two cases, however, have held that *Porcelli* is not authority under that statute. *See* People v. Sylvester, 86 Ill. App. 3d 186, 407 N.E.2d 1002 (1980); People v. Childs, 67 Ill. App. 3d 473, 385 N.E.2d 147 (1979).

93. People v. Klingenberg, 34 Ill. App. 3d 705, 339 N.E.2d 456 (1975); *Knight*, 28 Ill. App. 3d 232, 327 N.E.2d 518.

94. *Kezerian*, 77 Ill. 2d 121, 395 N.E.2d 551; People v. Roberts, 83 Ill. App. 3d 311, 404 N.E.2d 278 (1980).

95. 1975 Ill. Laws 3561 (codified at ILL. REV. STAT. ch. 38, ¶ 14-2(a) (1977)).

96. People v. Dixon, 22 Ill. 2d 513, 177 N.E.2d 224 (1961), *cert. denied*, 368 U.S. 1003 (1962), *rev'd on other grounds*, 34 Ill. 2d 387, 216 N.E.2d 154 (1966), *rev'd*, 115 Ill. 2d 47, 503 N.E.2d 346 (1986).

97. People v. Ardella, 49 Ill. 2d 517, 276 N.E.2d 302 (1971); *In re* Estate of

defendant to waive a Fourth Amendment right" is not required.[98] However, the mere knowledge that one's conversation is being overheard may be insufficient consent.[99]

Frequently, the issue of consent is raised in the context of a claim that the consent was coerced. Such a claim may be raised, not only by the nonconsenting party to the conversation,[100] but also by a nonparty to the conversation.[101] Among the claims of coercion that the courts have rejected have been those based on youth[102] and promises of leniency.[103]

III. Exceptions to the Substantive Offense

Even if the elements discussed above are present, a person may not have committed eavesdropping if his acts fall under an exception to the statute. Some of these exceptions are statutory and are fairly explicit in their terms. Others arise through judicial construction and may be more difficult to delineate than the statutory exceptions.

A. *"Nonsurreptitious" Eavesdropping*

People v. Beardsley[104] held that article 14 is directed only to the "surreptitious interception of a private conversation." In his concurrence, Justice Simon argued that the majority's opinion en-

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Stevenson, 44 Ill. 2d 525, 256 N.E.2d 766, *cert. denied*, 400 U.S. 850 (1970); People v. Vella, 133 Ill. App. 3d 104, 478 N.E.2d 593 (1985); People v. Fredrics, 76 Ill. App. 3d 1043, 395 N.E.2d 723 (1979).

98. *Fredrics*, 76 Ill. App. 3d at 1049, 395 N.E.2d at 728.

99. *See* People v. Satek, 78 Ill. App. 3d 543, 396 N.E.2d 1133 (1979). In *Satek*, the court held that the fact that an arrestee could hear beeping tones on the jailhouse phone system did not mean that he consented to the recording of his conversation. The court commented that "[t]he statute contains no indication that its protections may be waived in the absence of express consent." *Id.* at 547, 396 N.E.2d at 1135-36. A somewhat different version of consent was suggested in an Illinois Attorney General opinion that dealt with the issue of jailhouse intercom systems. That opinion contended that "implied consent could be attributed to prisoners who, after being informed of the use of a monitoring system in the county jail and having been given a *Miranda* warning at the time of their arrest, continue normal communications." 1974 Op. Ill. Att'y. Gen. 155, 159.

100. People v. Maslowsky, 34 Ill. 2d 456, 216 N.E.2d 669 (1966).

101. Some cases have expressly rejected fourth amendment-like standing requirements. *See* People v. Clankie, 154 Ill. App. 3d 197, 506 N.E.2d 409 (1987); *Satek*, 78 Ill. App. 3d at 549, 396 N.E.2d at 1137.

102. People v. Fredrics, 76 Ill. App. 3d 1043, 395 N.E.2d 723 (1979). In *Fredrics*, the defendant argued unsuccessfully that an 11 year old boy's consent could not have been voluntary because, by agreeing to carry a transmitter, he was agreeing to submit to another act of molestation. *Id.*

103. *Cf. Vella*, 133 Ill. App. 3d 104, 478 N.E.2d 593; People v. George, 67 Ill. App. 3d 102, 384 N.E.2d 377 (1978) (consenting party was 17 years old), *cert. denied*, 444 U.S. 925 (1979).

104. 115 Ill. 2d 47, 58, 503 N.E.2d 346, 352 (1986).

grafted onto the plain language of article 14 the negative requirement that the prohibited eavesdropping not be surreptitious.[105] It is true that the majority's focus on the private nature of the intercepted conversation as a threshold to criminal liability finds some support in earlier cases.[106] Nevertheless, the terms "surreptitious" and "private" appear nowhere in article 14, and thus eavesdropping that is not surreptitious should be thought of as a nonstatutory exception to the act.

Because so little time has elapsed since the *Beardsley* opinion, it is difficult to precisely define what eavesdropping is not surreptitious, and, therefore, falls within this exception. Cases involving such matters as intercom monitored communications of prisoners[107] and the videotaping of persons arrested for driving while intoxicated were among the expectation of privacy cases decided before *Beardsley*.[108] Given that the conversation in *Beardsley* took place between two police officers in their squad car, it might be fair to say that the "nonsurreptitious" eavesdropping exception applies particularly to conversations that take place in law enforcement facilities.[109]

B. *Statutory Exemptions*

Paragraph 14-3 lists five specific exemptions to the offense of

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105. Justice Simon correctly contended that if the statute prohibited only surreptitious eavesdropping, paragraph 14-1(a) would not need to exempt hard-of-hearing devices from the definition of eavesdropping devices. *Id.* at 63-64, 503 N.E.2d at 354 (Simon, J., concurring).

106. *See, e.g.*, People v. Klingenberg, 34 Ill. App. 3d 705, 708, 339 N.E.2d 456, 459 (1975). The court in *Klingenberg* concluded "that the statute was enacted to protect the individual from the interception of communication intended to be private." On its face, this statement appears inconsistent with the supreme court's comment in People v. Richardson, 60 Ill. 2d 189, 194, 328 N.E.2d 260, 263, *appeal dismissed*, 423 U.S. 805 (1975), that "the subjective expectations of the defendant are irrelevant here." The reason that those expectations were irrelevant in *Richardson* was because the defendant's phone calls with a police officer were recorded by the officer, and because there was no interception, the party's recording of the conversation did not violate the law. *Id.* The remarks about the defendant's expectations should be viewed as needless *dicta*.

The *Klingenberg* court's subjective test was used in many pre-*Beardsley* decisions. *See, e.g.*, People v. Clark, 125 Ill. App. 3d 608, 466 N.E.2d 361 (1984); McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 439 N.E.2d 475 (1982); People v. Myles, 62 Ill. App. 3d 931, 379 N.E.2d 897 (1978); Cassidy v. American Broadcasting Cos., 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978).

107. *Clark*, 125 Ill. App. 3d at 613, 466 N.E.2d at 364; *Myles*, 62 Ill. App. 3d at 935, 379 N.E.2d at 900.

108. *Klingenberg*, 34 Ill. App. 3d at 709, 339 N.E.2d at 460.

109. The *Cassidy* case is one exception to that statement. *Cassidy*, 60 Ill. App. 3d at 836, 377 N.E.2d at 130. In *Cassidy*, where the recorded conversation took place in a massage parlor, the court held that the plaintiff, an undercover policeman, did not have a reasonable expectation of privacy in his statements to a model, because when he asked the model if they were "on TV," she replied that they were "making movies." *Id.*

eavesdropping. There has been little litigation or interpretation of these exemptions. Moreover, if the act does not cover nonsurreptitious eavesdropping, some of the exemptions are superfluous.

Two of the exemptions involve public broadcasts.[110] *Beardsley* indicates that an exemption for listening to broadcasts intended to be public is unnecessary. Without an express exception, however, the interception of station-to-station telecommunications signals could be a violation of the act even if those signals will ultimately be broadcasted to the public. One might argue that the eavesdropping act prohibits the satellite dish interception of pay television signals. The flaw with this argument is that it assumes that the term "public" is synonymous with the term "general public, not paying admission." It also fails to recognize that the purpose of the statutes is to protect privacy, not property, and that it is difficult to claim a legitimate privacy interest in broadcast communications to a large audience even if that audience pays for the privilege.[111]

Paragraph 14-3(b) exempts from the act the interception of communications by employees of common carriers by wire, acting in the scope of their employment, "so long as no information obtained thereby is used or divulged by the hearer."[112] In *People v. Bennett*, the court construed this exception to apply only to the use of devices that can only hear or record.[113] In other words, *Bennett* provides that because the act does not prohibit the use of a device that transmits and receives sound, the exception is unnecessary to cover the use of those devices.

The *Bennett* court's construction of this exemption conforms with its principal holding. Yet, one must wonder what effect such a construction has on the value of this "telephone workers" exception.

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110. *See* ILL. ANN. STAT. ch. 38, ¶ 14-3(a) (Smith-Hurd 1979) ("[l]istening to radio, wireless and television communications of any sort where the same are publicly made"); *see also id.* ¶ 14-3(c) (any broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made). At first glance, paragraph 14-3(a) would appear to include activities exempted by paragraph 14-3(c). A closer comparison of the provisions suggests that perhaps paragraph 14-3(c) was intended to exempt the interception of such matters as station-to-station transmission of live or recorded programs that are intended for later public broadcast. Neither provision has an analogue in federal law.

111. Communications over police band frequencies would also fall into the category of "any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency" as exempted by paragraph 14-3(d). *See* 1975 Op. Ill. Att'y. Gen. 271, 274.

112. *See* ILL. REV. STAT. ch. 38, ¶ 14-3(b) (1985). The full text of the provision is as follows: "Hearing conversation when heard by employees of any common carrier by wire incidental to the normal course of their employment in the operation, maintenance or repair of the equipment of such common carrier by wire so long as no information obtained thereby is used or divulged by the hearer."

113. People v. Bennett, 120 Ill. App. 3d 144, 148-49, 457 N.E.2d 986, 989 (1983).

If the drafters meant it to apply to telephone operators, *Bennett* thwarted their intent, because operators usually use devices that transmit and receive sound. If the paragraph was meant to cover pen registers and telephone traps, that purpose has not been accomplished, given that those devices are not eavesdropping devices.[114] Nor does it apply to the recording of telecommunications, despite *Bennett's dicta* to the contrary, because paragraph 14-3(b) refers only to "hearing," not to recording, conversations. In fact, this exception applies only to employees of common carriers by wire who overhear, but do not record or divulge conversations, using devices that cannot transmit sound. It is difficult to see how this exception serves any function because not only are there few devices to which it would apply, but also, if the employee does not use or divulge the information, nobody would know that there has been an interception.

Another paragraph 14-3 exemption concerns emergency communications made in connection with law enforcement. The exempt activity is "[r]ecording or listening with the aid of any device to any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency or institutions dealing in emergency services."[115] This provision has been a source of confusion, perhaps because the plain language of the provision appears to create an exception of little value. A strictly grammatical reading of this paragraph reveals that it should apply to someone who listens to communications by law enforcement or emergency services personnel. The example that leaps to mind is the police band radio listener.

This has not always been the reading of the provision. An opinion of the Illinois Attorney General, in a challenge to good grammar, asserted that the phrase "made in the normal course of operations" refers not to the immediately preceding phrase "any emergency communication," but to the phrase "recording or listening."[116] The reported opinions dealing with this exception have all involved private phone calls to or from jailhouses or police stations. In two of those cases, arrestees made the calls, and although these cases reached opposite conclusions on the propriety of monitoring such calls, both opinions held the paragraph 14-3(d) exception inapplicable to communications by private individuals.[117] In a third case, the

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114. *See supra* note 57 and accompanying text for a discussion of telephone traps.

115. The institutions dealing in emergency services include, but are not limited to "hospitals, clinics, ambulance services, fire fighting agencies, any public utility, emergency repair facility, civilian defense establishment or military institution." ILL. REV. STAT. ch. 38, ¶ 14-3(d) (1985).

116. 1977 Op. Ill. Att'y. Gen. 195, 196.

117. In People v. Satek, 78 Ill. App. 3d 543, 396 N.E.2d 1133 (1979), the court

call was from a private individual to a police officer. Because the call was not related to the investigation of a crime, however, paragraph 14-3(d) did not provide a "good faith reliance" defense for another police officer at the station charged with violating the civil rights of the caller in recording the conversation.[118]

The final exception enumerated in paragraph 14-3 excludes from the act the recording of meetings required to be open to the public under the Illinois Open Meetings Act.[119] This provision, which was added in 1977,[120] effectively codified an opinion of the Attorney General.[121] This exception seems unnecessary because even if a recording of such a meeting were made surreptitiously and not openly, "Neither the public officials participating in such a meeting nor the private citizens in attendance at the meeting can claim any right of privacy for their conduct."[122]

C. *Territorial Limitations*

Electronic communications, particularly telecommunications, frequently cross state lines. One must therefore ask when, if ever, the Illinois eavesdropping statutes apply to interstate communications. Those instances in which they do not may be thought of as an exception to the statutes, for the purpose of this analysis.

The most perplexing jurisdictional problems involve prosecution for the acts of overhearing or recording conversations, not for the acts of use or divulgence of unlawfully intercepted information. If information is used or divulged, presumably in person, outside Illinois, no violation of the Illinois statutes has occurred.[123]

In *People v. Pascarella*,[124] the Illinois appellate court did not adopt a rule that would include or exclude all interstate communica-

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held that it was improper for the police to record outgoing telephone calls, even though the recording system emitted an audible beeping sound that could have indicated the presence of a recording device. In People v. Myles, 62 Ill. App. 3d 931, 379 N.E.2d 897 (1978), however, the court approved of the monitoring of a prisoner's telephone call from a telephone located in the bullpen section of the jail which was surrounded by a sign warning that all calls were monitored.

118. Jandak v. Village of Brookfield, 520 F. Supp. 815 (N.D. Ill. 1981).

119. ILL. REV. STAT. ch. 38, ¶ 14-3(e) (1985). The Illinois Open Meetings Act is contained in ILL. REV. STAT. ch. 102, ¶ 41-46 (1985).

120. 1977 Ill. Laws 2531 (codified at ILL. REV. STAT. ch. 38, ¶ 14-3(e) (1977)).

121. 1975 Op. Ill. Atty. Gen. 107.

122. *Id.* at 109.

123. People v. Bovinett, 73 Ill. App. 3d 833, 392 N.E.2d 428 (1979) (information divulged in administrative hearing in Missouri). Likewise, it was held in People v. Moore, 90 Ill. App. 3d 760, 413 N.E.2d 516 (1980), that an Illinois eavesdropping order could be based on a complaint alleging facts that occurred entirely in Missouri, as long as a felony, which was the subject of the eavesdropping, was about to be committed in Illinois.

124. 92 Ill. App. 3d 413, 415 N.E.2d 1285, *cert. denied*, 454 U.S. 900 (1981).

tions with a party in Illinois. Nor did the court draw a distinction between communications that originate in Illinois and those that originate outside the state. In *Pascarella*, an Illinois police officer, pursuant to order of an Illinois court, telephoned the defendant in Colorado and recorded the conversation. The defendant argued that the Illinois court lacked jurisdiction to enter the eavesdropping order.

The *Pascarella* court need not have addressed the jurisdictional question. Because Colorado, like the federal government, places no statutory restrictions on consensual eavesdropping,[125] and because Illinois law was not violated, the recording was legal regardless of which law was applied. Nevertheless, the court stated that Illinois courts may authorize recordings of telephone conversations "when, as here, the conversation is knowingly directed to a person in Illinois and that person consents to the recording, even though the other party to the conversation is physically located in another State. The situs of the conversation was, and was intended by both parties to be, Illinois."[126]

Pascarella's "situs of the conversation" theory of jurisdiction may cause needless confusion in future cases although at least one court has accepted, without further discussion, the application of the Illinois eavesdropping statutes to interstate telephone calls.[127] It may be best to view the "situs of the conversation" language as *dicta*.

IV. Civil Actions

Paragraph 14-6 of the Criminal Code of 1961 permits "[a]ny or all parties to any conversation upon which eavesdropping is practiced contrary to this [a]rticle" to bring civil actions. Among the provision's remedies are injunctive relief and actual and punitive damages.[128] There does not appear to be any reported instance of

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125. *See* People v. Morton, 189 Colo. 198, 539 P.2d 1255 (1975), *cert. denied*, 423 U.S. 1053 (1976).

126. *Pascarella*, 92 Ill. App. 3d at 416-17, 415 N.E.2d at 1288.

127. McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 439 N.E.2d 475 (1982).

128. The full text of the section is as follows:

Any or all parties to any conversation upon which eavesdropping is practiced contrary to this Article shall be entitled to the following remedies:

(a) To an injunction by the circuit court prohibiting further eavesdropping by the eavesdropper and by or on behalf of his principal, or either;
(b) To all actual damages against the eavesdropper or his principal or both;
(c) To any punitive damages which may be awarded by the court or by a jury;
(d) To all actual damages against any landlord, owner or building operator, or any common carrier by wire who aids, abets, or knowingly permits the eavesdropping concerned;
(e) To any punitive damages which may be awarded by the court or by a jury against any landlord, owner or building operator, or common carrier by

the invocation of the injunctive relief provisions. After all, if the prohibited conduct is also criminal conduct, a real threat of prosecution may be more effective than an injunction in discouraging future eavesdropping.

The damages provisions have also been infrequently used. When invoked, they have rarely supported a complaint. This writer has not uncovered a case where a plaintiff successfully recovered damages under paragraph 14-6.[129] One reason for the small number of civil actions brought under these provisions may be the perception that in most situations the recoverable damages might prove small.[130]

The elements of a civil cause of action under paragraph 14-3 are the same as the elements of a criminal complaint. Of course, the nature of civil proceedings gives rise to some differences in the trial of cases. For example, one court held that "the intention of the declarant at the time the statement is made is a private, individual, subjective issue which cannot be determined strictly on the basis of any predetermined set of objective criteria and resolved on a motion to dismiss."[131] This statement may apply equally to criminal proceedings, although no reported decision has addressed the issue of the sufficiency of a criminal eavesdropping complaint.

Essentially, then, the only time that a motion to dismiss a civil eavesdropping complaint would be appropriate is if the pleadings establish certain defenses. The courts have held that several defenses expressly apply to paragraph 14-6 actions. In *Stamatiou v.*

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wire who aids, abets, or knowingly permits the eavesdropping concerned. ILL. REV. STAT. ch. 38, ¶ 14-6 (1985).

129. Indeed, in the majority of reported decisions interpreting this provision, the issues were resolved in favor of the defendant at the pleadings or summary judgment stages. *See, e.g.*, Cebula v. General Elec. Co., 614 F. Supp. 260 (N.D. Ill 1985); Heyman v. Heyman, 548 F. Supp. 1041 (N.D. Ill. 1982); Stamatiou v. United States Gypsum Co., 400 F. Supp. 431 (N.D. Ill. 1975), *aff'd*, 534 F.2d 330 (7th Cir. 1976); Cassidy v. American Broadcasting Cos., 60 Ill. App. 3d 831, 377 N.E.2d 126 (1978).

130. In any action which resembles an action for the invasion of privacy, the proper assessment of damages is a difficult business. *See* Eick v. Perk Dog Food Co., 347 Ill. App. 293, 299-301, 106 N.E.2d 742, 745-46 (1952). In By-Prod Corp. v. Armen-Berry Co., 668 F.2d 956 (7th Cir. 1982), the court discussed the proper measure of damages in a civil eavesdropping action in the context of evaluating the basis for the diversity jurisdiction of a permissive counterclaim. An officer of the plaintiff tape recorded a telephone conversation, but later erased it without listening to it. The Seventh Circuit concluded that it was a "legal certainty" that the defendant could not obtain a judgment greater than $10,000 on its counterclaim because "it is clear beyond reasonable doubt that Armen-Berry could not obtain any actual damages" and that Illinois does not permit the recovery of punitive damages in the absence of actual damages. *Id.* at 961. It may have been a reasonable conclusion that the counterclaimant could not meet the jurisdictional amount in an action based on a recording made but not listened to; however, the assumption that no actual damages, even nominal damages, could be awarded seems to be an act of appellate fact-finding.

131. *McDonald's Corp*, 108 Ill. App. 3d at 741, 439 N.E.2d at 481. *Accord* Bianco v. American Broadcasting Cos., 470 F. Supp. 182 (N.D. Ill. 1979).

United States Gypsum Co.,[132] the statutory defense of necessity was held to bar a civil eavesdropping complaint.[133] The plaintiff in *Stamatiou* demanded payment from the defendant before he would reveal the location of certain documents to which the defendant had a legal claim. Officers of the defendant company tape recorded these conversations. In granting summary judgment for the defendants on plaintiff's eavesdropping count, the court concluded that the recording was undertaken to prevent a greater injury, the loss of the documents, than would result from the recording itself.

In *Heyman v. Heyman*,[134] the court barred a civil eavesdropping action because of the then-existing version of statutory interspousal immunity.[135] It is a logical assumption, then, that parental immunity also prevents parent-child civil eavesdropping actions.[136] To what extent local government immunity would apply to such an action is an open question. Under paragraph 2-202 of the "Local Governmental and Governmental Employees Tort Immunity Act," public employees are not liable for acts or omissions made "in the execution or enforcement of any law unless such act or omission constitutes willful or wanton conduct"[137] and a local entity is not liable if its employee is not liable.[138] Because the "willful or wanton" exception typically arises in the context of personal injury cases, it has been held that the acts giving rise to liability "must have been committed with actual or deliberate intention to harm or with an utter indifference to or conscious disregard for the safety of others."[139] If in fact the safety of others is the primary concern in the exemption from this statutory immunity, then it is unlikely that civil eavesdropping actions can be maintained against local law en-

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132. 400 F. Supp. 431 (N.D. Ill. 1975).

133. In Illinois, the statutory defense of necessity, codified at ILL. REV. STAT. ch. 38, ¶ 7-13 (1985), unlike other states, is not limited to homicide prosecutions or felony complaints. It extends to violations of "any penal statute of this State," which has been construed to include any municipal ordinance violations. City of Chicago v. Mayer, 56 Ill. 2d 366, 308 N.E.2d 601 (1974); ILL. REV. STAT. ch. 38, ¶ 2-12 (1985).

134. 548 F. Supp. 1041 (N.D. Ill. 1982).

135. *Id.* In 1981, an exception was created to the Illinois spousal immunity provision to permit spouses to sue for intentional torts committed during coverture. This exception was later limited to cases "where the spouse inflicted physical harm." *Compare* ILL. REV. STAT. ch. 40, ¶ 1001 (1981) *with* ILL. REV. STAT. ch. 40, ¶ 1001 (1986 Supp.). This physical harm requirement means that the exception would not apply to civil eavesdropping actions, and that the result reached in *Heyman* is still good law. It should be noted, however, that the immunity does not bar third-party actions. *See* Wirth v. City of Highland Park, 102 Ill. App. 3d 1074, 430 N.E.2d 236 (1981).

136. Note, however, that the existence of an immunity from damages does not mean that illegally obtained evidence is admissible in court. *See* Fears v. Fears, 5 Ill. App. 3d 610, 283 N.E.2d 709 (1972).

137. ILL. ANN. STAT. ch. 85, ¶ 2-202 (Smith-Hurd 1987).

138. *Id.* ¶ 2-109.

139. Breck v. Cortez, 141 Ill. App. 3d 351, 360, 490 N.E.2d 88, 94 (1986).

forcement officers and the entities that employ them.[140]

As with all civil actions, questions of limitations have arisen in eavesdropping cases. The courts have held that the appropriate statute of limitations for civil eavesdropping is neither the one-year period applicable to actions for the invasion of privacy[141] nor the two-year period governing actions for statutory penalties.[142] Instead, the applicable statute of limitations is a five-year period.[143]

The issue of who are proper parties to an eavesdropping action has been raised in *respondeat superior* contexts. In *McDonald's Corporation v. Levine*, two employees of the principal plaintiff, McDonald's, brought separate complaints against the defendants who allegedly recorded telephone conversations concerning corporate business.[144] In affirming the dismissal of the complaints brought by these employees, the appellate court noted that the employees "were only acting in a corporate representative capacity for McDonald's. Thus, the only parties to the conversations were the [defendants] and McDonald's, not [the employees]."[145] The converse of the *McDonald's* situation appeared in *Cebula v. General Electric Co.*,[146] where the plaintiff's supervisor tape-recorded the conversation in which he fired the plaintiff. The plaintiff sued his employer, alleging that the employer "knowingly employ[ed] another who illegally use[d] an eavesdropping device."[147] He contended that the word "knowingly" modifies the word "employs" and that for an employer to be liable under the act, the employer need not know about the eavesdropping activity. In granting summary judgment for the employer, the court disagreed with this construction, reasoning that to read the statute the way that the plaintiff did would render the word "knowingly" redundant, because employment is rarely accidental.[148]

Cebula and *McDonald's* are hard to reconcile. *McDonald's* seems to hold that a corporation is a proper plaintiff in a civil eavesdropping action if the invaded conversation concerns corporate business. The corporation's "knowledge" of the eavesdropping is not rel-

140. There does not appear to be an analogous immunity for state law enforcement officers, although if the State of Illinois were made a party to such a suit, the action would have to be brought in the Illinois Court of Claims. ILL. REV. STAT. ch. 127, ¶ 801 (1985); *Id.* ch. 37, ¶ 439.8(d).

141. *Id.* ch. 110, ¶ 13-201.

142. *Id.* ¶ 13-202.

143. McDonald's Corp. v. Levine, 108 Ill. App. 3d 732, 439 N.E.2d 475 (1982). The court commented that the fraudulent concealment provision contained in ILL. REV. STAT. ch. 110, ¶ 13-205 (1985), could toll this period.

144. *McDonald's Corp.*, 108 Ill. App. 3d. at 732, 439 N.E.2d at 475.

145. *Id.* at 742, 439 N.E.2d at 482.

146. 614 F. Supp. 260 (N.D. Ill. 1985).

147. ILL. REV. STAT. ch. 38, ¶ 14-1(c)(1) (1985).

148. *Cebula*, 614 F. Supp. at 267-68 n.4.

evant. On the other hand, for a corporate defendant to be a proper party, according to *Cebula*, it must have "known" about the eavesdropping. The subject of the conversation is not relevant. The result in *Cebula* accords more with the statutory language, because nothing in article 14 limits standing by the topic of conversation. To be sure, paragraph 14-6 does not define the term "[a]ny or all parties to any conversation upon which eavesdropping is practiced," and the *McDonald's* court was not bound to follow the "knowing employment" test applicable to corporate defendants. But a more natural reading of the phrase "any or all parties" should not have excluded the corporate employees in *McDonald's*, whether or not the corporation should be included in that definition.

V. Judicial Supervision of Eavesdropping

Before 1976, the judicial system was involved only peripherally with the activity of eavesdropping. It was not until a claim of violation of the statutes was made that the decision-making power of the judicial system was invoked. After 1976, Public Act 79-1159 brought eavesdropping regulation to the judiciary even before the activity took place.

With the passage of Public Act 79-1159,[149] the General Assembly created a formal process by which law enforcement agencies could seek advance approval from the courts of proposed eavesdropping activity. That process entails an elaborate system of reporting by judges, State's Attorneys and the Administrative Office of the Illinois Courts. The apparent purpose of these provisions is to create a public record of eavesdropping activity so that individuals cannot be eavesdropped upon without their knowledge.[150] The procedure is modeled after federal eavesdropping regulation provisions,[151] although the Illinois statute regulates nonconsensual eavesdropping, which is not even considered eavesdropping under the federal scheme.[152]

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149. 1975 Ill. Laws 3561 (codified at Ill. Rev. Stat. ch. 38, ¶ 108-A-1 to -11 (1977)).

150. An important motivating factor underlying this legislation was the occurrence of several incidents, in which members of the General Assembly were the subjects of actual or perceived surveillance operations. These incidents ranged from the "Leland Hotel" incident described in People v. Maslowsky, 34 Ill. 2d 456, 216 N.E.2d 669 (1966), to allegations, immediately before the passage of this legislation, that the capitol building itself had been "bugged." *See Capitol Found Bugless*, Chicago Tribune, Mar. 12, 1975, § 3, at 8, col. 2; *Inquiry Under Way in Capital Bugging*, Chicago Tribune, Feb. 13, 1975, § 1, at 3, col. 4.

151. *See* 18 U.S.C. §§ 2518, 2519 (1982).

152. The legislative debates on the bill, which eventually became P.A. 79-1159, give the impression that some of the legislators thought that they were voting to adopt the federal procedure. A member of the house who served on a subcommittee of a house judiciary committee, which produced the final version of the bill, informed

The judicial supervision process begins with an application to the circuit court for an order permitting prospective eavesdropping. If eavesdropping occurs, the court must review the tapes made and overheard parties must be given notice of the activity. Finally, the judge and the State's Attorney must make reports to the Administrative Office of the Illinois Courts, which, in turn, submits an annual report on eavesdropping to the General Assembly. The next portion of this article examines these procedures in the order in which they normally occur.

A. *The Application*

Article 108A contains five requirements that each application for judicial approval of eavesdropping activity must meet. The application must be made: (1) with the authorization of a State's Attorney;[153] (2) to a circuit judge;[154] (3) must be "in writing or upon oath or affirmation";[155] (4) must allege that one party has consented to the monitoring;[156] and (5) must include information on certain factors listed in paragraph 108A-3.[157] Virtually all of these factors have been the subject of litigation in which the validity of an application has been challenged.

As under the version of article 14, which was in effect from 1969 to 1976, the question of which State's Attorney may authorize the application has been raised. In general, while an assistant State's Attorney may be able to authorize an application in downstate counties, such an authorization may be sufficient in Cook County only upon a showing that the State's Attorney is unavailable.[158]

The identity of the judge to make application to, while yet an unlitigated issue, is a troubling one. Sections 108A-1 and 108-A3(a) expressly limit the power to approve eavesdropping applications to "circuit judges." Yet, section 9 of article VI of the Illinois Constitution vests the circuit courts with jurisdiction of "all justiciable mat-

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the members of the house that what the proposed bill "does is provide a tightening of the procedure of eavesdropping by adopting the federal rule. The federal government . . . seems to get along well with it and it was the feeling of the Sub-Committee that the particular procedures that are in use under the federal law would be good for Illinois so I would also urge an 'aye' vote." ILL. HOUSE PROCEEDINGS, May 9, 1975, at 237 (remarks of Rep. Leinenweber).

153. ILL. REV. STAT. ch. 38, ¶¶ 108A-1, -3(a)(1) (1985).

154. *Id.* ¶¶ 108A-1, -3(a).

155. *Id.* ¶ 108A-3(a).

156. *Id.* ¶ 108A-1.

157. These factors include such matters as the identity of the persons involved in the activity, the facts which justify a belief that a felony has been or will be committed, the proposed type and length of monitoring, and the results of any previous eavesdropping applications involving the same subject. *Id.* ¶ 108A-3(a)(1)-(5).

158. *See supra* note 86 for a discussion of who may authorize an eavesdropping order.

ters" and section 8 of article VI provides that the supreme court "shall provide by rule for matters to be assigned to Associate Judges."[159] In his 1983 Annual Report to the General Assembly, Chief Justice Howard C. Ryan suggested that article 108A's unique statutory distinction between circuit and associate judges presents separation of powers problems.[160] As a practical matter, associate judges have in fact entered eavesdropping orders without challenge.[161]

An equally unresolved issue is whether application may be made to a judge of another circuit. In some situations, such as when a politically prominent figure is under investigation, law enforcement authorities may wish to preserve the confidentiality of their operations by making application to a judge of a different circuit.[162] The Illinois Constitution authorizes the supreme court "to assign a Judge temporarily to any court,"[163] and it is customary for the court to enter an order formalizing assignments of judges to different circuits to hear cases. One might argue that without such an assignment order, the out-of-circuit judge lacks the authority to enter an eavesdropping order. It is unlikely, however, that this argument would prove persuasive.[164]

Paragraph 108A-3(a) requires the application to be "made in writing upon oath or affirmation." If the written application is submitted by an assistant State's Attorney, the authorization of the

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159. ILL. CONST. art. VI, § 8.

160. *See* ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 24-25 (1983). This recommendation has been repeated in the Illinois Supreme Court Chief Justice's 1984, 1985 and 1986 reports. Although legislation has been introduced to implement that recommendation, it has not, to date, been passed.

161. In People v. Wrestler, 121 Ill. App. 3d 147, 151, 458 N.E.2d 1348, 1350 (1984), Judge Charles H. Wilhelm, an associate judge, entered an eavesdropping order. *See* ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, ANNUAL REPORT TO THE SUPREME COURT OF ILLINOIS 109 (1982). Judge Wilhelm's authority to enter that order was not challenged on appeal.

162. *See, e.g.*, People v. Pitchford, 115 Ill. App. 3d 164, 450 N.E.2d 349 (1983) (judge of the First Judicial Circuit issued eavesdropping order in investigation involving State's Attorney in the Second Judicial Circuit—propriety of order not challenged on appeal), *cert. denied*, 465 U.S. 1024 (1984).

163. ILL. CONST. art. VI, § 16.

164. As noted above, the circuit courts have jurisdiction over "all justiciable matters," *id.* § 8, and it seems likely that the practice of entering assignment orders is largely for administrative convenience, not for jurisdictional purposes. After all, article VI, section 16 of the Illinois Constitution states that the supreme court "may" enter such orders, not that it must, and article 108A provides for application to be made to "a circuit judge," not to a circuit judge of a particular circuit. ILL. REV. STAT. ch. 38, ¶¶ 108A-1, -3(a) (1985). Moreover, by way of analogy, it has been held that orders entered in a felony case by associate judges who have not been assigned to do so in accordance with Supreme Court Rule 295 are not void *ab initio*. People v. Zajic, 88 Ill. App. 3d 412, 410 N.E.2d 626 (1980).

State's Attorney need not be in writing.[165] It has also been held that the requirement of a written application is not violated where an oral application for subsequent approval of emergency activity under paragraph 108A-6 is later supplemented by a written application.[166] The use of an unsworn application has resulted in conflicting authority. In *People v. Monoson*,[167] the lack of an oath was described as a substantial defect that rendered the application void, while in *People v. Sylvester*,[168] the court held that such an omission was harmless.

The application must allege that "one party to a conversation to be monitored . . . has consented to such monitoring."[169] The issue that has arisen under this provision is whether an application, which alleges that a party will consent to the eavesdropping, is sufficient. Under the plain language of this provision, it probably would not be sufficient. Yet, paragraph 108A-4(a) permits authorization of an application if "one party to the conversation has *or will have* consented to the use of the device."[170] Although the courts have acknowledged the conflicting language in article 108A, they have consistently held that it is unnecessary to obtain the consent of a party before the order is entered.[171]

The heart of the application is the portion that contains the information enumerated in paragraphs 108A-3(1) to (5). The purpose of this information, which is discussed in detail below, is to permit the judge to make a rational determination that "reasonable cause" exists to believe that a felony has been or will be committed and that evidence will be obtained through eavesdropping.[172] What is "reasonable cause"? Most authorities hold that reasonable cause has the same meaning as probable cause, and that the analysis used for search warrants is useful in reviewing eavesdropping applications as well.[173] Like an application for a search warrant, an eavesdrop-

165. People v. Sylvester, 86 Ill. App. 3d 186, 407 N.E.2d 1002 (1980); People v. Lewis, 84 Ill. App. 3d 556, 406 N.E.2d 11 (1980).

166. *See* People v. Rogers, 141 Ill. App. 3d 374, 490 N.E.2d 133 (1986).

167. 75 Ill. App. 3d 1, 393 N.E.2d 1239 (1979).

168. 86 Ill. App. 3d 186, 407 N.E.2d 1002 (1980).

169. ILL. REV. STAT. ch. 38, ¶ 108A-1 (1985).

170. *Id.* ¶ 108A-4(a).

171. People v. Ellis, 122 Ill. App. 3d 900, 461 N.E.2d 646 (1984); *Pitchford*, 115 Ill. App. 3d 164, 450 N.E.2d 349; People v. Scribner, 108 Ill. App. 3d 1138, 440 N.E.2d 160 (1982); People v. Moore, 90 Ill. App. 3d 760, 413 N.E.2d 516 (1980).

172. ILL. REV. STAT. ch. 38, ¶¶ 108A-4(b), (c) (1985).

173. As originally passed by both houses of the General Assembly, H.B. 212 used the term "probable cause." In reviewing that proposal, Governor Walker suggested that the legislature change the term "probable cause" to "reasonable cause" because the term "probable cause" might "be construed too technically, it might be construed to require the standard of proof necessary to issue a conventional search warrant." Letter from Gov. Walker to the Illinois House of Representatives (September 26, 1975). The General Assembly accepted this suggestion, and, as enacted, P.A.

ping application may be supplemented by testimony.[174] Consequently, if the record shows that the issuing judge heard additional testimony, and that the judge recited that he was "advised in the premises," it will be presumed that that additional testimony established reasonable cause, even if the application did not.[175]

Challenges to the sufficiency of the substance of eavesdropping applications generally involve allegations that the issuing judge considered impermissible hearsay. The standards used in testing an eavesdropping application were enunciated in *Illinois v. Gates*.[176] In those reviewing court cases containing claims that an eavesdropping application did not establish reasonable cause, application of the *Gates* "totality of circumstances" test has usually produced a result in support of the application.[177] In these cases, the significant facts dealt with whether the named hearsay declarant was reliable, and whether any independent evidence corroborated the conclusions of the declarant.

Only two cases have held that applications did not establish reasonable cause. The application in *People v. Wassell*[178] was deficient because the applicant did not name the hearsay declarant, and no facts were alleged to show how the informant learned that the defendant was connected to an offense. The issuing judge did not take additional testimony. In *People v. Monoson*,[179] the applicant

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79-1159 included the term "reasonable cause." It has been held that despite the cautions expressed in the Governor's message, the General Assembly must have acted with the knowledge that the courts have construed the terms "reasonable cause" and "probable cause" to be interchangeable. People v. Hammer, 128 Ill. App. 3d 735, 471 N.E.2d 615 (1984); People v. Wrestler, 121 Ill. App. 3d 147, 458 N.E.2d 1348 (1984); *Sylvester*, 86 Ill. App. 3d 186, 407 N.E.2d 1002.

174. Testimony may be used to strengthen an otherwise incomplete affidavit in support of a request for a search warrant. City of Chicago v. Adams, 67 Ill. 2d 429, 367 N.E.2d 1299 (1977). This practice is expressly authorized in connection with eavesdropping applications. ILL. REV. STAT. ch. 38, ¶ 108A-3(b) (1985).

175. People v. Moore, 90 Ill. App. 3d 760, 413 N.E.2d 516 (1980). However, there is "no well-reasoned authority which states that after-acquired or after-presented testimony is available to bolster an inadequate application." People v. Wassell, 119 Ill. App. 3d 15, 20, 455 N.E.2d 1100, 1104 (1983). The after-acquired testimony referred to in *Wassell* was testimony presented at trial.

176. 462 U.S. 213 (1983); *see* People v. Hammer, 128 Ill. App. 3d 735, 471 N.E.2d 615 (1984).

177. *See, e.g.*, People v. Henderson, 129 Ill. App. 3d 611, 472 N.E.2d 1147 (1984); *Hammer*, 128 Ill. App. 3d 735, 471 N.E.2d 615; *Ellis*, 122 Ill. App. 3d 900, 461 N.E.2d 646; People v. Woods, 122 Ill. App. 3d 176, 460 N.E.2d 880 (1984); *Wrestler*, 121 Ill. App. 3d 147, 458 N.E.2d 1348; *Pitchford*, 115 Ill. App. 3d 164, 450 N.E.2d 349; *Scribner*, 108 Ill. App. 3d 1138, 440 N.E.2d 160; *Moore*, 90 Ill. App. 3d 760, 413 N.E.2d 516; *Sylvester*, 86 Ill. App. 3d 186, 407 N.E.2d 1002; People v. O'Dell, 84 Ill. App. 3d 359, 405 N.E.2d 809 (1980); People v. Fredrics, 76 Ill. App. 3d 1043, 395 N.E.2d 723 (1979). It almost goes without saying that, as the *Ellis* and *Moore* cases noted, the issuing judge's determination of the sufficiency of the application is entitled to great deference by later trial judges and reviewing courts.

178. 119 Ill. App. 3d 15, 455 N.E.2d 1100 (1983).

179. 75 Ill. App. 3d 1, 393 N.E.2d 1239 (1979).

included in the application an account of a conversation between the defendant and another person. There was no allegation, however, about how that account was brought to the applicant's attention. Also, and perhaps more significant, the application, which sought permission to investigate the offenses of bribery or official misconduct, included no facts to show that the defendant was a public official or that the making of a $10,000 interest-free loan was in return for anything illegal or unauthorized.

From *Wassell* and *Monoson*, one may make several observations about when an eavesdropping application will be insufficient. First, an application that does not identify the hearsay declarant or does not establish the connection between the declarant and the applicant is insufficient if it does not include any other facts that permit the issuing judge to test the declarant's reliability. Second, an application that omits a significant fact, which would convert non-criminal conduct to criminal conduct, may also be insufficient.[180] It should be noted that unlike search warrant applications, the courts rarely hold that eavesdropping applications are "stale." This is because search warrants concern tangible objects, which can move, deteriorate or be destroyed, the subject of eavesdropping concerns ideas. Thus, an eavesdropping application that referred to defendant's conversations concerning his participation in arson two years previously, was held to be sufficient.[181]

B. *The Order*

Paragraph 108A-5(a)[182] is fairly explicit in listing the contents of an eavesdropping order. It must include: (1) the identity of the consenting party and a requirement that the monitoring include him; (2) the identity of the subject, if known; and (3) the length of the authorized period and whether or not the period terminates automatically when the specified conversations have been overheard. Sections 108A-4(b) and (c) provide that the order must be based on reasonable cause that a felony has occurred or will occur and that information about it will be obtained through eavesdropping.[183] But

180. Paragraph 108A-3(a)(2)(a) requires the application to include "details as to the felony that has been, is being, or is about to be committed," but the application need not name the exact felony if the facts alleged include enough information to allow the court to determine what felony is involved. *Scribner*, 108 Ill. App. 3d 1138, 440 N.E.2d 160.

181. *O'Dell*, 84 Ill. App. 3d 359, 405 N.E.2d 809; *see also Ellis*, 122 Ill. App. 3d 900, 461 N.E.2d 646 (2½-month delay between criminal activity and proposed eavesdropping did not render the application stale). Of course, where the expected conversation would refer to criminal activity committed longer ago than the appropriate limitations period, it would appear that the application should be denied as stale.

182. ILL. REV. STAT. ch. 38, ¶ 108A-5(a) (1985).

183. *Id.* ¶¶ 108A-4(b), (c).

those provisions have not been read as creating a requirement that the order include the reasonable cause findings, since paragraph 108A-5(a) establishes no such requirement.[184]

The mandate that the order contain the identity of the consenting party means exactly that. It does not mean that the name of the law enforcement agency or the officer who performs the surveillance must be given.[185] As a corollary to this proposition, if the order does name a particular law enforcement agency or officer, no fatal variance occurs if another agency or officer performs the surveillance because the identity of the agency or officer is an optional item in the order.[186] Also, the order need not expressly authorize the consenting party to engage in eavesdropping.[187]

Although the identity of the consenting party is a mandatory component of the order, the identity of the subject is not required. Paragraph 108A-5(a)(2) provides that designation of "the other person or persons" who will participate in the conversation is required only if they are known. In *People v. Sylvester*,[188] the court held that this language was met by an eavesdropping order that described the subject by a first name and physical description only. The application alleged that the defendant's last name was unknown to the petitioner. In fact, the types of blanket surveillance authorized in some cases[189] show that a particular individual or individuals need not be known as the target of the proposed operation when the order is entered. If one person is named in the order, and another person is overheard, it is not clear whether the conversation of the second person must be suppressed as obtained in violation of the order. In *People v. Moss*,[190] the order stated, as requested in the application, that conversations of Winifred Moss would be overheard. But when the informant met Winifred, he was in the company of his brother, William, and both men attacked the informant. On appeal from his conviction of battery, William argued that because his name was known to the informant, it should have been included in the order. Because William did not file a post-trial motion raising the issue, the appellate court deemed the issue waived. In its plain error analysis, however, the court suggested that because William's involvement was the result of his fortuitous proximity to Winifred, it would

184. People v. Sylvester, 86 Ill. App. 3d 186, 407 N.E.2d 1002 (1980).

185. *Id*; *see also* People v. Kezerian, 77 Ill. 2d 121, 395 N.E.2d 551 (1979) (same result reached under prior law).

186. People v. Wrestler, 121 Ill. App. 3d 147, 458 N.E.2d 1348 (1984).

187. People v. McKendrick, 138 Ill. App. 3d 1018, 486 N.E.2d 1297 (1985).

188. 86 Ill. App. 3d 186, 407 N.E.2d 1002.

189. People v. Childs, 67 Ill. App. 3d 473, 385 N.E.2d 147 (1979) (television camera set up inside store operated by police department to simulate a fencing operation).

190. 133 Ill. App. 3d 728, 479 N.E.2d 425 (1985).

not have been error to admit the recording even if William had objected at trial.

Paragraph 108A-5(a)(3) requires the order to include the period of time in which the use of the device is authorized, "including a statement as to whether or not the use shall automatically terminate when the described conversations have been first obtained."[191] Failure to include the "automatic termination" language does not render the order void where there is reasonable cause to believe that more than one conversation will take place during the definite period.[192] An order may not permit eavesdropping for more than ten days without the entry of an extension, but if the period specified in the order exceeds ten days, suppression is not warranted if no eavesdropping occurs during the excess period.[193] Similarly, it has been held that where the issuing judge signs the order after the stated period commences, suppression is not required if no eavesdropping occurs before the order is signed.[194]

Several final observations about the order may be made. First, a court may consider a search warrant and a related eavesdropping application at the same time, and need not enter an order on one before hearing the other.[195] Second, the use of supplemental (as opposed to extension) orders is permissible.[196] Finally, when an emergency arises,[197] eavesdropping may be undertaken without a court order, but an order must be obtained within forty-eight hours, and in that order the court must find that an emergency existed.[198]

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191. ILL. REV. STAT. ch. 38, ¶ 108A-5(a)(3) (1985).

192. People v. O'Dell, 84 Ill. App. 3d 359, 405 N.E.2d 809 (1980). In People v. Moore, 90 Ill. App. 3d 760, 413 N.E.2d 516 (1980), it was held that an order that listed a definite period and stated that the order would not automatically terminate upon the overhearing of one conversation was not void as an improper attempt to enter an automatic extension of the original period without further judicial action.

193. *Wrestler*, 121 Ill. App. 3d 147, 458 N.E.2d 1348.

194. People v. Pitchford, 115 Ill. App. 3d 164, 450 N.E.2d 349 (1983), *cert. denied*, 465 U.S. 1024 (1984).

195. People v. Silver, 151 Ill. App. 3d 156, 502 N.E.2d 1141 (1986).

196. In *Wrestler*, the original order permitted telephonic interception, while a supplemental order, in effect during the last portion of the original order, permitted the recording of face-to-face conversations. *Wrestler*, 121 Ill. App. 3d 147, 458 N.E.2d 1348.

197. An emergency "exists when, without previous notice to the law enforcement officer sufficient to obtain prior judicial approval, the conversation to be overheard or recorded will occur within a short period of time or the use of the device is necessary for the protection of the law enforcement officer." ILL. REV. STAT. ch. 38, ¶ 108A-6(a) (1985).

198. *Id.* ¶ 108A-6(b); *see also* People v. Rogers, 141 Ill. App. 3d 374, 490 N.E.2d 133 (1986). *Rogers* is the only reported case to have reviewed a subsequent authorization of emergency eavesdropping activity.

C. *Post-Order Procedures*

Article 108A sets forth two procedures that must be followed after the order is entered and the eavesdropping operation is completed. First, the issuing judge reviews any recordings made, as well as the application and order.[199] Second, within ninety days after the authorized period, notice of the order must be given to the persons named in it, and to any other persons to the recorded conversation whom the judge deems should be notified.[200]

The question that arises concerning both of these procedures is whether violation of either would ever justify suppression of the results of the eavesdropping. It may be argued that no post-recording defects warrant suppression. Whether or not that statement is true, a delay in complying with those procedures will probably not result in suppression. For example, in one case, the conceded failure of the state to turn the recordings over to the issuing judge "immediately" after the expiration of the authorized period did not prevent the use of the recordings at trial.[201] Also, the fact that late notice[202] or no notice[203] of eavesdropping activity was given has been held harmless.[204]

D. *Motions to Suppress*

As a general matter, motions to suppress the results of eavesdropping activity are governed by paragraph 108A-9.[205] Three grounds for suppression are set forth in that paragraph: (1) that "the conversation was unlawfully overheard and recorded";[206] (2) that the order authorizing the activity "was improperly granted";[207] and (3) that "the recording or interception was not made in conformity with the order of authorization."[208]

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199. ILL. REV. STAT. ch. 38, ¶ 108A-7 (1985). The recordings do not have to be reviewed after each authorized period, where extensions are granted, but should be reviewed after the conclusion of the last period of extension. People v. Evans, 78 Ill. App. 3d 996, 398 N.E.2d 326 (1979).

200. ILL. REV. STAT. ch. 38, ¶ 108A-8 (1985).

201. People v. Nieves, 92 Ill. 2d 452, 442 N.E.2d 228 (1982) (state and defense stipulated that a 16-day delay did not meet the "immediacy" standards of paragraph 108A-7(b)).

202. People v. Henderson, 129 Ill. App. 3d 611, 472 N.E.2d 1147 (1984) (notice was filed approximately 2 weeks after the 90-day period in one case and approximately 4½ months after that period in another case).

203. People v. Ellis, 122 Ill. App. 3d 900, 461 N.E.2d 646 (1984).

204. In *Ellis*, the court observed that the state was required, pursuant to discovery rules, to disclose any electronic surveillance to the defendant by a date which fell within the 90-day period. *Id.* at 904-05, 465 N.E.2d at 651.

205. ILL. REV. STAT. ch. 38, ¶ 108A-9 (1985).

206. *Id.* ¶ 108A-9(a)(1).

207. *Id.* ¶ 108A-9(a)(2).

208. *Id.* ¶ 108A-9(a)(3).

These grounds are broadly and emphatically stated. The language used suggests that any noncompliance with article 108A requires suppression.[209] The Illinois Supreme Court, however, has not construed this language in this way. For example, in *People v. Nieves*,[210] the defendant argued that the failure of the state to comply with the automatic-sealing provisions of paragraph 108A-7 justified suppression of certain recordings. The supreme court noted that the federal courts have held that not every failure to comply with the analogous federal eavesdropping provisions[211] renders the conversation unlawfully recorded or intercepted.[212] In fact, those courts have adopted a three-step test to determine whether a particular statutory violation justifies suppression. The factors to be considered are whether: (1) the provision is "a central or functional safeguard" in the statutory scheme to prevent abuses; (2) the purpose the provision was designed to accomplish has been satisfied in spite of the error; and (3) "the statutory requirement was deliberately ignored and, if so, whether there was any tactical advantage to be gained by the government."[213] Applying that analysis to the defendant's argument, the court concluded that the purpose of the immediate sealing requirement, to prevent tampering with the tapes, had been met because there was no claim that the tapes had been altered.

The test adopted in *Nieves* leaves it to future litigants to argue which violations of article 108A should produce suppression of eavesdropping results. As a practical matter, according to the reviewing courts, few violations, if any, other than the failure of the application to state reasonable cause, have proved fatal to eavesdropping activity. It would be presumptuous to state that no defect other than a lack of reasonable cause will result in suppression, but the *Nieves* rule may be made somewhat more definite with several additional comments.

First, no post-recording defect has produced a reviewing court

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209. In People v. Evans, 78 Ill. App. 3d 996, 398 N.E.2d 326 (1979), the court referred to the ground for suppression given in paragraph 108A-9(a)(1), that the conversation was "unlawfully overheard and recorded." The court noted that "[t]he use of eavesdropping devices by law enforcement officials for the purpose of obtaining evidence of criminal activity only becomes lawful when the legislatively mandated procedures for securing the authorization of the use of such devices has been fully complied with. We, therefore, agree with the argument of the defendant that a failure to comply with the required procedures . . . renders the use of the device unlawful." *Evans*, 78 Ill. App. 3d at 999, 398 N.E.2d at 329. This reasoning was rejected implicitly in *Nieves*.

210. 92 Ill. 2d 452, 442 N.E.2d 228 (1982).

211. 18 U.S.C. §§ 2510-2520 (1982).

212. United States v. Chavez, 416 U.S. 562, 574-75 (1974).

213. *Nieves*, 92 Ill. 2d at 458-59, 442 N.E.2d at 232 (referring to a test stated in United States v. Chun, 503 F.2d 533, 541-42 (9th Cir. 1974)).

decision resulting in suppression. This proposition is supported by reference to the grounds for suppression in paragraph 108A-9(a). The first of these grounds is that the conversation was "unlawfully overheard and recorded,"[214] and not that any of the post-recording procedures were violated. Furthermore, the second ground deals with the proper issuance of an order, and the third ground involves a variance between the eavesdropping operation and the order. None are post-recording defects.

Second, arguments concerning violations of constitutional rights, other than those that go to the sufficiency of the application to trigger the initial involvement of the government will probably be unsuccessful.[215] For example, prior law held that *Miranda*-type warnings given to the defendant that his statements were being recorded were not required.[216]

Even if a court determines that a violation of article 108A normally warranting suppression has occurred, the evidence will not necessarily be suppressed. Only if the challenged evidence was derived from a violation of the eavesdropping statutes will it be excluded.[217] In other words, where independent grounds for the evidence are found,[218] the evidence will not be excluded, but if such grounds do not exist, the evidence will be suppressed.[219] Matters

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214. Under a literal reading of this conjunctive phrase, a conversation that is intercepted, but not recorded, could not be suppressed.

215. In People v. Clankie, 154 Ill. App. 3d 197, 506 N.E.2d 409 (1987), the defendant contended that the admission of a tape recording made after his first trial, which resulted in a mistrial, violated his right to counsel. On appeal, the appellate court held that decisions preventing the prosecution from circumventing an indicted defendant's right to counsel did not apply, because the only charge of which he was found guilty was added after the eavesdropping and did not relate to the charges still pending after the first trial. The court also held that the trial court's refusal to admit the defendant's own illegally made recording into evidence did not deny the defendant his right to confrontation, because both parties to the conversation were available for cross-examination.

216. People v. Ardella, 49 Ill. 2d 517, 276 N.E.2d 302 (1971); People v. Klingenberg, 34 Ill. App. 3d 705, 339 N.E.2d 456 (1975); People v. Knight, 28 Ill. App. 3d 232, 327 N.E.2d 518 (1975).

217. The "fruit of the poisonous tree" doctrine enunciated in Wong Sun v. United States, 371 U.S. 471 (1963), applies to Illinois' eavesdropping statutes. People v. Gervasi, 89 Ill. 2d 522, 434 N.E.2d 1112 (1982); People v. Maslowsky, 34 Ill. 2d 456, 216 N.E.2d 669 (1966), *reh'g denied*, 385 U.S. 924 (1966).

218. Where a participant in the conversation in question is able to testify about it directly, that testimony is typically held not to be the fruit of an illegal recording. *Gervasi*, 89 Ill. 2d at 529-30, 434 N.E.2d at 1116; People v. Mosley, 63 Ill. App. 3d 437, 444, 379 N.E.2d 1240, 1246 (1978) (dicta); People v. Porcelli, 25 Ill. App. 3d 145, 149-50, 323 N.E.2d 1, 4 (1974).

219. In People v. Satek, 78 Ill. App. 3d 543, 396 N.E.2d 1133 (1979), the defendant's name first came to the attention of police when it was mentioned in a jailhouse telephone call made by a co-defendant. It is not obvious from the opinion whether the police learned the defendant's name by listening to the illegal recording of the conversation or by overhearing the co-defendant speak into the receiver. The court stated, however, that any testimony about the telephone conversation, including tes-

other than independent grounds for the evidence may also "attenuate the taint" of illegal eavesdropping activity. It has been held that the use of such evidence in federal court bars claims of violation of the eavesdropping statutes based on subsequent uses of that evidence,[220] and that the circuit or appellate courts cannot bar use of illegally obtained recordings in Illinois attorney discipline proceedings.[221]

The procedure to follow in raising a claim of a violation of article 108A is set forth in paragraph 108A-9(b). This paragraph states that a motion "shall be made before the proceeding unless there was no previous opportunity for such motion."[222] No procedure is described which permits a grand jury witness to raise such a claim. A procedure for that purpose, however, was established in *In re Cook County Grand Jury.*[223] If a witness makes a claim that illegal eavesdropping activity has taken place, a "responsible government official" should submit an affidavit affirming or denying the claim. If the government admits that surveillance has taken place, but denies that the surveillance was unlawful, "the witness may request limited access to the documents submitted by the government to support its

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timony by the co-defendant, should be suppressed as a product of the illegal recording. *Id.* at 551, 396 N.E.2d at 1138-39. The unstated assumption of the court seems to be that the co-defendant, who was a party to the conversation, would not have testified about it if the conversation had been recorded. Otherwise, *Satek* is difficult to reconcile with *Gervasi*, *Mosley* and *Porcelli*, all of which allowed parties to recorded conversations to testify about them.

220. In *In Re* the Application of CBS, Inc., 540 F. Supp. 769 (N.D. Ill. 1982), the plaintiff sought access to recordings that were played in open court during a federal sentencing hearing. In granting the application, the district court observed that "[w]hatever privacy right defendant may have had in these taped conversations has been lost when the tapes were played in open court." *Id.* at 772 n.5. The only authority cited for this proposition was a federal case, and this statement is particularly questionable in view of the fact that paragraph 14-5 prohibits the use of illegally obtained evidence "in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, [or] in any grand jury proceedings." ILL. REV. STAT. ch. 38, ¶ 14-5 (1985).

221. In Ettinger v. Rolewick, 140 Ill. App. 3d 295, 488 N.E.2d 598 (1986), the plaintiff, who was mentioned in recordings that, in *Gervasi*, were held to have been illegally made, sought an injunction against the Attorney Registration and Disciplinary Commission to prevent the use of those tapes in disciplinary proceedings against him. Relying upon the constitutional authority of the supreme court over matters concerning the fitness of an attorney to practice law, the court held that without direction from the supreme court, a lower court does not have the power to interfere in that disciplinary process. *Id.* at 301, 488 N.E.2d at 602.

222. ILL. REV. STAT. ch. 38, ¶ 108A-9(b) (1985). Failure to raise an article 108A violation until trial is held to be a waiver of that issue. People v. O'Dell, 84 Ill. App. 3d 359, 405 N.E.2d 809 (1980) (defense counsel aware of violation seven months before trial). *O'Dell* also held that Franks v. Delaware, 438 U.S. 154 (1978), was inapplicable to consensual eavesdropping. Thus, it may be fair to say that the defendant is not entitled to an evidentiary hearing if he alleges that perjury has been committed in the eavesdropping application (although the trial court may have the discretion to hold such a hearing).

223. 113 Ill. App. 3d 639, 447 N.E.2d 862 (1983).

claim."[224] The court then has the discretion to hold a hearing to evaluate the witness' claim.

A motion *in limine* is a typical vehicle in which a party may allege that illegal eavesdropping has occurred. This, of course, can place a substantial burden on the trial judge, who may have to listen to hours of recordings in order to evaluate the claim.[225] Where the claim is made in a criminal case, the judge will have presumably reviewed the recordings before trial pursuant to paragraph 108A-7(b). There is no reported authority on the issue of the preclusive effect, if any, of that review on subsequent motions to suppress, and whether that earlier review eliminates the need for the same judge to listen to the recording again following that motion.

If a court grants a motion to suppress, the state may take an interlocutory appeal under paragraph 108A-10.[226] The scope of that appeal is not limited to issues of constitutional dimension.[227]

E. *Nonstatutory Exceptions to Article 108*

In addition to the exceptions created by statutory language, or by implication from that language, to the requirement of a court order for consensual eavesdropping, the courts have created two nonstatutory exceptions to that requirement. The first of these arises from the existence of parallel state and federal courts, law enforcement agencies and eavesdropping regulation mechanisms, while the second derives from the perceived need for security in detention facilities.

Where federal authorities, pursuing a federal investigation, act in compliance with federal law, but not in compliance with article

224. *Id.* at 648, 447 N.E.2d at 867.

225. Allied Wire Prods. v. Marketing Techniques, 99 Ill. App. 3d 29, 424 N.E.2d 1288 (1981), suggests that if the party or attorney who files the motion is unwilling to examine the contested recordings first, the trial court has no duty to do so.

226. Paragraph 108A-10 also permits the state to appeal from "a denial of an application for an order of authorization or approval." ILL. REV. STAT. ch. 38, ¶ 108A-10 (1985). Similar language is not found in Supreme Court Rule 604(a), governing state appeals in criminal cases. It has been stated that "[i]n a criminal case the State may appeal only as provided by Supreme Court Rule 604." People v. Johnson, 113 Ill. App. 3d 367, 370, 447 N.E.2d 502, 504 (1983). In view of the supreme court's exclusive rulemaking power concerning appeals, *see* ILL. CONST. art. VI, § 16, the quoted portion of paragraph 108A-10 is of dubious constitutionality.

227. Although the opinion in People v. Eddington, 47 Ill. App. 3d 388, 362 N.E.2d 103 (1977), limited the scope of a court's review of a suppression order to those issues which were constitutional in scope, later opinions diminish the force of that language. *See* People v. Flatt, 82 Ill. 2d 250, 412 N.E.2d 509 (1980) (abandoning the distinction between "constitutional" and "non-constitutional" grounds for suppression); People v. Young, 82 Ill. 2d 234, 412 N.E.2d 501 (1980). It makes little sense to permit the state to appeal from an order suppressing the results of consensual eavesdropping, and then limit the scope of review to constitutional issues, because the restrictions imposed on consensual eavesdropping are statutory, not constitutional.

108A, the eavesdropping evidence produced by that operation is admissible in Illinois courts.[228] A long line of federal cases has held that violation of Illinois law by federal agents does not bar the use of eavesdropping evidence in federal courts because federal law, not state law, governs the admissibility of evidence in federal courts.[229] It has even been held that federal authorities who act in violation of Illinois law, but do not act with the assistance of state authorities, are not subject to federal civil rights claims.[230]

If state and federal law enforcement agencies act together, the suspicion may arise that the collaboration is motivated, in part, by the intent to avoid article 108A. But that suspicion has not been considered a sufficient ground to suppress the results of such a joint operation, whether the state officers are described as present merely to protect federal officers[231] or whether they are participants in a true joint enterprise.[232] As a general rule, then, one could say that the presence of any federal officers in a law enforcement operation acts to remove the requirement of compliance with article 108A, as long as the operation does not violate federal law.

The second nonstatutory exception to article 108A relates to jailhouse conversations. Although the United States Supreme Court has recognized that prisoners have a diminished expectation of privacy in their conversations,[233] nothing in article 108A permits those conversations to be monitored without court order. Nevertheless, reviewing court decisions have usually permitted such monitoring, even where one party has not consented.[234] Where the monitoring operation is open, and the prisoners are warned of it, *Beardsley* in-

228. People v. Fidler, 72 Ill. App. 3d 924, 391 N.E.2d 210 (1979).

229. United States v. Horton, 601 F.2d 319 (7th Cir.) (state law does not prevent admission of admissible evidence in federal court), *cert. denied*, 444 U.S. 937 (1979); United States v. Neville, 516 F.2d 1302 (8th Cir.) (violation of state law does not bar evidence in federal court if in compliance with federal law), *cert. denied*, 423 U.S. 925 (1975); United States v. Infelice, 506 F.2d 1358 (7th Cir.) (federal law governs evidence in federal court), *cert. denied*, 402 U.S. 949 (1971); United States v. Teller, 412 F.2d 374 (7th Cir. 1969) (evidence allowed even though in violation of Illinois law), *cert. denied*, 419 U.S. 1107 (1975); United States v. Krol, 374 F.2d 776 (7th Cir. 1967) (federal law determines admissibility of evidence). This principle applies even if state, not federal, agents obtained the evidence, according to United States v. Gervasi, 562 F. Supp. 632 (N.D. Ill. 1983). The Seventh Circuit upheld the use in federal administrative agencies of evidence obtained in violation of the Illinois statutes. NLRB v. Local 90, Operative Plasterers & Cement Masons, 606 F.2d 189 (7th Cir. 1979).

230. Stamatiou v. United States Gypsum Co., 400 F. Supp. 431 (N.D. Ill. 1975), *aff'd*, 534 F.2d 330 (7th Cir. 1976).

231. People v. Manna, 96 Ill. App. 3d 506, 421 N.E.2d 542 (1981).

232. People v. Winchell, 140 Ill. App. 3d 244, 488 N.E.2d 620 (1986).

233. Lanza v. New York, 370 U.S. 139 (1962).

234. People v. Clark, 125 Ill. App. 3d 608, 466 N.E.2d 361 (1984); People v. Myles, 62 Ill. App. 3d 931, 379 N.E.2d 897 (1978). *But see* People v. Satek, 78 Ill. App. 3d 543, 396 N.E.2d 1133 (1979) (results of recorded jailhouse telephone conversation suppressed).

dicates that the operation would not be surreptitious and would therefore be legal.[235] If the operation is covert, as it was in *People v. Clark*,[236] a court order should be required.

One may debate the merits of these two judicially constructed exceptions to article 108A. What is not debatable is that the broad terms of both eavesdropping statutes do not call for the "federal agent exception" nor the "jailhouse conversation" exception.

F. *Eavesdropping Reports*

When it was first enacted, paragraph 108A-11 provided for three separate reports to be filed concerning eavesdropping activity. The first report is filed with the Administrative Office of the Illinois Courts by the judge who grants or denies the order, within thirty days of the latest activity on the application.[237] The judges' reporting requirement was deleted by the General Assembly, effective July 1, 1987.[238] The second type of report is filed by Illinois State's Attorneys each January with the Administrative Office.[239]

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235. The conversation in *Myles*, 62 Ill. App. 3d 931, 379 N.E.2d 897, was overheard on a telephone that was surrounded by two signs proclaiming that all calls were to be monitored. Such open monitoring was approved of in 1974 Op. Ill. Att'y. Gen. 155.

236. 125 Ill. App. 3d 608, 466 N.E.2d 361 (1984).

237. Seven items must be included in these reports, under ILL. REV. STAT. ch. 38, ¶ 108A-11(a) (1985):

(1) the fact that such an order, extension, or subsequent approval of an emergency was applied for;
(2) the kind of order or extension applied for;
(3) a statement as to whether the order or extension was granted as applied for, was modified, or was denied;
(4) the period authorized by the order or extensions in which an eavesdropping device could be used;
(5) the felony specified in the order, extension or denied application;
(6) the identity of the applying investigative or law enforcement officer and agency making the application and the State's Attorney authorizing the application; and
(7) the nature of the facilities from which or the place where the eavesdropping device was to be used.

Id.

238. P.A. 84-1428, effective July 1, 1987.

239. A separate report is filed for each eavesdropping operation, listing the same information given in the judges' reports and five additional items enumerated in ILL. REV. STAT. ch. 38, ¶ 108A-11(b)(2)-(6) (1985):

(2) a general description of the uses of eavesdropping devices actually made under such order to overhear or record conversations, including: (a) the approximate nature and frequency of incriminating conversations overheard, (b) the approximate nature and frequency of other conversations overheard, (c) the approximate number of persons whose conversations were overheard, and (d) the approximate nature, amount, and cost of the manpower and other resources used pursuant to the authorization to use an eavesdropping device;
(3) the number of arrests resulting from authorized uses of eavesdropping devices and the offenses for which arrests were made;

The third type of report is filed by the Administrative Office each April with the General Assembly. Reports filed before April 1986 had to include a summary of all the information provided in the State's Attorneys' and judges' reports for the preceding year,[240] while reports filed in April 1986 and later only need include "information on the number of applications for orders authorizing the use of eavesdropping devices, the number of orders and extensions granted or denied during the preceding calendar year, and the convictions arising out of such uses."[241] It has been argued that the General Assembly's placement of this reporting requirement upon the Administrative Office is an unwarranted intrusion on the Illinois Supreme Court's administrative authority.[242]

The tables included with this article consist of an analysis of various components of the Administrative Office's annual reports filed with the General Assembly. As an organizational matter, these tables follow the chronological order of a typical eavesdropping operation. For example, the first table, Table A, features statistics on applications filed under article 108A, while the last table, Table F, collects statistics on convictions reported by State's Attorneys resulting from eavesdropping operations.

The figures in Table A are divided into original applications and requests for extension. Applications for subsequent approval of emergency operations under paragraph 108A-6 are counted as original applications. A cursory examination of this table reveals that, as a general rule, eavesdropping is conducted principally in urban counties. It is not easy, however, to establish a precise correlation between a county's population or crime rate and its use of eavesdropping devices. For example, in the decade for which statistics are available, Franklin County reported forty-two original applications and three extensions, and Whiteside County reported twenty-nine original applications and four extensions. By comparison, only thirteen original applications and no extensions were filed in Champaign County and fifteen original applications and two extensions were filed in Macon County, either of which county is more populous than Franklin and Whiteside Counties combined.[243]

(4) the number of trials resulting from such uses of eavesdropping devices;
(5) the number of motions to suppress made with respect to such uses, and the number granted or denied; and
(6) the number of convictions resulting from such uses and the offenses for which the convictions were obtained and a general assessment of the importance of the convictions.

Id.

240. ILL. REV. STAT. ch. 38, ¶ 108A-11(c) (1983).

241. *Id.* (1985).

242. REPORT OF THE CHIEF JUSTICE TO THE ILLINOIS GENERAL ASSEMBLY 22-23, February 25, 1987.

243. According to the 1980 census, the population of Champaign County was

Although the four counties mentioned may be atypical, the fact remains that the use of eavesdropping devices cannot be explained by population or crime rates alone. Perhaps the most important factor is the willingness of local law enforcement officials to avail themselves of eavesdropping devices, a factor that cannot be measured. Even a change in the office of State's Attorney may relate to a marked change in the use of eavesdropping devices.[244] In fact, the great variation in eavesdropping applications over time in many smaller and medium-sized counties leads to the conclusion that such intangible factors make prediction or generalization about numbers of applications nearly impossible.

Table B gives a compilation of actions taken by circuit judges on original and extension eavesdropping applications from 1976 to 1986. The 1976 through 1984 reports include a column for the entry "applications modified," but no such statistic is reported for 1985 or 1986. Table B shows that of a total of 2,249 actions taken on these applications, 2,243 were to grant the application as requested. Only one application was denied during the decade covered by the reports.

The significance of the figures shown in Table B may be debated. It can be argued that the cumulative trial court action on eavesdropping applications is not much different than the cumulative action taken on search warrant applications. It can also be argued that the effectiveness of a constitutional or statutory mechanism designed to protect civil liberties cannot be measured statistically. Nevertheless, those who suggest that the application procedure established in article 108A has led to more than an automatic approval of law enforcement eavesdropping would be hard pressed to prove their argument by reference to Table B.[245]

Tables C and D are related. In both tables, three representative years were selected to permit a comparison of two features of eavesdropping activity—the felonies investigated by eavesdropping and the facilities used in these investigations. The years chosen were 1979, 1982 and 1984. To prevent counting the same information more than once, all entries reported with applications for extension have been disregarded. The technique may have eliminated most of the possible duplication in Tables C and D, but it is unlikely that all

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168,392, that of Franklin County was 43,201, that of Macon County was 131,375 and that of Whiteside County was 65,970.

244. As an example, one could point to Cook County, which experienced a noticeable increase in reported eavesdropping beginning in 1981, the first year of a new State's Attorney's term of office.

245. One might argue that the true deterrent function of article 108A is served when law enforcement agencies refrain from presenting dubious applications to the courts. No statistics are available to prove or refute this claim.

duplication has been eliminated. Where two or more original applications relate to the same investigation, the data relating to that investigation will be counted twice, because none of the reports in question contain enough identifying information to rule out the possibility that two original applications, however similar they may appear, pertain to two different investigations.

The felonies investigated are, of course, included in the State's Attorney's applications as well as in the judges' and State's Attorney's reports. Most descriptions of the offenses are self-explanatory, but several additional comments need to be made. First, attempt and conspiracy offenses are classified with the particular underlying substantive offense. Second, several categories of related offenses have been counted together.[246]

When the statistics for 1979, 1982 and 1984 are compared, a consistent pattern relating to the felonies investigated emerges. As one might expect, controlled substance offenses are always investigated most frequently. Eavesdropping operations are also routinely used in the investigation of homicide, theft offenses and bribery. These last three categories of offenses constitute the second, third and fourth most frequent uses of eavesdropping devices, although not in any consistent ranking for all three years.[247]

In Table D, the facilities used in eavesdropping operations are listed for the three representative years. The term "facilities" is somewhat ambiguous. As an illustration, if an agent uses a transmitter on his person, and he does so at a place of business and in a vehicle, the State's Attorney's report could identify the facilities as the device itself (the transmitter), or as the place in which they are used (the place of business or the vehicle), or both. With 103 State's

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246. The term "controlled substances offenses" refers to all controlled substance and cannabis offenses located in ILL. REV. STAT. ch. 56½ (1985). Theft offenses are those offenses listed in articles 16 and 16A of the Criminal Code of 1961, *id.* ch. 38, ¶¶ 16-1 to -8, 16A-1 to -10, as well as offenses relating to the theft of motor vehicles, *id.* ch. 95½, ¶¶ 4-100 to -307. Burglary includes home invasion, simple burglary and residential burglary. *Id.* ch. 38, ¶¶ 12-11, 19-1, 19-3. Arson consists of arson and aggravated arson, *id.* ch. 38, ¶¶ 20-1, 20-1.1. Sex offenses are all offenses in article 11 of the Criminal Code. *Compare* ILL. REV. STAT. ch. 38, ¶¶ 11-1 to -21 (1985) *with Id.* (1983). Kidnapping offenses are all felonies listed in article 10 of the Criminal Code. *Id.* ch. 38, ¶¶ 10-1 to -7 (1985).

247. The "other offenses" referred to at the bottom of Table C, with the frequency of those offenses indicated in parentheses, are: criminal usury (4), ILL. REV. STAT. ch. 38, ¶¶ 39-1 to -3 (1985); criminal damage to property (3), *id.* ¶ 21-1; antitrust act violations (3), *id.* ¶ 60-1; armed violence (3), *id.* ¶¶ 33A-1 to -3; escape (2), *id.* ¶ 31-6; unlawful use of weapons (2), *id.* ¶¶ 24-1, -1.1; state benefits fraud (1), *id.* ¶ 17-6; criminal defamation (1), *id.* ¶ 27-1; threatening public officials (1), *id.* ¶ 12-9; impersonation of a member of a veteran's organization (1), *id.* ¶ 17-2; bringing contraband into a penal institution (1), *id.* ¶¶ 31A-1, -1.1; insurance fraud (1), *id.* ¶ 1101; harassment by telephone (1), *id.* ch. 134, ¶ 16.4-1. The numbers do not add up to 30, the total in the "other offenses" row, because federal offenses, which were listed in 2 applications, are not listed.

Attorneys filing reports, it was inevitable that the portions of their reports dealing with facilities present inconsistent data on this entry. These inconsistencies explain, in part, such incongruities as the figure that two telephone wiretaps were used in 1982, and fifty-eight were used in 1984. It seems as though both State's Attorneys and the Administrative Office counted a telephone wiretap under the location of the telephone in 1982, while in 1984, those wiretaps were counted under the separate category for "telephone wiretap" or under the location of the telephone, or both. The lack of precision in the use of the term "facilities" suggests that Table D should be used with caution.

Tables E and F contain information about the post-eavesdropping activities of suppression motions and convictions. As with Tables C and D, only information from original applications has been used in an attempt to avoid counting any figures more than once. Tables E and F suffer from an inherent methodological flaw, which renders that information of little use to researchers. It should be remembered that State's Attorneys must file reports in January of each year on eavesdropping that occurred in the preceding calendar year.[248] These reports are the only source for suppression motion and conviction information. Because the reports are filed in January, the cases that are reported upon are between one and twelve months old. Particularly in the larger metropolitan counties, a felony case of that age is unlikely to have been disposed of, unless by a plea of guilty. Thus, many State's Attorney's reports list "0" or "not available" or "case pending" in the suppression motions and convictions columns, even though a suppression motion may be made or a conviction may be obtained in the future.

Given the timetable under which the reports must be filed, the existence of an entry in either the suppression motions column or the convictions column is largely fortuitous, depending for the most part on the entry of a speedy plea of guilty. The figures reported in Tables E and F are, as a result, likely to be considerably lower than the actual number of suppression motions made and convictions obtained in eavesdropping actions. Because this is so, one must wonder why the General Assembly continues to require the reporting of this essentially meaningless data. This author has no easy answer to this question.

VI. Conclusion

It has not been the purpose of this article to enter the debate about the proper role of electronic surveillance in a free society. Dis-

248. *Id.* ch. 38, ¶ 108A-11(a).

tinguished members of the law enforcement and academic communities in Illinois have carried on that dialogue elsewhere.[249] Nevertheless, this survey of the application of the eavesdropping statutes in Illinois' trial and reviewing courts invites an analysis about the policies underlying judicial regulation of consensual eavesdropping.

The principal reason for the enactment of article 108A was to discourage the indiscriminate use of eavesdropping devices and to provide a means for the judiciary to exercise control over the use of those devices. But the narrow judicial construction of articles 14 and 108A calls into question the effectiveness of these statutes in accomplishing these purposes. If the statutes apply only to "surreptitious consensual eavesdropping," if a party to a conversation cannot violate the statutes by recording that conversation, and if devices with the capacity to transmit sound as well as receive it are not "eavesdropping devices," then what conduct is left to be regulated by article 108A? Moreover, if 99.73% of the applications filed under article 108A are granted as requested, does the application procedure do anything more than create unnecessary paperwork for judges and law enforcement officials? Finally, if much of the data collected through the mechanism established in article 108A is of little use to the public, law enforcement officials and researchers, should it continue to be collected?

The General Assembly must answer these questions the next time it considers amendments to articles 14 and 108A.[250] In proposing alterations to the state's eavesdropping statutes, however, the members should be careful not to ignore the lessons of several decades of interpretation of those statutes. For example, a proposal for a nonconsensual eavesdropping statute that includes the existing terms "interception" and "eavesdropping device" without redefining them could lead to a statute that significantly encroaches upon individual liberties.

Whether Illinois continues to allow only consensual eavesdropping or joins those states that permit nonconsensual eavesdrop-

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249. *See, e.g.*, Aspen, *Court-Ordered Wiretapping: An Experiment in Illinois*, 15 De Paul L. Rev. 15 (1965); Henzi, *supra* note 81; Michael, *Electronic Surveillance in Illinois*, 1 Loy. U. Chi. L.J. 33 (1970); Morison, *State Officials Again Promote Expanded Electronic Eavesdropping Law*, The Compiler (Ill. Crim. Justice Inf. Auth.), Spring-Summer 1987, at 10; *Daley Urges Eased Eavesdropping Law*, Chicago Tribune, Apr. 15, 1981, § 1, at 4, col. 5.

250. In recent years, the General Assembly has considered several proposals to permit the use of nonconsensual eavesdropping in certain situations. In the last, 85th General Assembly, two identical bills to that effect, S.B. 964 and H.B. 2571, reached the floor of the house of origin, where each bill was narrowly defeated. S.B. 964 lost on the third reading in the senate, with 27 "nay" votes, 25 "aye" votes and 4 senators voting "present." H.B. 2571 lost on the third reading in the house, with 55 "nay" votes, 53 "aye" votes and 7 representatives voting "present."

ping[251] is difficult to predict. It can safely be concluded that no matter what form those statutes may take, reference to the history of the existing statutes is essential to ensure that any new language is construed and applied the way that the drafters intended.

251. At least 30 states currently authorize nonconsensual electronic surveillance. Morison, *supra* note 249, at 10.

APPENDICES A — F

TABLE A — EAVESDROPPING APPLICATIONS IN ALL ILLINOIS COUNTIES 1976 - 1986

TABLE B — ACTION TAKEN ON EAVESDROPPING APPLICATIONS 1976 - 1986

TABLE C — FELONIES SPECIFIED IN ORIGINAL EAVESDROPPING APPLICATIONS 1979, 1982 and 1984

TABLE D — NATURE OF FACILITIES USED IN EAVESDROPPING OPERATIONS REPRESENTED BY ORIGINAL ORDERS 1979, 1982 AND 1984

TABLE E — SUPPRESSION MOTIONS GRANTED AND DENIED IN EAVESDROPPING OPERATIONS 1976 - 1984

TABLE F — CONVICTIONS REPORTED IN EAVESDROPPING OPERATIONS 1976 - 1986

TABLE A — EAVESDROPPING APPLICATIONS IN ALL ILLINOIS COUNTIES 1976 - 1986

		1976		1977		1978		1979		1980		1981		1982		1983		1984		1985		1986*		TOTAL	
		ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.
1ST	ALEXANDER	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0	0	1	0	0	0	3	0	5	1
	JACKSON	0	0	0	0	0	0	0	0	0	0	8	2	3	0	5	1	4	0	2	0	4	0	26	3
	JOHNSON	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	2	0
	MASSAC	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0	0	2	0	4	0	7	0	14	1
	POPE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	2	0
	PULASKI	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	SALINE	0	0	0	0	0	0	0	0	0	0	0	0	1	0	6	2	2	0	1	0	1	0	11	2
	UNION	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	2	0
	WILLIAMSON	0	0	1	0	1	0	1	0	0	0	0	0	0	0	1	0	0	0	4	0	7	0	15	0
	CIRCUIT TOTAL	0	0	1	0	1	0	1	0	0	0	11	4	4	0	12	3	9	0	14	0	24	0	77	7
2ND	CRAWFORD	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1	1	0	1	2	2
	EDWARDS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	FRANKLIN	0	0	1	0	0	0	0	0	0	0	1	1	0	0	1	0	1	1	27	1	11	0	42	3
	GALLATIN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0
	HAMILTON	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	2	0
	HARDIN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0
	JEFFERSON	0	0	0	0	0	0	0	0	1	0	2	0	0	0	5	1	0	0	6	1	7	0	21	2
	LAWRENCE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0	0	5	0
	RICHLAND	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	0	0	0	0	0	1	1
	WABASH	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	1	0	0	0	3	0
	WAYNE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	1	0	0	1	3	1
	WHITE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	7	0	3	0	10	0
	CIRCUIT TOTAL	0	0	1	0	0	0	0	0	2	0	3	1	0	0	10	2	7	1	45	3	23	2	91	9
3RD	BOND	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	1	2	1	0	0	0	0	4	2
	MADISON	3	0	1	0	7	2	5	1	9	2	2	0	9	6	14	4	15	6	14	4	12	2	91	27
	CIRCUIT TOTAL	3	0	1	0	7	2	5	1	9	2	3	0	9	6	15	5	17	7	14	4	12	2	95	29
4TH	CHRISTIAN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	CLAY	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0
	CLINTON	0	0	0	0	0	0	0	0	0	0	0	0	1	2	1	0	0	0	0	0	0	0	2	2
	EFFINGHAM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	2	0
	FAYETTE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	1	0	0	0	3	0
	JASPER	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0

*1986 FIGURES FOR THE 12TH CIRCUIT INCLUDE STATISTICS FOR THE 21ST CIRCUIT COUNTIES OF KANKAKEE AND IROQUOIS

TABLE A — EAVESDROPPING APPLICATIONS IN ALL ILLINOIS COUNTIES 1976 - 1986

		1976		1977		1978		1979		1980		1981		1982		1983		1984		1985		1986*		TOTAL	
		ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.
	MARION	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	1	0	2	0	5	0
	MONTGOMERY	0	0	1	0	0	0	0	0	0	0	2	0	0	0	0	0	2	0	6	0	4	0	15	0
	SHELBY	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	CIRCUIT TOTAL	0	0	1	0	0	0	0	0	0	0	3	0	1	2	1	0	5	0	10	0	8	0	29	2
5TH	CLARK	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	3	0	4	0
	COLES	0	0	1	0	0	0	1	0	0	0	0	0	1	0	7	0	3	0	5	0	7	0	25	0
	CUMBERLAND	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	EDGAR	0	0	0	0	0	0	0	0	0	0	2	0	0	0	1	0	0	0	0	0	0	0	3	0
	VERMILION	0	0	1	0	0	0	2	1	1	0	1	0	1	0	1	1	5	3	5	1	1	0	18	6
	CIRCUIT TOTAL	0	0	2	0	0	0	3	1	1	0	3	0	2	0	10	1	8	3	10	1	11	0	50	6
6TH	CHAMPAIGN	0	0	3	0	0	0	1	0	0	0	0	0	2	0	2	0	0	0	2	0	3	0	13	0
	DE WITT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	1	0	3	0
	DOUGLAS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	2	0	0	0	3	0
	MACON	1	0	0	0	0	0	0	0	1	0	2	0	1	1	0	0	6	1	3	0	1	0	15	2
	MOULTRIE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	PIATT	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	CIRCUIT TOTAL	1	0	3	0	0	0	1	0	1	0	2	0	3	1	2	0	8	1	8	0	5	0	34	2
7TH	GREENE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	2	0
	JERSEY	0	0	0	0	0	0	0	0	0	0	2	0	1	1	0	0	0	0	1	0	0	0	4	1
	MACOUPIN	0	0	1	0	0	0	1	0	0	0	0	0	0	0	1	0	0	0	1	0	2	0	6	0
	MORGAN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	4	0	1	0	2	1	0	0	7	1
	SANGAMON	0	0	0	0	1	0	2	0	1	0	3	0	4	1	0	0	2	0	2	0	6	2	21	3
	SCOTT	0	0	0	0	0	0	0	0	0	0	1	1	0	2	0	0	0	0	0	0	0	0	1	3
	CIRCUIT TOTAL	0	0	1	0	1	0	3	0	1	0	6	1	5	4	7	0	3	0	6	1	8	2	41	8
8TH	ADAMS	0	0	0	0	2	0	2	0	0	0	0	0	5	0	8	0	3	0	5	0	3	0	28	0
	BROWN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0
	CALHOUN	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	CASE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	MASON	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	1	1	0	1	0	3	1
	MENARD	0	0	0	0	1	0	2	0	0	0	1	0	1	0	0	0	0	0	0	0	0	0	5	0
	PIKE	0	0	0	0	1	0	0	0	0	0	0	0	1	1	8	2	0	0	0	0	0	0	10	3
	SCHUYLER	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0
	CIRCUIT TOTAL	0	0	0	0	4	0	4	0	0	0	1	0	7	1	17	2	4	1	6	0	5	0	48	4

*1986 FIGURES FOR THE 12TH CIRCUIT INCLUDE STATISTICS FOR THE 21ST CIRCUIT COUNTIES OF KANKAKEE AND IROQUOIS

TABLE A — EAVESDROPPING APPLICATIONS IN ALL ILLINOIS COUNTIES 1976 - 1986

Circuit	County	1976		1977		1978		1979		1980		1981		1982		1983		1984		1985		1986*		TOTAL	
		ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.
9TH	FULTON	0	0	0	0	1	0	2	1	0	0	1	0	5	0	2	2	4	0	2	0	1	0	18	3
	HANCOCK	0	0	0	0	0	0	0	0	0	0	0	0	1	0	1	0	0	0	0	0	4	0	6	0
	HENDERSON	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0
	KNOX	0	0	0	0	0	0	1	1	0	0	0	0	0	0	10	2	0	0	0	0	1	1	12	4
	MCDONOUGH	0	0	0	0	0	0	0	0	0	0	1	0	2	0	0	0	0	0	0	0	0	0	3	0
	WARREN	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	3	0	2	0	1	0	8	0
	CIRCUIT TOTAL	0	0	0	0	1	0	3	2	1	0	2	0	8	0	14	4	8	0	4	0	7	1	48	7
10TH	MARSHALL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	PEORIA	0	0	0	0	2	0	6	4	6	2	6	0	14	3	7	2	3	0	0	0	4	0	48	11
	PUTNAM	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	STARK	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	TAZEWELL	2	0	2	0	3	0	0	0	0	0	2	0	5	1	0	0	1	1	1	0	8	2	24	4
	CIRCUIT TOTAL	2	0	2	0	5	0	6	4	6	2	8	0	19	4	7	2	4	1	1	0	12	2	72	15
11TH	FORD	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	0	3	0
	LIVINGSTON	0	0	0	0	0	0	0	0	2	0	1	0	0	0	6	2	1	0	2	1	5	0	17	3
	LOGAN	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	1	0	2	2	4	2
	MCLEAN	0	0	0	0	1	0	2	0	0	0	3	2	0	0	7	0	1	0	11	0	8	0	33	2
	WOODFORD	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	CIRCUIT TOTAL	0	0	1	0	1	0	2	0	3	0	4	2	0	0	13	2	2	0	14	1	17	2	57	7
12TH	IROQUOIS	0	0	0	0	0	0	1	0	0	0	0	0	0	0	3	0	5	0	1	0	1	0	11	0
	KANKAKEE	0	0	0	0	0	0	0	0	0	0	0	0	4	3	3	0	8	1	6	1	5	2	26	7
	WILL	0	0	7	11	4	2	16	18	17	1	14	2	17	2	5	1	16	6	34	11	19	6	149	60
	CIRCUIT TOTAL	0	0	7	11	4	2	17	18	17	1	14	2	21	5	11	1	29	7	41	12	25	8	186	67
13TH	BUREAU	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	3	0	3	0
	GRUNDY	0	0	0	0	0	0	2	0	0	0	0	0	0	0	1	5	0	0	4	0	1	0	8	5
	LA SALLE	0	0	5	2	2	0	1	1	3	2	2	0	1	0	3	0	0	0	7	2	11	1	35	8
	CIRCUIT TOTAL	0	0	5	2	2	0	3	1	3	2	2	0	1	0	4	5	0	0	11	2	15	1	46	13
14TH	HENRY	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	2	1	0	0	2	1
	MERCER	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1	0	0	0	2	0
	ROCK ISLAND	2	0	0	0	0	0	2	1	1	0	1	0	4	3	6	1	7	0	11	0	5	1	39	6
	WHITESIDE	0	0	0	0	0	0	0	0	1	0	0	0	2	0	2	1	3	0	2	0	19	3	29	4
	CIRCUIT TOTAL	2	0	0	0	0	0	2	1	2	0	1	0	7	3	8	2	10	0	16	1	24	4	72	11

*1986 FIGURES FOR THE 12TH CIRCUIT INCLUDE STATISTICS FOR THE 21ST CIRCUIT COUNTIES OF KANKAKEE AND IROGUOIS

TABLE A — EAVESDROPPING APPLICATIONS IN ALL ILLINOIS COUNTIES 1976 - 1986

		1976		1977		1978		1979		1980		1981		1982		1983		1984		1985		1986*		TOTAL	
		ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.	ORIG.	EXT.
15TH	CARROLL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	1	0
	JO DAVIESS	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0	2	0
	LEE	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	3	1	2	0	6	1
	OGLE	0	0	0	7	1	1	0	0	3	3	2	0	0	0	4	0	1	0	4	1	1	0	16	12
	STEPHENSON	0	0	1	0	0	0	2	0	2	0	2	0	0	0	2	0	1	0	0	0	9	0	19	0
	CIRCUIT TOTAL	0	0	1	7	1	1	3	0	5	3	5	0	0	0	6	0	3	0	8	2	12	0	44	13
16TH	DE KALB	0	0	0	0	0	0	3	0	0	0	2	2	2	1	0	0	0	0	0	0	1	0	8	3
	KANE	0	0	1	0	0	0	0	0	2	0	5	0	4	0	6	0	2	0	1	0	6	0	27	0
	KENDALL	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	CIRCUIT TOTAL	0	0	1	0	0	0	3	0	2	0	7	2	6	1	6	0	2	0	1	0	7	0	35	3
17TH	BOONE	0	0	0	0	0	0	0	0	0	0	0	0	1	1	0	0	3	0	0	0	0	0	4	1
	WINNEBAGO	11	0	2	3	0	0	9	2	3	1	6	0	5	0	2	0	7	1	3	0	7	0	55	7
	CIRCUIT TOTAL	11	0	2	3	0	0	9	2	3	1	6	0	6	1	2	0	10	1	3	0	7	0	59	8
18TH	DU PAGE	0	0	7	1	6	2	19	1	13	1	6	1	10	0	16	0	9	1	15	4	26	9	127	20
	CIRCUIT TOTAL	0	0	7	1	6	2	19	1	13	1	6	1	10	0	16	0	9	1	15	4	26	9	127	20
19TH	LAKE	0	0	1	1	2	0	2	1	6	3	2	0	1	0	5	0	3	1	7	2	4	1	33	9
	MCHENRY	0	0	0	0	2	1	1	1	0	0	2	0	4	0	0	0	2	1	1	0	0	0	12	3
	CIRCUIT TOTAL	0	0	1	1	4	1	3	2	6	3	4	0	5	0	5	0	5	2	8	2	4	1	45	12
20TH	MONROE	0	0	1	0	0	0	0	0	1	0	1	1	0	0	1	1	0	0	0	0	0	0	4	2
	PERRY	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0	2	0
	RANDOLPH	0	0	0	0	0	0	0	0	0	0	3	0	1	0	0	0	0	0	0	0	0	0	4	0
	ST. CLAIR	0	0	3	5	5	0	5	5	6	5	21	4	13	2	14	2	10	5	18	3	21	9	116	40
	WASHINGTON	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	CIRCUIT TOTAL	0	0	4	5	5	0	5	5	7	5	25	5	15	2	15	3	10	5	18	3	22	9	126	42
COOK		14	1	24	1	15	2	17	5	10	0	44	7	100	19	93	10	82	5	70	24	48	12	517	86
DOWNSTATE TOTAL		19	0	41	30	42	8	92	38	82	20	116	18	129	30	181	32	153	30	253	36	274	43	1382	285
STATE TOTAL		33	1	65	31	57	10	109	43	92	20	160	25	229	49	274	42	235	35	323	60	322	55	1899	371

*1986 FIGURES FOR THE 12TH CIRCUIT INCLUDE STATISTICS FOR THE 21ST CIRCUIT COUNTIES OF KANKAKEE AND IROQUOIS

TABLE B

ACTION TAKEN ON EAVESDROPPING APPLICATIONS 1976 - 1986

	APPLICATIONS GRANTED	APPLICATIONS MODIFIED	APPLICATIONS DENIED
1976	34	0	0
1977	95	0	0
1978	63	4	0
1979	151	0	0
1980	111	1	0
1981	185	0	0
1982	278	0	0
1983	316	0	0
1984	268	0	0
1985	369	0	1
1986	372	0	0
TOTAL	2243 (99.73%)	5 (.22%)	1 (.04%)

TABLE C

FELONIES SPECIFIED IN ORIGINAL EAVESDROPPING APPLICATIONS 1979, 1982 AND 1984

OFFENSE	1979		1982		1984	
	Number	Percent	Number	Percent	Number	Percent
Contr. Subst. Offenses	28	23.0%	99	36.7%	120	46.7%
Homicide	26	21.3%	28	10.4%	23	8.9%
Theft Offenses	17	13.9%	33	12.2%	23	8.9%
Bribery	12	9.8%	41	15.2%	20	7.8%
Intimidation	6	4.9%	10	3.7%	7	2.6%
Burglary	4	3.3%	5	1.9%	13	5.1%
Official Misconduct	4	3.3%	11	4.1%	10	3.9%
Arson	6	4.9%	6	2.2%	9	3.5%
Sex Offenses	6	4.9%	6	2.2%	8	3.1%
Robbery Offenses	4	3.3%	5	1.9%	2	.8%
Kidnapping Offenses	4	3.3%	3	1.1%	2	.8%
Forgery	2	1.6%	3	1.1%	0	0
Communic. w/ a Witness	1	.8%	4	1.5%	4	1.6%
Gambling Offenses	0	0	2	.7%	2	.8%
All Other Offenses	2	1.6%	14	5.2%	14	5.4%
TOTAL	122	99.9%	270	100.1%	257	99.9%

TABLE D

NATURE OF FACILITIES USED IN EAVESDROPPING OPERATIONS REPRESENTED BY ORIGINAL ORDERS
1979, 1982 and 1984

NATURE OF FACILITIES	1979		1982		1984	
	Number	Percent	Number	Percent	Number	Percent
Residence	36	34.3%	79	23.6%	48	19.0%
Transmitter on Agent	17	16.2%	122	36.4%	61	24.1%
Place of Business	28	26.7%	67	20.0%	40	15.8%
Hotel/Motel	6	5.7%	16	4.8%	9	3.6%
Law Enforc. Office	7	6.7%	11	3.3%	6	2.4%
Telephone Wiretap	1	.9%	2	.6%	58	22.9%
In Vehicle	4	3.8%	16	4.8%	4	1.6%
Public St./ Walkway	1	.9%	8	2.4%	5	2.0%
Outdoors/ Parking Lot	1	.9%	6	1.8%	9	3.6%
Courthouse/ Govt. Office	2	1.9%	1	.3%	6	2.4%
Jail	2	1.9%	1	.3%	1	.4%
Other Facilities	0	0	6	1.8%	6	2.4%
TOTAL	105	99.9%	335	99.8%	253	100.2%

TABLE E

SUPPRESSION MOTIONS GRANTED AND DENIED IN EAVESDROPPING OPERATIONS 1976 - 1984

YEAR	MOTIONS GRANTED	MOTIONS DENIED
1976	0	0
1977	0	4
1978	0	4
1979	0	6
1980	1	2
1981	8	10
1982	0	15
1983	0	11
1984	2	4
TOTAL	11 (16.4%)	56 (83.6%)

TABLE F

CONVICTIONS REPORTED IN EAVESDROPPING OPERATIONS 1976 - 1986

CIRCUIT	1976	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986*	TOTAL
1ST	0	0	0	0	0	1	0	1	6	1	1	10
2ND	0	0	0	0	0	0	0	7	3	3	3	16
3RD	0	0	1	2	7	0	0	0	12	8	4	34
4TH	0	0	0	0	0	0	0	0	0	2	0	2
5TH	0	0	0	0	0	1	0	2	4	6	1	14
6TH	0	1	0	1	1	1	0	3	0	2	0	9
7TH	0	0	0	1	0	1	2	1	2	2	1	10
8TH	0	0	0	0	0	1	0	0	1	13	3	18
9TH	0	0	1	0	0	0	4	8	3	5	6	27
10TH	0	0	2	2	0	5	19	0	1	0	7	36
11TH	0	0	0	0	0	1	0	5	1	7	7	21
12TH	0	8	0	7	1	0	8	10	2	0	0	36
13TH	0	3	3	0	0	3	0	4	0	2	13	28
14TH	0	0	0	0	0	0	0	4	3	12	5	24
15TH	0	0	0	4	5	1	0	0	0	1	3	14
16TH	0	0	0	1	0	5	4	0	0	0	2	12
17TH	1	4	0	1	0	0	1	0	0	0	0	7
18TH	0	0	2	3	0	5	1	0	0	0	0	11
19TH	0	0	0	1	0	1	6	3	4	0	1	16
20TH	0	2	0	2	0	3	4	4	2	3	8	28
COOK	0	0	4	3	2	6	20	1	2	2	0	40
TOTAL	1	18	13	28	16	35	69	53	46	69	65	413

* 1986 FIGURES FOR THE 12TH CIRCUIT INCLUDE DATA FOR 21ST CIRCUIT COUNTIES OF IROQUOIS AND KANKAKEE.