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BOARD CERTIFIED IN CRIMINAL TRIALS & APPEALS

July 12, 2004

The Honorable Larry J. Sartin
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

RE: FDLE, CJSTC v. Karmelin
Case No.: 04-2300 PL, 19375

LJS

Your Honor:

In compliance with the Initial Order of July 2, 2004, Petitioner's counsel and I spoke on July 8, 2004. An agreement on venue and dates were reached, which Mr. White is submitting under separate cover.

Prior to the probable cause determination hearing, Respondent filed a Motion to Suppress/Motion to Dismiss, which Petitioner refused to rule upon. Additionally, since the proceedings before you are de novo, I am submitting a new Motion to Suppress/Motion to Dismiss.

With warmest regards,

Ira D. Karmelin

enclosure

cc:
Joseph S. White, Esquire

FILED
04 JUL 14 PM 12:00
ADMINISTRATIVE
DIVISION OF
HEARINGS

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF LAW ENFORCEMENT,
CRIMINAL JUSTICE STANDARDS AND
TRAINING COMMISSION,

CASE NO.: 04-2300 PL
19375

FILED
04 JUL 14 PM 12:00
DIVISION OF
ADMINISTRATIVE
HEARINGS

Petitioner,

vs.

IRA D. KARMELIN,

Respondent.

MOTION TO SUPPRESS ALL INTERCEPTED
COMMUNICATIONS AND ANY EVIDENCE DERIVED THEREFROM
AND
MOTION TO DISMISS ALLEGATIONS

RESPONDENT, IRA D. KARMELIN, pursuant to 18 U.S.C. 2518(10)(a)(i) and Section 934.09(10)(a), Florida Statutes (2002), hereby moves the Administrative Law Judge for an Order suppressing all unlawfully intercepted communications and any evidence derived therefrom, including but not limited to the identity of Respondent, the testimony of all witnesses, all printouts of instant messages, all printouts of "NetMeeting" chats, all images that have been video taped, the contents of conversations unlawfully intercepted by Jennifer Hersey and John Hancock, the products of all investigative subpoenas issued relative to this cause or relative to Orange County Sheriff's Office case number 03-006248 and any evidence obtained by the execution of any search warrant relative to either cause, including the search warrant executed on January 21, 2003, in Palm Beach County, Florida. Additionally, Respondent moves the Administrative Law Judge for an Order dismissing all allegations as they derive from the unlawful interception of protected communications.

As grounds:

LEGAL AUTHORITY FOR THE INSTANT MOTION

1. 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002) provide for the security of Oral, Wire and Electronic Communications.

2. 18 U.S.C. 2518(10)(a)(i), provides, in pertinent part, “[a]ny aggrieved person in any . . . hearing or other proceeding in or before any . . . authority of . . . a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, or evidence derived therefrom, on the grounds that the communication was unlawfully intercepted[.]”

3. Section 934.09(10)(a)1, Florida Statutes (2002), provides, in pertinent part, “[a]ny aggrieved person in any . . . hearing, or other proceeding in or before any . . . department, officer, agency, regulatory body, or other authority may move to suppress the contents of any intercepted wire, oral, or electronic communication, or evidence derived therefrom, on the grounds that [t]he communication was unlawfully intercepted[.]”

STATEMENT OF FACTS

4. On January 11, 2003, Jennifer Hersey (Hersey), John Hancock (Hancock) and WFTV Channel 9 Orlando (WFTV), unlawfully recorded Respondent’s protected electronic communications, specifically Instant Messages and “NetMeeting” Chats, by use of a computer and video camera, both of which are “electronic, mechanical, or other device[s]” as defined by 18 U.S.C. 2510(5) and section 934.02(4), Florida Statutes (2002). These unlawful recordings constitute unlawfully intercepted communications as defined and prohibited by 18 U.S.C. 2510, et. sec., and

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARMELIN

Case No.: 04-2300 PL, 19375

Page 3 of 27

Chapter 934, Florida Statutes (2002). These unlawful interceptions have subsequently been duplicated by printing the recorded messages and chats from the computer, as well as reproducing the video tape created at the time the communications took place.

5. On January 11, 2003, Hersey, Hancock and WFTV, unlawfully recorded Respondent's protected electronic communications, specifically images of the Respondent, which were sent over the Internet by use of a computer and the wires attached thereto, by video taping the images through a video camera, which is an "electronic, mechanical, or other device[s]" as defined by 18 U.S.C. 2510(5) and section 934.02(4), Florida Statutes (2002). These unlawful recordings constitute unlawfully intercepted communications as defined and prohibited by 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). The unlawful interceptions have subsequently been duplicated by copying the video tape and transmitting the contents of the tape from WFTV to other television stations worldwide. These unlawful interceptions have also been broadcasted to the public at large by WFTV and other television stations across Florida and the United States. The transmission of the unlawfully intercepted electronic communication was a violation of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002), as WFTV intentionally disclosed the contents of the unlawfully intercepted electronic communication, knowing or having reason to know that the information being disclosed was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). Further, WFTV's actions were also a violation of 18 U.S.C. 2511(1)(d) and section 934.03(1)(d), Florida Statutes (2002), as WFTV unlawfully used the contents of Respondent's wire, oral or

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 4 of 27

electronic communications, knowing or having reason to know that the information was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002).

6. On January 13, 2003, Hersey, Hancock and WFTV, unlawfully recorded Respondent's protected electronic communications, specifically Instant Messages, by use of a computer and video camera, both of which are "electronic, mechanical, or other device[s]" as defined by 18 U.S.C. 2510(5) and section 934.02(4), Florida Statutes (2002). These unlawful recordings constitute unlawfully intercepted communications as defined and prohibited by 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). These unlawful interceptions have subsequently been duplicated by printing the recorded messages from the computer, as well as reproducing the video tape created at or near the time the communications took place.

7. On January 14, 2003, Hersey, Hancock and WFTV, unlawfully recorded Respondent's protected electronic communications, specifically Instant Messages and "NetMeeting" Chats, by use of a computer and video camera, both of which are "electronic, mechanical, or other device[s]" as defined by 18 U.S.C. 2510(5) and section 934.02(4), Florida Statutes (2002). These unlawful recordings constitute unlawfully intercepted communications as defined and prohibited by 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). These unlawful interceptions have subsequently been duplicated by printing the recorded messages and chats from the computer, as well as reproducing the video tape created at the time the communications took place.

8. On January 14, 2003, Hersey, Hancock and WFTV, unlawfully intercepted, as that

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 5 of 27

term is defined by 18 U.S.C. 2510(4) and section 934.02(3), Florida Statutes (2002), Respondent's protected wire communication(s), specifically an "AIM talk" between Respondent and a third party, by use of a computer, which is an "electronic, mechanical, or other device[s]" as defined by 18 U.S.C. 2510(5) and section 934.02(4), Florida Statutes (2002). The unlawful interception of this wire communication is Hersey's stated reason why Hersey, Hancock and WFTV, contacted the Orange County Sheriff's Office (Sheriff's Office), which initiated a criminal investigation of Respondent because of Hersey's, Hancock's and WFTV's unlawful interception of Respondent's wire communication(s).

9. On, about or between January 14 and 15, 2003, Hersey, Hancock and WFTV, in violation of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002), intentionally disclosed the contents of the unlawfully intercepted communications outlined above to Detective Thomas R. Harrison (Harrison), Sergeant Kevin Stenger (Stenger), and the Sheriff's Office, knowing or having reason to know that the information being disclosed was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). Until this unlawful disclosure was made, no lawful criminal investigation was underway, nor was Respondent known to law enforcement as a suspect in any crime.

10. From January 15, 2003, until August 15, 2003, Harrison, Stenger, and the Sheriff's Office, in violation of 18 U.S.C. 2511(1)(d) and section 934.03(1)(d), Florida Statutes (2002), unlawfully used the contents of Respondent's wire, oral or electronic communications, knowing or having reason to know that the information was obtained through the interception of wire, oral or

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 6 of 27

electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002).

11. On January 15, 2003, Hersey, Hancock, WFTV, Harrison, Stenger, and the Sheriff's Office, unlawfully recorded Respondent's protected electronic communications, specifically Instant Messages, by use of a computer and video camera, both of which are "electronic, mechanical, or other device[s]" as defined by 18 U.S.C. 2510(5) and section 934.02(4), Florida Statutes (2002). These unlawful recordings constitute unlawfully intercepted communications as defined and prohibited by 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). These unlawful interceptions have subsequently been duplicated by printing the recorded messages from the computer, as well as reproducing the video tape created at the time the communications took place.

12. On January 16, 2003, Hersey, Hancock, WFTV, Harrison, Stenger, and the Sheriff's Office, unlawfully recorded Respondent's protected electronic communications, specifically Instant Messages, by use of a computer and video camera, both of which are "electronic, mechanical, or other device[s]" as defined by 18 U.S.C. 2510(5) and section 934.02(4), Florida Statutes (2002). These unlawful recordings constitute unlawfully intercepted communications as defined and prohibited by 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). These unlawful interceptions have subsequently been duplicated by printing the recorded messages from the computer, as well as reproducing the video tape created at the time the communications took place.

13. On January 16, 2003, Harrison, Stenger, and the Sheriff's Office, in violation of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002), intentionally disclosed the

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 7 of 27

contents of the unlawfully intercepted communications outlined above to the Office of the Statewide Prosecutor (Statewide Prosecutor), knowing or having reason to know that the information being disclosed was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002).

14. From January 15, 2003, until August 15, 2003, the Statewide Prosecutor, by and through Assistant Statewide Prosecutor M. Rebecca Springer (Springer), Assistant Statewide Prosecutor Thomas A. Sadaka (Sadaka), and other unknown assistant statewide prosecutors, unlawfully used the contents of Respondent's wire, oral or electronic communications, knowing or having reason to know that the information was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002).

15. On January 20, 2003, Hersey, Hancock and WFTV, unlawfully recorded Respondent's protected electronic communications, specifically Instant Messages, by use of a computer and video camera, both of which are "electronic, mechanical, or other device[s]" as defined by 18 U.S.C. 2510(5) and section 934.02(4), Florida Statutes (2002). These unlawful recordings constitute unlawfully intercepted communications as defined and prohibited by 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). These unlawful interceptions have subsequently been duplicated by printing the recorded messages from the computer, as well as reproducing the video tape created at the time the communications took place.

16. From January 21, 2003, until at least August 15, 2003, and possible continuing until

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARMELIN

Case No.: 04-2300 PL, 19375

Page 8 of 27

today, Hersey, Hancock, WFTV, Harrison, Stenger and the Sheriff's Office have repeatedly and unlawfully disclosed the existence and contents of the unlawfully intercepted communications outlined above to numerous people by various means including but not limited to broadcasting the existence and contents of the unlawfully intercepted communications on various television stations, placing the unlawfully intercepted communications on the Internet, and providing interview(s) to the media disclosing to them for publication the existence and contents of the unlawfully intercepted communications, all in violation of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002).

17. On or about January 24, 2003, the Sheriff's Office, through Harrison and Stenger, in violation of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002), intentionally disclosed the contents of the unlawfully intercepted communications outlined above to M. Carol Beaver (Beaver), a law enforcement officer with the Loudoun County (Virginia) Sheriff's Office, knowing or having reason to know that the information being disclosed was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). This unlawful disclosure was with the unlawful intent that it would further be unlawfully disclosed, and was unlawfully disclosed, to a magistrate in the Commonwealth of Virginia for the purpose of obtaining a search warrant for Respondent's AOL and AIM accounts. All disclosures and actions herein were in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002).

18. On or about January 29, 2003, Harrison, Stenger, and the Sheriff's Office, in violation

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 9 of 27

of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002), intentionally disclosed the contents of the unlawfully intercepted communications outlined above to Lawson L. Lamar, State Attorney for the 9th Judicial Circuit of Florida, in and for Orange County, Florida (State Attorney) and his assistants, knowing or having reason to know that the information being disclosed was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002).

19. From January 29, 2003, until August 15, 2003, , the State Attorney, by and through Assistant State Attorney Robert J. Welch (Welch), Assistant State Attorney William C. Vose (Vose), Assistant State Attorney Candra A. Ogden (Ogden), and other unknown assistant state attorneys, unlawfully used the contents of Respondent's wire, oral or electronic communications, knowing or having reason to know that the information was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002).

20. Since an unknown date no earlier than January 21, 2003, the Florida Department of Law Enforcement (FDLE) and the Criminal Justice Standards and Training Commission (Commission), in violation of 18 U.S.C. 2511(1)(d) and section 934.03(1)(d), Florida Statutes (2002), have unlawfully used the contents of Respondent's wire, oral or electronic communications, knowing or having reason to know that the information was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002).

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 10 of 27

21. All communications referred to in this Motion affected intrastate, interstate or foreign commerce.

22. Respondent never consented to the interception of any oral, wire or electronic communication.

23. No warrant has every been issued for the interception of Respondent's oral, wire or electronic communications.

24. Based upon the paragraphs above, Harrison, Stenger, and the Sheriff's Office, obtained subpoena(s) and search warrant(s) for Respondent's America On Line account. Additionally, based upon these same paragraphs said entities obtained an arrest warrant for Respondent's person and a search warrant for Respondent's private dwelling, seizing Respondent's computer, diskettes and CDs therefrom. Further, said entities using these same paragraphs obtained a subpoena for Respondent's telephone records.

25. The unlawful interceptions, disclosures and uses of Respondent's communications by Hersey, Hancock, WFTV, Harrison, Stenger, and the Sheriff's Office constitute felonies under 18 U.S.C. 2511(4) and section 934.03(4), Florida Statutes (2002).

26. The unlawful uses of Respondent's communications by the Statewide Prosecutor, Springer, Sadaka, other unknown assistant statewide prosecutors, the State Attorney, Welch, Vose, Ogden, other unknown assistant state attorneys, FDLE and the Commission, constitute felonies under 18 U.S.C. 2511(4) and section 934.03(4), Florida Statutes (2002).

LEGAL DEFINITIONS

27. “‘Intercept’ means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.” 18 U.S.C. 2510(4) and §934.02(3), Fla. Stat. (2002).

28. “‘Wire communication’ means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection” 18 U.S.C. 2510(1) and §934.02(1), Fla. Stat. (2002).

29. “‘Electronic communication’ means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system that affects . . . commerce, but does not include any wire or oral communication.” 18 U.S.C. 2510(12)(a) and §934.02(12)(a), Fla. Stat. (2002)

30. “‘Oral communication’ means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under such circumstances justifying such expectation” 18 U.S.C. 2510(2) and §934.02(2), Fla. Stat. (2002).

31. With certain exceptions not relevant to the Instant Cause, “‘electronic, mechanical, or other device’ means any device or apparatus which can be used to intercept a wire, electronic, or oral communication” 18 U.S.C. 2510(5) and §934.02(4), Fla. Stat. (2002).

ARGUMENT AND MEMORANDUM OF LAW

“By passage of [18 U.S.C. 2510, et. sec.], Congress preempted the field of the interception of [oral,] wire [and electronic] communications under its power to regulate interstate

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 12 of 27

communications.” State v. Rivers, 660 So.2d 1360, 1362 (Fla. 1995); State v. Fratello, 835 So.2d 312, 314 (Fla. 5th DCA 2002). In so doing, Congress has prohibited the use of any unlawfully intercepted oral or wire communication from any governmental hearing; however, Congress did not prohibit the use of unlawfully intercepted electronic communications. 18 U.S.C. 2518(10)(a)(i). Nonetheless, states are free to adopt more restrictive statutes than Congress but not less restrictive statutes. Rivers, supra, citing to S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), reprinted in 1968 U.S.C.C.A.N. 2112, 2113. Florida has adopted a more restrictive statute “intend[ing] to afford broad protection[s] to private communications.” State v. Tsavaris, 394 So.2d 418, 422 (Fla. 1981). In addition to prohibiting the use of any unlawfully intercepted oral or wire communication, section 934.09(10)(a)1, Florida Statutes (2002), prohibits the use of any unlawfully intercepted electronic communication. The exclusionary rule created by 18 U.S.C. 2510, et. sec. and Chapter 934, Florida Statutes (2002) is unlike the exclusionary rule created by the courts to deter constitutional violations by law enforcement. While “good faith”¹ is an exception to the judicially created exclusionary rule it is not an exception to the exclusions required by 18 U.S.C. 2510, et. sec. and Chapter 934, Florida Statutes (2002). Davis v. State, 529 So.2d 732, 735 (Fla. 4th DCA 1988)(“By setting forth in unequivocal language that the suppression of evidence is the consequence of an illegal wiretap, the Legislature removed from judicial purview, the authority to alter the statutory scheme by creating a good faith exception.”) adopted in its entirety by State v. Garcia, 547 So.2d 628, 630 (Fla. 1989). Thus, the statutory exclusions created by 18 U.S.C. 2510, et. sec. and Chapter 934, Florida Statutes

¹See, United States v. Leon, 468 U.S. 897, 104 S.Ct. 3045, 82 L.Ed.2d 677 (1984).

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 13 of 27

(2002) are absolute. Jackson v. State, 636 So.2d 1372, 1374 (Fla. 2^d DCA 1994) approved 650 So.2d 24 (Fla. 1995). As such, there can be no judicial or administrative exceptions to the statutory exclusions created by Congress and the Florida Legislature. These statutes must be strictly construed and the exceptions contained therein narrowly applied. State v. Fratello, 835 So.2d 312, 316 (Fla. 5th DCA 2002); Jackson, 636 So.2d at 1374. “Courts have consistently construed chapter 934 to compel ipso facto suppression of evidence obtained through illegal wiretaps.”² Davis, 529 So.2d at 735 (citations omitted). Recording of an intercepted communication is not required to qualify it as an unlawful intercept or wiretap. State v. Tsavaris, 394 So.2d 418, 424 (Fla. 1981)(“where . . . an initial interception is illegal, the recording of that interception must likewise be illegal.”); State v. Tsavaris, 382 So.2d 56, 63 (Fla. 2^d DCA 1980); affirmed, 394 So.2d 418 (Fla. 1981)(“the recording of a [communication] is immaterial when the overhearing is itself illegal.”). An intercepted communication is a communication in which control or possession was gained through any³ sense, including hearing, and the use of an electronic, mechanical or other device. Tsavaris, 394 So.2d at 421. The exclusion and suppression of evidence obtained through illegal interceptions includes any evidence derived therefrom. 18 U.S.C. 2518(10)(a)(i); §934.09(10)(a)1, Fla. Stat. (2002). As such,

²As the Florida Supreme Court noted in State v. Tsavaris, 394 So.2d 418, n.4 (Fla. 1981), Chapter 934, Florida Statutes, does not speak in terms of “wiretapping” or “eavesdropping.” Regardless of the means used to unlawfully acquire a protected communication, the acquisition of the communication constitutes an unlawful interception prohibited by Chapter 934, Florida Statutes.

³At the time Tsavaris was decided, the definition of “intercept” included only the aural acquisition of a communication, however, Congress and the Florida Legislature have both expanded the definition of “intercept” to include any acquisition of a communication, aural or otherwise. Ch. 88-184, §1, Laws of Fla.

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 14 of 27

prosecutors cannot even use information from illegal interceptions to formulate questions, as the questions are “fruits of the poisonous tree” - the fruits of the illegal conduct. Horning-Keating v. State, 777 So.2d 438, 448 (Fla. 5th DCA 2001). See also, Miller v. State, 619 So.2d 9 (Fla. 4th DCA 1993); Rizzieri v. State, 443 So.2d 310 (Fla. 3^d DCA 1983). Thus, law enforcement cannot conduct a criminal investigation premised upon a violation of 18 U.S.C. 2510, et. sec. or Chapter 934, Florida Statutes (2002), as that investigation would be fruit of the poisonous tree - the fruit of illegal conduct, an illegal interception of communication. Id. Further, prosecutors cannot use an investigation premised upon an unlawful interception to prosecute a case, as it too would be fruit of the poisonous tree - the fruit of an illegal interception of communication. Id. Just as law enforcement cannot conduct a criminal investigation premised upon a violation of 18 U.S.C. 2510, et. sec. or Chapter 934, Florida Statutes (2002), no governmental agency or administrative body can conduct any type of investigation or proceeding premised upon a violation of 18 U.S.C. 2510, et. sec. or Chapter 934, Florida Statutes (2002), as that investigation and proceeding would be fruit of the poisonous tree - the fruit of illegal conduct, an illegal interception of communication. Id.

In the Instant Cause, Hersey, Hancock and WFTV, contacted the Sheriff's Office, Harrison and Stenger, as a direct result of an unlawfully intercepted wire communication on January 14, 2003. At that time, Hersey and the Respondent, who was in his home, were engaged in an electronic communication, specifically a “NetMeeting.” Although the parties were mutually transmitting their images, unbeknownst to Respondent, Hersey had disabled the microphone in her computer but kept the hidden speaker active so she could hear Respondent but Respondent could not hear her. Through

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 15 of 27

Hersey's tampered with her computer, Hersey was able to hear Respondent's speech as he spoke to a third party on "AIM talk." Rather than informing Respondent that his conversation with a third party could be overheard, Hersey, using the speaker hidden in her computer, intentionally and surreptitiously eavesdropped on Respondent's private conversation. Additionally, Hersey requested Hancock to eavesdrop with her, which he also did intentionally and surreptitiously. Neither Hersey, Hancock nor WFTV recorded the conversation they were eavesdropping upon; however, recording is not a prerequisite to an unlawful interception of a communication. State v. Tsavaris, 382 So.2d 56, 63 (Fla. 2^d DCA 1980); affirmed, 394 So.2d 418, 424 (Fla. 1981). Although Hersey, Hancock and WFTV are members of the media and claim to have been attempting to gather news,

hidden mechanical contrivances are not indispensable tools of news gathering. The ancient art of investigative reporting was successfully practiced long before the invention of electronic devices, so they cannot be said to be "indispensable tools of investigative reporting."

Shevin v. Sunbeam Television Corp., 351 So.2d 723, 727 (Fla. 1977). Respondent never consented to Hersey, Hancock or WFTV intercepting his private "AIM talk" conversation. Because Respondent's speech traveled over the wires of the Internet, his speech became a wire communication. Thus, Respondent's conversation is protected by 18 U.S.C. 2510, et. sec. and Chapter 934, Florida Statutes (2002). "The actual "interception" of communication occurs not where such is ultimately heard or recorded but where the communication originates." State v. Mozo, 655 So.2d 1115, 1117 (Fla. 1995). As such, the interception of Respondent's communications occurred inside his residence in Palm Beach County, Florida. There is no question that individuals have a

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 16 of 27

reasonable expectation⁴ of privacy in their home. Id. Although neither Hersey, Hancock nor WFTV recorded Respondent's private "AIM talk," the lack of recording does not diminish the illegality of their felonious interception of Respondent's private and protected communication. Tsavaris, supra. Neither 18 U.S.C. 2510(4) nor section 934.02(3), Florida Statutes (2002) require a communication be recorded in order to be defined as an intercepted communication. Interception merely requires the "aural or other acquisition" of any oral, wire or electronic communication. In the Instant Cause, Hersey, Hancock and WFTV acquired Respondent's private "AIM talk" by using a computer, an "electronic, mechanical or other device," and the Internet to intentionally, surreptitiously, covertly and without Respondent's consent, eavesdrop⁵ on Respondent's private conversation(s), specifically his "AIM talk." Because of their unlawful interception of Respondent's protected, private conversation(s), Hersey, Hancock, and WFTV contacted the Sheriff's Office, who assigned Harrison and Stenger to conduct a criminal investigation which lead to Respondent's arrest, as well as the Instant allegations and all the evidence in the Instant Cause. As such, Respondent's identity,⁶

⁴Although Respondent had a reasonable expectation that his wire communication was not subject to interception, no subjective expectation is required to protect Respondent's wire communications. By definition, all wire communications are protected, while only oral communications uttered with a reasonable expectation that the communication was not subject to interception are protected.

⁵"[A]ll unauthorized eavesdropping by use of [electronic, mechanical or other devices . . .] in the absence of knowledge and consent of [all] parties to the conversation is unlawful, criminal in nature and punishable as a third degree felony. State v. Horn, 298 So.2d 194, 199 (Fla. 1st DCA 1974).

⁶Respondent's identity, like any other evidence, is subject to suppression based upon unlawful conduct. State v. Perkins, 760 So.2d 85 (Fla. 2000); Turben v. State, 761 So.2d 1243 (Fla. 2^d DCA 2000); Delafield v. State 777 So.2d 1020 (Fla. 2^d DCA 2000).

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 17 of 27

FDLE's investigation and all evidence in this Cause are the "fruit" of Hersey's, Hancock's and WFTV's violation of 18 U.S.C. 2511 and Section 934.03, Florida Statutes (2002). Thus, pursuant to 18 U.S.C. 2515, 18 U.S.C. 2518(10)(a)(i), Section 943.06, Florida Statutes (2002), and Section 934.09(10)(a)1, Florida Statutes (2002), neither the contents of the unlawfully intercepted wire communication can be admitted into evidence nor any evidence derived therefrom. Horning-Keating v. State, 777 So.2d 438, 448 (Fla. 5th DCA 2001); Bagley v. State, 397 So.2d 1036 (Fla. 5th DCA 1981). See also, Miller v. State, 619 So.2d 9 (Fla. 4th DCA 1993); Rizzieri v. State, 443 So.2d 310 (Fla. 3^d DCA 1983). Any attempt by FDLE to assert that the evidence in the Instant Cause would have been inevitably discovered and therefore not derived from the unlawful interceptions is without merit. The "Inevitable Discovery" exception to the **judicially** created exclusionary rule requires that a lawful criminal investigation be underway at the time a Respondent's rights are violated. Hatcher v. State, 834 So.2d 314, 318 (Fla. 5th DCA 2003)(The inevitable discovery doctrine requires proof that the evidence would have been discovered independently of the improper conduct by "means of normal investigative measures that inevitably would have been set in motion as a matter of routine police procedure.").

Speculation must not play a part in the application of [the Inevitable Discovery] rule, and it, of course is not sufficient to show that some possible further investigation would have revealed the evidence. Ruffin v. State, 651 So.2d 206 (Fla. 2^d DCA 1995). See also Bowen v. State, 685 So.2d 942 (Fla. 5th DCA 1996).

State v. Duggins, 691 So.2d 566, 568 (Fla. 2^d DCA 1997).

[T]he court must find that [the evidence] would have been discovered independent of the constitutional violation. In such cases, the state

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 18 of 27

must prove some official entity would have found the illegal evidence absent the illegal search and seizure. Speculation may not play a part in the inevitable discovery rule; the focus must be on demonstrated facts, capable of verification.

Bowen v. State, 685 So.2d 942, 944 (Fla. 5th DCA 1996)(citations omitted). Applying this doctrine to the Instant Cause, if it can ever be applied to wiretapping violations, reveals that it cannot cure the felonious violation of Respondent's right to secure communications. Since Respondent was not known to law enforcement as a suspect in any crime, nor was a criminal investigation even underway at the time Hersey, Hancock and WFTV feloniously violated Respondent's statutory right to secure communications, the necessary predicate(s) for the application of the "Inevitable Discovery" doctrine are missing; thus, "Inevitable Discovery" is inapplicable to the Cause at Bar. Additionally, Harrison testified in his criminal deposition that Hersey called law enforcement solely because of her interception of Respondent's protected wire communication(s); thus, the inevitable discovery doctrine cannot apply to the Instant Cause since but for the violation of Respondent's communication rights no investigation, lawful or otherwise, would have been initiated or conducted. Accordingly, the Instant Cause, the investigation from whence it stems and all evidence obtained therefrom must be suppressed and excluded.

In addition to the unlawful interception of Respondent's wire communications, Hersey, Hancock and WFTV, unlawfully recorded Respondent's electronic communications. Hersey, Hancock and WFTV surreptitiously used a video camera to record Respondent's "NetMeeting" transmissions with Hersey. Although it has become common, and is lawful, to use hidden cameras to videotape nannies in the home, provided no oral communications are recorded, the Instant video

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 19 of 27

recordings are not lawful. When parents use “nanny cams” to protect their children, the parents are recording the actual nanny rather than an electronic communication which contains the nanny’s image. In the Instant Cause, Respondent transmitted an electronic image of himself to Hersey using the Internet and the wires attached thereto. There can be no question that the Internet affects commerce, be it intrastate, interstate or foreign commerce. Hersey, Hancock and WFTV intentionally placed a video camera, an “electronic, mechanical or other device,” in a location so Respondent could not see it and did not know of it’s presence. Utilizing the camera, Hersey, Hancock and WFTV unlawfully acquired the electronic image of Respondent by recording it on videotape. Their actions are no different than when an individual unlawfully records a wire communication such as a telephone call. Telephone calls are temporary in nature and are intended for the ears of the recipient only. Likewise, Respondent’s electronic image of himself was temporary in nature and intended for the eyes of the recipient only. Respondent never intended for nor did he ever consent to the electronic image of himself being permanently recorded on tape. As such, Hersey’s, Hancock’s and WFTV’s intentional video taping of Respondent’s electronic image was in violation of 18 U.S.C. 2511 and Section 934.03, Florida Statutes (2002). Additionally, Respondent never consented to his image, an electronic communication, being transmitted to the public on WFTV in Orlando nor on television stations across Florida and the United States.

[As t]he court pointed out [in Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971),] a person should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording in full living color and hi-fi to the public at large.

Shevin v. Sunbeam Television Corp., 351 So.2d 723, 727 (Fla. 1977). See also, State v. Calhoun,

479 So.2d 241 (Fla. 4th DCA 1985). Thus, because of Hersey, Hancock and WFTV's illegal and outrageous conduct and pursuant to Section 934.09(10)(a)1, Florida Statutes (2002), neither the contents of the unlawfully intercepted electronic communication nor any evidence derived therefrom can be admitted into evidence. Horning-Keating, supra; Bagley, supra. See also, Miller, supra; Rizzieri, supra.

Hersey, Hancock and WFTV unlawfully intercepted other electronic communications from the Respondent. As outlined above, Respondent and Hersey had "Instant Message" and "NetMeeting" chat conversations. Unlike Email, where one party transmits a message that can contain words and images and is automatically saved by the Internet Service Provider (ISP) as a function of the transmission; Instant Messages (IMs) and Chats are not automatically saved by the ISP. IMs and Chats are akin to telephone conversations. They are instantaneous and temporary in nature, and are meant to be kept that way. On the other hand, Email is akin to letters sent through the postal service. They are permanent and can easily be shown to others. It takes no additional act to save an Email. It is saved automatically. However, it takes additional act(s) to record IMs and Chats. Again, Hersey, Hancock and WFTV intentionally placed a video camera, an "electronic, mechanical or other device," in a location so Respondent could not see it and did not know of its presence. Utilizing the camera, Hersey, Hancock and WFTV surreptitiously acquired the electronic writings (communications) of Respondent, recording them on videotape. As before, their actions were no different than the unlawful recording of a telephone call. Respondent's electronic writings were temporary in nature and intended for the eyes of the recipient only. Respondent never intended

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARMELIN

Case No.: 04-2300 PL, 19375

Page 21 of 27

for nor did he ever consent to the electronic writings being permanently recorded on tape or broadcast to the public at large. Shevin, supra. As such, Hersey's, Hancock's and WFTV's intentional video taping of Respondent's electronic writings were in violation of 18 U.S.C. 2511 and Section 934.03, Florida Statutes (2002). Thus, because of their illegal and outrageous conduct and pursuant to Section 934.09(10)(a)1, Florida Statutes (2002), neither the contents of the unlawfully intercepted electronic communication nor any evidence derived therefrom can be admitted into evidence. Horning-Keating, supra; Bagley, supra. See also, Miller, supra; Rizzieri, supra.

In addition to videotaping Respondent's electronic writings, Hersey used her computer to permanently record Respondent's electronic writings. Hersey created files in her computer's memory system which contain Respondent's IMs and Chats. These files were subsequently printed from the computer as a permanent, printed recording of Respondent's temporary electronic writings. Respondent's IMs and Chats clearly contained writings which were transmitted over a wire that affected commerce; thus, Respondent's IMs and Chats are electronic communications. Hersey clearly used a computer, a device or apparatus which can be used to intercept or acquire the contents of an electronic⁷ communication, to permanently record Respondent's IMs and Chats, rather than

⁷It is important to note that only the definition of an "oral communication" requires the court to determine if the speaker had a reasonable expectation that the communication was not subject to interception. Neither "wire communication" nor "electronic communication" contain this prong; as such, whether the transmitter had a reasonable expectation that the communication was not subject to interception is not for the court to determine. Only if the court determines that all parties to the communications consented to their interception can the court find compliance with 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). This consent cannot be found by the transmission of the communication alone, otherwise anyone could tape record (intercept) any telephone conversation (wire communication) they were a party to.

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 22 of 27

simply viewing them once as they were intended. As such, Hersey's intentional recording of Respondent's IMs and Chats (electronic communications) was in violation of 18 U.S.C. 2511 and Section 934.03, Florida Statutes (2002). At the time Hersey intentionally recorded Respondent's electronic communications, Hersey was acting at the request of and as an agent of WFTV. Thus, because of their illegal and outrageous conduct and pursuant to Section 934.09(10)(a)1, Florida Statutes (2002), neither the contents of the unlawfully intercepted electronic communication nor any evidence derived therefrom can be admitted into evidence. Horning-Keating, supra; Bagley, supra. See also, Miller, supra; Rizzieri, supra.

On January 15, 2003, Harrison and Stenger viewed the unlawfully intercepted electronic communications of the Respondent, which were on videotape and paper. Hersey and Hancock also informed Harrison and Stenger of Respondent's unlawfully intercepted wire communication and their belief as to its contents. In determining whether to conduct a criminal investigation of Respondent, Harrison, Stenger and the Sheriff's Office, in violation of 18 U.S.C. 2511(1)(d) and section 934.03(1)(d), Florida Statutes (2002), unlawfully used the contents of Respondent's wire, oral or electronic communications, knowing or having reason to know that the information was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). On January 15 and 16, 2003, the Sheriff's Office, through Harrison and Stenger, joined Hersey, Hancock and WFTV in the interception of Respondent's electronic communications. Although it can be lawful for a person acting under the direction of a law enforcement officer to intercept communications they are a party

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 23 of 27

to, for the purpose of obtaining evidence of a criminal act; §934.03(2)(c), Fla. Stat. (2002); if the law enforcement officer joined in or directed the person to intercept the communication based upon a previously unlawfully intercepted communication, the interception is not lawful as it would be the fruit of or evidence derived from the prior unlawful intercept. See generally, Horning-Keating, supra; Bagley, supra; Miller, supra; Rizzieri, supra. As the Florida Supreme Court stated, there are no exceptions to the exclusionary rule created by the Legislature. Davis v. State, 529 So.2d 732, 735 (Fla. 4th DCA 1988) (“By setting forth in unequivocal language that the suppression of evidence is the consequence of an illegal wiretap, the Legislature removed from judicial purview, the authority to alter the statutory scheme by creating a good faith exception.”) adopted in its entirety by State v. Garcia, 547 So.2d 628, 630 (Fla. 1989). As such, neither Hersey, Hancock, WFTV, Harrison, Stenger nor the Sheriff’s Office can claim lawfulness under section 943.03(2)(c), since law enforcement was contacted and acted because of Hersey’s, Hancock’s and WFTV’s prior unlawful interception of Respondent’s wire communication with a third party. The allegations FDLE has raised before this Commission stem from Harrison, Stenger and the Sheriff’s Office unlawful investigation. Thus, no evidence obtained by law enforcement or FDLE is admissible in the Instant Cause since it all derived from the unlawful interception of Respondent’s wire communication by Hersey, Hancock and WFTV. Horning-Keating, supra; Bagley, supra. See also, Miller, supra; Rizzieri, supra. These actions were also based upon the unlawful interception of Respondent’s electronic communications; as such, this provides an additional ground upon which no evidence can be admitted. Id.

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 24 of 27

On or about January 24, 2003, the Sheriff's Office, through Harrison and Stenger, in violation of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002), intentionally disclosed the contents of the unlawfully intercepted communications outlined above to Beaver, knowing or having reason to know that the information being disclosed was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). This disclosure was with the unlawful intent that it would be further disclosed to a magistrate in the Commonwealth of Virginia. Beaver unlawfully used the contents of Respondent's wire, oral or electronic communications in obtaining a search warrant from the Commonwealth of Virginia for Respondent's AOL and AIM accounts. Thus, no evidence obtained by law enforcement in this Cause is admissible since it all derived from the unlawful interception of Respondent's wire and electronic communications by Hersey, Hancock and WFTV. Horning-Keating, supra; Bagley, supra. See also, Miller, supra; Rizzieri, supra.

On January 16, 2003, and subsequent dates, the Sheriff's Office, through Harrison and Stenger, in violation of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002), intentionally disclosed the contents of the unlawfully intercepted communications outlined above to the Statewide Prosecutor, knowing or having reason to know that the information being disclosed was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). The Statewide Prosecutor, through Springer, Sadaka and other unknown assistant statewide prosecutors, then unlawfully used the contents of Respondent's wire, oral or electronic communications, knowing or having reason to

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARME LIN

Case No.: 04-2300 PL, 19375

Page 25 of 27

know that the information was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002), in deciding to issue investigative subpoenas to AOL, Adelphia Cable and BellSouth. On or about January 29, 2003, the Sheriff's Office, through Harrison and Stenger, in violation of 18 U.S.C. 2511(1)(c) and section 934.03(1)(c), Florida Statutes (2002), intentionally disclosed the contents of the unlawfully intercepted communications outlined above to the State Attorney and his assistants, knowing or having reason to know that the information being disclosed was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002). The State Attorney, through Welch, Vose, Ogden and other unknown assistant state attorneys, have unlawfully used the contents of Respondent's wire, oral or electronic communications, knowing or having reason to know that the information was obtained through the interception of wire, oral or electronic communications in violation of 18 U.S.C. 2510, et. sec., and Chapter 934, Florida Statutes (2002), in deciding to issue an investigative subpoena to BellSouth and in deciding to file an Information and Amended Information in the Instant Cause. Thus, as all evidence obtained by law enforcement in this Cause derived from the unlawful interception of Respondent's wire and electronic communication by Hersey, Hancock, WFTV, Harrison, Stenger, and the Sheriff's Office, and all decisions made by the Statewide Prosecutor, State Attorney, and their assistants as well as FDLE were based upon these unlawful interceptions, no evidence is admissible in the Instant Cause. Horning-Keating, supra; Bagley, supra. See also, Miller, supra; Rizzieri, supra.

Motion to Suppress And Motion to Dismiss
FDLE, CJSTC v. KARMELIN
Case No.: 04-2300 PL, 19375
Page 26 of 27

CONCLUSION

WHEREFORE, RESPONDENT, IRA D. KARMELIN, pursuant to 18 U.S.C. 2518(10)(a)(i) and Section 934.09(10)(a), Florida Statutes (2002), hereby moves the Administrative Law Judge for an Order suppressing all unlawfully intercepted communications and any evidence derived therefrom, including but not limited to the identity of Respondent, the testimony of all witnesses, all printouts of instant messages, all printouts of "NetMeeting" chats, all images that have been video taped, the contents of conversations unlawfully intercepted by Jennifer Hersey and John Hancock, the products of all investigative subpoenas issued relative to this cause or relative to Orange County Sheriff's Office case number 03-006248 and any evidence obtained by the execution of any search warrant relative to either cause, including the search warrant executed on January 21, 2003, in Palm Beach County, Florida. Additionally, Respondent moves the Administrative Law Judge for an Order dismissing all allegations as they derive from the unlawful interception of protected communications.

Respectfully submitted,

IRA D. KARMELIN, ESQUIRE
Florida Bar Number 0946885
PO Box 220811
West Palm Beach, Florida 33422-0811
(561) 683-6141

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to Joseph

Motion to Suppress And Motion to Dismiss

FDLE, CJSTC v. KARMELIN

Case No.: 04-2300 PL, 19375

Page 27 of 27

S. White, Esquire, Florida Department of Law Enforcement, Post Office Box 1489, Tallahassee,

Florida 32302-1489, this 12th day of July, 2004.

A handwritten signature in black ink, appearing to read "Ira D. Karmelin", written over a horizontal line.

IRA D. KARMELIN, ESQUIRE

Florida Bar Number 0946885

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