IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS **Plaintiff** **v.** **CHRIS DREW,** **Defendant.**	**Case No. 10 CR 0004601** **Judge Stanley Sacks** **Room #602**

REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Both parties having submitted their opening briefs, the dirty little secret of this lawsuit is now out, which is that the specific legal issue raised here as to whether citizens have a constitutionally-protected right to audio record conversation between themselves and police officers on the public way without first gaining the police officers' consent has not been firmly established by the courts anywhere in the country. As both parties opening briefs reveal, there is virtually no on-point precedent regarding this matter and what little precedent there is does not directly confront the constitutional issues at stake here. In the words of a recent Pennsylvania civil case, the law regarding this matter is "underdeveloped." Matheny v. County of Allegheny, 2010 U.S. Dist. LEXIS 24189. Moreover, there is no Illinois case law on point, and there is no reported instance of the State of Illinois ever using the law in this way. This is, accordingly, a matter of first impression.

But, of course, the candid acknowledgment of the absence of any on-point precedent is not the end of the story; it's the beginning. The absence of precedent means that this Court's determination of the constitutionality of the Eavesdropping Law must be derived in a pragmatic fashion from underlying principles related to the general newsgathering right, which no one disputes exists, and from the application of logic and experience, which leads to the conclusion that the blanket prohibition in the Illinois Eavesdropping Law against audio recording police officers on the public way without their consent violates the First Amendment.

To facilitate this determination, this reply brief is broken up into five parts, addressing in turn each of the State's various arguments in its response brief. First, Defendant shows that the State is simply wrong to suggest that the Illinois legislature's passage of the 1994 Amendment to the Illinois Eavesdropping Law resolves any potential constitutional issues in the State's favor. Far from it. The 1994 Amendment is actually the cause of the constitutional infirmity here.

Second, Defendant shows that the two cases relied on by the State to support its claim of the constitutionality of the Eavesdropping Law do not, in fact, support such a claim.

Third, Defendant establishes that, given that the State does not in any way dispute the existence of the newsgathering right under the First Amendment, the real issue here is not the existence of a newsgathering right but its scope and contours and that, even though there is no on-point precedent, the ability of citizens to audio record conversations between themselves and police officers on the public way is a protected activity, based on the same standards used in other contexts related to this newsgathering right, namely logic and experience.

Fourth, Defendant shows that the current distinction in the law between the right to *video* record police officers' conduct on the public way, which has been recognized by courts as a protected activity, and the right to *audio* record such conduct, which as yet has not been recognized, is senseless and without legal merit.

And fifth, Defendant argues that, practically speaking, the encounter between Defendant Drew and the police officer is not a "conversation," as that term has been defined under the Eavesdropping Law, and that the State in arguing otherwise seeks to stretch the boundaries of what constitutes a real and legitimate exchange between parties in defining police officers' on-street commands as a "conversation."

ARGUMENT

A. The State's Assertion That the 1994 Amendment To the Eavesdropping Law Insures Its Constitutionality Is Meritless; In fact, the 1994 Amendment Is the Problem.

In response to Defendant's assertion that the Illinois Eavesdropping Law is at odds with the First Amendment's newsgathering right, the State notes that the Illinois legislature amended the law in 1994 so that it would apply to all conversations and eliminated any consideration of a party's "expectation of privacy interest." See State's Response at 1. And in addition, the State

accuses Defendant of "overlook[ing]" this fact. Id. But, of course, Defendant has not overlooked this fact. Defendant Drew notes prominently in his brief the passage of the 1994 amendment and that it "significantly altered the law," in that "[t]he relevant analysis under the amended Illinois Eavesdropping Law became not whether the parties had an expectation of privacy, but rather whether the "eavesdropper" had obtained the consent of all parties before recording." See Defendant's Brief at 5, fn. 1. Indeed, the 1994 amendment is at the heart of Defendant's entire legal argument. For it is precisely the 1994 amendment that has created the circumstances that bring rise to defendant's claim that the Illinois Eavesdropping Statute is unreasonably and unconstitutionally broad in its scope, in that it eliminates in an overly restrictive manner the ability of citizens to monitor the conduct of public officials. See Defendant's brief in its entirety.

Mystifyingly, the State concludes its discussion of the 1994 amendment by noting that the legislature, if they had wanted to, "could have included" "an exemption" in the law for citizens to monitor police conduct but that "no such exemption exists." State's Response at 2. The only implication that Defendant can make of this argument is that the State is saying that because the Illinois legislator chose not to exempt police-citizen encounters, the Eavesdropping Law is constitutional. This argument takes deference to legislative authority to another level and, if true, would essentially gut the purpose of the First Amendment, which protects against governmental overreach, including against legislatures, even well intentioned ones, passing legislation at odds with the First Amendment. To state the obvious, the role of the courts is not to defer to the legislative decisions, but to enforce the Constitution. The State surely understands this.

B. **The Case Law the State Relies On to Support the Constitutionality of the Illinois Eavesdropping Law Is Inapplicable**.

The State relies on two cases to establish that the broad reach of Illinois Eavesdropping Law is constitutionally permissible, but upon analysis neither case actually support the State's claim. The first is Matheny v. County of Allegheny, 2010 U.S. Dist. LEXIS 24189. State's

Response at 2-3. Matheny does not stand for the proposition that there is no constitutional protection for citizens to audio record conversation between themselves and the police on the public way. The issue decided in Matheny was not whether a constitutional right existed to audio record conversations between citizens and police officers on the public way without the police officers' consent; the issue was whether that right was "clearly established" at the time of Methany's arrest. Id. at *13 fn. 3. The Matheny court held that the right was not clearly established, but the court never decided that the right does not exist.

In Matheny, the plaintiff brought a §1983 action in civil court, for violation of his First and Fourth Amendment rights and for a claim for malicious protection against the County of Allegheny and certain of its officials, after plaintiff had been arrested under the Pennyslvania Wiretapping and Electronic Surveillance Contol Act for secretly recording a conversation between himself and a police officer. This was a civil case, after the criminal charges against plaintiff had been dismissed. In a pre-trial motion, the arresting officer contended that he was exempt from civil liability based on a claim of qualified immunity. The Matheny court agreed. In making its determination, the court had to consider whether a citizen's right to record the conversation between himself and the police was "clearly established." The Court said it was not "clearly established," not because the right did not exist, but because the law was "limited," id. at *15 and "underdeveloped." Id. at *17.

The Matheny court is right — the issue whether citizens like Mr. Drew have a constitutional right to audio record conversations of the police on the public way is "underdeveloped." As explained previously, there is no on-point precedent that deals with the constitutionality of this particular matter. That is the gist of the Matheny court's decision granting the police officer qualified immunity, and it is also now at the heart of the complexity now facing this court. Yet in what can only be seen as an effort to unduly simplify the issues faced by this

Court, the State completely ignores the Matheny court's discussion of the "underdeveloped" nature of the law.

A fair reading of Matheny, however, actually offers not insignificant support for the notion that other courts someday may well recognize that a prohibition on a citizen's right to audio record a conversation with a police officer without the police officer's consent, as exists in the Illinois Eavesdropping Law, violates the First Amendment. Such support can be seen in that court's recognition that "a limited right to videotape police conduct, subject to reasonable time, place, and manner restrictions" "but as of yet has not extended that right to the context of an audio recording." Id. In other words, while the right to *video* record has been recognized as constitutionally protected under certain circumstances, the right to *audio* record as yet has not been. This raises the question whether any distinction between the right to video versus the right to audio record makes logical sense. It is Defendant's position that such distinction makes no sense, and, significantly, the State has not offered any basis for the existence of such distinction. (See discussion infra at 11-12).

The second case the State relies on to establish that the Illinois Eavesdropping Law is constitutionally permissible is Commonwealth v. Hyde, 750 N.E.2d 963 (Mass. 2001). See State's Response at 3. This case, however, does not support the State's claim that the broad reach of the Illinois Eavsdropping Law is constitutional. In Hyde, a motorist was convicted of secretly recording a conversation between himself and a police officer, and the conviction was upheld by the Hyde court. The Hyde court, however, did not address the constitutionality of Massachusetts' Electronic Surveillance Statute under the First Amendment. The issue addressed in Hyde centered exclusively around legislative intent and whether the Massachusetts' legislature intended for the statute to apply in such circumstances. Based on the statute's language, the majority in Hyde concluded that the legislature did intend the law to apply to such police-citizen encounters, but,

significantly, the Hyde majority did not address the statute's constitutionality or even mention the words "Constitution" or "First Amendment' in its entire ruling. The only mention of the First Amendment is made in the vigorous dissent in Hyde, in which Justice Marshall suggests that the application of the law to situations where it inhibits the ability of citizens to monitor police conduct does impair the First Amendment. Id. at 977. (Marshall, dissent)[1]. Put differently, in upholding the conviction of the defendant Hyde, the Hyde majority undertook a strictly legislative analysis, taking pains to avoid the constitutional question, a question which is now on the table.

C. The Proper Criteria to Use In Determining the Scope of the Newsgathering Right Are "Logic" and "Experience," Which Call for the Eavesdropping Statute's Unconstitutionality.

Defendant's opening brief relies on a body of precedent establishing in general terms the existence of a "newsgathering right" under the First Amendment. (See Defendant's Brief at 9-11).[2] Notably, the State in its response does not deny or question the existence of a newsgathering right or that the public's right is coextensive with the media's. Accordingly, the State's response clarifies that the question for this Court is not whether the newsgathering right exists, but what is the scope and contours of the newsgathering right and, in particular, whether citizens' ability to audio record conversations with the police on the public way in the performance of the officers' official duties without prior consent should be included under the right. Admittedly, the scope of

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1 Justice Marshall also pointed out in his dissent that at the time of the Hyde decision in 2001 there was only one other case in which an eavesdropping law was used to prosecute an individual for recording a conversation between himself and a police officer, and its application in these circumstances was summarily rejected by that court, noting that "in State v. Flora, 68 Wn. App. 802, 845 P.2d 1355 (1992), the court overturned a conviction obtained in circumstances nearly identical to [Hyde]...The Flora court rejected as 'wholly without merit' the view now adopted by this court. Id. at 806. The court 'declined the State's invitation' to transform its wiretapping statute 'into a sword available for use against individuals by public officers acting in their official capacity.' Hyde at 974-975.

2 In addition to cases cited therein, see also Branzburg v. Hayes, 408 U.S. 665 (1972) (the Supreme Court acknowledged the existence of First Amendment protection for news-gathering.); Builders Association of Greater Chicago v. The County of Cook, et al., 998 U.S. Dist. LEXIS 2991 (1998) ("Rooted in the First

the newsgathering right is not firm and definite, and it involves difficult questions of line drawing.[3] Given the absence of on-point precedent and the fuzzy contours of the newsgathering right , this Court's determination of the constitutionality of the Illinois Eavesdropping Law must be derived in a pragmatic fashion, namely from underlying principles related to the general newsgathering right and from the application of logic and sound policy.[4]

In determining the scope of the right, the most logical criterion to use are those set forth by the Supreme Court in the case of Richmond Newspapers Inc. v. Virginia, 448 U.S. 555 (1980), in which the Supreme Court established that under the First Amendment's newsgathering privilege a presumption existed in favor of the public's right to attend judicial proceedings. In that case, Justice Brennan's concurring opinion stressed that the determination of whether a particular proceeding should be closed depends on "the weight of the historical practice" and "an assessment of the specific structural value of public access in the circumstances." Id. at 598. Subsequently, Brennan's discussion in Richmond Newspapers of the historical practice and structural value factors was

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Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process").

3 Here's how Justice Powell describes the "test" in Saxbe et al. v. Washington Post Co. et al., 417 U.S. 843 (1974)) (case involving absolute ban on interviews of prisoners in federal prisons): "At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience. It is worth repeating our admonition in Branzburg that 'without some protection for seeking out the news, freedom of the press could be eviscerated.' 408 U.S., at 681." Saxbe at 860.

4 Judge Richard Posner, as one of the country's leading advocates for "judicial pragmatism," has written critically of judges' and lawyers' tendency to over-rely blindly on precedent as a means of making judicial decisions and as legal advocates: "It must be admitted that orientation--albeit inward toward the judge, rather than inward toward the professional culture. The impure style points outward, toward the world outside statutes and opinions…..Most judges, like most poets, "copy" the work of their predecessors. They make small additions to the swelling corpus of judicial opinions, which now number in the millions. A few judges, while not unmindful of the constraints imposed and the resources supplied by this corpus, look outward to the world of action that law regulates and the world of thought from which the ideas and values of the law ultimately derive." Richard A. Posner, Judges' Writing Styles (And Do They Matter?), University of Chicago Law Review, 62 U. Chi. L. Rev. 1421, 1435 (1995).

approved by the Court in Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1, 9 (1986). In that case, the Court refined the Richmond Newspapers test for determining whether a qualified First Amendment right of access applies to a particular proceeding, articulating a two-prong test based on both "experience" and "logic." Id. The "experience" prong involves a historical analysis of the tradition of openness for a given proceeding, id. at 10-11, and the "logic" prong involves an analysis of whether public access to the proceeding "plays a particularly significant positive role in the actual functioning of the process." Id. at 11-12. Appropriating these two notions, it becomes clear that the Illinois Eavesdropping law impairs citizens' First Amendment rights to an objectionable degree, in the process crossing a line of reasonableness and making the prohibition at issue constitutionally infirm.

In terms of what serves the interest of institutional "logic," it must be emphasized that the newsgathering right is severely imperiled by this law. The ability to record police officers' conduct provides a much-needed check on potential police abuse (see Defendant's brief at 6-7), and audio recording is essential to this endeavor. The evidentiary value of audio recording is necessary to stop certain very specific forms of police misconduct; see Defendant's brief at 7, fn. 4 (identifying several examples of police misconduct that can only be captured through audio, including the threat of unlawful violence and/or frame-up and the use of racial epithets and other foul words). Such information is simply not obtainable through any other means, constituting wholly unique bits of evidence that are frozen at a particular place and time. The consideration of the critical dependence of such audio evidence is appropriate to determine the First amendment Protections to be afforded. See Saxbe et al. v. Washington Post Co. et al., 417 U.S. 843, 854 (1974) ("A newsman depends on interviews in much the same way that a trial attorney relies on cross-examination. Only in face-to-face discussion can a reporter put a question to an inmate and respond to his answer with an immediate follow-up question. Only in an interview can the reporter pursue a particular line of

inquiry to a satisfactory resolution or confront an inmate with discrepancies or apparent inconsistencies in his story. Without a personal interview a reporter is often at a loss to determine the honesty of his informant or the accuracy of the information received.")

In addition, the right to hear is part and parcel of the First Amendment. Case law makes clear that the First Amendment is not just about the right to speak but also the right to hear. See Defendant's brief at 9-10 (discussing Robinson v. Fetterman, 378 F. Supp. 2d 534 (E.D. Pa. 2005), which explicitly recognizes that the First Amendment protects criticism of the police and that the scope of this protection encompasses the "right to receive information and ideas.") Further, in terms of the fundamental values underlying the First Amendment, the great First Amendment scholar Alexander Meiklejohn emphasized that the First Amendment was focused on the concept of self-governance, which necessitates the monitoring and the hearing government actors and actions: "We listen ... because we need to hear. If there are arguments against ... our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government." Alexander Meiklejohn, Free Speech and Its Relation to Self-Government, 65-66 (1948). Here, Meiklejohn was talking about matters of war and peace, but the ability to expose and monitor the actions of governmental officials is equally applicable to matters of police misconduct. The inability of citizens to monitor police misconduct by recording conversations on the public way during the officers' performance of their official duties allows police officers to shield unduly their actions from public view, and when executive branch officials, which police officers are, are able to unreasonably shield their actions from public view, the democratic process is correspondingly diminished.

In terms of what we might call "experience," the courts have recognized that police officers in the line of duty must expect less privacy than private citizens. See Defendant's brief at 13-14. There is good reason for this, namely we hold police officers to a higher standard of conduct than

other public employees, and their privacy interests are concomitantly reduced; and public confidence in the police is a social necessity and is enhanced by procedures that deter unlawful police conduct. Id. The State in its reply did not and cannot say otherwise. Yes, we honor individual privacy in our country, as embedded in the Fourth Amendment. As the Supreme Court has recognized, the "sanctity of a man's home and the privacies of life," including his private conversations, are essential to our "constitutional liberty and security." Berger v. New York, 88 U.S. 41, 49 (1967). But the ability to monitor police conduct on the public way by affording citizens the right to audio record conversations does not strip away a police officers' privacy; it limits it only in the most narrow and reasonable sense. See Defendant's Brief at 14. ("To be clear, no one is saying that police officers are expected to give up all their privacy rights. This case is only about the limited ability to record police-citizen interactions on the public ways of officers acting in the performance of their official duties.")

D. The State Does Not Offer Any Basis For Distinguishing Between Audio And Video.

Courts have recognized, and the State does not deny, there exists a First Amendment right to *video* record police officers on the public way. See Matheny v. County of Allegheny, 2010 U.S. Dist. LEXIS 24189 at *17. This right, however, has not as yet been extended to audio. In its brief, the State gives no basis for this distinction, and commonsense says it is without merit. Both video and audio equally serve the interests of monitoring police conduct, by providing insight into disputed events. Yes, it is true that audio and video serve to record different forms of police conduct – a punch, say, versus a verbal threat – but why this is a relevant distinction under the First Amendment right to monitor police conduct is unclear. Moreover, Defendant's cannot find any other place in Illinois law that distinguishes between audio and video for purposes of the First Amendment, and in practical terms, the Illinois Open Meetings Act, 5 ILCS 120/2.06 (2010) does not distinguish between video and audio as concerns the right to record information. In addition, the Illinois State

Police Act requires the Illinois State police to video and audio record conversations between themselves and citizens during traffic enforcement procedures. See 20 ILCS 2610/30 (2010) (e) ("Any enforcement stop resulting from a suspected violation of the Illinois Vehicle Code [625 ILCS 5/1-100 et seq.] shall be video and audio recorded. Audio recording shall terminate upon release of the violator and prior to initiating a separate criminal investigation"), thereby indicating that both audio and video serve useful and effective monitoring functions and that permitting one for purposes of monitoring without the other is meritless.

E. Practically Speaking, It Does Not Constitute A "Conversation" When A Police Officer Tells A Citizen He Must Stop What He Is Doing Or Be Arrested.

Finally, the State argues that the arresting officer and Defendant Drew had a "conversation," as that term is defined under the Eavesdropping Law. State's Response at 3. The State cites Defendant's arrest report, which says that "Sgt. Mizera asked arrestee to stop peddling, at which time arrestee told him he would not stop. Sgt. Mizera then told arrestee that he would be arrested if he did not cease peddling, at which time, arrestee told him, "Arrest me." Id. The State's position ignores practical reality. In real terms, this "exchange" does not constitute a "conversation." Is it a conversation when a police officer directing traffic says to the driver of a car, "Stop!"? No, it is a command, an order, a direction. Here, the arresting officer effectively said, "Stop or I will arrest you." The police officer isn't waiting for or interested in feedback here. And case law makes clear that the statute requires a real "conversation." Once again, as the federal court put it in DeBoer, et al. v. Village of Oak Park, 90 F. Supp. 2d 922 (U.S.D.C. Illinois, Eastern Division,1999):

> Furthermore, every reported decision which considers the meaning of the term "conversation" involves a telephone call, a discussion at a meeting, or some other oral exchange between a small group of people. We are aware of no decision applying the eavesdropping statute to a public speech, lecture, rally, ceremony, or any event similar to that held by the plaintiffs in the Village Hall. As the Illinois Appellate Court observed in a different context, "it was not the legislature's intent to provide a definition of 'conversation' so broad as to encompass any audible expression whatsoever." In re Marriage of Almquist, 299 Ill. App. 3d 732, 704 N.E.2d 68, 71, 234 Ill. Dec. 910 (Ill. App. Ct. 1998) (playing a recording of

> someone's voice as a means of interfering with a telephone call did not constitute participation in that conversation).

Id. at 923. Simply put, the State's argument puts form over substance. The encounter between Defendant Drew and the police officer here was more on the order of a lecture than an actual conversation, and as such, it does not come under the category conversation as defined by the Eavesdropping Statute.

CONCLUSION

For the foregoing reasons, Defendant Drew respectfully requests that this Court dismiss the criminal eavesdropping charge now pending against him.

Dated: May 3, 2010

Respectfully submitted,

CHRIS DREW,
Defendant,

By: ______________________________
One of His Attorneys

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that today, Tuesday, May 4, 2010, he caused a copy of **REPLY BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS** to be served upon the following counsel of record by hand delivery.

TO: Gene Wood, Ass't State's Attorney.

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