

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2006 Term

No. 33073

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

**STATE OF WEST VIRGINIA,
Appellee,**

V.

**EDDIE MULLENS,
Appellant.**

**Appeal from the Circuit Court of Boone County
Honorable E. Lee Schlaegel, Jr., Judge
Criminal Action No. 04-F-85**

REVERSED AND REMANDED

**Submitted: November 14, 2006
Filed: February 28, 2007**

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CHIEF JUSTICE DAVIS delivered the Opinion of the Court.

JUSTICES MAYNARD and BENJAMIN dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. “The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution.” Syllabus point 2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

2. It is a violation of West Virginia Constitution article III, § 6 for the police to invade the privacy and sanctity of a person’s home by employing an informant to surreptitiously use an electronic surveillance device to record matters occurring in that person’s home without first obtaining a duly authorized court order pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005). To the extent that *State v. Thompson*, 176 W. Va. 300, 342 S.E.2d 268 (1986), holds differently, it is overruled.

3. “Wherever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts.” Syllabus point 3, *Slack v. Jacob*, 8 W. Va. 612 (1875).

4. Article III, § 6 of the West Virginia Constitution prohibits the police from sending an informant into the home of another person under the auspices of the one-party consent to electronic surveillance provisions of W. Va. Code § 62-1D-3(b)(2) (1987)

(Repl. Vol. 2005) where the police have not obtained prior authorization to do so pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005).

Davis, Chief Justice:

Eddie Mullens (hereinafter “Mr. Mullens”) appeals an order of the Circuit Court of Boone County sentencing him to a term of one to five years imprisonment,¹ after entering a conditional guilty plea to a charge of delivery of a controlled substance.² Pursuant to the terms of the conditional guilty plea, Mr. Mullens assigns error to the circuit court’s denial of his motion to suppress an audio and video recording of the drug transaction that occurred in his home. Mr. Mullens asserts that the audio and video recording should have been suppressed because the evidence was obtained by an informant acting under the color of law *without* a court order. After careful consideration of the briefs, record and oral arguments, we find that the circuit court should have suppressed the audio and video recording in this case. Accordingly, Mr. Mullens’ conviction and sentence are reversed, and this case is remanded to permit him to withdraw his guilty plea.

¹This sentence was suspended, and Mr. Mullens was placed on two years probation.

²The parameters of a conditional plea are outlined in Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure as follows:

Conditional Pleas. With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

See also State v. Lilly, 194 W. Va. 595, 461 S.E.2d 101 (1995) (Cleckley, J., concurring) (discussing conditional pleas).

I.

FACTUAL AND PROCEDURAL HISTORY

On December 11, 2003, law enforcement agents with the U.S. 119 Drug and Violent Crimes Task Force (hereinafter “Task Force”)³ employed a confidential informant to make an illegal drug purchase at Mr. Mullens’ home.⁴ The Task Force equipped the confidential informant with a hidden audio and video recording device.⁵ The Task Force did not obtain judicial authorization to allow the confidential informant to use the electronic surveillance device while inside Mr. Mullens’ home.

On the evening of December 11, the confidential informant went to Mr. Mullens’ home. The confidential informant was invited into the home by Mr. Mullens and his wife, Jessica Mullens. Once inside the home, the confidential informant purchased 3.23 grams of marijuana. The electronic surveillance device worn by the confidential informant recorded the drug purchase.

On September 22, 2004, a grand jury returned an indictment against Mr. Mullens and his wife, charging them with one count of delivery of a controlled substance and

³The Task Force was led by Deputy Sheriff Chad Barker.

⁴For security reasons, the record does not disclose the identity of the confidential informant.

⁵This “electronic surveillance device [is] commonly referred to as a body wire[.]” *State v. Dillon*, 191 W. Va. 648, 652, 447 S.E.2d 583, 587 (1994).

one count of conspiring to deliver a controlled substance.⁶ Mr. Mullens filed a motion to suppress the audio and video recording of the drug transaction asserting that the federal and state constitutions and state electronic surveillance laws required judicial authorization for the confidential informant to enter his home with the electronic surveillance device. After holding a hearing on the motion, the circuit court entered an order on November 16, 2005, denying the motion to suppress. The circuit court's ruling was based upon the United States Supreme Court's decision in *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971).

As a consequence of the circuit court's denial of the motion to suppress, Mr. Mullens entered a plea agreement with the State. Under that agreement, Mr. Mullens pled guilty to the charge of delivery of a controlled substance, upon the condition that he be allowed to appeal the denial of his motion to suppress. By order entered November 30, 2005, the circuit court accepted the plea agreement and sentenced Mr. Mullens to a term of 1 to 5 years imprisonment.⁷ From this ruling, Mr. Mullens now appeals.

⁶The record does not disclose any information about the disposition of the case against Mr. Mullens' wife.

⁷As previously indicated, the sentence was suspended, and Mr. Mullens was placed on probation.

II.

STANDARD OF REVIEW

We have been called upon to decide whether the circuit court committed error in denying Mr. Mullens' motion to suppress evidence obtained through the use of an electronic surveillance device. In examining a challenge to a circuit court's ruling in a suppression hearing, we are guided by the following standard of review:

On appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

Syl. pt. 3, *State v. Stuart*, 192 W. Va. 428, 452 S.E.2d 886 (1994). Insofar as the circuit court's ruling on the suppression motion involved purely legal determinations, we review the circuit court's order de novo.

III.

DISCUSSION

The instant appeal requires us to decide whether the police can, without prior impartial judicial authorization, solicit a person to serve as a confidential informant, equip that person with an electronic surveillance device and send him/her into the home of any citizen the police arbitrarily decide to investigate. The impact of this Court's resolution of the issue herein presented reaches literally into the home of every citizen of our State. The

immense import of our ruling in this case demands that we leave no stone unturned and no footnote unread in reaching our decision. For this reason our analysis will proceed with an examination of (1) federal electronic surveillance laws, (2) electronic surveillance laws of other states, and (3) West Virginia's electronic surveillance laws.

***A. An Informant's Use of an Electronic Surveillance Device
in the Home of Another under Federal Laws***

In Mr. Mullens' motion to suppress he argued that the prohibition of unlawful search and seizure, under the Fourth Amendment to the federal constitution, was violated by the failure of the police to obtain judicial authorization to have an informant enter his home wearing an audio and video recording device. The circuit court found that, based upon the decision of the United States Supreme Court in *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), the Fourth Amendment was not violated. Before we discuss *White*, we must first examine the federal electronic surveillance statutes.

1. Federal electronic surveillance under Title III. Under federal law, the use of electronic surveillance devices by law enforcement officials was initially governed by general provisions contained in the Federal Communications Act of 1934.⁸ However, in 1968 Congress enacted detailed electronic surveillance laws through Title III of the Omnibus

⁸The relevant provision of the Federal Communications Act is found at 47 U.S.C.A. § 605 (2001). This statute prohibits the unauthorized interception of wire, radio or satellite delivered programs.

Crime Control and Safe Streets Act.⁹ Title III “sets forth comprehensive standards governing the use of . . . electronic surveillance by both governmental and private agents.” *Mitchell v. Forsyth*, 472 U.S. 511, 515, 105 S. Ct. 2806, 2809, 86 L. Ed. 2d 411, 418 (1985). In 1986, Congress amended Title III through enactment of the Electronic Communications Privacy Act (hereinafter “ECPA”),¹⁰ in an effort to reflect technological advancements in the area of electronic surveillance. *See Snow v. DIRECTV, Inc.*, 450 F.3d 1314, 1320 (11th Cir. 2006) (“The ECPA was enacted to update the then existing federal wiretapping law to protect

⁹Title III regulates both wiretapping and electronic surveillance. So as not to confuse matters, our use of the term “electronic surveillance” includes wiretapping and all other forms of surveillance.

¹⁰The Electronic Communications Privacy Act is codified as amended at 18 U.S.C.A § 3121, *et seq.* This Act establishes standards for intercepting telephone numbers through the use of pen registers and trap and trace devices.

The ECPA had a second component called the Stored Communications Act. This Act established punishments for the unauthorized accessing of a wire or electronic communication that is in electronic storage. *See* 18 U.S.C.A § 2701, *et seq.*

the privacy of the growing number of electronic communications.”).¹¹ Title III was further amended by the Communications Assistance for Law Enforcement Act of 1994.¹²

It has been suggested that the long history of federal law in the area of electronic surveillance devices reveals attempts by Congress “to assist law enforcement in the investigation and prosecution of organized crime and to protect the privacy rights of United States citizens against the unwarranted interception of . . . communications[.]” Daniel R. Dinger, *Should Parents Be Allowed to Record a Child’s Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 Seattle U.L. Rev. 955, 958 (2005). “In short, Title III represents an attempt by Congress to establish a

¹¹See also *Brown v. Waddell*, 50 F.3d 285, 289 (4th Cir. 1995) (“The principal purpose of the ECPA amendments to Title III was to extend to ‘electronic communications’ the same protections against unauthorized interceptions that Title III had been providing for ‘oral’ and ‘wire’ communications via common carrier transmissions. This extension was found necessary by Congress because of ‘dramatic changes in new computer and telecommunications technologies’ that had created new risks to ‘privacy and security of communications transmitted by new noncommon carrier communication services or new forms of telecommunications and computer technology.’ These had not been covered by Title III’s protection of ‘voice communications transmitted via common carrier,’ and the ECPA amendments were designed to remedy that newly-developed gap in coverage.”).

¹²This Act “requires telecommunications carriers to ensure that their systems are technically capable of enabling law enforcement agencies operating with proper legal authority to intercept individual telephone calls and to obtain certain ‘call-identifying information.’” *United States Telecom Ass’n v. Federal Communications Comm’n*, 227 F.3d 450, 453 (D.C. Cir. 2000). The Act is codified at 47 U.S.C.A. § 1001, *et seq.* (2001).

system of electronic surveillance subject to rigorous safeguards.” *United States v. Clemente*, 482 F. Supp. 102, 106 (S.D.N.Y. 1979).

The pertinent federal electronic surveillance provisions of Title III are codified at 18 U.S.C.A. § 2510, *et seq.* These statutes “represent[] an attempt to strike what is clearly a balance through stringent regulation of the uses of electronic surveillance in order to achieve the dual purpose of protecting individual privacy, while permitting limited government surveillance in accordance with uniform standards.” *Application of the U.S. Authorizing the Interception of Wire Communications*, 413 F. Supp. 1321, 1331 (E.D. Pa. 1976). Except for specifically codified exceptions, Title III prohibits the unauthorized use of a device to record another’s communication.¹³ Title III requires judicial authorization,

¹³The prohibitions under Title III are contained in 18 U.S.C.A. § 2511(1) as follows:

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

(b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral

(continued...)

¹³(...continued)

communication . . . ;

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

(d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; or

(e) (I) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, intercepted by means authorized by sections 2511(2)(a)(ii), 2511(2)(b)-(c), 2511(2)(e), 2516, and 2518 of this chapter, (ii) knowing or having reason to know that the information was obtained through the interception of such a communication in connection with a criminal investigation, (iii) having obtained or received the

(continued...)

except in limited circumstances, for recording the communications of another with an electronic surveillance device.¹⁴ Under Title III, criminal and civil penalties are imposed for the unauthorized use of a device to record the communication of another person.¹⁵ Title III also contains an evidentiary suppression remedy that provides for the suppression of unlawfully intercepted communications.¹⁶

One of the exceptions to the prohibition on unauthorized electronic surveillance is found in 18 U.S.C.A. § 2511 (2) (c). This statute provides:

(c) It shall not be unlawful under this chapter for *a person acting under color of law* to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

¹³(...continued)

information in connection with a criminal investigation, and (iv) with intent to improperly obstruct, impede, or interfere with a duly authorized criminal investigation, shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

¹⁴See 18 U.S.C.A. §§ 2516 and 2518.

¹⁵See 18 U.S.C.A. § 2511(4) and (5).

¹⁶See 18 U.S.C.A. §§ 2515 and 2518(10).

(Emphasis added).¹⁷

Under this statute, “consent of one party to a conversation is sufficient to permit a person acting under color of law to [lawfully] intercept a wire, oral, or electronic communication.” *United States v. Pratt*, 913 F.2d 982, 986 (1st Cir. 1990) (internal quotations omitted). Federal “[c]ourts have established that informants who record private conversations at the direction of government investigators are ‘acting under color of law.’” *United States v. Haimowitz*, 725 F.2d 1561, 1582 (11th Cir. 1984) (citations omitted).

For the purposes of this case, it is clear that there is statutory authority for federal officials to place an electronic surveillance device on a consenting informant, without judicial authorization, for the purpose of recording communications with a third-party suspect. The issue of whether or not the use of an informant in this manner, while in the home of a suspect, violates the Fourth Amendment was addressed in the *White* decision.

¹⁷Another exception is set out under 18 U.S.C.A. § 2511 (2) (d) as follows:

(d) It shall not be unlawful under this chapter for *a person not acting under color of law* to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

(Emphasis added).

2. *United States v. White* and the Fourth Amendment. The case of *United States v. White*, 401 U.S. 745, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971), involved a defendant who was prosecuted by the federal government for drug trafficking. Prior to the defendant's arrest, federal authorities arranged to have a confidential informant wear a listening device during meetings with the defendant. Federal officials did not obtain judicial authorization to equip the informant with an electronic surveillance device. As a result of the informant wearing the electronic surveillance device, federal authorities were able to hear conversations between the defendant and the informant during eight separate meetings—only one of which was in the actual home of the defendant. During the defendant's trial, the government introduced evidence of the statements made by the defendant to the informant.¹⁸ The defendant was ultimately convicted. The Court of Appeals for the Seventh Circuit reversed the conviction, concluding that evidence of statements made by the defendant to the informant should have been suppressed, because the evidence was obtained without a warrant in violation of the Fourth Amendment.¹⁹

¹⁸The informant did not testify during the trial. The statements made by the defendant to the informant were testified to by officers who were listening in on the conversations.

¹⁹The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In a six to three decision, the United States Supreme Court reversed the decision of the Court of Appeals. Thus, the judgment in *White* was rendered in a plurality opinion.²⁰ The plurality opinion justified the Court's judgment as follows:

No warrant to "search and seize" is required . . . when the Government sends to defendant's home a secret agent who conceals his identity and makes a purchase of narcotics from the accused, or when the same agent, unbeknown to the defendant, carries electronic equipment to record the defendant's words and the evidence so gathered is later offered in evidence.

. . . .

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness the defendant necessarily risks.

White, 401 U.S. at 749-51, 91 S.Ct. at 1125-26, 28 L. Ed. 2d at 457-58 (internal citations omitted).

²⁰The plurality opinion was written by Justice White, in which Chief Justice Burger and Justices Stewart and Blackmun joined.

The decision in *White* stands for the proposition that a person does not have an expectation of privacy regarding conversations held in his/her home with a third party. Without such an expectation of privacy, under *White* the Fourth Amendment does not require the police to obtain judicial authorization to send an informant wearing an electronic surveillance device into the home of another person. *See also United States v. Eschweiler*, 745 F.2d 435 (7th Cir. 1984); (holding that informant's use of electronic surveillance device in defendant's home did not violate the Fourth Amendment); *United States v. Hankins*, 195 Fed. Appx. 295 (6th Cir. 2006) (same); *United States v. Brathwaite*, 458 F. 3d 376 (5th Cir. 2006) (same); *United States v. Davis*, 326 F.3d 361 (2nd Cir. 2003)(same).

Three Justices dissented from the majority's judgment in *White*. All three Justices believed that the Fourth Amendment required federal officials to obtain a warrant before attaching an electronic surveillance device to an informant, for the purpose of capturing conversations with a suspect, regardless of where the conversations were held. The position taken by the dissenters was articulated best in the dissenting opinion of Justice Harlan. In his dissent, Justice Harlan made the following observations:

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. . . . The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting.

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother that

spontaneity – reflected in frivolous, impetuous, sacrilegious, and defiant discourse – that liberates daily life. Much offhand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener’s inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant.

. . . .

Finally, it is too easy to forget– and, hence, too often forgotten– that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally. By casting its “risk analysis” solely in terms of the expectations and risks that “wrongdoers” or “one contemplating illegal activities” ought to bear, the plurality opinion, I think, misses the mark entirely. . . . The very purpose of interposing the Fourth Amendment warrant requirement is to redistribute the privacy risks throughout society in a way that . . . would prevent public officials from engaging in that [third-party bugging] practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer. The interest [the majority] fails to protect is the expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation. Interposition of a warrant requirement is designed not to shield “wrongdoers,” but to secure a measure of privacy and a sense of personal security throughout our society.

The Fourth Amendment does, of course, leave room for the employment of modern technology in criminal law enforcement, but in the stream of current developments in Fourth Amendment

law I think it must be held that third-party electronic monitoring, subject only to the self-restraint of law enforcement officials, has no place in our society.

White, 401 U.S. at 787-90, 91 S. Ct. at 1143-45, 28 L. Ed. 2d at 478-80 (Harlan, J., dissenting) (internal citations omitted).

In addition to the dissenters in *White*, scholars have argued that the Fourth Amendment should require a warrant to be issued before the police send an informant into a suspect's home while wearing an electronic surveillance device. The following is a cursory review of the criticisms of *White* by some scholars:

Justice Harlan's dissent in *United States v. White* warned against unsupervised use of government power to spy on the people. He urged that electronic and false-friend surveillance . . . be permitted only under the warrant requirements of the Fourth Amendment, so that government intrusion is possible only if a magistrate agrees with the government that there is probable cause. Respect for the principles that underlie the Fourth Amendment and the rebellion that produced it, demands no less. . . . By declaring that one has no reasonable expectation of privacy when speaking with another, the Court removes conversation from the protections of the Fourth Amendment, leaving government power unchecked. The Amendment becomes an empty, and mocking, promise. The Court has thus abdicated the judicial function in an area so sensitive that it lay at the heart of the revolution.

Donald L. Doernberg, "*Can You Hear Me Now?: Expectations of Privacy, False Friends, and the Perils of Speaking under the Supreme Court's Fourth Amendment Jurisprudence*," 39 Ind. L. Rev. 253, 306-08 (2006).

Unless the *White* plurality truly is willing to saddle American society with the universal risk that every conversation may be electronically monitored, then the *White* plurality view is not only illogical and unreasonable – it is absurd. Moreover, it defies common sense as well as the common understanding of Americans who yet have some sensitivity to the “qualitative difference” between electronic surveillance and conventional police investigation.

Mona R. Shokrai, *Double-Trouble: The Underregulation of Surreptitious Video Surveillance in Conjunction with the Use of Snitches in Domestic Government Investigations*, 13 Rich. J.L. & Tech. 3, 58 (2006) (quoting Tom P. Conom, *Privacy and the Fourth Amendment in the Twenty-First Century*, 19 CHAMPION 13, 18 (1995)).

The *White* plurality, without any discussion or analysis of the doctrinal shift announced in [*Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)] reaffirmed prior holdings that authorized unchecked surveillance of private conversations and unbridled invasions of private homes and offices whenever informants are available to gather information for the government. If the “Fourth Amendment protects people, and not places,” as *Katz* insisted, then why is the Amendment inapplicable against government efforts to record conversations or infiltrate homes or offices using secret informants? If the Fourth Amendment restrains the discretion of the police to wiretap or “bug” private conversations (conducted in telephone booths), it is not apparent why that same provision is inapplicable when the police monitor and record private conversations through the use of a secret informant deliberately position(ed) to hear those conversations. After all, a secret informant acts as a “human bug” for the government.

Tracey Maclin, *Katz, Kyllo, and Technology: Virtual Fourth Amendment Protection in the Twenty-first Century*, 72 Miss. L.J. 51, 76 (2002).

It cannot be denied that one risks public revelation of private thoughts any time one takes on a confidante. Once again,

however, the Court's assumption of the risk/implied consent analysis takes on an air of fantasy. . . . The Court's analysis in its undercover cases is based on a dangerous premise: that we should expect no privacy from the government when we do not expect it from others. If this premise were taken seriously, the only sphere of privacy still protected from unnecessary government intrusion would be what we kept to ourselves. . . .

Furthermore, undercover activity is more likely than other types of searches to occasion prolonged insinuation into people's privacy. In the typical search and seizure scenario, the target can minimize the intrusion by consenting to particular actions or proving his or her innocence in some way. When the government proceeds covertly, however, these options are not available. Added to this denigration of individual interests is the damage undercover police work causes to the democratic state's objective of remaining legitimate. First, because it relies on fraud and deceit, covert investigation undermines trust in the government. More importantly, it increases distrust of everyone, since anyone could be a government agent. . . .

. . . Thus, undercover activity undercuts both the state's interest in maintaining the allegiance of its citizenry and its objective of nurturing an open, democratic society.

Because of these possible effects, one might argue that undercover activity should be banned. . . . At the least, judicial authorization should be obtained prior to any nonexigent undercover activity. . . .

Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. Rev. 1, 103-05 (1991). See also Tracey Maclin, *Informants and the Fourth Amendment: A Reconsideration*, 74 Wash. U. L.Q. 573, 617 (1996) (“[W]hen I open my front door to a friend, to an overnight delivery worker, or to a complete stranger, access is afforded only to those whom I knowingly admit. If the police want access to my home, they should follow lawful

procedure. At times, stealthy entries may be necessary; but under the Constitution, the police cannot decide by themselves when they will enter a home.”).

Notwithstanding the criticisms of *White*, the decision remains the law for Fourth Amendment purposes. Thus, insofar as the circuit court found that the Fourth Amendment was not violated by the conduct of the police in this case, that ruling was correct.

***B. An Informant’s Use of an Electronic Surveillance Device
in the Home of Another under the Laws of Other States***

Pursuant to Title III, 18 U.S.C.A. § 2516(2), states are authorized “to adopt coordinate statutes permitting the interception of wire, oral, or electronic communications, and to grant greater, but not lesser, protection than that available under federal law.” *Commonwealth v. Spangler*, 809 A.2d 234, 231-32 (Pa. 2002). *See also Bishop v. State*, 526 S.E.2d. 917 (Ga. Ct. App. 1999); *Commonwealth v. Barboza*, 763 N.E.2d. 547 (Mass. 2002).²¹ A majority of jurisdictions have followed the federal government and enacted

²¹In the leading treatise on electronic surveillance laws the following was said regarding the interplay of Title III and state laws:

The legislative history of Title III clearly indicates that Congress intended to permit state electronic surveillance laws to be more restrictive than the federal provisions, and therefore more protective of individual privacy. State surveillance statutes cannot, however, be less restrictive than Title III; nor can they expand the opportunities to conduct surveillance beyond those

(continued...)

electronic surveillance statutes patterned after Title III. The discussion of electronic surveillance laws of other states will proceed in two parts: (1) states that do not have Title III type electronic surveillance statutes, and (2) states with Title III type electronic surveillance statutes.

1. States that do not have Title III type electronic surveillance statutes.

There are five states that have not adopted Title III type electronic surveillance statutes: Alabama, Kentucky, Michigan, Montana and Vermont. Except for Vermont, all of these states have criminal eavesdropping statutes that generally prohibit the use of electronic surveillance devices.²² Each state having such criminal statutes provides for exceptions. Alabama's criminal statute permits the police to use a consenting informant to record communications with a suspect. *See Spangler v. State*, 711 So. 2d 1125 (Ala. Crim. App.

²¹(...continued)

provided by Title III.

. . . .

. . . Furthermore, a state court may construe the procedural requirements of its electronic surveillance law more strictly than federal courts, thereby giving added meaning to the state's constitutional or statutory guarantee of privacy.

James G. Carr, *The Law of Electronic Surveillance*, § 2.4(a) (2002).

²²The statutes in these states do not provide the elaborate procedures of Title III for authorizing electronic surveillance by judicial officers. In these states, the police must utilize general search warrant laws in order to engage in electronic surveillance.

1997); Ala. Stat. § 13A-11-30(1) (2005). Kentucky's statute also permits the police to use an informant to record communications with a suspect. *See Carrier v. Commonwealth*, 607 S.W.2d 115 (Ky. Ct. App. 1980); Ky. Rev. Stat. § 526.010 (1999). Further, Michigan's criminal eavesdropping laws have been interpreted as permitting the police to use an informant to record conversations with a suspect. *See People v. Collins*, 475 N.W.2d 684 (Mich. 1991); Mich. Comp. L. § 750.539g(a) (2003). Additionally, Montana's criminal eavesdropping laws permit the police to use an informant to record conversations with a suspect. *See State v. Brown*, 755 P.2d 1364 (Mont. 1988); Mont. Code § 45-8-213(1)(c)(I) (2005).

Our research did not uncover any case in Alabama, Kentucky or Montana which addressed the issue of using an informant to enter a suspect's home while the informant was equipped with an electronic surveillance device. However, the Michigan Supreme Court in *People v. Beavers*, 227 N.W.2d 511 (Mich. 1975), has held that the state constitution required a warrant to be issued before the police could send an informant equipped with an electronic surveillance device into the home of a suspect. The decision in *Beavers*, however, was overruled by *People v. Collins*, 475 N.W.2d 684 (Mich. 1991), a case which did not involve communications in a suspect's home.²³

²³It must be assumed that *Collins* would permit the police to send an informant into the home of a suspect, without judicial authorization, while the informant was equipped with an electronic surveillance device.

As previously indicated, Vermont does not appear to have any statutory laws addressing the issue of using electronic surveillance devices. This issue appears to be guided solely by the search and seizure provision of the state's constitution. In spite of the absence of any statutory law, the issue of using an informant equipped with an electronic surveillance device to enter the home of a suspect, without a warrant, has been addressed by the Supreme Court of Vermont.

In *State v. Blow*, 602 A.2d 552 (Vt. 1991), the police used an informant to record a drug transaction in the home of the defendant. During the trial, a police officer was permitted to testify about the contents of the electronically recorded drug transaction. The defendant was convicted. In his appeal, the defendant argued that the electronic surveillance evidence should have been suppressed because it was obtained without a search warrant as required by the search and seizure provision of the Vermont Constitution. The Supreme Court of Vermont agreed with the defendant and reversed the conviction. The opinion in *Blow* reasoned as follows:

In assessing the constitutionality of technologically enhanced government surveillance in a particular case, we must identify the values that are at risk, and vest the reasonable-expectation-of-privacy test with those values. In the instant case, defendant's conversation with the informant took place in defendant's home, and there is no indication in the record to suggest that he expected the conversations to be transmitted beyond the immediate environs, especially not through electronic enhancement. Clearly, he did not "knowingly expose" the conversation to the outside world, and therefore exhibited a clear subjective expectation of privacy.

The objective component of the . . . test was met as well. We have stated that the reasonableness analysis must be tied to identifiable constitutional values. One such value under [the state constitution] concerns the deeply-rooted legal and societal principle that the coveted privacy of the home should be especially protected. [F]reedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office.

. . . .

We conclude that warrantless electronic participant monitoring conducted in a home offends the core values of [our constitution]. Accordingly, where the State uses an agent to enter a home for the purposes of eliciting and electronically transmitting evidence from an occupant of the home, it is the burden of the State to obtain a warrant upon probable cause prior to conducting that search.

Blow, 602 A.2d at 555-56 (citations and internal quotations omitted). *See also State v. Geraw*, 795 A.2d 1219 (Vt. 2002) (holding that a police officer working undercover cannot enter a defendant's home with an electronic surveillance device without a search warrant).

2. States with Title III type electronic surveillance statutes. As previously stated, a majority of jurisdictions have electronic surveillance statutes patterned after Title III.²⁴ These statutes, like Title III, generally prohibit electronic surveillance in the absence

²⁴*See* Alaska Stat. § 12.37.010, *et seq.* (2006); Ariz. Rev. Stat. § 13-3001, *et seq.* (2001); Ark. Code § 5-60-120 (2005); Cal. Penal Code § 629.50, *et seq.* (1999); Colo. Rev. Stat. § 16-16-101, *et seq.* (2006); Conn. Gen. Stat. §§ 53a-187, *et seq.* & 54-41a, *et seq.* (2001); Del. Code tit. 11, § 2401, *et seq.* (2001); D.C. Code § 23-541, *et seq.* (2001); Fla. Stat. § 934.01, *et seq.* (2001); Ga. Code § 16-11-60, *et seq.* (2003); Haw. Rev. Stat. § 803-41, *et seq.* (1993); Idaho Code § 18-6701, *et seq.* (2004); Ill. Comp. Stat. ch. 720, § 5/14-1 (2003); Ind. Stat. § 35- (continued...)

of judicial authorization. However, while most of these jurisdictions follow Title III and statutorily recognize one-party consent to electronic surveillance, some jurisdictions do not. For this reason our discussion in this section will be divided into two parts: (a) states with Title III type one-party consent statutes, and (b) states without Title III type one-party consent statutes.

(a) *States with Title III type one-party consent statutes.* A total of 32 jurisdictions follow Title III by statutorily authorizing one-party consent to electronic surveillance. That is, under the statutes of these jurisdictions, the police do not need judicial

²⁴(...continued)

33.5-1-5, *et seq.* (1998); Iowa Code § 808B.1, *et seq.* (2003); Kan. Stat. § 22-2614, *et seq.* (1995); La. Rev. Stat. § 15:1301, *et seq.* (2005); Me. Rev. Stat. tit. 15, § 709, *et seq.* (2003); Md. Cts. Jud. Pro. Code § 10-401, *et seq.* (2006); Mass. Gen. L. ch. 272, § 99 (2000); Minn. Stat. § 626A.01, *et seq.* (2003); Miss. Code § 41-29-501, *et seq.* (1999); Mo. Stat. § 542.400, *et seq.* (2002); Neb. Rev. Stat. § 86-701, *et seq.* (1999); Nev. Rev. Stat. § 179.410, *et seq.* (2005); N.H. Rev. Stat. § 570-A:1, *et seq.* (2003); N.J. Stat. § 2A:156A-1, *et seq.* (1985); N.M. Stat. § 30-12-1, *et seq.* (2004); N.Y. Crim. Pro. Stat. § 700.05, *et seq.* (1996); N.C. Gen. Stat. § 15A-286, *et seq.* (2005); N.D. Cen. Code § 29-29.2-01, *et seq.* (2006); Ohio Rev. Code § 2933.51, *et seq.* (2006); Okla. Stat. tit. 13, § 176.1, *et seq.* (2002); Ore. Rev. Stat. § 133.721, *et seq.* & § 165.535, *et seq.* (2005); Pa. Consol. Stat. tit. 18, § 5701, *et seq.* (2000); R.I. Gen. L. § 12-5.1-1, *et seq.* (2002); S.C. Code § 17-30-10, *et seq.* (2006); S.D. Codified L. § 23A-35A-1, *et seq.* (2004); Tenn. Code § 40-6-301, *et seq.* (2006); Tex. Code Crim. Pro. Arts. 18.20 (Supp. 2006) & 18.21 (2005) & Tex. Pen. Code § 16.01, *et seq.* (2003); Utah Code § 77-23a-1, *et seq.* (2003); Va. Code § 19.2-61, *et seq.* (2004); Wis. Stat. § 968.27, *et seq.* (1998); Wyo. Stat. § 7-3-701, *et seq.* (2005).

authorization to conduct electronic surveillance if one party to the communication consents to the recording.²⁵

Only six jurisdictions that statutorily authorize one-party consent for the use of electronic surveillance devices have addressed the issue in the context of an informant recording communications in the home of a suspect: Florida, Ohio, Massachusetts, Mississippi, Wisconsin, and Wyoming. Among these, the decisions of the Supreme Courts of Florida and Massachusetts are particularly instructive.

²⁵The following jurisdictions authorize one-party consent by statute: Ariz. Rev. Stat. § 13-3012(9) (Supp. 2006); Ark. Code §§ 5-60-120(a) & (c) (2005); Cal. Penal Code § 633.5 (1999); Colo. Rev. Stat. §§ 18-9-303 & 304 (2006); Del. Code tit. 11, § 2402(c)(4) (2001); D.C. Code § 23-542(b)(2) (2001); Fla. Stat. § 934.03(2)(c) (Supp. 2007); Ga. Code § 16-11-66(a) (2003); Haw. Rev. Stat. § 803-42(b)(4) (1993); Idaho Code § 18-6702(2)(c) (2004); Iowa Code § 808B.2.2.b (2003); La. Rev. Stat. § 15:1303(C)(3) (Supp. 2006); Me. Rev. Stat. tit. 15, § 709(4) (2003); Md. Cts. Jud. Pro. Code § 10-402(c)(2) (2006); Mass. Gen. L. ch. 272, § 99(B)(4) (2000); Minn. Stat. § 626A.02(2)(c) (2003); Miss. Code § 41-29-531(d) (Supp. 2006); Mo. Stat. § 542.402(2)(2) (2002); Neb. Rev. Stat. § 86-702(2)(b) (1999); N.M. Stat. § 30-12-1(E)(3) (2004); N.Y. Crim. Pro. Stat. § 700.05(3) (1996); N.C. Gen. Stat. § 15A-287(a) (2005); N.D. Cen. Code § 29-29.2-05 (2006); Ohio Rev. Code § 2933.52(B)(4) (2006); Okla. Stat. tit. 13, § 176.4(4) (2002); S.C. Code § 17-30-30(B) (2006); S.D. Codified L. § 23A-35A-20 (2004); Tex. Pen. Code § 16.02(c)(3) (Supp. 2006); Utah Code § 77-23a-4(7)(a) (2003); Va. Code § 19.2-62(B)(2) (2004); Wis. Stat. § 968.31(2)(b) (Supp. 2006) (1998); Wyo. Stat. § 7-3-702(b)(I) (2005).

California's statute authorizes very narrow circumstances in which one-party consent electronic surveillance may occur. Even so, the Supreme Court of California has recognized a general rule that one-party consent electronic surveillance is permissible. *See People v. Towery*, 174 Cal. App. 3d 1114 (1985).

In *State v. Sarmiento*, 397 So. 2d 643 (Fla.1981), the Florida Supreme Court rejected the ruling in *White* and held that the search and seizure provision of the state constitution prohibited an informant from using an electronic surveillance device in a suspect's home without judicial authorization. In response to the decision in *Sarmiento*, the people of Florida amended the state's constitutional search and seizure provision to require that it be "construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Fla. Const. art. 1, § 12 (2004). As a result of this amendment, the Florida Supreme Court in *State v. Hume*, 512 So. 2d 185 (Fla. 1987), held that "the recording of conversations between a defendant and an undercover agent in a defendant's home, such as occurred in the instant case [without a warrant], does not violate the fourth amendment of the United States Constitution and, accordingly, does not violate the newly adopted article I, section 12, of the Florida Constitution." *Hume*, 512 So. 2d at 188. In addition to the court in *Hume*, two other courts have held that the search and seizure provision of their respective state constitutions allows an informant to secretly wear an electronic surveillance device in a suspect's home without judicial authorization. See *Lee v. State*, 489 So. 2d 1382 (Miss. 1986) (upholding surveillance under state and federal constitutions); *Alamada v. State*, 994 P.2d 299 (Wyo. 1999) (upholding surveillance under state constitution).²⁶

²⁶See also *State v. Azzi*, No. 558, 1983 WL 6726 (Ohio Ct. App. Sept. 28, 1983) (upholding surveillance under federal constitution).

In *Commonwealth v. Blood*, 507 N.E.2d 1029 (Mass. 1987), the Massachusetts Supreme Court was called upon to decide whether the search and seizure provision of the state's constitution allowed the police to send an informant into the home of suspects, without a warrant, to record communications. In resolving this issue, the *Blood* decision rejected the United States Supreme Court's ruling in *White*, and found that the Massachusetts Constitution required issuance of a search warrant. The *Blood* opinion reasoned as follows:

[I]n circumstances not disclosing any speaker's intent to cast words beyond a narrow compass of known listeners, we conclude that it is objectively reasonable to expect that conversational interchange in a private home will not be invaded surreptitiously by warrantless electronic transmission or recording. The remaining question is whether "one party consent" so alters the balance as to obviate the need for a warrant requirement. It does not. Such consent only affords the State a person willing to transport the invisible instruments of eavesdropping into "earshot."

. . . .

. . . [T]he consent exception puts the conversational liberty of every person in the hands of any officer lucky enough to find a consenting informant.

. . . .

. . . [T]he Commonwealth relies . . . on [several] arguments. None is persuasive. The first of these arguments asserts, according to the Commonwealth, that because the person subject to the warrantless interception is a "wrongdoer," [he] should be made to bear the risk of betrayal. This argument proceeds from a pernicious assumption, that anyone subjected to surveillance by police is, because of that fact, necessarily a "wrongdoer." It is the purpose of the warrant requirement . . . to subject police suspicions to the scrutiny of a neutral and detached magistrate instead of [leaving them to be] judged by the officer engaged in

the often competitive enterprise of ferreting out crime. Little would be left of anyone's justifiable reliance on privacy . . . if everyone must realize that he will be free from warrantless electronic intrusion only so long as someone in the government does not suspect him of improper conduct or wrong thinking[.]

The relevant question is not whether criminals must bear the risk of warrantless surveillance, but whether it should be imposed on all members of society. The *White* plurality underestimated this risk because it perceived no distinction of constitutional moment between the common gossip and the "wired" informant. For us, however, a distinction lies in the disparity between that sense of security which is felt among trusted friends and the feelings of hostility encountered among competitors or combatants. The sense of security is essential to liberty of thought, speech, and association.

. . . .

The Commonwealth urges consideration of the principle developed in *White* that a defendant who has no constitutional right to exclude the informer's unaided testimony . . . has [no constitutional] privilege against a more accurate version of the events in question. We do not dispute the premise that arguably more accurate evidence may be gathered if police electronically record conversations than if a participant trusts solely to his memory when testifying. And we agree that a criminal defendant cannot rely on the exclusion of the testimony of an informer's personal, unmediated account of what was said. The probative value of evidence wrongfully obtained does not, however, justify a search or seizure in defeat of constitutional safeguards.

We conclude that it is unreasonably intrusive to impose the risk of electronic surveillance on every act of speaking aloud to another person. We cannot conclude that, in the absence of a warrant, the consent of less than all the partakers of a conversation is sufficient to waive any participant's rights pursuant to [the search and seizure provision] not to be recorded. If a person commits his secret thoughts to paper, that is no license for the police to seize the paper; if a person

communicates his secret thoughts verbally [sic] to another, that is no license for the police to record the words. . . . The right of privacy would mean little if it were limited to a person's solitary thoughts, and so fostered secretiveness.

. . . .

Judicially supervised use of electronic surveillance by law enforcement officers is not forbidden by [our constitution]. [I]t is too easy to forget – and, hence, too often forgotten – that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally. . . . Interposition of a warrant requirement is designed not to shield “wrongdoers,” but to secure a measure of privacy and a sense of personal security throughout our society.

No warrant was sought by [the police in this case]. Three days elapsed between [the informant's] agreement to be wired and the taping of the first conversation admitted in evidence; nine more days elapsed before a second conversation was taped. Thus, we perceive no exigency which prevented the procurement of a warrant. Each conversation whose recorded contents was admitted at trial had unfolded in a person's home, in circumstances not even remotely suggestive of any speaker's intent to be heard beyond the circle of known listeners. As to each of those conversations, we hold that its warrantless electronic search by surreptitious transmission and its electronic seizure by surreptitious recording were in violation of [our constitution].

Blood, 507 N.E.2d at 1034-38 (internal quotations and citations omitted).²⁷

²⁷In *State v. Smith*, 242 N.W.2d 184 (Wis. 1976), the Wisconsin Supreme Court held that one-party consent surveillance evidence obtained in a suspect's home was inadmissible under the language of that state's electronic surveillance statutes. However, in 1989 the Wisconsin Legislature amended the statutes to permit one-party consent surveillance for felony drug investigations.

(b) *States without Title III type one-party consent statutes.* The electronic surveillance statutes in 13 jurisdictions differ from Title III in that they do not authorize the police to unilaterally engage in one-party consent surveillance. Pursuant to these statutes, the police are required to obtain authorization from a judicial officer or the Attorney General in order to equip an informant with an electronic surveillance device, for the purpose of recording communications with a suspect.²⁸ The issue of an informant recording communications in the home of a suspect, without lawful authorization, has been addressed by seven of these jurisdictions: Alaska, Indiana, Kansas, Nevada, Oregon, Pennsylvania, and Washington.

In the cases of *Snellgrove v. State*, 569 N.E.2d 337 (Ind. 1991), and *State v. Wright*, 444 P.2d 676 (Wash. 1968), the courts were called upon to decide whether the

²⁸See Alaska Stat. § 12.37.010, *et seq.* (2006); Conn. Gen. Stat. §§ 53a-187, *et seq.* & 54-41a, *et seq.* (2001); Ill. Comp. Stat. ch. 720, § 5/14-3(g-5) (Supp. 2006) (permits Attorney General to authorize one-party consent); Ind. Stat. § 35-33.5-1-5, *et seq.* (1998); Kan. Stat. § 22-2614, *et seq.* (1995); Nev. Rev. Stat. § 179.410, *et seq.* (2005) (allows one-party consent in an emergency); N.H. Rev. Stat. § 570-A:1, *et seq.* (2003) (permits Attorney General to authorize one-party consent); N.J. Stat. § 2A:156A-1, *et seq.* (1985) (permits Attorney General to authorize one-party consent); Ore. Rev. Stat. § 133.721, *et seq.* & § 165.535, *et seq.* (2005); Pa. Consol. Stat. tit. 18, § 5701, *et seq.* (2000) (permits Attorney General to authorize one-party consent); R.I. Gen. L. § 12-5.1-1, *et seq.* (2002); Tenn. Code § 40-6-301, *et seq.* (2006); Wash. Rev. Code § 9.73.010, *et seq.* (2003).

The Supreme Court of Connecticut has held that warrantless one-party consent recording is not prohibited, even though it is not statutorily authorized. See *State v. Grullon*, 562 A.2d 481 (Conn. 1989). The Supreme Court of Washington permits warrantless one-party consent recording only when the communication is not deemed private. See *State v. Clark*, 916 P.2d 384 (Wash. 1996).

Fourth Amendment to the federal constitution prohibited warrantless electronic surveillance in a suspect's home by an informant. Both courts held that the Fourth Amendment was not violated by such conduct. The courts in *Snellgrove* and *Wright* were not called upon to decide the issue on state constitutional grounds. The courts in *State v. Roudybush*, 686 P.2d 100 (Kan. 1984), and *State v. Bonds*, 550 P.2d 409 (Nev. 1976), construed their respective surveillance statutes as not prohibiting an informant from recording communications in a suspect's home without a warrant. The courts in *Roudybush* and *Bonds* also were not called upon to decide the issue in the context of their state constitutions. In *State v. Fleetwood*, 16 P.3d 503 (Ore. 2000), the Oregon Supreme Court held that the electronic surveillance statutes of that state did not permit the police to send an informant into a suspect's home with a recording device without a warrant. The court in *Fleetwood* prevented one-party consent surveillance in the home on statutory grounds, but not on constitutional grounds.

The court in *State v. Glass*, 583 P.2d 872 (Alaska 1978), *opinion on reh'g*, 596 P.2d 10 (Alaska 1979),²⁹ was asked to decide whether the Alaska Constitution was violated when an informant, without a warrant, wore an electronic surveillance device in a suspect's home that allowed the police to record the communication. In resolving the issue, the court in *Glass* rejected the holding by the United States Supreme Court in *White*, and found that the state's constitutional search and seizure and right to privacy provisions prohibited

²⁹The opinion on rehearing addressed the issue of the prospective application of the original opinion.

warrantless electronic surveillance in the home of a suspect. The *Glass* Court reasoned as follows:

In construing similar provisions of Alaska's Constitution, we, of course, give careful consideration to the holdings of the United States Supreme Court, although we are not bound by them. *White*, however, does not present a clear cut agreement by any majority of the justices, and our decision as to Alaska's Constitution should therefore be influenced solely by the reasoning supporting the differing positions. Moreover, the United States Supreme Court has carefully stated: "[T]he protection of a person's General right to privacy his right to be let alone by other people is, like the protection of his property and of his very life, left largely to the law of the individual States."

....

It is, of course, easy to say that one engaged in an illegal activity has no right to complain if his conversations are broadcast or recorded. If, however, law enforcement officials may lawfully cause participants secretly to record and transcribe private conversations, nothing prevents monitoring of those persons not engaged in illegal activity, who have incurred displeasure, have not conformed or have espoused unpopular causes.

....

It seems only just that conduct of those engaged in criminal activity be revealed. Legitimate interests of law enforcement authorities, however, may generally be met in the same manner as in other searches and seizures. In the absence of limited exceptions, a search warrant should be obtained from an impartial magistrate, based on probable cause to believe that criminal activity will be discovered, before electronic monitoring of conversations should be allowed. It may be that, as in other search and seizure contexts, the requirement of a warrant may be obviated under exigent circumstances. We withhold passing on that issue until presented with a specific

case. Generally, however, a search warrant should be required before permitting electronic monitoring of conversations.

We believe that this requirement will not unreasonably impinge on legitimate law enforcement efforts. . . . In Glass' case, it appears that [the informant] believed she could purchase heroin at Glass' home. If there were probable cause for the belief, a warrant could have been secured. Just as the warrant requirement protects against unreasonable search and seizures, it can prevent improper invasions of privacy by electronic monitoring. Alaska's Constitution mandates that its people be free from invasions of privacy by means of surreptitious monitoring of conversations.

Glass, 583 P.2d at 876-81 (internal quotations and citations omitted).

In *Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1994), the Pennsylvania Supreme Court had to decide whether the search and seizure provision of that state's constitution permitted an informant to use an electronic surveillance device in a suspect's home without a warrant. Under Pennsylvania's electronic surveillance statute, as it existed at that time, one-party consent surveillance was authorized. The court in *Brion* found that the state constitution required a warrant to be issued before an informant with an electronic surveillance device could enter the home of a suspect. The court reasoned as follows:

To determine whether one's activities fall within the right of privacy, we must examine: first, whether Appellant has exhibited an expectation of privacy[;] and second, whether that expectation is one that society is prepared to recognize as reasonable.

. . . [T]he instant case involves conversations taking place in the sanctity of one's home. If nowhere else, an individual must feel secure in his ability to hold a private conversation within the

four walls of his home. For the right to privacy to mean anything, it must guarantee privacy to an individual in his own home. . . . Upon closing the door of one's home to the outside world, a person may legitimately expect the highest degree of privacy known to our society.

. . . .

. . . An individual has a constitutionally protected right to be secure in his home.

. . . [Consequently,] we hold that an individual can reasonably expect that his right to privacy will not be violated in his home through the use of any electronic surveillance. In so holding, we need not find [the statute] unconstitutional. We must presume that the General Assembly did not intend to violate the constitution, and will construe a statute so as to sustain its validity if such is fairly possible. With respect to oral communications occurring within one's home, interception pursuant to [the statute] can only be deemed constitutional under Article 1, Section 8 if there has been a prior determination of probable cause by a neutral, judicial authority. In light of the General Assembly's preference expressed elsewhere in the Act that probable cause determinations regarding other electronic surveillance be made by a judge of the Superior Court, for consistency we believe that such procedures should be applied in fulfilling this probable cause/warrant requirement.

In this case, there is no evidence to suggest that Brion committed any act which would reasonably lead to the conclusion that he did not have an expectation of privacy within his home. Because there was no determination of probable cause by a neutral judicial authority, the consensual body wire violated Article I, Section 8 and the tape recording of the transaction in Brion's home should have been suppressed.

Brion, 652 A.2d at 288-89 (internal quotations and citations omitted).

3. Summation. The above analysis indicates that the appellate courts in at least fifteen states have addressed the issue of an informant entering the home of a suspect, while the informant was wearing an electronic surveillance device not judicially approved. Nine courts permit such surveillance,³⁰ however, only four of those courts have decided the issue on state constitutional grounds.³¹ Six courts prohibit such surveillance,³² and four of those courts have done so on state constitutional grounds.³³ Thus, it would appear that half of the courts in other states addressing the issue have rejected the *White* decision on state constitutional grounds, and thus prohibit an informant from entering the home of a suspect while wearing an electronic surveillance device without a search warrant having been issued.

³⁰See *State v. Hume*, 512 So. 2d 185 (Fla. 1987); *Snellgrove v. State*, 569 N.E.2d 337 (Ind. 1991); *State v. Roudybush*, 686 P.2d 100 (Kan. 1984); *People v. Collins*, 475 N.W.2d 684 (Mich. 1991) (decision did not involve an informant in the home, but it overruled a prior case that prohibited in-home surveillance by an informant); *Lee v. State*, 489 So. 2d 1382 (Miss. 1986); *State v. Bonds*, 550 P.2d 409 (Nev. 1976); *State v. Azzi*, No. 558, 1983 WL 6726 (Ohio Ct. App. Sept. 28, 1983); *State v. Wright*, 444 P.2d 676 (Wash. 1968); *Alamada v. State*, 994 P.2d 299 (Wyo. 1999).

³¹See *State v. Hume*, 512 So. 2d 185 (Fla. 1987); *People v. Collins*, 475 N.W.2d 684 (Mich. 1991) (decision did not involve an informant in the home, but it overruled a prior case that prohibited in-home surveillance by an informant); *Lee v. State*, 489 So. 2d 1382 (Miss. 1986); *Alamada v. State*, 994 P.2d 299 (Wyo. 1999).

³²See *State v. Glass*, 583 P.2d 872 (Alaska 1978); *Commonwealth v. Blood*, 507 N.E.2d 1029 (Mass. 1987); *State v. Fleetwood*, 16 P.3d 503 (Ore. 2000); *Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1994); *State v. Blow*, 602 A.2d 552 (Vt. 1991); *State v. Smith*, 242 N.W.2d 184 (Wis. 1976) (modified by statute).

³³See *State v. Glass*, 583 P.2d 872 (Alaska 1978); *Commonwealth v. Blood*, 507 N.E.2d 1029 (Mass. 1987); *Commonwealth v. Brion*, 652 A.2d 287 (Pa. 1994); *State v. Blow*, 602 A.2d 552 (Vt. 1991).

***C. An Informant's Use of an Electronic Surveillance Device
in the Home of Another under the Laws of West Virginia***

Now, we must decide whether West Virginia's statutory electronic surveillance statutes and the constitutional search and seizure provision permit a police informant to enter the home of a suspect while wearing a surveillance device without first obtaining judicial authorization.

1. West Virginia's electronic surveillance statutes. In 1987, the West Virginia Legislature enacted the West Virginia Wiretapping and Electronic Surveillance Act (hereinafter "the Act"), codified at W. Va. Code § 62-1D-1, *et seq.*³⁴ As a general matter, the Act makes it unlawful for anyone to "[i]ntentionally intercept, attempt to intercept or procure any other person to intercept or attempt to intercept, any wire, oral or electronic communication." W. Va. Code § 62-1D-3(a)(1) (1987) (Repl. Vol. 2005). A violation of this provision is a felony offense.³⁵ *See* W. Va. Code § 62-1D-3(a)(3).³⁶ Further, the Act provides "[t]hat evidence obtained in violation of the provisions of this article shall not be admissible in any proceeding." W. Va. Code § 62-1D-6 (1987) (Repl Vol. 2005).

³⁴The Act is patterned after Title III.

³⁵There are other prohibitions under the Act which are not relevant to this case.

³⁶The Act also provides a civil remedy for a violation. *See* W. Va. Code § 62-1D-12 (1987) (Repl. Vol. 2005).

The Act permits the use of an electronic surveillance device for investigating specifically enumerated offenses,³⁷ when authorized by a designated circuit court judge.³⁸ Pursuant to the Act, a county prosecutor³⁹ or a duly authorized member of the state police⁴⁰ may make an application for a warrant to intercept communication with an electronic surveillance device. The Act permits a judge to issue a warrant only if the evidence and argument presented by the applicant establishes that:

- (1) There is probable cause to believe that one or more individuals are committing, have committed, or are about to commit one or more of the particular offenses enumerated in [§ 62-1D-8] of this article;
- (2) There is probable cause for belief that particular communications concerning such offense or offenses will be obtained through the interception;
- (3) Normal investigative procedures have been tried and have failed and reasonably appear to be unlikely to succeed if attempted again, or that to do so would be unreasonably dangerous and likely to result in death or injury or the destruction of property; and

³⁷The crimes for which a circuit court judge may authorize electronic surveillance are set out in W. Va. Code § 62-1D-8 (1987) (Repl. Vol. 2005).

³⁸The Act sets out the procedure for designating specific circuit court judges to authorize electronic surveillance. Under the Act, “[t]he chief justice of the supreme court of appeals shall, on an annual basis, designate five active circuit court judges to individually hear and rule upon applications for orders authorizing the interception of wire, oral or electronic communications.” W. Va. Code § 62-1D-7 (1987) (Repl. Vol. 2005).

³⁹See W. Va. Code § 62-1D-8.

⁴⁰See W. Va. Code § 62-1D-11(a)(1) (1987) (Repl. Vol. 2005).

(4) There is probable cause to believe that the facilities from which, or the place where, the wire, oral or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of the offense, or offenses are leased to, listed in the name of, or commonly used by this person.

W. Va. Code § 62-1D-11(c).

The Act provides for a one-party consent exception to the warrant requirement.

This exception is contained in W. Va. § 62-1D-3(b)(2) as follows:

It is lawful under this article for a person to intercept a wire, oral or electronic communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or the constitution or laws of this state.⁴¹

(Footnote added). Until now, this Court has never been called upon to decide whether the Act's one-party consent exception permits the police to send an informant into a suspect's

⁴¹It should be noted that the one-party exception of the Act differs from Title III in that the Act does not use the phrase "color of law" that is found in Title III. Even so, the language in the Act extends both to someone acting under the color of law and to someone not acting under the color of law. The one-party consent statutes of several states track the language used in the Act. *See* Ariz. Rev. Stat. § 13-3012(9) (Supp. 2006); Ark. Code § 5-60-120(a) & (c) (2005); Cal. Penal Code § 633.5 (1999); Colo. Rev. Stat. §§ 18-9-303 & 304 (2006); Del. Code tit. 11, § 2402(c)(4) (2001); Ga. Code § 16-11-66(a) (2003); Me. Rev. Stat. tit. 15, § 709(4) (2003); Md. Cts. Jud. Pro. Code § 10-402(c)(2) (2006); Mass. Gen. L. ch. 272, § 99(B)(4) (2000); N.Y. Crim. Pro. Stat. § 700.05(3) (1996); N.C. Gen. Stat. § 15A-287(a) (2005); Ohio Rev. Code § 2933.52(B)(4) (2006); S.D. Codified L. § 23A-35A-20 (2004); Tex. Pen. Code § 16.02(c)(3) (Supp. 2006); Va. Code § 19.2-62(B)(2) (2004); Wyo. Stat. § 7-3-702(b)(I) (2005).

home with an electronic surveillance device, but without judicial authorization. However, in two prior decisions we have interpreted the Act's one-party consent exception as permitting the police to record communications between a suspect and an informant that *did not occur* in a suspect's home.⁴²

In *State v. Dillon*, 191 W. Va. 648, 447 S.E.2d 583 (1994), the police, without a warrant, placed an electronic surveillance device on an informant in order to record drug transactions between the informant and the defendant. The police were able to record several conversations between the informant and the defendant while they were in a car and on the street. As a result of the surreptitious recordings, the defendant was indicted and prosecuted for drug trafficking. During the trial, the informant did not appear. Consequently, the prosecutor introduced the tape recordings into evidence. The defendant was convicted. He appealed. One of the issues raised by the defendant was that the tape recordings should not have been allowed into evidence because there was no testimony by the informant indicating the informant consented to wearing the electronic surveillance device. We rejected this argument and held that,

Proof of consent for purposes of electronic intercept set forth in
West Virginia Code §§ 62-1D-3 and 62-1D-6 need not be

⁴²In *Marano v. Holland*, 179 W. Va. 156, 366 S.E.2d 117 (1988), we were called upon to address the one-party consent provision of Title III. We stated in Syllabus point 15 of *Marano* that “[o]ne spouse’s interception of telephone communications by the other is a violation of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, et seq., which by its terms renders them inadmissible.” 179 W. Va. 156, 366 S.E.2d 117.

proven solely by the consenting individual's testimony, but can be proven through other evidence, such as the testimony of the person to whom the consent was given, that the consenting individual actually consented to the electronic intercept.

Syl. pt. 1, *Dillon*, 191 W. Va. at 657, 447 S.E.2d at 592.

In *State v. Williams*, 215 W. Va. 201, 599 S.E.2d 624 (2004), a fifteen-year-old sexual assault victim gave the police permission to place a wiretap on her telephone to record a conversation she had with the defendant, her attacker.⁴³ The defendant was subsequently arrested and prosecuted for sexual assault. During the trial, the taped telephone conversation was introduced into evidence. The defendant was ultimately convicted, and he appealed. One of the issues raised in the appeal by the defendant was that the telephone wiretap was illegal because the Act did not permit a child to give consent to electronic recording. This Court rejected the argument. In doing so, we found that the applicable definitions provided under the Act did not make a distinction between an adult and a child. *Williams* stated “[t]he statute simply contains no vicarious consent exception for minors, and we refuse to find that one exists without a statutory basis to do so.” *Williams*, 215 W. Va. at 207, 599 S.E.2d at 630.⁴⁴

⁴³The defendant had previously abducted the girl, but returned her to her home.

⁴⁴In a child custody case we held that “[a] parent has no right on behalf of his or her children to give consent under W. Va. Code, 62-1D-3(c)(2) (1987) . . . to have the children’s conversations with the other parent recorded while the children are in the other parent’s house.” Syl. pt. 4, *W. Va. Dep’t of Health & Human Res. ex rel. Wright v. David L.*, 192 (continued...)

We believe that, under the decisions in *Dillon* and *Williams*, the one-party consent exception of the Act permits the police to equip an informant with an electronic surveillance device and, without a warrant, send the informant into the home of a suspect. Consequently, in the instant case, the Act permitted the police to send an informant into Mr. Mullens' home while the informant was wearing an electronic surveillance device.

2. One-party consent to electronic surveillance in the home of a suspect and the search and seizure provision of the West Virginia Constitution. Although we have concluded that the conduct complained of in the instant case was lawful under the Act, we must now decide whether the search and seizure provision of our state constitution permits one-party consent to electronic surveillance in the home of a suspect without a warrant.⁴⁵ Article 3, § 6 of the West Virginia Constitution provides:

The rights of the citizens to be secure in their houses, persons, papers and effects, against unreasonable searches and seizures, shall not be violated. No warrant shall issue except upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, or the person or thing to be seized.

⁴⁴(...continued)

W. Va. 663, 453 S.E.2d 646 (1994).

⁴⁵We wish to be clear that our concern here is only with the use of an electronic surveillance device by an informant while in the home of a suspect. Our decision has no impact on the authority of the police to place a bodywire on an informant to record communications with a suspect outside the suspect's home.

We have indicated that the purpose of article 3, § 6 “is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement officers, so as to safeguard the privacy and security of individuals against arbitrary invasions [by governmental officials].” *State v. Legg*, 207 W. Va. 686, 692, 536 S.E.2d 110, 116 (2000) (internal quotations and citations omitted). This Court has also held that “[t]he provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the Federal Constitution.” Syl. pt. 2, *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979). Therefore, the mere fact that the Fourth Amendment has been interpreted as allowing one-party consent electronic surveillance in the home of a suspect does not mean that this Court is required to interpret article III, § 6 in the same manner. “This Court has determined repeatedly that the West Virginia Constitution may be more protective of individual rights than its federal counterpart.” *State ex rel. Carper v. West Virginia Parole Bd.*, 203 W. Va. 583, 590 n.6, 509 S.E.2d 864, 871 n.6 (1998). In other words, we may “interpret state constitutional guarantees in a manner different than the United States Supreme Court has interpreted comparable federal constitutional guarantees.” *Peters v. Narick*, 165 W. Va. 622, 628 n.13, 270 S.E.2d 760, 764 n.13 (1980).

The order of the circuit court and the briefs of the parties failed to cite to any prior decision of this Court addressing the issue of whether our state constitution permits one-party consent to electronic surveillance in the home of a suspect without a warrant.

However, this Court has previously addressed the issue. The issue arose in a case that was decided approximately one year before the Act was created.

In *State v. Thompson*, 176 W. Va. 300, 342 S.E.2d 268 (1986), the police had information that the defendant was selling drugs. As a result of this information the police, without a warrant, placed a radio transmitter on the informant and sent him to the defendant's home. While in the defendant's home, the informant purchased drugs, and the transaction was monitored and recorded by the police. The defendant was subsequently prosecuted and found guilty of drug trafficking. One of the issues raised on appeal was that it was error to introduce the tape recording of the drug transaction. The defendant alleged that the tape recording was made in violation of article III, § 6 because the police did not obtain a warrant to have the informant enter his home with an electronic surveillance device. This Court disagreed. In doing so, this Court very briefly looked at its prior decision that involved one-

party consent surveillance outside the home.⁴⁶ Based upon that decision the Court tersely reasoned as follows:

The Court also believes that the defendant's contention that the surveillance was made without a warrant and uninvited constituted an illegal search and seizure is without merit. . . .

. . . .

⁴⁶The case discussed and relied upon in the *Thompson* opinion was *Blackburn v. State*, 170 W. Va. 96, 290 S.E.2d 22 (1982). The decision in *Blackburn* involved a tape recording of a telephone conversation that occurred between the defendant and an informant acting in cooperation with the police. *Blackburn* held that the recording was lawful. In doing so, the opinion set out the following in Syllabus point 4:

Warrantless electronic recording of a defendant's conversation with the consent of a participant to the conversation who, unknown to the defendant, is acting in concert with the police does not violate the prohibition against unreasonable searches and seizures contained in article 3, section 6 of our state constitution.

170 W. Va. 96, 290 S.E.2d 22.

The opinion also briefly discussed, but distinguished, the case of *Farruggia v. Hedrick*, 174 W. Va. 58, 322 S.E.2d 42 (1984). The opinion in *Farruggia* involved a police informant who recorded conversations with the defendant while in a parking lot, a car, and at the office of the defendant's attorney. Because the defendant was indicted at the time of the recordings, this Court found that the recordings violated the defendant's right to counsel. In the single syllabus point of the opinion this Court held the following:

The Sixth Amendment to the Constitution of the United States prohibits the use at trial of incriminating statements made by a defendant to an accomplice after indictment and without the assistance of counsel when the accomplice was cooperating with the police and was equipped secretly to transmit and record the conversation.

174 W. Va. 58, 322 S.E. 2d 42.

Taking the [prior decision into consideration], it is clear that a warrantless electronic recording of a defendant's conversation made before his Sixth Amendment right to counsel has attached, and made with the consent of a participant to the conversation who, unknown to the defendant, is acting in concert with the police, does not violate the prohibition against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution and by article III, section 6 of the West Virginia Constitution.

Clearly the tape involved in the case presently before the Court was made with the knowledge and consent of [the informant]. At the time the defendant had neither been arrested nor indicted. . . . We believe that the tape was admissible into evidence.

Thompson, 176 W. Va. at 305-06, 342 S.E.2d at 273-72.

We are troubled by the complete lack of any analysis in *Thompson* on the issue of the expectations of privacy in the home. In reaching the conclusion that article III, § 6 allows the police to invade the privacy of a citizen's home, through an informant wearing an electronic surveillance device without judicial authorization, the *Thompson* opinion did not provide one sentence discussing the privacy in the home that article III, § 6 is designed to protect. *Thompson* assumed, without discussion, that no difference existed between a person's reasonable expectations of privacy in his/her home, versus the privacy a person expects outside the home. See *State v. Peacher*, 167 W. Va. 540, 567-68, 280 S.E.2d 559, 578 (1981) ("A person's expectation of privacy in his automobile is less than that which he would have in his home[.]"). This assumption by *Thompson* guts article III, § 6 and makes it a hollow constitutional protection from unreasonable searches and seizures in the home.

“There is no question . . . that activities which take place within the sanctity of the home merit the most exacting [article III, § 6] protection.” *State v. Lacy*, 196 W. Va. 104, 111, 468 S.E.2d 719, 726 (1996). This Court has long held that article III, § 6 “protect[s] the rights of citizens from unreasonable searches and seizures in their houses.” *State v. McNeal*, 162 W. Va. 550, 555, 251 S.E.2d 484, 488 (1979). For this reason, the jurisprudence of this Court addressing article III, § 6 has “drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.” *State v. Craft*, 165 W. Va. 741, 755, 272 S.E.2d 46, 55 (1980) (internal quotations and citation omitted). That is, with limited exceptions, “any search of a person[’s] . . . dwelling on mere suspicion and the seizure of any article found as a result thereof, without . . . a search warrant, is an unlawful search and seizure in violation of Section 6, Article 3 of the Constitution of West Virginia.” Syl. pt. 1, in part, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972). *See also State v. Slat*, 98 W. Va. 448, 449, 127 S.E. 191, 192 (1925) (“Any search of a person’s house without a valid search warrant is an unreasonable search, under section 6, art. 3, [of the] Constitution of West Virginia[.]”). We underscored the significance of the expectations of privacy in the home in *State v. W. J. B.*, 166 W. Va. 602, 612, 276 S.E.2d 550, 556 (1981):

[T]here is still basic vitality to the ancient English rule that a man’s home is his castle, and he has the right to expect some privacy and security within its confines. This rule arises from a societal recognition that the home shelters and is a physical refuge for the basic unit of society[,] the family. In the criminal law there is a marked recognition of this fact, as shown by the

difference in the right to arrest a criminal without a warrant[,] as between his home and a public place.

W. J. B., 166 W. Va. at 612, 276 S.E.2d at 556.

This Court's long history of protecting the sanctity of the home from warrantless searches and seizures counsels against allowing *Thompson* to stand. In Syllabus point 2 of *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974), this Court held:

An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law.

Our decision to depart from stare decisis is based upon a “serious judicial error” in the *Thompson* opinion.⁴⁷ That error was the complete obliteration of the bright line this Court has historically drawn between searches and seizures in the home, versus searches and seizures outside the home. *Thompson* failed to acknowledge the existence of this distinction. Consequently, we now hold that it is a violation of West Virginia Constitution article III, § 6 for the police to invade the privacy and sanctity of a person's home by employing an informant to surreptitiously use an electronic surveillance device to record matters occurring

⁴⁷“Stare decisis rests upon the important principle that the law by which people are governed should be ‘fixed, definite, and known,’ and not subject to frequent modification in the absence of compelling reasons.” *Bradshaw v. Soulsby*, 210 W. Va. 682, 690, 558 S.E.2d 681, 689 (2001) (Maynard, J., dissenting) (quoting *Booth v. Sims*, 193 W. Va. 323, 350 n.14, 456 S.E.2d 167, 194 n.14 (1995)).

in that person's home without first obtaining a duly authorized court order pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005). To the extent that *State v. Thompson*, 176 W. Va. 300, 342 S.E.2d 268 (1986), holds differently, it is overruled.

We are mindful that, in addition to *Thompson*, the wording of the state's electronic surveillance Act permits an informant to enter the home of a suspect with a recording device without judicial authorization. However, our rejection of the *Thompson* decision does not require invalidation of the one-party consent provision of the Act. It is a longstanding fundamental principle of law that "[w]herever an act of the Legislature can be so construed and applied as to avoid a conflict with the Constitution, and give it the force of law, such construction will be adopted by the courts." Syl. pt. 3, *Slack v. Jacob*, 8 W. Va. 612 (1875). See *State v. Siers*, 103 W. Va. 34, 36, 136 S.E. 504, 505 (1927) ("[I]t is a rule of constitutional interpretation that, when two constructions may be placed upon a statute, one of which renders it constitutional and the other unconstitutional, it is the duty of the courts to so limit the statute as to make it comply with constitutional requirements."). Our ruling today merely limits the one-party consent provision of the Act from being used to send an informant into the home of a suspect to record communications therein without having obtained a search warrant authorizing such conduct. Therefore we hold that, Article III, § 6 of the West Virginia Constitution prohibits the police from sending an informant into the home of another person under the auspices of the one-party consent to electronic surveillance provisions of W. Va. Code § 62-1D-3(b)(2) (1987) (Repl. Vol. 2005) where the police have

not obtained prior authorization to do so pursuant to W. Va. Code § 62-1D-11 (1987) (Repl. Vol. 2005).

Turning to the facts of this case, there is no dispute. The police failed to obtain judicial authorization to send the informant into Mr. Mullens' home while the informant was wearing an electronic surveillance device. Consequently, the trial court should have granted Mr. Mullens' motion to suppress the electronic surveillance recordings obtained in his home by the informant. Insofar as Mr. Mullens entered a conditional plea of guilty, on remand he may exercise his right to withdraw the guilty plea and let a jury decide his fate.⁴⁸

IV.

CONCLUSION

The circuit court's conviction and sentencing order is reversed. This case is remanded for further disposition consistent with this opinion.

⁴⁸We will point out that "[t]he application of our decision today . . . is limited to the retrial of [Mr. Mullens] and to cases in litigation or on [direct] appeal during the pendency of this appeal[.]" *State v. McCraine*, 214 W. Va. 188, 205 n. 21, 588 S.E.2d 177, 194 n. 21 (2003). In other words, we do not extend full retroactivity to our ruling in this case. *See* Syl. pt. 5, *State v. Blake*, 197 W. Va. 700, 478 S.E.2d 550 (1996) ("The criteria to be used in deciding the retroactivity of new constitutional rules of criminal procedure are: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. Thus, a judicial decision in a criminal case is to be given prospective application only if: (a) It established a new principle of law; (b) its retroactive application would retard its operation; and (c) its retroactive application would produce inequitable results.").

Reversed and Remanded.